

NREPA WETLAND REVISIONS

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Senate Bill 1211 as enacted
Public Act 631 of 2018
Sponsor: Sen. Tom Casperson
House Committee: Michigan Competitiveness
Senate Committee: Natural Resources
Complete to 6-25-19

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

SUMMARY:

Senate Bill 1211 amends wetlands protection and management provisions in the Natural Resources and Environmental Protection Act (NREPA). The bill took effect March 29, 2019.

Part 303 Definitions

The bill revises the definition of *wetland* in Part 303 (Wetlands Protection) of NREPA. Previously, wetland meant: 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 Great Lakes, an inland lake or pond, or a river or stream and is more than five acres in size.
- Not contiguous to the Great Lakes, an inland lake or pond, or a river or stream and is five acres or less in size if the Department of Environment, Great Lakes, and Energy (EGLE) 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 EGLE has so notified the owner.

The bill removes entirely the above provision that allowed EGLE to determine that protection of an area was essential to preserving the natural resources of the state. The bill revises the rest of the definition so that wetland means: 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 must meet one of the following:

- Be “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.”
- Be contiguous to the Great Lakes, Lake St. Clair, an inland lake or *pond*, or a stream. (The bill stipulates that *pond* does not include a farm or stock pond lawfully constructed without a permit under other provisions of NREPA.)
- Be more than five acres in size.
- Have the documented presence of an endangered or threatened species under the federal Endangered Species Act or Part 365 (Endangered Species Protection) of NREPA.
- Be a *rare and imperiled wetland*.

Hydric soil means 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.

The bill removes the following from the 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 adds “coastal fen” to the definition and retains the following:

- Great Lakes marsh.
- Southern wet meadow.
- Inland salt marsh.
- Coastal plain marsh.
- Interdunal wetland.
- Lakeplain wet prairie.
- Lakeplain wet-mesic prairie.
- Wet-mesic prairie.
- Wet prairie.
- Prairie fen.
- Northern fen.
- Patterned fen.
- Poor fen.
- Muskeg.
- Relict conifer swamp.
- Southern floodplain forest.

In 2019 and every five years thereafter, the Department of Natural Resources (DNR) may make recommendations to the legislature for changes in the list of rare and imperiled wetland.

Part 301 Definition

The bill amends the definition of *inland lake or stream* for purposes of Part 301 (Inland Lakes and Streams) to include 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.”¹

Definitions Specific to Section 30312f

The bill contains several definitions specific to section 30312f of NREPA, added by 2018 PA 561, which were included in this bill to avoid accidentally enacting conflicting provisions.

¹ The referenced provision reads in its entirety: “The term ‘navigable waters’ means the *waters of the United States*, including the territorial seas.”

Permit Applications

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.

Senate Bill 1211 additionally requires 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 further requires documentation, and subsequent determination, of suggestions on changes to allow the permit to be approved.

Allowed Wetland Uses

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.

Senate Bill 1211 adds that borrow material for road construction or maintenance must be taken from upland sources if feasible, and directs that, in determining whether an alternative will minimize any adverse effect on the wetland, EGLE must consider cost, existing technology, and logistics in light of overall project purposes.

Notice of Pending Permit Applications

NREPA previously required EGLE to prepare biweekly lists of permit applications, containing specified information, and mail them to persons who expressed interest and paid a \$25 fee.

Instead, Senate Bill 1211 requires EGLE to post on its website, and to provide a process for getting email notification of, all of the following under Part 303:

- A list of pending applications.
- Public notices.
- Public hearing schedules.

Entering Premises

Previously under NREPA, EGLE could enter on or through premises on which a prohibited wetland activity, or information needed to determine compliance with Part 303, was located, upon reasonable cause or obtaining a search warrant.

The bill modifies this provision to allow EGLE to enter such premises under any of the following circumstances:

- Upon obtaining a search warrant, an administrative warrant issued by the director of EGLE, or the consent of the person who owns or controls the premises.
- If there is an imminent threat to the public health or environment.
- Upon reasonable cause 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.”

Civil Enforcement Actions

The bill requires that, beginning May 1, 2019, before initiating a civil enforcement action under NREPA, EGLE or the DNR must 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 previously required) contacting the person and extending an offer to meet to discuss the potential enforcement action and potential resolution of the issue. The relevant department may not initiate a civil enforcement action until after such a meeting has been held or after waiting at least 60 days if a meeting is not held.

However, these provisions do not apply if the civil enforcement action is a civil infraction action or if the relevant department determines that the violation constitutes an imminent and substantial danger to the environment or to public health or safety.

Challenge of Wetland Designation, Award of Fees

Finally, Senate Bill 1211 provides that the award of attorney fees in a civil action under Part 303 or costs in a contested case under Part 303 are subject to the applicable provisions of the Revised Judicature Act. However, regardless of whether the state's position was substantially justifiable, in either a civil action or contested case, reasonable expert professional witness fees, as determined by the presiding officer, must awarded to a landowner that prevails against the state on the issue of whether the landowner's property is wetland.

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.

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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.