

Senate Fiscal Agency  
P. O. Box 30036  
Lansing, Michigan 48909-7536

**SFA**



**BILL ANALYSIS**

Telephone: (517) 373-5383  
Fax: (517) 373-1986  
TDD: (517) 373-0543

Senate Bill 989 (Substitute S-2 as passed by the Senate)  
Sponsor: Senator George A. McManus, Jr.  
Committee: Farming, Agribusiness and Food Systems

Date Completed: 3-8-02

## **RATIONALE**

All pesticides sold, distributed, or used in the State fall under the regulation of Part 83 of the Natural Resources and Environmental Protection Act (NREPA) and various sections of the Administrative Code. One section of the Code, Regulation 636 (R 285.636), governs pesticide applicator certification. When Michigan Department of Agriculture officials sought to change some certification requirements for pet groomers and sewer line root control under Regulation 636, they realized they could not do so without amendments to Part 83 of the NREPA. Once examined, Part 83 revealed that the statute is silent on such recent issues as the sale of pesticides over the Internet and the use of pesticides as a weapon of terrorism. Further, according to the Department, pesticide companies and applicators have complained for years about confusing, wordy, or vague language in Part 83. Some people believe that the part should be updated to strengthen the regulatory authority of the Department, clarify existing language, and address concerns of pesticide applicators, farmers, and consumers.

## **CONTENT**

**The bill would amend Part 83 (Pesticide Control) of the Natural Resources and Environmental Protection Act to do the following:**

- Require the registration of all pesticides sold, distributed, or offered for sale in the State, including pesticides for which the offer to sell originated within the State or was directed by the offeror to people in the State and received by them.**
- Prohibit a person who used, distributed, exposed, or offered to sell a pesticide from making false claims about its characteristics, benefits, or**

**qualities.**

- Exempt people wishing to apply pesticides for private agricultural purposes from certain certification and licensing requirements.**
- Increase fees the Michigan Department of Agriculture collects for pesticide applicator certification, registration, and licensing.**
- Increase criminal penalties for violations of Part 83, include attempted violations in the penalty provisions, and extend the penalties to any person who violated Part 83.**

The bill would repeal Section 8307, which provides for the registration of pesticides, labeling, special local needs, and groundwater contamination. The bill would replace most of those provisions with new language regulating similar content.

### Pesticide Registration

The Act requires every pesticide distributed, sold, exposed, or offered for sale in the State to be annually registered with the Director of Agriculture. The applicant must submit the pesticide product name, a copy of the pesticide labeling, the applicant's name and address, and the name and address of the person whose name will appear on the label, if other than the applicant. If the pesticide is not registered by the United States Environmental Protection Agency (EPA), the applicant also must submit a full description of the tests and the results of the tests upon which claims are based for the pesticide.

(The Act defines "pesticide" as a substance or mixture of substances intended for preventing, destroying, repelling, or mitigating pests or intended for use as a plant regulator, defoliant, or desiccant. The bill would retain this definition, but add that a pesticide would

not include liquid chemical sterilant products, including any sterilant or subordinate disinfectant claims on such products, for use on a critical or semi-critical device. The bill would define "critical device" as any device introduced directly into the human body, either into or in contact with the bloodstream or normally sterile areas of the body. "Semi-critical device" would mean any device that contacted intact mucous membranes but did not ordinarily penetrate the blood barrier or otherwise enter normally sterile areas of the body.)

In order for the Director to register the pesticide, the applicant must have paid all groundwater protection fees required under Part 87 of the Act (Groundwater and Freshwater Protection). In addition, when the Director deems it necessary, the applicant must submit a complete formula of the pesticide, including the active and inert ingredients. The Director may not use the information for his or her own advantage or disclose the formula or trade secrets to those not authorized under Section 8307(5) of Part 83.

The bill would retain the requirement that every pesticide distributed, sold, exposed, or offered for sale in the State be annually registered with the Director. The bill specifies that a pesticide would be considered distributed, sold, exposed, or offered for sale in this State when the offer to sell either originated within this State or was directed by the offeror to people in this State and received by them. In addition, the bill would add the pesticide's EPA registration number to the information required with the registration application. The bill would delete the requirement that an applicant submit a description of tests and test results for non-EPA registered pesticides, but would continue to require the submission, at the Director's request, of a pesticide's formula and ingredients. Also, the bill would require that, in addition to groundwater fees, all late fees under Part 87 and all registration fees and administrative fines under Part 83 be paid before the Director registered an applicant.

Under the Act, decisions on pesticide registration must be made cooperatively by the Departments of Agriculture, Natural Resources, and Community Health in accordance with a memorandum of agreement entered into by the Departments. The bill would delete this provision.

Under the bill, if a registrant distributed identical pesticides under multiple brand names, or distributed more than one pesticide formulation, each brand or formulation of a pesticide would have to be registered as a separate product. Further, the bill would prohibit registration of a pesticide that contained a substance required to be registered with the Department of Agriculture unless that substance also were registered.

#### Registration Renewal

Under the Act, a registration approved by the Director and in effect on June 30 for which the July 1 renewal application is made and the annual registration fee paid, must continue in full force and effect until the Director notifies the applicant that the registration is renewed or denied. The bill would delete this provision.

The bill would require that a registered pesticide continue to be registered as long as it remained in the channels of trade in this State. The registrant would be required to maintain the pesticide registration by submitting an application for renewal before the expiration date. It would be a violation to continue to distribute a pesticide for which the Director had not received a renewal application, including the required fee, by the last day in June.

The Act requires a registrant who intends to discontinue a pesticide registration either to terminate further distribution within the State and continue to register the pesticide annually for two successive years; or to initiate a recall of the pesticide from distribution in the State within 60 days from the date of notification to the Director of intent to discontinue registration. The bill would retain these provisions but delete the 60-day requirement, calling instead for the registrant to apply for renewal before the pesticide registration expired. In addition, the bill provides that pesticides that did *not* go through a two-year discontinuance period but were found in the channels of trade would be subject to registration penalties and all related fees since the product's last year of registration.

#### Truth in Labeling

The bill would prohibit a person who used, distributed, exposed, or offered to sell a pesticide from making claims that it could be used on sites that were not included in the pesticide labeling, or from making claims that

the pesticide had characteristics, ingredients, uses, benefits, or qualities that it did not have or that were not allowed under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA).

#### Special Local Needs

The Act provides for registration of a pesticide for special local needs under FIFRA if the Director determines that all of the following conditions are met:

- The pesticide's composition warrants the proposed claims for it.
- The pesticide's labeling and other material required to be submitted comply with the labeling requirements of FIFRA or regulations promulgated under that Act.
- The pesticide will perform its intended functions without unreasonable adverse effects on the environment.
- The classification for general or restricted use is in conformity with Section 3(d) of FIFRA, which regulates the registration of pesticides.
- When used in accordance with widespread and commonly recognized practice, it will not generally cause unreasonable adverse effects on the environment.

The bill would add a condition that a special local need existed. The bill would delete the last requirement.

#### Groundwater Protection

Under the Act, the Director may cancel the registration of a pesticide that contains a specific pesticide ingredient, if that ingredient has been confirmed in groundwater at three or more areas at levels exceeding the groundwater resource protection level. The bill would retain this provision, but would refer to areas where envelope monitoring had been conducted. (The Act defines "envelope monitoring" as monitoring of groundwater in areas adjacent to properties where groundwater is contaminated to determine the concentration and spatial distribution of the contaminant in the aquifer.)

#### Registration Refusal

Under the Act, the Director may refuse to register or may cancel or suspend registration of a pesticide if one or more of the following circumstances exist:

- The pesticide does not warrant its proposed

- claims.
- The pesticide labeling and other material required to be submitted do not comply with the Act or the rules promulgated under the Act.
  - The pesticide is in violation of the Act or rules.
  - Based on substantial scientific evidence, use of the pesticide causes, or is likely to cause if registered, an unreasonable, adverse effect.
  - Based on substantial scientific evidence, use of the pesticide causes, or is likely to cause if registered, an unreasonable, serious, chronic hazard to human health or long-term environmental damage, which cannot be controlled by designating the pesticide as a restricted use pesticide, by limiting the uses for which a pesticide may be used or registered, or by any other changes to the registration or pesticide label.

The bill would retain the first three provisions, but specify that the pesticide could not be registered if it did not warrant its EPA registration and labeling claims. The bill would replace the last two provisions with a provision that the Director could refuse to register a pesticide if he or she determined, based on substantial scientific evidence, that the pesticide would likely cause an unreasonable, adverse effect on the environment.

The Act requires the applicant to be notified of the manner in which the pesticide, labeling, or other material failed to comply with the Act. If, upon receipt of the notice, the applicant does not make the required changes within 30 days, the Director may refuse to register the pesticide. The bill would delete this provision.

#### Restricted Use and General Use Pesticides

Under the Act, pesticides for which a state management plan is required must be registered as restricted use pesticides. ("Restricted use pesticide" means a pesticide classified for restricted use by the EPA or the Director, and "general use pesticide" means a pesticide not classified as restricted.) The bill would replace "state management plan" with "pesticide management plan" and would define that term as a plan for the protection of groundwater as required by the EPA's labeling requirements for pesticides and devices.

#### Certified Applicators

The Act provides that persons who apply restricted or general use pesticides must be certified or registered. A commercial applicator is a person who is required to be a registered or certified applicator, or who holds himself or herself out to the public as being in the business of applying pesticides. A private agricultural applicator is a certified applicator who uses or supervises the use of a restricted use pesticide for a private agricultural purpose.

The bill provides that a commercial applicator would not include a person using a pesticide for a private agricultural purpose, and that a person could apply a general use pesticide for a private agricultural purpose without being a certified applicator or registered applicator. (The Act defines "private agricultural purpose" as the production of an agricultural commodity on either property owned or rented by the person applying the pesticide or by his or employer; or the property of another person if applied without compensation, other than the trading of personal services between producers of agricultural commodities. The bill would refer to the "application of a pesticide for the production of an agricultural commodity...".)

The bill specifies that a person would not be required to be a certified applicator to apply a restricted use pesticide for a private agricultural purpose if that person were under the direct supervision of a certified applicator, unless prohibited by the pesticide label.

Under the Act, a certified applicator must supervise the application of a general use pesticide by a noncertified applicator under his or her instruction and control, even if the certified applicator is not physically present. Further, a certified applicator must directly supervise the application of a restricted use pesticide if prescribed by the label or Part 83. The bill would delete the first provision, requiring only that a certified applicator supervise the application of *restricted use* pesticides by a noncertified applicator. The bill states that a commercial applicator would be responsible for pesticide applications made by persons under his or her supervision.

The bill would require that a commercial certified or registered applicator be at least 18 years old. Further, the bill specifies that a commercial applicator could make pesticide applications only in the category for which he or she was certified or registered.

## Registered Applicators

Under the Act, "registered applicator" means a person who is authorized to apply general and restricted use pesticides for a commercial purpose. Under the bill, "registered applicator" would mean an individual authorized to apply general use pesticides for a private or commercial purpose.

Currently, a registered applicator may apply a general use pesticide under the supervision of a certified applicator and apply a restricted use pesticide under the direct supervision of a certified applicator. The bill would delete this provision.

The Act specifies that a registered applicator who applies general use pesticides for noncommercial uses is exempt from the provisions requiring supervision by a certified applicator. The bill would retain this provision.

Under the Act, the employer of a registered applicator must maintain a record of each applicator's directly supervised hours of restricted use pesticide application, and retain those records for three years following the termination of that person's employment. The bill would strike this requirement.

Further, the Act provides that, during a registered applicator's initial three-year registration, the applicator may apply categories of restricted use pesticides while not directly supervised if the applicator has applied that category under direct supervision for the number of hours required by the Director, unless prohibited by the pesticide's label. At that point, the employer of the applicator may notify the Director, who then forwards a sticker or symbol that must be attached to the registered applicator's registration card. The bill would delete all of these provisions.

## Commercial Applicator Licensing

The Act requires commercial applicators who advertise in any form to obtain a commercial applicator license for each place of business. In order to qualify for a license, an applicator must have worked for at least two years as an employee of a commercial applicator, or have comparable experience as determined by the Director; or an applicator must have earned a baccalaureate degree in pests and pest control and worked for at least one year for a commercial applicator. The bill would retain these requirements, but allow a person with

comparable education and experience, as determined by the Director, to obtain a license. In addition, the bill would replace years of work experience with application seasons of work experience. (The bill would define "application season" as a time period of pesticide application, consistent with the category of application, within a calendar year.)

The bill specifies that a person subject to the licensing requirements in this section could apply only pesticides that were registered with, or subject to, either United States EPA or this State's laws and rules. The bill further provides that a person subject to the licensing requirements could not represent that a pesticide application had characteristics, ingredients, uses, benefits, or qualities that it did not have. Also, a person subject to these licensing requirements would be prohibited from representing that a pesticide application was necessary to control a pest not present or likely to occur.

License, Certification, and Registration Fees

Under the Act, applications for certification, licensure, and registration must be accompanied by a fee. The bill would increase the fees as described in Table 1.

Table 1

Application	Duration	Current Fee	Proposed Fee
Private Applicator Certification	3 Years	\$10	\$30
Commercial Applicator Certification	3 Years	\$50	\$75
Private Applicator Registration	3 Years	\$25	\$30
Commercial Applicator Registration	3 Years	\$25	\$45
Restricted Use Pesticide Dealer	1 Year	\$50	\$100
Commercial Pesticide Applicator Business License	1 Year	\$50	\$100

Pesticide Product Registration	1 Year	\$20 per product	\$40 per product
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Currently, revenue received from fees is deposited in the Pesticide Control Fund. The bill also would require revenue from penalties, administrative or civil fines, and any payments for costs or reimbursement for expenses of investigations to be deposited in the Fund.

The Act exempts a number of people from certification and registration requirements. The bill would add people who apply general use pesticides to swimming pools (provided they did not trigger the Act's certification requirements, such as by advertising themselves as pesticide applicators). The bill would further exempt commercial applicators and private individuals (as well as employees of those persons) who applied microbiocides indoors where there would be no potential for downstream effect. (The bill would define "microbiocide" as a pesticide intended for preventing, repelling, destroying, or mitigating microbes. A "microbe" would include any virus, fungus, bacterium, or other microorganism. "Downstream effect" would be defined as the potential for movement of a microbiocide to affect surface water or groundwater.) This exemption would not apply, however, to commercial applicators who applied microbiocides to plants or planting medium indoors.

Director Authority

The Act establishes the authorities of the Director, such as the authority to declare any form of plant or animal life a pest; the authority to determine the toxicity of pesticides to humans; and the authority to enter into cooperative agreements with agencies of the Federal government. The bill would further permit the Director to conduct investigations to assure compliance with the Act, and to conduct investigations when there was reasonable cause to believe that a pesticide had been used in violation of the Act. Also, the bill would permit the Director to create certification categories in addition to those promulgated by rule.

Penalties and Remedies

The bill states that a person who violated Part 83 would be subject to the penalties and remedies provided in that part regardless of whether he or she acted alone or through an employee or agent. Under the Act, a person who violates Part 83 is subject to an

administrative fine of up to \$1,000 for each violation, after notice and the chance for a hearing. Under the bill, this fine also would apply to an attempted violation. (The bill would define "violates this part" or "violation of this part" as a violation of Part 83, a rule promulgated under the part, or an order issued under the part.)

Under the Act, a registrant, commercial applicator, registered applicator, restricted use pesticide dealer, or distributor who knowingly violates Part 83 is guilty of a misdemeanor and must be fined for each offense. Under the bill, any person who violated or attempted to violate Part 83 would be guilty of a misdemeanor punishable by imprisonment for up to 90 days or a fine of up to \$5,000, or both, for each offense.

The Act states that a registrant, commercial applicator, registered applicator, restricted use pesticide dealer, or distributor who knowingly and with malicious intent violates Part 83 or any rule promulgated under it is guilty of a misdemeanor, and must be fined up to \$25,000 for each offense. A private agricultural applicator or any other person who knowingly violates Part 83 or a rule promulgated under it is guilty of a misdemeanor and must be fined up to \$1,000 for each offense. The bill states, instead, that a person who violated or attempted to violate Part 83 with intent to cause harm to the environment by applying pesticides contrary to label instructions would be guilty of a felony punishable by imprisonment for up to five years, or a fine of at least \$25,000 but not more than \$50,000, or both, for each offense.

The Act provides that the Department may recover reasonable costs and attorney fees incurred in a prosecution resulting in a conviction for a violation committed knowingly and with malicious intent. Under the bill, the Department could recover reasonable costs and attorney fees incurred in a prosecution resulting in a conviction for a felony under the provisions described above.

Under the Act, the Attorney General may file a civil action in which the court may impose on a violator a maximum civil fine of \$5,000 for each violation. Under the bill, attempted violations also would be subject to this civil fine. Further, the bill would permit the Attorney General to bring an action in circuit court to recover the reasonable costs of the investigation from any person who violated or attempted to violate Part 83. Money

recovered would have to be forwarded to the State Treasurer for deposit into the Pesticide Control Fund.

The bill specifies that Section 8333 (which contains these penalty provisions) would take effect 90 days after the bill was enacted.

MCL 324.8302 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**

The proposed changes under the bill are the result of a two-year collaboration between representatives from agriculture, agribusiness, tree and lawn care, indoor applicators, aquatic applicators, consumer and environmental groups, and commercial pesticide applicators. As a result, the bill would well serve all members of the community who use or are affected by pesticides. For example, several sections would be reworded so they were easier to understand, and an employer's responsibility for an employee applying a pesticide would be clarified. The bill would address concerns about the misuse of pesticides by increasing penalties against those who intentionally apply pesticides contrary to label instructions and cause harm to the environment. Similarly, the bill would respond to the public's complaints about businesses that falsely claim that certain bugs or diseases are threatening the health of lawns, gardens, or crops in an area, by enacting a "truth in labeling" provision. The bill would make it easier, however, for pesticide applicators who use sanitizers and disinfectants to kill fungi, bacteria, and viruses by exempting them from unnecessary training and licensing requirements. Perhaps most importantly, the bill would establish a regulatory authority for Internet sales of pesticides in Michigan, even if the sale originated outside of the State. The changes proposed under the bill would update current law to encourage safer pesticide distribution, regulation, and use in Michigan.

### **Opposing Argument**

The bill specifies that any person who applied pesticides contrary to label instructions with intent to cause harm to the environment would be guilty of a felony, punishable by imprisonment and a fine between \$25,000 and

\$50,000. Because "person" would be defined in the bill as "an individual, partnership, corporation, association, governmental entity, or other legal entity", it is possible that a rogue employee could intentionally misuse a pesticide and the company or employer would be held responsible. The bill also specifies that a person who violated Part 83 would be subject to the penalties regardless of whether he or she acted alone or "through an employee or agent". If the company, rather than the guilty employee, had to pay the fine or hire legal help to defend itself, it could suffer severe financial losses.

**Response:** This charge, a felony, would require that a court find a defendant guilty beyond a reasonable doubt. A responsible, innocent employer with a rogue, malicious employee would not likely be found guilty using this high standard. It is questionable that a prosecutor even would charge an employer with this crime if it were unclear who was to blame.

Furthermore, imposing criminal liability on a pesticide employer for the actions of an employee would not be new. In 1989, the Michigan Court of Appeals held that the Pesticide Control Act (now part of the NREPA), "...imposes vicarious criminal liability upon a certified applicator for actions in violation of the act performed by a noncertified applicator working under the instruction and control of the certified applicator" (People v Jackson, 176 Mich App 620). Although the statutory language in question was changed since that decision, a statement of the Court remains pertinent: "[O]nly by imposing vicarious criminal responsibility can the full intent of the legislation, to protect the public health and safety from deliberate as well as negligent environmental degradation, effectively be carried out."

### **Opposing Argument**

The increase in license fees, though slight, still would place an undue burden on farmers. The State should absorb the expense of licensure, because certification and registration fees are part of the farmer's cost of doing business.

**Response:** The certification or registration fee for a farmer to apply pesticides on his or her own crops would be \$30 for three years, one of the lowest license fees levied by the Department. This \$10 increase would be the first since 1976. The Department uses the money generated from these licenses to provide support for new initiatives such as industry and internal pesticide training, technology maintenance and development, a

proposed e-commerce system for license and certification renewal, urban initiatives, regulatory activities, and other programs that benefit the regulated industry.

Legislative Analyst: Claire Layman

### **FISCAL IMPACT**

The bill would increase State revenue resulting from the changes in fees proposed. The estimated annual increase would be \$502,500. The revenue would be deposited in the Pesticide Control Fund for administrative costs of the Department of Agriculture.

The bill could result in increased local revenue associated with the felony penalty provisions. Further, the bill could result in additional State revenue from the provision allowing the Attorney General to recover reasonable costs associated with an investigation involving a violation, or attempted violation, of Part 83. This revenue would offset investigation costs and therefore have no net fiscal impact.

There are no data to indicate how many more offenders would be convicted of misusing pesticides with the intent to cause harm to the environment by applying pesticides contrary to label instructions. An offender convicted would receive up to five years' probation or imprisonment and/or a fine of \$25,000-\$50,000. If one additional offender were convicted and received the longest minimum sentences, it would cost the State \$83,300.

Fiscal Analyst: Craig Thiel  
Bethany Wicksall

### **A0102/s989a**

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.