

# Legislative Analysis

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## DEPARTMENT OF ENVIRONMENTAL QUALITY OVERSIGHT BOARDS

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<http://www.house.mi.gov/hfa>

**Senate Bill 652 (H-1) as reported from House committee**  
**Sponsor: Sen. Thomas Casperson**

Analysis available at  
<http://www.legislature.mi.gov>

**Senate Bill 653 (H-2) as reported from House committee**  
**Sponsor: Sen. Darwin Booher**

**Senate Bill 654 (H-1) as reported from House committee**  
**Sponsor: Sen. David Robertson**

**1st House Committee: Natural Resources**  
**2nd House Committee: Michigan Competitiveness**  
**Senate Committee: Natural Resources**  
**Complete to 5-9-18**

**BRIEF SUMMARY:** Senate Bills 652, 653, and 654 would create various boards with oversight over the Michigan Department of Environmental Quality (DEQ). SB 652 would amend the Administrative Procedures Act to create the Environmental Rules Review Committee, while SBs 653 and 654 would amend the Natural Resources and Environmental Protection Act to create the Permit Appeal Panel and the Environmental Science Advisory Board, respectively.

Senate Bills 653 and 654 are each tie-barred to the other two bills, which means that they could not take effect unless all three bills were enacted. Each bill would take effect 90 days after enactment.

**FISCAL IMPACT:** Please see *Fiscal Information*, below.

### **THE CONTENT OF THE BILLS:**

**Senate Bill 652** would create the *Environmental Rules Review Committee* as an independent body in the Office of Performance and Transformation (OPT) to oversee all rule-making of the DEQ.

#### Composition of the Committee

Nonvoting members of the Committee would consist of the director of the DEQ, the director of the Department of Health and Human Services (DHHS), and the CEO of the Michigan Economic Development Corporation (MEDC), or designees of those officers. The governor, with the advice and consent of the Senate, would appoint the voting members of the Committee, who would include a medical professional and an individual representing each of the following constituencies:

- The solid waste management industry
- A statewide manufacturing organization

- A statewide organization that represents small businesses
- Public utilities that engage in the generation, transmission, or distribution of electricity
- A statewide environmental organization
- The oil and gas industry
- A statewide agricultural organization
- Local governments
- A statewide land conservancy organization
- The general public

Lobbyists could serve as members of the Committee as long as they did not simultaneously receive compensation or reimbursement of actual expenses for lobbying from more than one person while serving on the Committee.

Voting members of the Committee would have to possess knowledge, experience, or education that qualifies them to represent their respective constituencies. Individuals could not serve as voting members if they were current employees of any state office, department, or agency or if they were employed by the DEQ in the preceding three years. Not more than six voting members could be members of the same political party.

Following initial staggered terms, members would serve four-year terms, and could not be appointed to serve more than three consecutive terms (but could be reappointed after sitting out for a term). The governor would be able to remove voting members for cause.

Vacancies would also be filled by gubernatorial appointment with the advice and consent of the Senate. The Committee could not conduct any business or perform any duties while there is a vacancy in the voting membership.

The Committee's chairperson or a majority of the members could call a meeting with at least 10 days' advance notice (less notice would be allowed if all voting members agree).

#### Science Advisor

Under the bill, the directors of the DEQ and DHHS would each select a *science advisor* to participate in Committee meetings and provide expert advice on science-based issues. The advisor would have to possess the proper educational credentials and background to provide science-based expert advice. The Committee could also engage administrative, technical, or legal consultants or state staffers in those specialties.

#### Rule-making process

If the DEQ were to request rule promulgation, the OPT would transmit the request to the Committee. (The bill strongly encourages the DEQ to create a stakeholder review process before beginning the rule promulgation process to ensure that all viewpoints are adequately represented.) The DEQ would provide copies of draft proposed rules to the OPT and the Committee. Then, the Committee would meet to determine if the proposed rules meet all of the following criteria:

- Do not exceed the rule-making delegation allowed by statute.

- Reasonably implement and apply the statute authorizing the rule-making and are consistent with all other applicable law.
- Are necessary and suitable to achieve their purposes in proportion to the burdens they place on individuals and businesses.
- Are as clear and unambiguous as reasonably appropriate considering the subject matter and individuals affected.
- Are based on sound and objective scientific reasoning.

If the Committee determines that the proposed rules do not meet these criteria, the DEQ could not proceed with the request for rule-making. If the Committee determines that they do meet the criteria, the Committee would give notice of and conduct a public hearing. Then, the Committee would meet to discuss testimony given at the hearing and determine if any revisions to the proposed rules are appropriate. If revisions are not appropriate, the proposed rules would be processed without the proposed revisions. If they are appropriate, the Committee could adopt the proposed rules subject to the revisions being made.

If the Committee approves the proposed rules, the OPT would transmit or electronically submit certain documents related to the rule promulgation to the Committee within one year after the last public hearing.

This procedure could be suspended if six voting members of the Committee voted to do so. The Committee would have to make a final decision on proposed rules and any revisions within 12 calendar months of receipt of the request for rule-making from the DEQ.

MCL 24.233 et al.

**Senate Bill 653** would establish a *permit appeal panel* in the DEQ, consisting of 15 individuals appointed by the governor, with the first members appointed within 60 days after this bill takes effect. All members would have to meet both of the following requirements:

- Meet one or more of the following:
  - Hold a current professional engineering, geologist, hydrologist, or hydrogeologist license or registration from a state, tribe, or U.S. territory, or the Commonwealth of Puerto Rico, and have the equivalent of six years of full-time relevant experience.
  - Have a master's degree from an accredited institution of higher education in a discipline of engineering or science related to air or water and have the equivalent of eight years of full-time relevant experience.
- Remain current in his or her field through participation in continuing education or other activities.

Individuals would be ineligible to serve on the panel if they were current employees of any state office, department, or agency, or if they or their employer were party to one or more contracts with the DEQ and the compensation paid under those contracts in any of the preceding three years represented more than 5% of the gross income in that preceding year.

Following initial staggered terms, members would serve on the panel for four-year terms. After serving two consecutive terms, a member would be required to sit out for two years before serving again. The governor could remove a member for incompetence, dereliction of duty, malfeasance, misfeasance, or nonfeasance in office, or any other good cause.

#### Appeal to an appeal board

Permit applicants aggrieved by the DEQ's decision to deny a permit or regarding the terms or conditions of a permit would have 90 days after notice to appeal to an appeal board by submitting a petition to the DEQ director. The petition would include the issues in dispute and any other relevant documents supporting the petitioner's position.

If the DEQ director believed that the dispute could be resolved without convening an appeal board, he or she could negotiate a resolution. Otherwise, the DEQ director would convene a meeting of an appeal board to be held within 45 days after receipt of the petition. The appeal board would consist of five members of the permit appeal panel selected by the director on the basis of their relevant expertise. All of the members appointed to an appeal board must submit an agreement not to accept certain employment from the appellant within one year after the decision is rendered. Business of the panel and each board must be conducted at public meetings held in compliance with the Open Meetings Act.

The DEQ director would provide the board with a copy of the petition and all supporting documentation from the petitioner and the DEQ, and each side would be given an opportunity to present its position at the appeal board's meeting. The appeal board would provide to the petitioner and DEQ written notice of its decision to adopt, modify, or reverse the DEQ's initial decision within 45 days of hearing the appeal. Within 60 days of receiving this decision, the DEQ director would have to issue a final decision, consistent with the appeal board's decision. If the DEQ director failed to do so, the appeal board's decision would be considered to be his or her decision. The DEQ director's final decision could be appealed to the circuit court of the county where the party appealing the decision resides or to the Ingham County Circuit Court.

Panel members could not participate in an appeal if they have a conflict of interest, which would exist if any of the following apply:

- If the permit applicant had hired that member or the member's employer on an environmental matter in the preceding three years.
- If the member had been employed by the party appealing the decision in the previous three years.
- If the member had more than a 1% ownership in the party appealing the decision.
- If the member receives, or has during the previous 2 years received, a significant portion of income directly or indirectly from permit holders or applicants for a permit.

If a member were disqualified from participating due to a conflict of interest, the DEQ director would select a different member of the appeal panel to participate in the appeal.

MCL 324.1301 and proposed MCL 324.1313 and 324.1315

**Senate Bill 654** would create the *Environmental Science Board* in the Department of Technology, Management, and Budget, which would advise the governor and state offices on issues affecting the protection of the environment or the management of natural resources in the state. The Board would consist of nine individuals appointed by the governor who have expertise in one or more of the following areas:

- Engineering
- Environmental science
- Economics
- Chemistry
- Geology
- Physics
- Biology
- Human medicine
- Statistics
- Risk assessment
- Other disciplines that the governor considers appropriate

Following initial staggered terms, members would serve for three-year terms, and could be removed by the governor at any time, with or without cause or prior notice. Current legislators and employees of state offices, departments, or agencies or the federal government would be ineligible to serve as members of the board.

Writings prepared, owned, used, in the possession of, or retained by the board in the performance of an official function would be subject to the Freedom of Information Act.

If requested by the board, state offices, departments, or agencies could provide administrative, technical, or legal staff to assist the board in the performance of its duties.

#### Purpose and function of the board

The board would advise the governor and any state office, department, or agency specified by the governor on issues affecting the protection of the environment or the management of natural resources in the state. Its duty to advise would be limited to the specific advice requested by the governor, and it could not review or advise on any application, recommendation, or decision regarding a permit, license, or environmental impact statement. The board's advice would not be legally binding on or enforceable against any individual, governmental entity, private entity, or other person.

The board's advice would be based on objective reasoning; sound science; and, to the extent directed by the governor, relative and realistic risk to human health and the environment, analogous practices used or positions taken by the federal government and regulatory bodies in other states, and economic reasonableness. The governor could also specify other relevant factors in a request.

#### Procedure

Upon receipt of a request from the governor to advise on a particular issue, the board's chairperson would convene a committee made up of board members with relevant

expertise. The committee would make recommendations to the board, which would then deliberate on those recommendations and provide written advice to the governor.

As a part of its deliberations, the board or any committee of the board could make inquiries, develop studies, hold hearings, receive comments from the public, and call upon experts. State offices, departments, agencies, officers, employees, and contractors and political subdivisions of the state could cooperate with the board or any committee. The cooperation would include the following, as requested by the board or committee:

- Participating in meetings.
- Participating in inquiries or hearings.
- Providing any information.
- Providing access to documents, books, records, databases, or other information.
- Any other assistance reasonably necessary and related to the board’s deliberations and duties under the bill.

Proposed MCL 324.2601 et al.

**The bodies created by all three bills** would be subject to the following requirements:

- Members would serve without compensation but could be reimbursed by the state for actual and necessary expenses incurred in the performance of their official duties.
- Business conducted must take place at public meetings held in compliance with the Open Meetings Act.

***HOUSE COMMITTEE ACTION:***

The House Michigan Competitiveness committee adopted substitutes to all three bills. The H-1 substitute to SB 652 moves the bill’s effective date from January 1, 2018 to 90 days after its enactment. It also states that the qualifications of members of the Environmental Rules Review Committee are to be determined by the governor and Senate when appointing members, and do not invalidate any actions by the Committee.

SB 653’s H-2 substitute accounts for changes made by Public Act 36 of 2018. Additionally, it requires that an appeal board’s decision be consistent with the law governing the approval or denial of the permit application and the content of the permit. Finally, it would add to the list of disqualifying conflicts of interests members who had received in the previous two years “a significant portion of income directly or indirectly from permit holders or applicants for a permit”.

The H-1 substitute to SB 654 provides that certain factors should be the basis of board advice “to the extent the governor specifies” and that the governor could specify additional factors for consideration. It would also replace a provision that state departments, agencies, offices, officers, employees, contractors or political subdivisions “shall” cooperate with the board with a provision that they “may” cooperate with the board.

***FISCAL INFORMATION:***

**SB 652 – Environmental Rules Review Committee**

Senate Bill 652 would potentially create minor costs for the Office of Performance and Transformation (OPT) within the Department of Technology, Management, and Budget (DTMB). Any potential costs would depend on whether the office would be required to reimburse committee members for expenses incurred while performing their duties. Potential reimbursements could be absorbed within the existing annual appropriation amounts to the OPT.

The bill may result in increased administrative costs for the Department of Environmental Quality (DEQ); the extent of this cost increase is unclear. The bill requires the department to provide copies of draft proposed rules and introduces additional steps to the administrative rule process specific to the DEQ. However, the requirements specified in the bill fall largely outside of the department's purview to provide for an independent rules review process.

The bill is unlikely to have an impact on DEQ revenues or local government costs or revenues.

**SB 653 – DEQ permit appeal panel**

Senate Bill 653 is likely to increase costs for the Department of Environmental Quality by providing for the reimbursement of necessary and qualifying expenses of members of the permit appeal panel established within the department; the bill does not specify appropriations or fund sources for these reimbursements. The department may also realize additional administrative costs as the director works with the appeal board in accordance with the bill. The extent of the aforementioned costs is unclear. It is also unclear whether changes to permitting process will affect permit revenue collected by the DEQ.

The bill is unlikely to have an impact on local government costs or revenues.

**SB 654 – Environmental Science Advisory Board**

Senate Bill 654 would potentially create costs for the Department of Technology, Management, and Budget (DTMB). Potential costs would depend on the creation of the Environmental Science Advisory Board and the types and level of activities for which the Board is eligible to be reimbursed. Eligible activities include developing studies, calling upon experts, making inquiries, and holding hearings. Costs would likely be able to be supported within existing annual appropriation amounts to the DTMB.

Senate Bill 654 would not have an impact on revenues or costs for the Department of Environmental Quality or local units of government.

## **ARGUMENTS:**

### **For:**

Proponents argue that the bill package is intended to level the playing field between state departments and members of the public. With a neutral board, they argue that overzealous members of the DEQ would not have sole discretion to approve or deny permits.

### **Response:**

Opponents reply that this is a manufactured concern. According to the April 2018 MiScorecard compiled by the DEQ, the DEQ approves almost all permits applications. In Fiscal Year (FY) 2017, DEQ granted 7,447 permits and denied 34 (for a 99.5% approval rate), and in FY 2016, DEQ granted 8,862 and denied 20 (for a 99.8% approval rate).<sup>1</sup> In the rare instance that a permit is denied, critics say, it is for compelling environmental reasons and should not be overridden by a special interests-led committee.

### **Against:**

Some argue that the boards, especially the Environmental Rules Review Committee proposed in SB 652, would create a situation in which the “fox is guarding the hen house.” Because six of the eleven members of the proposed committee would come from the private sector and five from the public, some expressed a concern that the committee is skewed away from true public interest. While the committee would purport to protect the environment, they say, environmental concerns would inevitably take a backseat to industry and financial concerns.

### **Response:**

Supporters replied that it is unfair to assume that members of the private sector would naturally have bad intentions. Those parties are members of the public as well, proponents say, and there is no reason to believe that their decisions would not represent the best interest of the public at large. Moreover, supporters say, multi-sector lobbyists are prohibited from serving on the committee, and single-sector lobbyists are allowed, because those who work in a single sector are more likely to be subject area experts than those who represent various industries.

## **POSITIONS:**

Representatives of the following organizations testified in support of the bills (4-18-18):

- Michigan Chamber of Commerce
- Michigan Farm Bureau
- Michigan Manufacturers Association

The following organizations support the bills (4-18-18):

- Michigan Electric and Gas Association
- Foundry Association of Michigan
- Grand Rapids Chamber of Commerce
- Michigan Petroleum Association
- Michigan Soybean Association

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<sup>1</sup> [https://www.michigan.gov/documents/openmichigan/DEQ\\_Scorecard\\_621426\\_7.pdf](https://www.michigan.gov/documents/openmichigan/DEQ_Scorecard_621426_7.pdf)



- Michigan Ground Water Association
- St. Mary's Cement
- Michigan Oil and Gas Association
- Consumers Energy
- Michigan Chemistry Council
- Michigan Waste and Recycling Association
- Potato Growers of Michigan
- DTE Energy
- Midland Chamber of Commerce
- Saginaw Chamber of Commerce
- Detroit Chamber of Commerce
- Nu-Wool Co., Inc.
- Michigan Municipal Electric Association
- American Petroleum Institute
- TriMedia Environmental and Engineering Service
- Kuth Rogers PLC
- National Federation of Independent Business

The Michigan Electric Cooperative Association supports SBs 652 and 654. (4-18-18)

Representatives of the following organizations testified in opposition to Senate Bills 652 and 653 (4-18-18):

- Michigan Environmental Council
- Sierra Club
- Michigan League of Conservation

The following organizations oppose the bills (4-18-18):

- Michigan Department of Environmental Quality
- Natural Resources Defense Council
- West Michigan Environmental Action Council
- Sault Ste. Marie Tribe of Chippewa Indians

The following organizations oppose Senate Bills 652 and 653 (4-18-18):

- Michigan Trout Unlimited
- Michigan Clean Water Action
- Ecology Center
- For Love of Water

Legislative Analyst: Jenny McInerney  
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■ This analysis was prepared by nonpartisan House Fiscal Agency staff for use by House members in their deliberations, and does not constitute an official statement of legislative intent.