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BILL



ANALYSIS

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Senate Bill 436 (as reported without amendment)
Sponsor: Senator Jud Gilbert, II
Committee: Economic Development and Regulatory Reform

Date Completed: 6-9-09

RATIONALE

In 2004, legislation amended a number of statutes to establish consistent procedures and deadlines for departments and agencies to issue licenses and permits. As a rule, a department or agency must grant or deny a license or permit within 90 days after receiving an administratively complete application, and refund the applicant's license or permit fee by 15% if the deadline is missed. These requirements apply to licenses and permits for a wide range of activities, occupations, and businesses. The amended statutes include the Natural Resources and Environmental Protection Act (NREPA), which imposes a processing deadline of 30 to 150 days for specific permits and operating licenses. Despite this mandate, there have been complaints about the time it can take the Department of Environmental Quality (DEQ) to issue permits, uncertainty during the permitting process, and conditions the DEQ requires applicants to meet. To address these concerns, it has been suggested that people seeking certain environmental permits should be allowed to obtain a review of their applications from a private-sector professional engineer, whose recommendations the DEQ could accept or reject within a limited time frame. It also has been suggested that there should be an increase in the amount that must be refunded when a NREPA permitting deadline is missed.

CONTENT

The bill would add Section 1313 to Part 13 (Permits) of the Natural Resources and Environmental Protection Act to do the following:

- **Allow a person to file a permit application or a proposed remedial action plan with a licensed professional engineer for review.**
- **Require the licensed professional engineer to report his or her findings and recommendations to the Department of Environmental Quality.**
- **Require the DEQ to process the application or proposed plan within 21 days after receiving the engineer's report or after a hearing or consultation; and provide that any processing fee would be 50% of the amount otherwise charged.**
- **Require the DEQ to maintain a list of licensed professional engineers eligible to review permit applications or proposed remedial action plans.**
- **Require the DEQ to promulgate rules implementing Section 1313.**
- **Require the DEQ Director to submit to the Legislature an annual report regarding application and plan reviews by licensed professional engineers.**

The bill also would amend Part 13 to require a department, agency, or official to pay 50%, rather than 15%, of certain amounts if the department, agency, or official failed to approve or deny a permit application by the processing deadline.

For purposes of Section 1313, "permit" would mean a permit required by any of the following sections of the Act or rules promulgated under those sections:

- Section 3104: floodplain alteration permit.
- Section 3112 or 3113: permit to discharge into waters of the State.
- Section 5505: air pollution permit to install or operate.
- Section 30104: inland lakes and streams project permit
- Section 31509: dam construction, repair, or removal permit.
- Section 32503: bottomland dredging or spoils permit.
- Section 32723: water withdrawal permit.

Licensed Professional Engineer Review

The bill would allow a person to file an application for a permit or file a proposed remedial action plan with a licensed professional engineer approved by the DEQ as competent to process that type of permit or plan. The licensed professional engineer could not be an employee of the permit applicant or the person proposing the remedial action plan. Any fee charged to the applicant by the licensed professional engineer for reviewing a permit application would be in addition to the DEQ's permit application fee.

The licensed professional engineer would have to review the permit application or proposed remedial action plan based on the relevant standards in the Act and rules. If the engineer determined that the application or proposed plan met the relevant standards, he or she would have to give a written report of his or her findings and recommendations to the DEQ and the applicant or person proposing the plan.

Notwithstanding any other section of the Act, the DEQ would have to process the permit application or proposed remedial action plan within 21 days after receiving it, the professional engineer's findings and recommendations, and any fee, which would have to be 50% of the fee otherwise established by the Act or rules. If, however, the DEQ conducted a hearing or consultation on the permit application or proposed plan pursuant to the Act or rules, the Department would have to process the application or proposed plan within 21 days after the hearing or consultation. The DEQ could not obtain an extension of the deadline or request from the applicant or person proposing the plan any additional information pertaining to the application or

proposed plan. If the DEQ failed to process an application or proposed plan by the deadline, the application or plan would have to be considered approved.

If the DEQ denied a permit application or rejected a proposed remedial action plan contrary to the recommendations of a licensed professional engineer, within 15 days after the denial or rejection the Department would have to give the applicant or person proposing the plan a written explanation of the reasons for denial, including citations to specific statutory provisions or rules providing the basis for the denial or rejection. The explanation would have to be signed by the Director.

The DEQ would have to maintain a list or lists of licensed professional engineers eligible to conduct reviews of permit applications or proposed remedial action plans under Section 1313. The Department would have to post each list on its website and update each list at least every 30 days.

Within 270 days after the bill's effective date, the DEQ would have to promulgate rules to implement Section 1313.

By December 1, 2010, and every subsequent year, the Director would have to submit a report to the standing committees and Appropriations subcommittees of the Senate and House of Representatives with primary responsibility for environmental issues. The report would have to include all of the following information for each type of permit application or proposed remedial action plan that the DEQ received with findings and recommendations of a licensed professional engineer under Section 1313 for the preceding fiscal year:

- The number received.
- The number approved, the number approved by the deadline, the number approved because of failure to meet the deadline, and the average time for the DEQ to approve or disapprove the applications or proposed plans.
- The number denied.

Failure to Meet Deadline

Part 13 requires a department to approve or deny an application for a permit by the processing deadline, which ranges from 30 to 150 days depending on the type of

permit. The processing deadline applies to permits, or operating licenses, issued under specific sections of NREPA. (In this part, "department" means the department, agency, or official authorized by the Act to approve or deny an application for a particular permit. The departments in question include the DEQ and the Departments of Agriculture, Natural Resources, and Transportation.)

Except for several types of permits, if a department fails to satisfy this requirement, it must pay the applicant an amount equal to 15% of the greater of the following, as applicable:

- The amount of the application fee for that permit.
- If the department charges an assessment or other late fee on an annual or other periodic basis to a person holding the permit for which the application was submitted, the amount of the first periodic charge of the assessment or other fee for that permit.

Under the bill, a department would have to pay 50%, rather than 15%, of the applicable amount.

(The permits to which this does not apply are solid waste disposal area construction permits; solid waste disposal permits; and permits to place fill material in a wetland, remove soil or minerals from a wetland, construct, operate, or maintain any use or development in a wetland, or drain surface water from a wetland.)

MCL 324.1307 et al.

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

By allowing a person to have a permit application or proposed remedial action plan reviewed by a licensed professional engineer before submitting it to the DEQ, and requiring the Department to make a decision within 21 days after receiving the engineer's recommendations or after a consultation or hearing, the bill would expedite the processing of specific environmental permits. This would help address

complaints people have made about hurdles applicants must clear in order to obtain a permit, uncertainty about whether a permit will be issued until a facility already has been built or an investment made, and the time it can take for the process to be completed. This climate of overregulation can impede development that would bring jobs to Michigan. Evidently, this is what happened when a company recently decided not to build a coal power plant in Midland, because of the difficulty of obtaining an air emissions permit. Eliminating the delays and challenges that applicants currently experience would help promote development in Michigan and hasten the economic recovery. Allowing a private review also would help avert a backlog in permit applications, which may develop as the DEQ faces declining resources.

By increasing the amount that must be paid to a permit applicant when the processing deadline under Part 13 is missed, the bill would give the responsible departments added incentive to grant or deny applications within the statutory time frame.

Opposing Argument

It is not clear how review by a professional engineer would reduce the overall permit and remedial action plan (RAP) processing times. According to a report prepared by the DEQ under Part 13, recognizing incomplete applications, withdrawn applications, and applications that spanned multiple reporting periods, the Department made 97% of permit decisions within the required processing time, for fiscal year 2007-08.

Although the bill would require the Department to make a decision within a very limited time, it is possible that a professional engineer would need as much time as the Department does to review an application. Also, rather than making the process more efficient overall, the bill would require special treatment for certain permit applications or proposed RAPs, putting them at the head of the line and making it impossible for the DEQ to meet the processing deadline for other applications and proposed plans.

Furthermore, the time frame for the Department to make a decision would be far too short. For the permits in question, the shortest processing period under current law

is 60 days, or 120 days if a hearing is held. The longest is 150 days or, if a hearing is held, 90 days after the hearing, whichever is longer. These periods recognize the complexity and technical nature of the permit applications, and the potentially significant environmental impacts of the permitted activities. Under the bill, however, the DEQ would have only 21 days after receiving the professional engineer's findings and recommendations to review them, or 21 days after a public hearing to review and respond to public comment. There would be no proceeding in which the engineer could defend or explain his or her conclusions, and the DEQ could not seek additional information from the applicant. These limitations could make it necessary for the DEQ to duplicate the engineer's work, offsetting any potential savings in time and cost. In addition, the parties could not even mutually agree to an extension of time. This lack of flexibility could result in decisions that would harm the environment, public health, and economic development.

Response: It is likely that the DEQ is meeting the deadline 97% of the time because the processing period under Part 13 does not begin until the close of the "application period", which does not end until a department receives an "administratively complete" application. As a rule, an application must be considered administratively complete 30 days after it is received, but a department can specify additional information that it needs, and the 30-day period will be tolled until the department receives the specified information.

Opposing Argument

Allowing permit applicants and people proposing RAPs under Section 1313 to pay only 50% of the standard processing fee would impose a burden on all others seeking a permit or RAP approval under Part 13. This reduction in fee revenue also would have a negative impact on other program activities, such as enforcement and monitoring.

Response: The fee would be reduced because a private professional engineer would be doing much of the work that the DEQ otherwise would have to do, and the applicant would be paying for the engineer's services.

Opposing Argument

The rules promulgated to implement Section 1313 presumably would include the criteria licensed professional engineers would have to meet, and procedural requirements associated with including them on the required list and removing them from it. According to the DEQ, based on its experience with qualified consultants/certified professionals, it would be better to use a full licensing program administered by the Department of Energy, Labor, and Economic Development, if certain environmental professionals were to be given responsibilities and status under NREPA. In addition, this special status should not be limited to licensed professional engineers. Members of other scientific and environmental disciplines could be qualified to perform the type of work in question.

Opposing Argument

The bill would promote the privatization of State functions, allowing work to be performed by individuals and firms that are not subject to the State's accountability standards or auditing requirements. A licensed professional engineer also would not be subject to the Freedom of Information Act.

Legislative Analyst: Suzanne Lowe

FISCAL IMPACT

The bill would have an indeterminate fiscal impact on the Department of Environmental Quality. One provision of the bill would require the Department to refund 50%, rather than the currently required 15%, of application fees or late fees when an application was not processed by the prescribed deadline. In a recent report to the Legislature, required by Section 1311 of the Natural Resources and Environmental Protection Act, the Department reported that of 6,645 permit decisions made in a recent time period, 6,463, or 97%, were made within the required processing period. The bill also would allow a person to file with the Department an application that contained a review of that application performed by a licensed professional engineer, and to pay a processing fee of 50% of the amount otherwise charged. It is not known whether this proposal would reduce the time frame in which the Department could complete its own analysis of the permit. In addition, the Department would be required to maintain a

list of licensed professional engineers eligible to review permit applications or proposed remedial action plans, as proposed by the bill, and to file an annual report with the Legislature.

Fiscal Analyst: Bruce Baker

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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.