

NREPA WETLAND REVISIONS

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Senate Bill 1211 (H-2) as reported from House committee

Sponsor: Sen. Tom Casperson

House Committee: Michigan Competitiveness

Senate Committee: Natural Resources

Complete to 12-19-18

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

SUMMARY:

Senate Bill 1211 would amend the Natural Resources and Environmental Protection Act (NREPA) to change provisions governing wetlands protection and management. The bill, described in more detail below, would take effect 90 days after it is enacted.

Civil Enforcement Actions

The bill would require that, beginning May 1, 2019, before initiating a civil enforcement action under NREPA, the Department of Environmental Quality (DEQ) or the Department of Natural Resources (DNR) would have to provide the person in writing a list of each specific statute, rule, or permit that the person is alleged to have violated and a statement of the facts constituting the violation, in addition to (as is now required) contacting the person and extending an offer to meet to discuss the potential enforcement action and potential resolution of the issue. The bill would also specify that the relevant department could not initiate a civil enforcement action until after such a meeting had been held or after waiting at least 60 days if a meeting were not held.

However, these provisions would not apply if the civil enforcement action were a civil infraction action or if the relevant department determined that the violation constituted an imminent and substantial danger to the environment or to public health or safety.

Part 301 Definitions

The bill would amend Part 301 (Inland Lakes and Streams) of NREPA to eliminate the currently used term *inland lake or stream* and add separate definitions for both *inland lake* and *stream*, as described below.

Inland Lake

Under current law, inland lake means¹ a natural lake, pond, or impoundment or any other body of water that has definite banks, a bed, and visible evidence of a continued occurrence of water. It does not include the Great Lakes, Lake St. Clair, or a lake or pond that has a surface area of less than five acres.

¹ The definitions for “inland lake” and “stream” under current law, as described here, are derived from the definition of “inland lake or stream.”

The bill would define inland lake as either of the following:

- An artificial or natural inland lake, pond, or impoundment that is “a water of the United States as that term is used in section 502(7) of the federal Water Pollution Control Act, 33 USC 1362.”²
- A permanent artificial or natural inland lake, pond, or impoundment that has definite banks, a bed, and visible evidence of a continued occurrence of water and that is more than five acres in size. Inland lake would not include any of the following:
 - The Great Lakes or Lake St. Clair.
 - A feature used for treating wastewater or storm water.
 - Artificial features created in land unregulated by Part 301 of NREPA and used for cooling or storing water, farm or livestock irrigation or watering, log cleaning, swimming, mining or construction activities, or raising fish and other aquatic species.
 - An artificially irrigated or flooded area that will revert to dry land if the application of water to that area ceases.

Stream

Under current law, stream means a river, stream, or creek which may or may not be serving as a drain as defined by the Drain Code of 1956 or any other body of water that has definite banks, a bed, and visible evidence of a continued flow of water.

The bill would define stream as either of the following:

- An artificial or natural river, stream, or creek that is “a water of the United States as that term is used in section 502(7) of the federal Water Pollution Control Act, 33 USC 1362.”
- A permanent artificial or natural river, stream, or creek that has definite banks, a bed, and a continued flow of water. Stream would not include any of the following:
 - A storm water or wastewater control feature constructed to convey, treat, or store storm water or wastewater that is created on land unregulated by Part 301 of NREPA.
 - A ditch with ephemeral flow that does not flow directly from or through a feature regulated under Part 301 of NREPA.
 - An erosional feature, including gullies, rills, and other ephemeral features.
 - An artificially irrigated or flooded area that will revert to dry land if the application of water to that area ceases.

Part 303 Definitions

The bill would also revise the definition of *wetland* in Part 303 (Wetlands Protection) of NREPA. Under current law, wetland means land characterized by the presence of water at a frequency and duration sufficient to support, and that under normal circumstances does support, wetland vegetation or aquatic life, and is commonly referred to as a bog, swamp, or marsh, and which is any of the following:

- Contiguous to the Great Lakes or Lake St. Clair, an inland lake or pond, or a river or stream.
- Not contiguous to the waterbodies listed above and more than five acres in size.

² The referenced provision reads in its entirety: “The term ‘navigable waters’ means the *waters of the United States*, including the territorial seas.”

- Not contiguous to the Great Lakes, an inland lake or pond, or a river or stream and has five acres or less in size if the DEQ determines that the protection of the area is essential to the preservation of the natural resources of the state from pollution, impairment, or destruction and the DEQ has so notified the owner.

The bill would remove the provision above allowing DEQ determination that protection of an area is essential to preserving the natural resources of the state.

Under the bill, wetland would mean a land or water feature, commonly referred to as a bog, swamp, or marsh, inundated or saturated by water at a frequency and duration sufficient to support, and that under normal circumstances does support, hydric soils, aquatic life, and a predominance of wetland vegetation. A wetland would have to meet one of the following:

- Is “a water of the United States as that term is used in section 502(7) of the federal Water Pollution Control Act, 33 USC 1362.”
- Is *contiguous to* the Great Lakes, Lake St. Clair, or an inland lake or stream.³
- Is more than five acres in size.
- Has the documented presence of an endangered or threatened species under the federal Endangered Species Act.
- Is a *rare and imperiled wetland*.
- A water of the United States as that term is used in section 502(7) of the federal Water Pollution Control Act, 33 USC 1362.⁴

Hydric soil would mean a soil that formed under conditions of saturation, flooding, or ponding long enough during the growing season to develop anaerobic conditions in the upper part.

Contiguous to would be said to describe a land or water feature that has a continuous surface water connection or a similar, natural, direct physical connection with the Great Lakes, Lake St. Clair, or an inland lake or stream. A wetland located within 500 feet of the ordinary high-water mark of an inland lake or stream, or a land or water feature located within 1,000 feet of the ordinary high-water mark of the Great Lakes or Lake St. Clair, would be considered contiguous to those waterbodies unless there were no surface or groundwater connection. The definition of *contiguous to* would not apply to a land or water feature that is “a water of the United States as that term is used in section 502(7) of the federal Water Pollution Control Act, 33 USC 1362.”

A wetland would not be contiguous to the Great Lakes, Lake St. Clair, an inland lake, or a stream if the DEQ determined there to be no continuous surface water connection to or similar, natural, direct physical connection with such a body of water.

A wetland that is “a water of the United States” would not be contiguous to the Great Lakes, Lake St. Clair, an inland lake, or a stream if the DEQ determined there to be no direct

³ In several places in Part 303, the bill would appear to use or reference the terms “inland lake” and “stream,” as defined in Part 301, although those definitions do not apply to Part 303. Without the application of those definitions, the bill would appear to have the effect, among others, of removing rivers from provisions of Part 303.

⁴ The referenced provision reads in its entirety: “The term ‘navigable waters’ means the *waters of the United States*, including the territorial seas.”

physical contact and no surface water or interflowing groundwater connection to the body of water.

The bill would remove the following from NREPA's current definition of *rare and imperiled wetland*:

- Intermittent wetland or boggy seepage wetland
- Northern wet mesic prairie
- Rich conifer swamp
- Relict conifer swamp
- Hardwood conifer swamp
- Northern swamp
- Southern swamp
- Southern floodplain forest
- Inundated shrub swamp

The bill would add “coastal fen” to the *rare and imperiled wetland* definition.

The bill would also specifically exclude from the definition of wetland a land or water feature that is expressly excluded from the definition of *waters of the United States* under 40 CFR 230.3(o)(2).⁵ Among other things, this would exclude from the definition of wetland waste treatment systems, wastewater recycling structures, storm water control features, prior converted cropland, log cleaning ponds, irrigation ponds, stock watering ponds, certain ditches with ephemeral or intermittent flow, groundwater, and erosional features such as gullies or rills.

Definitions Specific to Proposed Section 30312f (HB 5854)

The bill also contains definitions that would be specific to Section 30312f of NREPA. That section is not in current law, and it is not contained in SB 1211, but it is proposed to be added to NREPA by House Bill 5854.⁶ (Some of the definitions would evidently need to apply to the section containing the definitions as well as to Section 30312f as proposed by HB 5854.) The definitions are as follows:

Altered or degraded wetland would mean wetland that meets any of the following:

- It has been partially or fully drained, as by ditching, tiling, or pumping.
- It has been partially or fully filled by direct placement of material in the wetland or significant sedimentation.
- Invasive plant species dominate in a majority of the vegetated surface area of the wetland.
- It has undergone land use conversion or alteration to vegetation, soil, or hydrology that currently affects the wetland functions and services.

Former wetland would mean land that was wetland but that has been modified to the point that it no longer has the hydrologic characteristics of wetland.

⁵ <https://www.law.cornell.edu/cfr/text/40/230.3>

⁶ See <http://www.legislature.mi.gov/documents/2017-2018/billengrossed/House/pdf/2018-HEBS-5854.pdf>

Net increase in wetland functions and services would mean an increase in one or more wetland functions and services with not more than a minimal decrease in other wetland functions and services.

Voluntary wetland restoration project would mean any of the following:

- Activities that are voluntarily undertaken to restore, reestablish, rehabilitate, or enhance altered or degraded wetland or former wetland and that result in a new increase in wetland functions and services.
- Activities to maintain or manage sites where activities described above have taken place, including sites restored before October 1, 1980.

However, *voluntary wetland restoration project* would not include an activity undertaken to fulfill a federal, state, or local wetland permit mitigation requirement.

Wetland functions and services would mean any of the following:

- Wetland hydrology that approximates the predisturbance condition or that emulates the natural condition of the wetland.
- Fish and wildlife habitat quality or quantity.
- Plant community quality, characterized by native vegetation types and diversity.
- Water- and soil-related functions of the wetland, such as nutrient removal, sediment retention, flood control, or groundwater recharge.
- Recreational use of the wetland, such as fishing, hunting, trapping, and birdwatching.

Permit Applications

Currently under NREPA, a denial of an application for a permit must document, and any review upholding the decision must determine, that the decision is based on all of the following:

- Specific provisions of NREPA or rules promulgated under NREPA.
- Sufficient facts or data.
- Reliable scientific principles and methods, reliably applied to the facts.

The bill would also require all of the above documentations and determinations for an approval with modification of a permit application under Part 301 or 303. The denial of a permit application under Part 301 or 303 would further require documentation, and subsequent determination, of suggestions on changes to allow the permit to be approved.

Allowed Wetland Uses

Currently, a permit is not required under NREPA for certain wetland uses, including the construction or maintenance of farm roads, forest roads, or temporary roads for moving mining or forestry equipment, if the roads are constructed and maintained in a manner to ensure that any adverse effect on the wetland will be minimized.

The bill would add that, if the wetland is not “a water of the United States as that term is used in section 502(7) of the federal Water Pollution Control Act, 33 USC 1362,” borrow material for road construction and maintenance could be taken from the wetland unless an adjacent upland source were available.

The bill would further direct that, in determining whether adverse effect on a wetland would be minimized, the DEQ must consider cost, existing technology, and logistics in light of overall project purposes.

Entering Premises

Under current law, upon reasonable cause or obtaining a search warrant, the DEQ may enter on or through premises on which a prohibited wetland activity, or information needed to determine compliance with Part 303, is located. The bill would provide that the DEQ could enter such premises under any of the following circumstances:

- Upon obtaining a search warrant, an administrative warrant issued by the director of the DEQ, or the consent of the person who owns or controls the premises.
- If there is an imminent threat to the public health or environment.
- If the wetland is “a water of the United States as that term is used in section 502(7) of the federal Water Pollution Control Act, 33 USC 1362,” upon reasonable cause.

Challenge of Wetland Designation, Award of Fees

Finally, under the bill, a landowner owning a land or water feature that was classified as wetland could challenge that classification before an environmental permit panel under Section 1315 of NREPA in the same manner and subject to the same proceedings as apply to a permit applicant.

The bill would provide that the award of attorney fees in a civil action or costs in a contested case would be subject to the applicable provisions of the Revised Judicature Act. However, regardless of whether the state’s position were substantially justifiable, expert professional witness fees would be awarded to a landowner that prevailed against the state on the issue of whether the landowner’s property was wetland, in either a civil action or contested case.

The bill would take effect 90 days after its enactment.

MCL 324.1511 et al.

FISCAL IMPACT:

It is unclear whether Senate Bill 1211 would affect costs or revenues for the DEQ. Further narrowing the definition of inland lakes, streams, and wetlands may limit the areas subject to permitted regulation, thereby reducing regulatory costs for the department and reducing the corresponding permit revenue. The department is likely to incur additional costs as a result of a requirement to provide individuals with written notice of their alleged permit violations. The bill is unlikely to affect local government costs or revenues.

POSITIONS:

The following entities indicated support for the bill (12-18-18):

- National Federation of Independent Business (NFIB)
- Michigan Farm Bureau
- Home Builders Association of Michigan
- Michigan Chamber of Commerce
- Michigan Realtors

- Michigan Forest Products Council
- Grossman Forestry Co.

The following entities indicated opposition to the bill (12-18-18):

- The Nature Conservancy
- Michigan Wetlands Association
- SEMCOG (Southeast Michigan Council of Governments)
- Oakland Audubon Society
- National Wild Turkey Federation
- Michigan Environmental Council
- Michigan United Conservation Clubs
- Michigan Trappers and Predator Callers Association
- Michigan League of Conservation Voters
- West Bloomfield Township Environmental Commission
- Clean Water Action
- National Wildlife Federation
- Michigan Trout Unlimited
- Michigan Steelhead and Salmon
- Detroit Audubon
- Michigan Pheasants Forever and Quail Forever
- Southwestern Lake Erie Waterfowl USA
- Delta Waterfowl
- Michigan Bass Nation
- Ruffed Grouse Society and American Woodcock Society
- Michigan Sierra Club
- Audubon Great Lakes
- Natural Resources Defense Council
- Crandell Environmental
- Niswander Environmental

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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.