



Senate Fiscal Agency  
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## BILL ANALYSIS



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Senate Bill 1211 (as enacted)  
Sponsor: Senator Tom Casperson  
Senate Committee: Natural Resources  
House Committee: Michigan Competitiveness

**PUBLIC ACT 631 of 2018**

Date Completed: 4-9-19

**CONTENT**

The bill amended **Part 301 (Inland Lakes and Streams) and Part 303 (Wetlands Protection)** of the Natural Resources and Environmental Protection Act (NREPA) to do the following:

- **Modify provisions pertaining to the denial or approval with modification of a permit.**
- **Extend a provision requiring a department to contact a permittee and extend an offer to discuss potential civil enforcement actions to any person, and require the department to provide that person a statement of facts and a list of each specific provision of statute, rule, or permit that the person was alleged to have violated.**
- **Revise provisions requiring the Department of Environmental Quality (DEQ) to make available a notification of a pending permit application.**
- **Require the Department to consider cost, existing technology, and logistics in light of an overall road project's purpose in a wetland in determining whether an alternative would minimize any adverse effects on the wetland.**
- **Omit a requirement that the Department may only request a fee equal to double the standard application fee for a permit when work has been done in violation of a permit requirement under Part 303, and if restoration is not ordered by the Department.**
- **Revise the conditions under which the Department may enter on, upon, or through the premises on which certain activity listed in Part 303 is located or on which information required to be maintained under Part 303 is located.**
- **Specify that the costs and fees incurred by the party in connection with the contested case under Part 303 must be awarded to a landowner who prevails on the issue of whether the landowner's property is wetland.**
- **Revise terms used throughout the Act.**

The bill took effect on March 29, 2019.

**Permit Applications**

The NREPA requires a denial of an application for a permit to document, and a review upholding the denial to determine, to the extent practical, the following:

- That the decision is based on specifically-cited provisions of the NREPA or promulgated rules.

- That the decision is based on sufficient facts or data, which are recorded in the file.
- To the extent applicable, that the decision is the product of reliable scientific principles and methods, and that the decision has applied the principles and methods reliably to the facts.

Under the bill, for a permit under Part 301 or 303, an approval with modification of an application for a permit is subject to the above requirements. In the case of a denial of an application for a permit under Part 301 or 303, the denial also must document suggestion on changes to allow the permit to be approved.

#### Contact & Statement of Facts Before Potential Civil Enforcement Actions

Under the NREPA, the department, before initiating a civil enforcement action under the Act against a person holding a permit issued under the Act, must contact the permittee and extend an offer for department staff to meet with the person to discuss the potential civil enforcement action and potential resolution of the issue. If the permittee agrees to meet, the Department may not initiate a civil enforcement action until after the meeting is held, unless the meeting is not held within a reasonable time as determined by the Department.

The bill extends these provisions to any person, instead of a person holding a permit. In addition, beginning May 1, 2019, the bill requires the department to provide the person in writing a list of each specific provision of statute, rule, or permit that the person is alleged to have violated and a statement of the facts constituting the violation. Also, if the person agrees to meet with the department, it may not initiate a civil enforcement action until after the meeting is held, unless the meeting is not held within a reasonable time of not less than 60 days.

"Department" means the department, agency, or officer authorized under the Act to approve or deny an application for a permit.

#### Part 301 Definitions

Part 301 of the Act defines "inland lake or stream" as a natural or artificial lake, pond, or impoundment; a river, stream, or creek which may or may not be serving as a drain as defined by the Drain Code; or any other body of water that has definite banks, a bed, and visible evidence of a continued flow or continued occurrence of water, including the St. Marys, St. Clair, and Detroit Rivers. The term does not include the Great Lakes, Lake St. Clair, or a lake or pond that has a surface area of less than five acres.

Under the bill, the term also means an artificial or natural 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. (That section defines "navigable waters" as the water of the United States, including the territorial seas. "Territorial seas" means the belt of the seas measured from the line of ordinary low water among that portion of the coast, which is in direct contact with the open sea and the line marking the seaward limit of inland waters, and extending seaward distance of three miles.)

#### Part 303 Definitions

Previously, Part 303 of the Act defined "wetland" as land characterized by the presence of water at a frequency and duration sufficient to support, and that under normal circumstances did support, wetland vegetation or aquatic life, and was commonly referred to as a bog, swamp, or marsh, and which is any of the following:

- Contiguous to the Great Lakes, Lake St. Clair, an inland lake or pond, or a river or stream.
- Not contiguous to the Great Lakes, an island lake or pond, or a river or stream and more than five acres in size.
- Not contiguous to the Great lakes, an inland lake or pond, or a river or stream, and five acres or less in size if the Department determines that protection of the area is essential to the preservation of the natural resources of Michigan from pollution, impairment, or destruction and the Department has notified the owner.

Under the bill, "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 land or water feature is not a wetland unless it meets any of the following:

- Is a water of the United States, as that term is used in the Federal Water Pollution Control Act.
- More than five acres in size.
- Has the documented presence of an endangered species or threatened species under Part 365 of the Endangered Species Act.
- Is a rare and imperiled wetland (see below).
- Contiguous to the Great Lakes, Lake St. Clair, an inland lake or pond, or a stream.

"Pond" does not include a farm or stock pond constructed consistent with the permit exemption under Section 30305(2)(g), which specifies that construction or maintenance of farm or stock ponds is allowed in a wetland without a permit subject to other Michigan laws and the owner's regulation.

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

Rare and Imperiled Wetland. Under the NREPA, "rare and imperiled wetland" means certain marshes, meadows, wetlands, prairies, fens, and swamps specified in the NREPA.

Previously, the term included intermittent wetland or boggy seepage wetland, Northern wet-mesic prairie, rich conifer swamp, hardwood conifer swamp, Northern swamp, Southern swamp, and inundated shrub swamp. The bill deleted these bodies from the definition. Additionally, the bill included coastal fen in the definition of "rare and imperiled wetland".

In 2019 and every five years after that, the Department of Natural Resources may make recommendations to the Legislature for changes in the list of rare and imperiled wetlands to reflect the status of each type of wetland to be included on the list as rare and imperiled throughout the State.

Section 30312(f) Definitions. "Altered or degraded wetland" means wetland that meets any of the following criteria:

- Has been partially or fully drained, such as by ditching, tiling, or pumping.
- 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.
- Has undergone land use conversion or alteration to vegetation, soil, or hydrology that currently affects the wetland functions and services.

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

"Net increase in wetland functions and services" means 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" means either 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 net 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.

The term does not include an activity undertaken to fulfill, currently or in the future, a Federal, State, or local wetland permit mitigation requirement.

"Wetland functions and services" means 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, including fishing, hunting, trapping, and birdwatching.

#### DEQ Duty When Considering Alternatives

The Act lists uses that are allowed in a wetland without a permit subject to other Michigan laws and the owner's regulation, such as fishing, trapping, hunting, swimming, and boating. The Act also allows for 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. Under the bill, borrow material for road construction or maintenance must be taken from upland sources if feasible. In determining whether an alternative will minimize any adverse effect on the wetland, the Department must consider cost, existing technology, and logistics in light of overall project purposes.

#### Notification of Pending Permit Application

The Act allowed a person who desired notification of a pending permit application to make a written request to the Department accompanied by a \$25 annual fee, which had to be credited to the General Fund. The Department had to prepare a biweekly list containing certain information of applications made during the previous two week and mail copies to people who request notice. The bill deletes these provisions.

Instead, under the bill, the Department must post on its website, and must have a process to provide electronic mail notification of, all of the following:

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

### Work Done in Violation of a Permit

Under the Act, to obtain a permit for constructing, operating, or maintaining any development in a wetland, a person must file an application with the DEQ on a form provided by the Department.

Previously, if work had been done in violation of a permit requirement under Part 303 and restoration was not ordered by the Department, the Department could accept an application for a permit if the application was accompanied by a fee equal to twice the application fee otherwise required. The bill omits from this provision the requirement that restoration not be ordered by the Department.

### Departmental Searches

Previously, under the Act, upon reasonable cause or obtaining a search warrant, the Department could enter on, upon, or through the premises on which an activity listed in Section 30304 was located or on which information required to be maintained under Part 303 was located.

(Section 30304 prohibits a person from performing the following activities without a permit or as otherwise provided: depositing or permitting the placing of fill materials in a wetland; dredging, removing, or permitting the removal of soil or minerals from a wetland; constructing, operating, or maintaining any use or development in a wetland; and draining surface water from a wetland.)

The bill revises this provision to state that the DEQ may enter on, upon, or through the premises on which an activity listed in Section 30304 is located or on which information required to be maintained under Part 303 is located under any of the following circumstances, as applicable:

- After obtaining a search warrant, an administrative warrant issued by the Director, 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.

### Award to a Prevailing Party

Under the bill, the award of costs in a contested case, or the award of attorney fees in a civil action, under Part 303 is subject to Chapter 8 of the Administrative Procedures Act or Chapter 24 of the Revised Judicature Act, respectively. However, regardless of whether the Department's position was substantially justifiable, reasonable expert professional witness fees, as determined by the presiding officer or court, as applicable, must be awarded to a landowner that prevails on the issue of whether the landowner's property is wetland.

### Assessment

The Act allows a person who owns or leases a parcel of property to request that the DEQ assess whether a parcel or property or a portion of the parcel is wetland.

Previously, a person could request that, as part of an assessment, the DEQ make a determination whether a wetland was not continuous. Instead, under the bill, a person may request that, as part of an assessment, the DEQ make a determination whether a wetland is contiguous to the Great Lakes, Lake St. Clair, an inland lake or pond, or a stream. "Pond"

does not include a farm or stock pond constructed consistent with the permit exemption under Section 30305(2)(g).

MCL 324.1511 et al.

Legislative Analyst: Stephen Jackson

### **FISCAL IMPACT**

The bill will have a small, but likely positive, fiscal impact on the Department of Environmental Quality, and no fiscal impact on local units of government. The bill effectively tightens the statutory definition of wetland, which will result in a reduction in the total number of acres subject to regulation as such. Previously, owners of wetlands had to apply for a permit to undertake certain activities on that land. Under the bill, there presumably will be fewer of these owners and, therefore, fewer permits for the DEQ to issue, as some parcels that were subject to the permit requirement will be no longer. This will result in the loss of an unknown amount of permit revenue, but also a reduction in costs related to the administration of the wetland permit program. Since wetland permit revenue is not sufficient to cover the entire cost of the wetland program, it is likely that the savings will exceed the amount of revenue lost, and save the DEQ a small amount of General Fund/General Purpose funds.

The bill will have a negative fiscal impact on the State and no fiscal impact on local government. Additional legal costs for the State may accrue when a State agency files action against a party in violation of the Act. The bill requires the State to pay any applicable expert professional witness fees to a prevailing landowner, which likely will result in increased court costs to the State.

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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.