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Senate Bill 663 (as passed by the Senate)  
Sponsor: Senator Sue Shink  
Committee: Energy and Environment

Date Completed: 8-16-24

### **RATIONALE**

According to testimony before the Senate Committee on Energy and Environment, the Department of Environment, Great Lakes, and Energy (EGLE) has been unable to promulgate rules under Part 31 (Water Resources Protection) of the Natural Resources and Environmental Protection Act (NREPA) since December 31, 2006, after legislation was passed to prevent it from doing so in 2004.<sup>1</sup> Some believe that this prohibition on rulemaking has left EGLE unable to fulfill its statutorily imposed purpose to protect the State's waters and has left the State unaligned with Federal standards, creating a negative impact on public health. Accordingly, it has been suggested that EGLE be given the authority to promulgate rules, as the rulemaking process requires consideration of stakeholder input and legislative oversight from the Joint Committee on Administrative Rules (JCAR).

### **CONTENT**

**The bill would amend Part 31 of NREPA to delete a provision prohibiting EGLE from promulgating rules to carry out its duties under Part 31 after December 31, 2006.**

Generally, Part 31 requires EGLE to protect and conserve Michigan's water resources and control the pollution of the State's surface or underground water, as well as the Great Lakes.

The Department may promulgate rules as it considers necessary to carry out its duties; however, the Act prohibits EGLE from promulgating any additional rules under Part 31 after December 31, 2006. Rules promulgated under Part 31 before January 1, 2007, have and will remain in effect unless rescinded. The bill would delete these provisions.

MCL 324.3103

### **ARGUMENTS**

*(Please note: The arguments contained in this analysis originate from sources outside the Senate Fiscal Agency. The Senate Fiscal Agency neither supports nor opposes legislation.)*

#### **Supporting Argument**

The Department's inability to adopt new administrative rules undermines its capacity to protect the State's water resources. Its administrative rules are out-of-date and do not reflect current science, which may lead to serious consequences. For example, according to testimony before the Senate Committee on Energy and Environment, EGLE's inability to update a list containing regulated polluting materials<sup>2</sup> means that emitters of emerging pollutants like polyfluoroalkyl substances (PFAS) and perfluorooctanoic acid (PFOA) are not required to report their release or spillage to EGLE, that EGLE is not required to surveil emitters, and that EGLE is not required to develop pollution incident prevention plans.

<sup>1</sup> Public Act 90 of 2004

<sup>2</sup> MI Admin. Code R. 324.2009

Substances like PFAS and PFOA are toxic and could endanger many if released into water sources; however, EGLE is unable to regulate them and other dangerous pollutants. This, in turn, leads to complications with EGLE's ability to update the procedural requirements and issuance of permits for plans for the land application of wastewater treatment residuals, which may spread PFAS and PFOA. Testimony also indicates that EGLE is unable to regulate the unloading of nutrients like phosphorus and nitrogen into the Great Lakes, an abundance of which has led to an increase in algal blooms that harm the health of the Lakes, humans who encounter them, and industries such as fishing and tourism.

Additionally, EGLE's rules are not aligned with Federal regulations, which may challenge its ability to work with the Federal government. For example, EGLE received delegated authority from the Federal government in 1973 to administer Michigan's National Pollutant Discharge Elimination System, which aims to protect surface waters by limiting the amount of wastewater discharged into them. The program is regulated by Part 21 (General Real Estate Powers) rules, which are tied to outdated provisions of the Federal Clean Water Act. The lack of alignment between Part 21 rules and the Act complicates EGLE's ability to issue up-to-date permits and may result in a withdrawal of its delegated authority. Additionally, testimony indicates that EGLE's inability to amend floodplain maps and standards may threaten the Federal government's ability to offer the National Flood Insurance Program in the State, as the program only is available to states that follow certain guidelines.<sup>3</sup>

The Department's inability to update its rules also makes regulating State waters more inconvenient. Firstly, scientific advancement over the past 20 years has led to faster, more accurate practices and techniques that EGLE has been unable to adopt. For example, EGLE is unable to use QPCR testing, a laboratory test that measures DNA, to identify the microorganisms on beaches and quickly determine whether they are safe and instead must use older, less efficient processes. Similarly, the prohibition prevents EGLE from adopting more streamlined and effective processes than the ones currently promulgated by rule, which can create an unnecessary administrative and technical burden for State, county, and local governments. By enacting the bill, EGLE would regain authority to make rules that protected the health and safety of the State's water resources and its residents.

### **Supporting Argument**

The Department's inability to adopt new administrative rules is unlawful. The Michigan Constitution states, "The conservation and development of the natural resources of the state are hereby declared to be of paramount public concern in the interest of the health, safety and general welfare of the people. The legislature shall provide for the protection of the air, water and other natural resources of the state from pollution, impairment and destruction."<sup>4</sup> In 1974, the Supreme Court ruled that this provision was a mandatory command made of the Legislature, not a declaratory statement.<sup>5</sup> The law prohibiting EGLE from promulgating rules to protect Michigan's water resources is unconstitutional. Testimony before the Senate Committee on Energy and Environment also indicates that NREPA, including Part 17 (Michigan Environmental Protection Act), mandates the protection of the State's water resources. The bill should be enacted so that the State can fulfill its constitutionally mandated duty.

### **Opposing Argument**

The bill would empower EGLE at the expense of the Legislature. According to testimony before the Senate Committee on Energy and Environment, rules promulgated by EGLE would have the force of law; however, it is the responsibility of the Legislature to develop and pass laws.

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<sup>3</sup> Generally, participating states must ensure that they adopt adequate land use and control measures to reduce flood damages, such as by prohibiting the construction of flood prone structures.

<sup>4</sup> MI Const. art. IV, § 52.

<sup>5</sup> *State Highway Commission v. Vanderkloot*, 392 Mich. 159 (Mich. 1974).

As they are elected by voters, members of the Legislature represent the will of the people in a way that State officials, who are not elected, do not. The ability to promulgate rules and amend laws should remain in the hands of the Legislature.

**Response:** Among other things, EGLE administers rules that are highly technical in nature and seek to solve important, complex issues, especially when it comes to protecting the State's water resources and public health. In these cases, *experts* should draft rules, not legislators whose knowledge likely is more general. Additionally, EGLE is an outlier among the departments of the executive branch, most of which can promulgate their own rules. The bill would ensure that, like other departments, EGLE could develop and administer rules drafted by those most qualified.

### **Opposing Argument**

Providing EGLE with the ability to promulgate rules could lead to overregulation. State officials are not elected and, therefore, are less accountable to Michiganders than legislators. This may allow bureaucrats to develop administrative rules that do not align with the goals of residents and that hurt companies, particularly small businesses. According to testimony before the Senate Committee on Energy and Environment, EGLE and its past iterations have overstepped its bounds and burdened residents. Instead of granting EGLE the unlimited ability to promulgate rules, the bill should at least include a sunset.

**Response:** Each department must follow the rulemaking process. A department must hold a public hearing during which members of the public may submit written comments or present testimony on proposed rules. After receiving public input, the department must submit its finalized rules to JCAR, a legislative committee composed of five Senators and five Representatives. While JCAR deliberates on a bill, the public may submit comments. Throughout the process, a department proposing to adopt new administrative rules receives significant input from the public and the Legislature, ensuring the development of rules that further the public interest. Additionally, testimony before the Senate Committee on Energy and Environment indicates that it takes a bill an average of seven years to pass. The JCAR process is an appropriate, timely process to pass rules, one EGLE should be able to participate in.

Legislative Analyst: Nathan Leaman

### **FISCAL IMPACT**

As the language of the bill is permissive, there would be no mandatory fiscal impact on the State or local units of government.

Fiscal Analyst: Jonah Houtz

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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.