

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 (as enrolled)
Sponsor: Senator George A. McManus, Jr.
Senate Committee: Farming, Agribusiness and Food Systems
House Committee: Agriculture and Resource Management

PUBLIC ACT 418 of 2002

Date Completed: 7-8-02

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 that they could not do so without amendments to Part 83 of the NREPA. Once examined, Part 83 revealed that the statute was 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 suggested 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.

- **Prohibit a person who uses, distributes, exposes, or offers 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.**
- **Extend criminal penalties to any person who violates Part 83, and include attempted violations in the penalty provisions.**

The bill repealed Section 8307, which provided for the registration of pesticides, labeling, special local needs, and groundwater contamination. The bill replaces 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. 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

CONTENT

The bill amended 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 originates within the State or is directed by the offeror to people in the State and received by them.**

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 specified in the Act.

The bill retains 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 is considered distributed, sold, exposed, or offered for sale in this State when the offer to sell either originates within this State or is directed by the offeror to people in this State and received by them. In addition, the bill adds the pesticide's U.S. Environmental Protection Agency (EPA) registration number to the information required with the registration application. The bill deleted a requirement that an applicant submit a description of tests and test results for non-EPA registered pesticides, but continues to require the submission, at the Director's request, of a pesticide's formula and ingredients. Also, the bill requires 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 registers an applicant.

Previously, decisions on pesticide registration had to 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 deleted this provision.

Under the bill, when a registrant distributes identical pesticides under multiple brand names, or distributes more than one pesticide formulation, each brand or formulation of a pesticide has to be registered as a separate product. Further, the bill prohibits registration of a pesticide that contains a substance required to be registered with the Department of Agriculture unless that substance also is registered.

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 retains this definition, but adds that a pesticide does 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 defines "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" means any device that contacts intact mucous membranes but does not ordinarily penetrate the blood barrier or otherwise enter normally sterile areas of the body.

Registration Renewal

Previously, a registration approved by the Director and in effect on June 30 for which the July 1 renewal application was made and the annual registration fee paid, continued in full force and effect until the Director notified the applicant that the registration was renewed or denied. The bill deleted this provision.

The bill requires that a registered pesticide continue to be registered as long as it remains in the channels of trade in this State. The registrant is required to maintain the pesticide registration by submitting an application for renewal before the expiration date. The bill makes it a violation of Part 83 to continue to distribute a pesticide for which the Director has 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. The bill retains these provisions but deleted a requirement that the recall be initiated within 60 days from the date of notification to the Director of the intent to discontinue registration. The bill, instead, calls for the registrant to initiate a recall before the pesticide registration expires. In addition, the bill provides that pesticides that do *not* go through a two-year discontinuance period but are found in the channels of trade are subject to registration penalties and all related fees since the product's last year of registration.

Truth in Labeling

The bill prohibits a person who uses,

distributes, exposes, or offers to sell a pesticide from making claims that it can be used on sites that are not included in the pesticide labeling, or from making claims that the pesticide has characteristics, ingredients, uses, benefits, or qualities that it does not have or that are 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.

The bill adds a condition that a special local need exists. The bill deleted a condition that, when used in accordance with widespread and commonly recognized practice, it would not generally cause unreasonable adverse effects on the environment.

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 retains this provision, but refers to areas where envelope monitoring has 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

Previously, the Director could refuse to

register or could cancel or suspend registration of a pesticide if one or more of the following circumstances existed:

- The pesticide did not warrant its proposed claims.
- The pesticide labeling and other material required to be submitted did not comply with Part 83 or the rules promulgated under it.
- The pesticide was in violation of Part 83 or the rules.
- Based on substantial scientific evidence, use of the pesticide caused, or was likely to cause if registered, an unreasonable, adverse effect.
- Based on substantial scientific evidence, use of the pesticide caused, or was likely to cause if registered, an unreasonable, serious, chronic hazard to human health or long-term environmental damage, which could not be controlled by designating the pesticide as a restricted use pesticide, by limiting the uses for which a pesticide could be used or registered, or by any other changes to the registration or pesticide label.

Under the bill, the Director may refuse to register or may cancel or suspend registration of a pesticide if any of the following circumstances exists:

- The pesticide does not meet its EPA registration and labeling claims.
- The pesticide labeling and other material required to be submitted do not comply with Part 83 or the rules promulgated under it.
- The pesticide is in violation of Part 83.
- Based on substantial scientific evidence, the Director determines that the use of the pesticide is likely to cause an unreasonable adverse effect on the environment, which cannot be controlled by designating the pesticide as a restricted use pesticide, by limiting its uses, or by making other changes to the registration or label.

Previously, the applicant had to be notified of the manner in which the pesticide, labeling, or other material failed to comply with Part 83. If, upon receipt of the notice, the applicant did not make the required changes within 30 days, the Director could refuse to register the pesticide. The bill deleted these provisions.

Restricted Use and General Use Pesticides

Under the Act, pesticides for which a state management plan was required had to 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 replaced "state management plan" with "pesticide management plan", and defines 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 does not include a person using a pesticide for a private agricultural purpose, and that a person may apply a general use pesticide for a private agricultural purpose without being a certified applicator or registered applicator. ("Private agricultural purpose" means the application of a pesticide for 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 specifies that a person is not required to be a certified applicator to apply a restricted use pesticide for a private agricultural purpose if that person is under the direct supervision of a certified applicator, unless prohibited by the pesticide label.

Previously, a certified applicator had to supervise the application of a general use pesticide by a noncertified applicator under his or her instruction and control, even if the certified applicator was not physically present.

The bill deleted this requirement. The bill retains a requirement that a certified applicator directly supervise the application of a restricted use pesticide if prescribed by the label, Part 83, or rules promulgated under it. The bill states that a commercial applicator is responsible for pesticide applications made by persons under his or her supervision.

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

Registered Applicators

Under the bill, "registered applicator" means an individual authorized to apply general use pesticides for a private or commercial purpose. (The Act had defined the term as a person authorized to apply general and restricted use pesticides for a commercial purpose.)

Previously, a registered applicator could 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 deleted 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 retains this provision.

Previously, the employer of a registered applicator had to 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 struck this requirement.

Further, the Act had provided that, during a registered applicator's initial three-year registration, the applicator could apply categories of restricted use pesticides while not directly supervised if the applicator had 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 could notify the Director, who then

forwarded a sticker or symbol that had to be attached to the registered applicator's registration card. The bill deleted all of these provisions.

Commercial Applicator Licensing

The Act required commercial applicators who advertised in any form, or who held themselves out to the public as being in the business of applying pesticides, to obtain a commercial applicator license for each place of business. The bill retains this requirement for those who hold themselves out to the public as being in the business. Under the bill, in order to qualify for a license, an applicator must have worked for at least two application seasons as an employee of a commercial applicator, or have comparable education and 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 application season for a commercial applicator. (The Act had referred to "year", rather than "application season", and had referred to comparable experience but not education. The bill defines "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 may apply only pesticides that are 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 may not represent that a pesticide application has characteristics, ingredients, uses, benefits, or qualities that it does not have. Also, a person subject to these licensing requirements is prohibited from representing that a pesticide application is 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 revised the fees as described in Table 1.

Table 1

Application	Duration	Former Fee	New Fee
Private Applicator Certification	3 Years	\$10	(no change)
Commercial Applicator Certification	3 Years	\$50	\$75
Private Applicator Registration	3 Years	\$25	\$10
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

Under the Act, revenue received from fees is deposited in the Pesticide Control Fund. The bill also requires that revenue from penalties, administrative or civil fines, and any payments for costs or reimbursement for expenses of investigations be deposited in the Fund.

The Act exempts a number of people from certification and registration requirements. The bill adds people not subject to the commercial applicator licensing requirements, who apply general use pesticides to swimming pools. The bill further exempts commercial applicators who apply microbiocides indoors where there is no potential for movement of an antimicrobial pesticide to affect surface water or groundwater. This exemption does not apply, however, to commercial applicators who apply antimicrobial pesticides to plants or planting medium indoors. The bill also exempts people who apply general use antimicrobial pesticides indoors on their own premises, and exempts their employees, subject to the same movement restriction. (The bill defines "antimicrobial pesticide" as a pesticide that is intended to disinfect, sanitize, reduce, or mitigate growth or development of microbial organisms, as defined under the FIFRA.)

Director Authority

The Act authorizes the Director to engage in certain activities, such as declaring any form of plant or animal life a pest; determining the toxicity of pesticides to humans; and entering into cooperative agreements with agencies of the Federal government. The bill further permits the Director to conduct investigations upon any place where pesticides or devices are used or held, to assure compliance with Part 83; and to conduct investigations when there is reasonable cause to believe that a pesticide has been used in violation of the part or rules. Also, the bill permits the Director to create certification categories in addition to those promulgated by rule.

Penalties and Remedies

The bill specifies that the amendments to Section 8333 (which contains the following penalty provisions) will take effect 90 days after the bill's enactment. (The bill was enacted on June 5, 2002.)

The bill states that a person who violates Part 83 is subject to the penalties and remedies provided in that part regardless of whether he or she acted alone or through an employee or agent. (The bill defines "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 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 applies to an attempted violation.

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, punishable by a maximum fine of \$5,000 for each offense; any of the same who knowingly and *with malicious intent* violates Part 83 or any rule promulgated under it is guilty of a misdemeanor, punishable by a fine of 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 subject to a maximum fine of \$1,000 for each offense. The bill removes these penalties. Under the bill, any person

who violates or attempts to violate Part 83 is 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 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. The bill deletes this provision.

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 are subject to this civil fine. Further, the bill permits the Attorney General to bring an action in circuit court to recover the reasonable costs of the investigation from any person who violates or attempts to violate Part 83. Money recovered must be forwarded to the State Treasurer for deposit into the Pesticide Control Fund.

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 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 well serves all members of the community who use or are affected by pesticides. For example, several sections have been reworded so they are easier to understand, and an employer's responsibility for an employee applying a pesticide is clarified. The bill responds 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 makes 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 establishes

regulatory authority for Internet sales of pesticides in Michigan, even if the sale originates outside of the State. The changes under the bill update the law to encourage safer pesticide distribution, regulation, and use in Michigan.

Opposing Argument

While the bill accomplishes a number of noteworthy goals, it falls short of protecting Michigan citizens from applicators who improperly apply pesticides. According to an article in a Detroit newspaper, *The Metro Times* (2-6-02), from 1997 through 2000, the Department of Agriculture received 124 complaints about professional exterminators. Allegations most frequently involved human exposure, misapplication of pesticides, or improperly licensed or certified applicators. One such complaint was registered by a Royal Oak woman who became ill after she hired a commercial pesticide company, Orkin, to spray her house for carpenter ants. Department of Agriculture employees visited her home, conducted an inspection, and found that the company was at fault for allowing a noncertified employee improperly to apply a highly toxic pesticide into the home's ventilation system. The Department did not levy fines or cite the company for the alleged violations, however, because Orkin made a good faith agreement to pay for the cost of the clean-up. Later, Orkin specified that it was willing to pay only up to \$3,535.95, refused to have the entire house cleaned, and wanted to select the company that would perform the clean-up. The homeowner refused the offer and hired a different company to decontaminate the entire house, at a cost of more than \$10,000. When the Department tested the house again, traces of pesticide were still on the furnace's cold-air intake. The homeowner paid for additional cleaning; upon moving back into the house, she became ill again, and has since moved out.

The Department of Agriculture has the responsibility to ensure that the citizens of Michigan are protected from harm caused by pesticide applicators. Although Part 83 provides for administrative, civil, and criminal penalties in actions brought by the State, the Department has no authority to guarantee that a misapplied pesticide will be cleaned up. Part 83 should empower the Department to order a negligent pesticide company to

perform a thorough cleanup of property where pesticides are improperly applied, and to pay the full cost of the cleanup if company does not perform it. If the company then fails to clean up the property or pay the cost, its license should be revoked.

In addition, Part 83 should mandate the imposition of sanctions for violations. According to the *Metro Times* article, the Department received 124 complaints regarding professional exterminators from 1997 through 2000; the complaints most frequently involved human exposure, misapplication of pesticides, or improperly licensed or certified applicators. The Department determined that State regulations had been violated in 85 cases, but levied fines in only 24 of them.

Furthermore, although there is little doubt about the potential dangers posed by pesticides, there is insufficient information about the degree to which professional applicators are involved in pesticide exposure incidents. This is due, at least in part, to the lack of uniform reporting requirements. According to the *Metro Times* article, 30 states mandate some form of reporting by hospitals, physicians, or laboratories that identify evidence of pesticide-related illness, and eight states require comprehensive investigations. Michigan is not among these jurisdictions.

Opposing Argument

The bill's substantial fee increases punish those legitimate businesses that guarantee the safety of everyone's food supply. Too often, fees or penalties are stepped up to avoid a tax increase. If a state department cannot accomplish its tasks within its budget, then its duties should be limited before "back door" revenue hikes are introduced.

Legislative Analyst: Claire Layman

FISCAL IMPACT

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

Further, the bill may 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 will offset investigation costs and therefore have no net fiscal impact.

There are no data to indicate how many offenders will be convicted of misdemeanors for misusing pesticides. An offender convicted will receive up to 90 days' probation or imprisonment in a local facility and/or a fine of up to \$5,000. Local units incur the cost of both probation and incarceration, which may vary by county from \$27-\$65 per day.

Fiscal Analyst: Craig Thiel
Bethany Wicksall

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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.