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BILL ANALYSIS



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Senate Bills 652, 653, and 654 (as introduced 11-9-17)

Sponsor: Senator Tom Casperson (S.B. 652)
Senator Darwin L. Booher (S.B. 653)
Senator Dave Robertson (S.B. 654)

Committee: Natural Resources

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CONTENT

Senate Bill 652 would amend the Administrative Procedures Act (APA) to establish the Environmental Rules Review Committee to oversee all rule-making of the Department of Environmental Quality.

Senate Bill 653 would add Part 26 to the Natural Resources and Environmental Protection Act (NREPA) to establish the Permit Appeal Panel, whose members would be appointed to appeal boards to decide appeals of permit application or content decisions issued by the Department of Environmental Quality.

Senate Bill 654 would amend NREPA to establish the Environmental Science Advisory Board to advise the Governor on issues affecting the protection of the environment or the management of natural resources in Michigan.

Senate Bill 652 would take effect on January 1, 2018. Senate Bills 653 and 654 each would take effect 90 days after enactment.

Senate Bills 653 and 654 are tie-barred to Senate Bill 652.

Senate Bill 652

Committee Creation; Membership

The bill would create the Environmental Rules Review Committee as an independent body in the Office of Performance and Transformation (OPT) to oversee all rule-making of the Department of Environmental Quality (DEQ). For purposes of the Act, the DEQ would include any department, agency, commission, or other person to which the DEQ's rule-making authority was transferred after the bill's effective date.

The Committee would consist of the Director of the DEQ, the Director of the Department of Health and Human Services (DHHS), and the chief executive officer of the Michigan Economic Development Corporation, or the designee of any of these individuals, who would serve as nonvoting members, and the following voting members:

- One individual who represented the solid waste management industry.
- One individual who represented a statewide manufacturing organization.
- One individual who represented a statewide organization that represents small businesses.

- One individual who represented public utilities that engage in the generation, transmission, and distribution of electricity.
- One individual who represented a statewide environmental organization.
- One individual who represented the oil and gas industry.
- One individual who represented a statewide agricultural organization.
- One individual who represented local governments.
- One individual who represented a statewide land conservancy organization.
- One individual who represented the general public.
- One individual who was a medical professional.

The voting members would have to be appointed by the Governor with the advice and consent of the Senate.

A voting member of the Committee would have to possess knowledge, experience, or education that qualified the individual to represent his or her constituency. An individual could not serve as a voting member if he or she were a current employee of any office, department, or agency of the State, or if he or she were employed by the DEQ within the preceding three years.

Not more than six of the voting members of the Committee could be members of the same political party. An individual who was a lobbyist agent registered with the Secretary of State could serve as a member of the Committee only if the individual did not simultaneously receive compensation or reimbursement of actual expenses for lobbying from more than one person while serving as a Committee member. The voting members could not receive compensation for service to the Committee but could be reimbursed by the OPT for actual and necessary expenses incurred in the performance of official duties as members.

A voting member of the Committee would be required to serve a term of four years, except that of the members first appointed, four would serve a term of four years, four would serve a term of three years, and three would serve a term of two years. A voting member of the Committee could not be appointed to serve more than three consecutive four-year terms but could be appointed again after not serving on the Committee for one full term. The term of a voting member would continue until a successor was appointed.

The Governor could remove a voting member for cause, including repeated failure to attend meetings. The Governor would have to appoint, by and with the advice and consent of the Senate, a member to fill a vacancy in the voting membership created by the expiration of a member's term, or the death, resignation, or removal of a member before the member's term had expired. A member appointed in this situation would serve for the remainder of the unexpired term. The voting members of the Committee could not conduct any business or perform any duties while there was a vacancy in the voting membership of the Committee.

Science Advisors

The DEQ Director DEQ and the Director of the DHHS each would be required to select a science advisor to participate in meetings of the Committee and provide expert advice to Committee members on relevant science-based issues that came before the Committee. To serve as a science advisor, an individual would have to possess the proper educational credentials and background to provide science-based expert advice. An individual could not serve as a science advisor if he or she were a State employee or contract employee of the State.

Committee Meetings

The Committee could perform business only at a public meeting held in compliance with the

Open Meetings Act. A meeting could be called by the chairperson or by a majority of the members. However, a meeting could not be called on less than 10 days' notice unless all the voting members agreed in writing or by electronic means to a shorter notice period.

A quorum of nine voting members present would be required to transact any business at a Committee meeting. Decisions by the Committee at a meeting would have to be made by a majority vote of the members present.

The Committee would be required to select a chairperson and vice-chairperson from its voting members. The chairperson would have to preside over all meetings of the Committee and ensure that its decisions were implemented. The vice-chairperson would be required to perform the duties of the chairperson in his or her absence. The chairperson and vice-chairperson would serve for a term of two years and could be selected to serve for additional terms.

The Committee could engage administrative, technical, or legal consultants, in addition to science advisors, to assist the Committee in the performance of its duties. If requested by the Committee, a State department, State agency, or State office could provide administrative, technical, or legal staff, in addition to science advisors, to assist the Committee in the performance of its duties.

Rule Promulgation

The APA sets out the process for a State agency to promulgate administrative rules. The process involves a series of steps that begin when an agency submits a request for rule-making to the OPT, and concludes when the Office files the rule with the Secretary of State. During the process, various notice, certification, and public hearing requirements must be met, the agency proposing the rule must prepare certain regulatory impact statements, and the proposed rule must be submitted to the legislative Joint Committee on Administrative Rules (JCAR).

Under the bill, the OPT would be required to promptly transmit to the Environmental Rules Review Committee electronic copies of a request for rule-making submitted to the Office by the DEQ. The Department would be "strongly encouraged" to create a stakeholder review process before beginning the rule promulgation process to ensure that all viewpoints were adequately represented in the proposed rule.

If six voting members of the Committee voted that a request for rule-making should not be required to proceed under the rule-making procedures described below, the procedures would not apply to that request for rule-making.

The DEQ would be required to provide copies of draft proposed rules to the OPT and the Committee. The Committee then would be required to meet at least once to determine whether the draft proposed rules met all of following criteria:

- The draft proposed rules did not exceed the rule-making delegation contained in the statute authorizing the rule-making.
- The draft proposed rules would reasonably implement and apply the statute authorizing the rule-making and be consistent with all other applicable law.
- The draft proposed rules were necessary and suitable to achieve their purposes in proportion to the burdens they would place on individuals and businesses.
- The draft proposed rules were as clear and unambiguous as reasonably appropriate considering their subject matter and the individuals and businesses that would be required to comply with them.

-- The draft proposed rules were based on sound and objective scientific reasoning.

The DEQ could submit revised draft proposed rules to the OPT and the Committee.

If the Committee determined that draft proposed rules did not meet the criteria above, the DEQ could not proceed with the request for rule-making. If the Committee determined that draft proposed rules did meet the criteria, a public hearing would have to be held and the Committee would be required to give notice of and conduct a public hearing. The DEQ would not be required to prepare a small business impact statement or a regulatory impact statement.

The Committee would be required to give notice of the public hearing and offer an opportunity to present data, views, questions, and arguments. The notice would have to include all of the following:

- A reference to the statutory authority under which the action was proposed.
- The time and place of the public hearing and a statement of the manner in which a person could submit data, views, questions, and arguments to the Committee at other times.
- A statement of the terms or substance of the proposed rule, a description of the subjects and issues involved, and the proposed effective date of the rule.

The Committee would be required to transmit copies of the notice to each person who requested advance notice of proposed action that could affect the person.

At a minimum, the Committee would be required to publish the notice of public hearing as prescribed in any applicable statute or, if none, as required by the APA. In addition, the Committee would have to publish the notice in the Michigan Register before the public hearing, and electronically file a copy of the notice with the OPT.

After the public hearing, the Committee would be required to meet at least one time to discuss comments made and testimony given at the public hearing and determine if any revisions to the draft proposed rules were appropriate. At that meeting, the DEQ Director or his or her designee would be required to provide a synopsis of the comments contained in the public hearing record. If the Committee determined that revisions were not appropriate, the draft proposed rules would be considered approved and would have to be processed as provided below. If the Committee determined that one or more revisions were appropriate, it could approve the draft proposed rules subject to the revisions being made. The Legislative Service Bureau (LSB) would be required to draft the revisions.

If fewer than six voting members for the Committee objected to the proposed revisions drafted by the LSB, the rules would have to be considered approved and processed as provided below. If six or more voting members objected to the proposed revisions, the Committee would be required to meet one or more times to approve revisions to the draft proposed rules.

If the Committee approved draft proposed rules, the OPT would be required to transmit by notice of transmittal to JCAR copies of the rules, the request for rule-making, the synopsis of the comments contained in the public hearing record, a description of any revisions to the proposed rules that were made by the Committee after the public hearing, and certificates of approval from the LSB and the Office. The OPT also would be required to submit electronically to the Committee a copy of the rule and any certificates of approval from the LSB and the Office. The Office would be required to transmit this information to the Committee within one year after the date of the last public hearing.

The Committee would be required to make a final decision regarding draft proposed rules and any revisions to draft proposed rules within 12 calendar months after receiving electronic copies of the request for rule-making submitted by the DEQ to the OPT.

Senate Bill 653

Permit Appeal Panel Membership

The bill would establish the Permit Appeal Panel in the Department of Environmental Quality. The Panel would consist of 15 individuals, appointed by the Governor. Each member of the Panel would have to meet one or both of the following:

- Hold a current professional engineering, geologist, hydrologist, or hydrogeologist license or registration from a state, tribe or U.S. territory, or Puerto Rico, and have the equivalent of six years of full-time relevant experience.
- Have a master's degree from an accredited institution of higher education in a discipline of engineering or science related to air or water and the equivalent of eight years of full-time relevant experience.

Each member also would be required to remain current in his or her field through participation in continuing education or other activities.

An individual would not be eligible for Panel membership if any of the following applied:

- The individual was a current employee of any office, department, or agency of the State.
- The individual was a party to one or more contracts with the DEQ and the compensation paid under those contracts represented more than 5% of the individual's annual gross income in any of the preceding three years.
- The individual was employed by an entity that was a party to one or more contracts with the DEQ and the compensation paid to the individual's employer under those contracts represented more than 5% of the employer's annual gross revenue in any of the preceding three years.
- The individual was employed by the DEQ within the preceding three years.

An individual appointed to the Permit Appeal Panel would serve a term of four years and could be reappointed. However, after serving two consecutive terms on the Panel, the individual would not be eligible to serve on the Panel for two years. The terms for members first appointed would have to be staggered so that three expired in one year, four expired in two years, and four expired in three years. A vacancy on the Panel would have to be filled in the same manner as the original appointment.

The Governor could remove a member of the Panel for incompetence, dereliction of duty, malfeasance, misfeasance, or nonfeasance in office, or any other good cause.

Individuals appointed to the Panel would serve without compensation, but could be reimbursed for their actual and necessary expenses incurred in the performance of their official duties as members of the Panel.

The Panel would be subject to the Open Meetings Act.

The Governor would be required to appoint the first Panel within 60 days after the bill was enacted.

Appeal Process

For purposes of the bill, "permit" would mean a permit or operating license issued by the DEQ under NREPA.

A permit applicant aggrieved by the decision of the DEQ regarding the approval or denial of a permit application or the content of a permit could appeal to an appeal board by submitting a petition to the Director. The petition would have to include the issues in dispute, the relevant facts, and any data, analysis, opinion and supporting documentation for the petitioner's position. If the Director believed that the dispute could be resolved without convening an appeal board, the Director could contact the petitioner regarding the issues in dispute and negotiate a resolution.

If the dispute were not resolved, the Director would have to convene a meeting of an appeal board, which would have to be held within 45 days after the Director received the petition. The appeal board would consist of five members of the Appeal Panel selected by the Director on the basis of their relevant expertise. To serve as an appeal board member, an Appeal Panel member would have to submit to the Director on a form provided by the Department an agreement not to accept employment from the appellant for at least one year after a decision was rendered on the matter if gross income from the employment would exceed 5% of the Panel member's gross income for all sources in any of the preceding three years. The Attorney General could bring an action to enforce the agreement.

The members of the appeal board would have to elect a chairperson. Three members would constitute a quorum. A majority of the votes cast would be required for official action of the appeal board. The appeal board would be subject to the Open Meetings Act.

The Director would be required to provide the appeal board with a copy of the petition and its supporting documentation and a copy of all supporting documentation from the DEQ. At the meeting of the appeal board, representatives of the appellant and the Department would have to be given an opportunity to present their positions.

Within 45 days after hearing the appeal, the appeal board would be required to make a decision regarding the petition and provide written notice of the decision to the Director and the petitioner. The written decision would have to include the specific scientific or technical rationale for the decision. The appeal board could adopt, modify, or reverse, in whole or in part, the Department's decision that was the subject of the appeal.

Within 60 days after receiving written notice of the appeal board's decision, the Director would be required to issue a final decision, in writing, incorporating as necessary the appeal board's decision into the terms of the permit. If the Director failed to do so, the decision of the appeal board would be considered the final decision of the Director. The final decision of the Director could be appealed to the circuit court of the county where the appellant resided or to the Circuit Court of Ingham County.

A member of the Appeal Panel could not participate in an appeal in which that member had a conflict of interest. The Director would have to select a member of the Appeal Panel to replace a member who had a conflict of interest. A member would have a conflict of interest if the appellant had hired that member or the member's employer on any environmental matter within the preceding three years.

Senate Bill 654

Advisory Board Membership

The bill would create the Environmental Science Advisory Board in the Department of Technology, Management, and Budget. The Board would consist of nine individuals appointed by the Governor who had expertise in one or more of the following areas:

- Engineering.
- Environmental science.
- Economics.
- Chemistry.
- Geology.
- Physics.
- Biology.
- Human medicine.
- Statistics.
- Risk assessment.
- Other disciplines that the Governor considered appropriate.

A current legislator or a current employee of any office, department, or agency of the State or of the Federal government would not be eligible to serve as a member of the Board.

A member of the Board would serve for a term of three years, except that of the members first appointed, three would serve for a term of two years and three would serve for a term of one year.

A member of the Board would serve at the pleasure of the Governor, who could remove a member at any time, with or without cause, and with or without prior notice. If a vacancy occurred on the Board, the Governor would have to make an appointment for the unexpired term.

The Governor would have to appoint a Board member as chairperson. The Governor also could appoint other members to other Board offices. Officers of the Board would serve at the pleasure of the Governor.

Board members would serve without compensation but could be reimbursed by the State for actual and necessary expenses incurred in the performance of their official duties as members.

A majority of the members would constitute a quorum for the transaction of business at a meeting of the Board. A majority of the members present and serving would be required for official action of the Board. The Board would be subject to the Open Meetings Act and the Freedom of Information Act.

The Board could adopt operating procedures that were consistent with proposed Part 26. The Board also could incur expenses necessary to carry out its duties. If requested by the Board, a department, agency, or office of State government could provide administrative, technical, or legal staff to assist the Board in the performance of its duties.

Board Advice

The Board would be required to advise the Governor on issues affecting the protection of the environment or the management of natural resources of the State. This duty would be limited

to the specific advice requested from time to time by the Governor. Advice provided by the Board would have to be based on the following factors:

- Objective reasoning.
- Sound science.
- Relative and realistic risk to human health and the environment.
- Analogous practices used or positions taken by the Federal government and regulatory bodies in other states.
- Economic reasonableness.

Any advice provided by the Board would not be legally binding on or enforceable against any individual, governmental entity, private entity, or other person. The Board could not review or advise on any application, recommendation, or decision regarding a permit, license, or environmental impact statement.

Upon receiving a request from the Governor to provide advice on a particular issue, the chairperson of the Board would have to convene a committee of the Board consisting of members with relevant expertise. The committee would have to develop a plan for formulating recommendations and make recommendations on the issue to the Board. The Board would have to deliberate on the committee's recommendations and provide written advice to the Governor regarding his or her request.

The Board or any committee of the Board could make inquiries, develop studies, hold hearings, receive comments from the public, and call upon experts who were not members of the Board to assist the Board in its deliberations.

All departments, agencies, offices, officers, employees, or contractors of the State, or any political subdivision of the State, would be required to cooperate with the Board or any committee of the Board. This would include doing the following as requested by the Board or a committee of the Board:

- Participating in meetings.
- Participating in inquiries or hearings.
- Providing any information.
- Providing access to documents, books, records, databases, or other information.
- Providing any other assistance reasonably necessary and related to the board's deliberations and duties under Part 26.

MCL 24.333 et al. (S.B. 652)
MCL 324.1301 et al. (S.B. 653)
Proposed MCL 324.2601-2611 (S.B. 654)

Legislative Analyst: Nathan Leaman

FISCAL IMPACT

Senate Bill 652

The bill would have a small, but likely negative fiscal impact on the Department of Environmental Quality, and no fiscal impact on local government. The bill would prohibit DEQ employees from serving in many capacities on the Environmental Rules Review Committee, so it would not create significant direct costs in that regard. However, the Committee's rule approval process would create additional steps for rule-making for the DEQ which could require additional staff time, and hence higher costs in that process. Those costs would be borne by various divisions within the DEQ, proportionate to their rule-making needs. The DEQ should be able to absorb those additional costs.

Additionally, the bill could have a negligible fiscal impact on the Office of Performance and Transformation within the Department of Technology, Management, and Budget. Actual costs are indeterminate and would depend on the number of meetings that the Committee would hold. Assuming the meetings actually held were few in number, any costs related to the required reimbursement to Committee members for any necessary expenses incurred while performing official Committee member duties could be absorbed within the OPT's annual appropriations.

Senate Bill 653

The bill would have a minor, but negative fiscal impact on the Department of Environmental Quality, and no fiscal impact on local units of government. The DEQ would provide administrative support for the Permit Appeal Panel established under the bill, and also would be responsible for travel and other necessary expenses of Panel members. The actual cost to the DEQ would depend on the number of appeals received and the number of meetings held to hear those appeals. As the bill would not provide additional revenue to cover these costs, they would be borne by existing DEQ resources.

Senate Bill 654

The bill could have a negligible fiscal impact on the Department of Technology, Management, and Budget. Any costs related to the required reimbursement of Environmental Science Advisory Board members for any necessary expenses incurred while performing official Board member duties could be absorbed within the Department's annual appropriations.

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This analysis was prepared by nonpartisan Senate staff for use by the Senate in its deliberations and does not constitute an official statement of legislative intent.