

# Legislative Analysis



## DEPARTMENT OF ENVIRONMENTAL QUALITY OVERSIGHT BOARDS

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**Senate Bill 652 as enacted**  
**Public Act 267 of 2018**  
**Sponsor: Sen. Thomas Casperson**

Analysis available at  
<http://www.legislature.mi.gov>

**Senate Bill 653 as enacted**  
**Public Act 268 of 2018**  
**Sponsor: Sen. Darwin Booher**

**Senate Bill 654 as enacted**  
**Public Act 269 of 2018**  
**Sponsor: Sen. David Robertson**

**1st House Committee: Natural Resources**  
**2nd House Committee: Michigan Competitiveness**  
**Senate Committee: Natural Resources**  
**Complete to 6-29-18**

**BRIEF SUMMARY:** Senate Bills 652, 653, and 654 create various boards with oversight over the Michigan Department of Environmental Quality (DEQ). SB 652 amends the Administrative Procedures Act to create the Environmental Rules Review Committee. SBs 653 and 654 amend the Natural Resources and Environmental Protection Act, with SB 653 creating the Environmental Permit Review Commission and Environmental Review Panel and SB 654 the Environmental Science Advisory Board.

**FISCAL IMPACT:** Please see *Fiscal Information*, below.

### **THE CONTENT OF THE BILLS:**

**Senate Bill 652** 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 DEQ.

#### Composition of the Committee

Nonvoting members of the Committee would consist of the directors of the DEQ, the Department of Health and Human Services (DHHS), the Department of Agriculture and Rural Development (MDARD), and the Department of Natural Resources (DNR), or designees of those officers. The governor, with the advice and consent of the Senate, would appoint the voting members of the Committee, who would include a public health professional, two individuals representing the general public, and an individual representing each of the following constituencies:

- The solid waste management industry
- A statewide manufacturing organization

- A statewide organization that represents small businesses
- Public utilities that engage in the generation, transmission, or distribution of electricity
- A statewide environmental organization
- The oil and gas industry
- A statewide agricultural organization
- Local governments
- A statewide land conservancy organization

Lobbyists could serve as members of the Committee as long as they did not simultaneously receive compensation or reimbursement of actual expenses for lobbying from more than one person while serving on the Committee.

Voting members of the Committee would have to possess knowledge, experience, or education that qualifies them to represent their respective constituencies. Individuals could not serve as voting members if any of the following applied:

- They were employees of any state office, department, or agency.
- They were party to one or more contracts with the DEQ and the compensation paid under those contracts in any of the preceding years represented more than 5% of their annual gross income in that preceding year (or they were employed by a person to whom that description applied).
- They were employed by the DEQ in the preceding three years.

Additionally, not more than six voting members could be members of the same political party.

Following initial staggered terms, members would serve four-year terms, and could not be appointed to serve more than three consecutive terms (but could be reappointed after sitting out for a term). The governor would be able to remove voting members for cause.

Vacancies would also be filled by gubernatorial appointment with the advice and consent of the Senate. The Committee could not conduct any business or perform any duties while there is a vacancy in the voting membership, with certain specified exceptions.

The Committee's chairperson or a majority of the members could call a meeting with at least 10 days' advance notice (less notice would be allowed if all voting members agree). Nine voting members would constitute a quorum.

#### Science Advisor

Under the bill, the directors of the DEQ and DHHS would each select a *science advisor* to participate in Committee meetings and provide expert advice on science-based issues. The advisor would have to possess the proper educational credentials and background to provide science-based expert advice, but could not be a state employee or contract worker. The Committee could also engage administrative, technical, or legal consultants or state staffers in those specialties to assist in performing its duties.

### Rule-making process

If the DEQ were to request rule promulgation, the OPT would transmit the request to the Committee. (The bill strongly encourages the DEQ to create a stakeholder review process before beginning the rule promulgation process to ensure that all viewpoints are adequately represented.) If the Committee determines that review of the rule-making is necessary, the DEQ would provide copies of draft proposed rules and a draft regulatory impact statement to the OPT and the Committee. Then, the Committee would meet to determine if the proposed rules meet all of the following *criteria*:

- The OPT has certified that they do not exceed the rule-making delegation allowed by statute.
- They reasonably implement and apply the statute authorizing the rule-making and are consistent with all other applicable law.
- They are necessary and suitable to achieve their purposes in proportion to the burdens they place on individuals and businesses.
- They are as clear and unambiguous as reasonably appropriate considering the subject matter and individuals affected.
- They are based on sound and objective scientific reasoning.

Within 35 days after receiving the proposed rules, the Committee would have to make one of the following *determinations*:

- By a vote of 9 voting members, that the request must not proceed under the process described above, but rather under the otherwise applicable sections of the Act.
- By a majority vote, that the proposed rules meet the requisite criteria and may proceed to a public hearing.
- By a majority vote, that the proposed rules do not meet the criteria or that an additional review is needed to determine whether they meet the criteria. In these cases, the Committee would have to notify the DEQ of the determination, including an explanation of the reasoning. Then, the DEQ would attempt to address those concerns by convening meetings with stakeholders, providing further information to the Committee, or revising the proposed rules, or other actions.

The proposed rules would then proceed to a *public hearing* if the Committee made a determination to move the proposed rules to a public hearing, determined that the proposed rules or any revised draft proposed rules submitted by the DEQ met the criteria described above, received an extension to allow the proposed rules to meet the criteria, or failed to make a determination. Within 120 days of the hearing, the DEQ would prepare and submit an *agency report* containing a synopsis of the public hearing and suggested changes to the proposed rules from the DEQ. If the DEQ failed to submit the report within 120 days, it would have to withdraw the rule request.

After receiving the agency report, the Committee would meet one or more times to discuss the report, approve the proposed rules with modifications, and approve or reject the proposed rules.

- If the Committee approved the proposed rules, the OPT would transmit to the Committee copies of the rules and would transmit or electronically submit certain

documents related to the rule promulgation to the Committee within one year after the last public hearing.

- If the Committee approved the proposed rules with modifications or rejected the rules, the Committee would submit a notice of objection to the director of the DEQ and the governor including an explanation of the decision. Then, the DEQ would attempt to resolve any issues, which may include submitting revised proposed rules.
  - If the DEQ and Committee resolve the issues, the OPT would transmit or electronically submit certain documents related to the rule promulgation to the Committee within one year after the last public hearing.
  - If the issues are not resolved, the DEQ would submit a written finding to the governor and the governor would either direct the rules process to proceed or direct the DEQ to withdraw the proposed rules.
- If the Committee failed to approve or reject the proposed rules, the OPT would transmit or electronically submit certain documents related to the rule promulgation to the Committee within one year after the last public hearing.

This rule-making procedure could be suspended by the chairperson and vice-chairperson within 14 days of the request for rule-making (unless that determination were overridden by seven voting members of the Committee).

In a contested case regarding a *permit* (where a permit or operating license is issued by the DEQ under NREPA or rules promulgated under NREPA, and the applicant is not Michigan or a political subdivision thereof), the designation of a presiding officer, the effect of a decision by a presiding officer, the availability of other administrative remedies, and judicial review would be controlled by Sections 1315 and 1317 of NREPA (both sections would be created by SB 653).

MCL 24.233 et al.

**Senate Bill 653** would establish an *Environmental Permit Review Commission* in the DEQ to advise the director on disputes related to permits and permit applications. The Commission would consist of 15 individuals appointed by the governor, with the first members appointed within 60 days after this bill takes effect. All members would have to meet one or more of the following:

- Have the equivalent of six years of full-time relevant experience as a practicing engineer, geologist, hydrologist, or hydrogeologist.
- 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 have the equivalent of eight years of full-time relevant experience.

Individuals would be ineligible to serve on the Commission if they were current employees of any state office, department, or agency, or if they or their employer were party to one or more contracts with the DEQ and the compensation paid under those contracts in any of the preceding three years represented more than 5% of the gross income in that preceding year.

Following initial staggered terms, members would serve on the Commission for four-year terms. After serving two consecutive terms, a member would be required to sit out for two years before serving again. The governor could remove a member for incompetence, dereliction of duty, malfeasance, misfeasance, or nonfeasance in office, or any other good cause.

#### Appeal to an Environmental Permit Panel

Permit applicants would be able to appeal to an *Environmental Permit Panel* by submitting a petition to the DEQ director before the permit had been approved or denied. The petition would include the issues in dispute and any other relevant documents supporting the petitioner's position.

If the DEQ director believed that the dispute could be resolved without convening a panel, he or she could negotiate a resolution (during a period not to exceed 45 days). Otherwise, the DEQ director would convene a meeting of a panel. The panel would consist of three members of the Commission selected by the director on the basis of their relevant expertise. All of the members appointed to a panel would have to submit an agreement not to accept certain employment from the petitioner within one year after the decision is rendered.

The DEQ director would provide the panel with a copy of the petition and all supporting documentation from the petitioner and the DEQ, and each side would be given an opportunity to present its position at the panel's meeting. The panel would provide to the petitioner and DEQ written notice of its recommendation to adopt, modify, or reverse the DEQ's or position. Within 60 days of receiving this recommendation, the DEQ director would have to issue a decision. If the director agreed with the recommendation, the DEQ would incorporate the recommendation into the terms of the permit. If the director did not agree, he or she would have to include the specific rationale for rejecting the recommendation. If the DEQ director failed to issue a decision, the panel's recommendation would be considered to be his or her decision.

The director's decision regarding a permit or permit application would not be subject to review under NREPA, the Administrative Procedures Act, or Section 631 of the Revised Judicature Act. However, the decision could be included in an appeal to a final permit action.

Commission members could not participate in a petition review if they have a conflict of interest, which would include any of the following:

- If the permit applicant had hired that member or the member's employer on an environmental matter in the preceding three years.
- If the member had been employed by the applicant in the previous three years.
- If the member had more than a 1% ownership in the applicant.

#### Contested case regarding a permit

In a contested case regarding a permit, an administrative law judge would preside, make the final decision, and issue the final decision and order for the DEQ. Any party to the case,

including the DEQ, could seek review of the final decision and order by an Environmental Permit Panel by submitting a request to the director and a notice to the hearing officer.

Upon petition for review of a final decision, the director would convene an *Environmental Review Panel* as provided above, except that members of the previous panel could not serve. The panel's review of the final decision would be limited to the record established by the administrative law judge. The panel could adopt, remand, modify, or reverse, in whole or in part, a final decision and order. The panel's opinion would become the DEQ's final decision and would be subject to judicial review as provided under the Administrative Procedures Act and other applicable law.

If no party timely appealed a final decision and order to a panel, the final decision and order would be the final agency action for purposes of any applicable judicial review.

MCL 324.1301 et al. and proposed MCL 324.1313, 324.1315, and 324.1317

**Senate Bill 654** would create the *Environmental Science Board* in the Department of Technology, Management, and Budget. The Board would consist of nine individuals appointed by the governor who have 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 considers appropriate

Following initial staggered terms, members would serve for three-year terms, and could be removed by the governor at any time, with or without cause or prior notice. Current legislators and employees of state offices, departments, or agencies or the federal government would be ineligible to serve as members of the board.

Writings prepared, owned, used, in the possession of, or retained by the board in the performance of an official function would be subject to the Freedom of Information Act.

If requested by the board, state offices, departments, or agencies could provide administrative, technical, or legal staff to assist the board in the performance of its duties.

#### Purpose and function of the board

The board would advise the governor and any state office, department, or agency specified by the governor on issues affecting the protection of the environment or the management of natural resources in the state. Its duty to advise would be limited to the specific advice

requested by the governor, and it could not review or advise on any application, recommendation, or decision regarding a permit, license, or environmental impact statement. The board's advice would not be legally binding on or enforceable against any individual, governmental entity, private entity, or other person.

The board's advice would be based on objective reasoning; sound science; and, to the extent directed by the governor, 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, and economic reasonableness. The governor could also specify other relevant factors in a request.

#### Procedure

Upon receipt of a request from the governor to advise on a particular issue, the board's chairperson would convene a committee made up of board members with relevant expertise. The committee would make recommendations to the board, which would then deliberate on those recommendations and provide written advice to the governor.

As a part of its deliberations, the board or any committee of the board could make inquiries, develop studies, hold hearings, receive comments from the public, and call upon experts. State offices, departments, agencies, officers, employees, and contractors and political subdivisions of the state could cooperate with the board or any committee. The cooperation could include the following, as requested by the board or committee:

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

Proposed MCL 324.2601 et al.

**The bodies created by all three bills** would be subject to the following requirements:

- 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.
- Business conducted must take place at public meetings held in compliance with the Open Meetings Act.

Senate Bill 652 is tie-barred to SB 653, which means that it could not take effect unless SB 653 were also enacted. Senate Bills 653 and 654 are each tie-barred to the other two bills.

#### ***FISCAL INFORMATION:***

##### **SB 652 – Environmental Rules Review Committee**

Senate Bill 652 may result in increased administrative costs for the Department of Environmental Quality; the extent of this cost increase is unclear. The bill provides for the DEQ to reimburse necessary and qualifying expenses of members of the Environmental

Rules Review Committee but does not specify appropriations or fund sources for these reimbursements. The bill requires the department to provide copies of draft proposed rules and draft regulatory statements and introduces additional steps to the administrative rule process specific to the DEQ. However, the requirements specified in the bill fall largely outside of the department's purview to provide for an independent rules review process. The bill is unlikely to have an impact on departmental revenues or local government costs or revenues.

Senate Bill 652 would also create potential minor costs for the Department of Environmental Quality depending on whether the department would be required to reimburse committee members for expenses incurred while performing their duties. Potential reimbursements could be absorbed within the existing annual appropriation amounts to the DEQ.

### **SB 653 – Environmental Permit Review Commission**

Senate Bill 653 is likely to increase costs for the Department of Environmental Quality by providing for the reimbursement of necessary and qualifying expenses of members of the Environmental Permit Review Commission within the department; the bill does not specify appropriations or fund sources for these reimbursements. The department may also realize additional administrative costs as the director works with the Commission in accordance with the bill. The extent of the costs is unclear. It is also unclear whether changes to the permitting process will affect permit revenue collected by the DEQ.

The bill is unlikely to have an impact on local government costs or revenues.

### **SB 654 – Environmental Science Advisory Board**

Senate Bill 654 would potentially create costs for the Department of Technology, Management, and Budget (DTMB). Potential costs would depend on the creation of the Environmental Science Advisory Board and the types and level of activities for which the Board is eligible to be reimbursed. Eligible activities include developing studies, calling upon experts, making inquiries, and holding hearings. Costs would likely be able to be supported within existing annual appropriation amounts to the DTMB.

Senate Bill 654 would not have an impact on revenues or costs for the Department of Environmental Quality or local units of government.

## ***ARGUMENTS:***

### ***For:***

Proponents argue that the bill package is intended to level the playing field between state departments and members of the public. With a neutral board, they argue that overzealous members of the DEQ would not have sole discretion to approve or deny permits.

### ***Response:***

Opponents reply that this is a manufactured concern. According to the April 2018 MiScorecard compiled by the DEQ, the DEQ approves almost all permits applications. In Fiscal Year (FY) 2017, DEQ granted 7,447 permits and denied 34 (for a 99.5% approval



rate), and in FY 2016, DEQ granted 8,862 and denied 20 (for a 99.8% approval rate).<sup>1</sup> In the rare instance that a permit is denied, critics say, it is for compelling environmental reasons and should not be overridden by a special interests-led committee.

***Against:***

Some argue that the boards, especially the Environmental Rules Review Committee proposed in SB 652, would create a situation in which the “fox is guarding the hen house.” Because six of the twelve members of the proposed committee would come from the private sector and six from the public, some expressed a concern that the committee is skewed away from true public interest. While the committee would purport to protect the environment, they say, environmental concerns would inevitably take a backseat to industry and financial concerns.

***Response:***

Supporters replied that it is unfair to assume that members of the private sector would naturally have bad intentions. Those parties are members of the public as well, proponents say, and there is no reason to believe that their decisions would not represent the best interest of the public at large. Moreover, supporters say, multi-sector lobbyists are prohibited from serving on the committee, and single-sector lobbyists are allowed, because those who work in a single sector are more likely to be subject area experts than those who represent various industries.

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■ This analysis was prepared by nonpartisan House Fiscal Agency staff for use by House members in their deliberations, and does not constitute an official statement of legislative intent.

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<sup>1</sup> [https://www.michigan.gov/documents/openmichigan/DEQ\\_Scorecard\\_621426\\_7.pdf](https://www.michigan.gov/documents/openmichigan/DEQ_Scorecard_621426_7.pdf)