



STATE OF MICHIGAN
OFFICE OF THE GOVERNOR
LANSING

GRETCHEN WHITMER
GOVERNOR

GARLIN GILCHRIST II
LT. GOVERNOR

February 6, 2019

The Honorable Dana Nessel
Attorney General
Department of Attorney General
G. Mennen Williams Building
Lansing, Michigan 48933

Dear General Nessel,

I write pursuant to MCL 14.32 seeking your opinion on questions of law relating to Public Acts 267 and 268 of 2018, and the Environmental Rules Review Committee and the Environmental Permit Review Commission created by those laws.

On November 9, 2017, Senate Bills 652 and 653 were introduced in the Michigan Senate, seeking to create, respectively, an Environmental Rules Review Committee and a Permit Appeal Panel (later named the Environmental Permit Review Commission).

Michigan is one of a few states that administers several environmental programs based upon delegated authority from the federal government, and has proudly done so since at least the 1980s. On March 16, 2018, the Michigan Department of Environmental Quality (“MDEQ”) sent a letter to the United States Environmental Protection Agency (“EPA”), requesting the EPA’s opinion on whether this proposed legislation complied with federal legal requirements that were binding on the State of Michigan in its administration of the Clean Water Act and the Clean Air Act. In particular, the MDEQ asked the EPA whether enactment of this legislation would revise Michigan’s programs administering the Clean Water Act and, if so, if it would expose those programs to being withdrawn by the EPA. Additionally, the MDEQ asked the EPA whether the legislation complied with conflict-of-interest and timing requirements under the Clean Air Act.

On April 24, 2018, the EPA sent a letter to the MDEQ responding to the MDEQ’s request for an opinion on SB 652 and SB 653. The EPA raised serious concerns with the Environmental Rules Review Commission proposed in SB 652 and the Permit Appeal Panel proposed in SB 653. The EPA opined that the creation of these bodies and the processes that accompany them would significantly impact how the MDEQ administered its federal programs, including under the Clean Water Act and Clean Air Act, and therefore that, under federal law, these program revisions would require formal submission to the EPA for review and approval. The EPA noted in particular that SB 652 and SB 653 lacked conflict-of-interest protections required under the Clean Air Act—namely, (1) that any board that approves permits have at least a majority of members who represent the public interest and

do not derive a significant portion of their income from persons subject to permits, and (2) that any potential conflicts of interest by board members be disclosed. The EPA further noted that SB 652, through its creation of the Environmental Rules Review Committee, raised concerns that a committee outside the MDEQ could override or dilute provisions in state rules that ensure that Michigan's environmental standards are at least as stringent as their federal counterparts. Finally, the EPA expressed concern that the processes imposed by SB 652 and SB 653 were so cumbersome and time-consuming that they contravened federal timing requirements for the promulgation of rules and the issuance of permits. The EPA stated that it was not in a position at that time to determine whether enactment of these proposed bills would trigger the withdrawal of Michigan's federally approved programs. Furthermore, the EPA said its review of these bills' revisions to Michigan's programs would be aided by an Attorney General opinion clarifying various aspects of how the legislation would operate and interact with federal requirements.

As amended, SB 652 and SB 653 were approved by the legislature, signed by the governor, and became Acts 267 and 268 on June 28, 2018.

Based on the foregoing, I seek your legal opinion on the following questions:

1. Do the bodies created by Act 267 and/or Act 268 violate federal conflict-of-interest requirements which the state is bound to follow in the administration of its federally approved environmental programs, including under the Clean Water Act and Clean Air Act? Among other possible violations, is the Environmental Rules Review Committee under Act 267 and/or the Environmental Permit Review Commission under Act 268 in violation of the board-composition and conflict-disclosure requirements of section 110(a)(2)(E) and section 128 of the Clean Air Act, which mandate that a majority of a board that approves permits must represent the public interest and not derive any significant portion of their income from persons subject to permits, and which also mandate the disclosure of any potential conflicts of interest that a board member may have?
2. Does Act 267 violate federal requirements, including those under the Clean Air Act and Clean Water Act, (1) by creating a body outside of the MDEQ that may override or dilute provisions in state rules that ensure that Michigan's environmental standards are at least as stringent as their federal counterparts, and/or (2) by impermissibly slowing down the process by which environmental rules are promulgated and permits are issued?
3. Does Act 268 violate federal requirements, including those under the Clean Air Act and Clean Water Act, regarding the timing and issuance of permits? In particular, does Act 268 violate federal law by impermissibly slowing down the permit issuance and/or review process?
4. For purposes of federal timing requirements, including those under the Clean Air Act, what is the effective date of a permit issued pursuant to the process created in either Act 267 or Act 268?

5. Under Act 267 and Act 268, what opportunity is afforded to other interested parties to comment, review, and appeal, and is this opportunity in violation of any federal requirements to that effect?
6. What impact do Act 267 and Act 268 have on federal program deadlines?

I would appreciate your attention to these questions of law. From lead-tainted water to PFAS contamination to foul-smelling emissions, the people of Michigan have faced increasing threats to their drinking water, their Great Lakes, and their way of life. At the same time, businesses that follow the rules deserve certainty and promptness in the permit review process. Thank you in advance for your attention to this request.

Sincerely,

A handwritten signature in cursive script that reads "Gretchen Whitmer". The signature is written in black ink and is positioned above the printed name and title.

Gretchen Whitmer
Governor



RICK SNYDER
GOVERNOR

STATE OF MICHIGAN
DEPARTMENT OF ENVIRONMENTAL QUALITY
LANSING



C. HEIDI GREYER
DIRECTOR

March 16, 2018

VIA E-MAIL AND U.S. MAIL

Ms. Cathy Stepp, Regional Administrator
United States Environmental Protection Agency
Region 5
77 West Jackson Boulevard (R-19J)
Chicago, Illinois 60604-3507

Dear Ms. Stepp:

The Michigan Department of Environmental Quality (MDEQ) is committed to protecting the environment while supporting economic development opportunities. Transparency and sound science decision making are core values for the department. We appreciate our partnership with the United States Environmental Protection Agency (EPA) and are seeking your opinion on pending legislation as they relate to programs authorized by the EPA.

The Michigan Legislature is considering the passage of Senate Bills 652, 653, and 654. The bills will create an Environmental Review Committee, Permit Appeal Panel, and Environmental Science Advisory Board and are enclosed for your reference. While the MDEQ is open to the bills, we would appreciate the EPA's opinion to assure no unintended consequences will occur as the result of the bills. In addition to seeking your overall opinion, specific questions regarding the pending legislation relative to the Clean Water Act (CWA) and Clean Air Act (CAA) are included below.

Clean Water Act

1. **Program Revisions** - If Senate Bill 653 is enacted, will Michigan's delegated 402 National Pollutant Discharge Elimination System Program or Michigan's assumed 404 Permitting Program be considered revised programs under Title 40 of the Code of Federal Regulations (CFR), Section 123.62 or Section 233.16?
2. **Program Withdrawals** - If the programs are deemed revised, does the EPA believe the 40 CFR, Section 123.63(a)(1)(ii), Section 233.53(b), or any other language regarding withdrawal of programs applies?

Clean Air Act

3. **Board Representation** - Does Senate Bill 653 comply with the requirements of Section 110(a)(2)(E) of the CAA regarding the representation of permit board members?

Ms. Cathy Stepp
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4. **Permit Timing** - If Senate Bill 653 is enacted, will the EPA consider the effective date of the permit as the date a permit decision is made by the MDEQ or the point that the appeals process is exhausted? There are several areas of the CAA related to the timing of permit issuance, including Sections 165(c), 503(c), and 502(b)(7). Does the additional time that may be added as the result of Senate Bill 653 conflict with or impact the timing of a permit decision identified in those sections?

Please feel free to have your staff reach out to Ms. Teresa Seidel, Director, Water Resources Division, at seidelt@michigan.gov or 517-284-5470, for questions related to the programs administered under the CWA; or Ms. Mary Ann Dolehanty, Acting Director, Air Quality Division, at dolehantyt@michigan.gov or 517-284-6773, for questions related to programs administered under the CAA.

As the bills are moving quickly through the legislative process, we would appreciate your prompt attention to this matter. Thank you for your assistance as we continue to evaluate the pending legislation prior to taking a formal position.

Sincerely,



C. Heidi Grether
Director
517-284-6712

Enclosures

cc: Ms. Amy Epkey, Administration Deputy Director, MDEQ
Ms. Susan Leeming, External Relations Deputy Director, MDEQ
Mr. Michael McClellan, Environment Deputy Director, MDEQ
Ms. Mary Ann Dolehanty, MDEQ
Ms. Teresa Seidel, MDEQ
Ms. Sarah M. Howes, Legislative Liaison, MDEQ



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5
77 WEST JACKSON BOULEVARD
CHICAGO, IL 60604-3590

APR 24 2018

REPLY TO THE ATTENTION OF:

The Honorable C. Heidi Grether, Director
Michigan Department of Environment Quality
Constitution Hall
525 West Allegan Street
P.O. Box 30473
Lansing Michigan 48909-7973

Dear Director Grether:

Thank you for your letter dated March 16, 2018, seeking the opinion of the U.S. Environmental Protection Agency on pending state legislation related to federal environmental programs administered by the Michigan Department of Environmental Quality (MDEQ). Your letter expresses a concern about potential unintended consequences in the event that Michigan Senate Bills (S.B.) 652, 653, and 654 are enacted, and requests EPA's opinion both generally and specifically with regard to Clean Water Act (CWA) and Clean Air Act (CAA) implementation. We appreciate your inquiry and hope this response assists MDEQ, whose partnership with EPA we value greatly.

Given the scope of the pending legislation, if S.B. 652 and 653 are enacted, we believe that MDEQ will need to formally submit program revisions to EPA for review and authorization or approval. These two bills create new processes and entities that could significantly impact how MDEQ administers its authorized, delegated and/or approved programs, including but not limited to those delegated and/or approved under the CWA (Sections 402 and 404) and the CAA. EPA believes that S.B. 654, which creates an Environmental Science Advisory Board with the purpose of providing non-legally binding advice when requested by the governor, and which is restricted from reviewing or advising on permits, would not trigger the same program review requirements.

More particularly, EPA offers the following comments:

- Both S.B. 652 and S.B. 653 (since permits can be issued by rule) raise conflict of interest concerns. S.B. 652 creates an Environmental Rules Review Committee to oversee MDEQ related rule-making. S.B. 653 creates an Appeal Panel within MDEQ to staff boards to hear appeals in a new MDEQ permitting process available only to permit applicants. As you recognize, S.B. 653 appears to be inconsistent with the board composition and conflict disclosure requirements of CAA Section 110(a)(2)(E), which requires compliance with Section 128 of the CAA. In relevant part, CAA Section 128 requires that state implementation plans contain requirements that any board which approves permits have at least a majority of members who represent the public interest

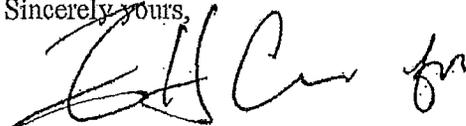
and do not derive any significant portion of their income from persons subject to permits. It also requires that any potential conflicts of interest by board members be disclosed. Equivalent requirements are not included in S.B. 652 and 653.

- S.B. 652 also raises concerns that a committee outside MDEQ may override or dilute provisions in state rules that ensure that Michigan's standards are at least as stringent as their federal counterparts. EPA is also concerned that the bill may create processes that adversely impact the time it takes to promulgate rules in response to federal revisions, in contravention of federal environmental laws.
- S.B. 653 may be inconsistent with CAA and CWA requirements regarding the timing and issuance of permits. S.B. 653 appears to insert a new process after the public comment period closes that, without counting informal dispute, could add 240 days. The bill may significantly delay permit issuance and/or review, allow the default issuance of permits, and narrow review for persons other than permit applicants, all in contravention of federal requirements.

You have asked for our opinion on whether S.B. 653 would trigger delegated program withdrawal under 40 C.F.R. §§ 123.62 and 233.16. While enacting S.B. 652 and S.B. 653 may adversely affect Michigan's authorized, delegated and/or approved programs, we are not in a position to make any findings about potential withdrawal under these provisions (or any other) at this time. Among other things, EPA would likely request that program revisions submitted to EPA for review and authorization or approval include an Attorney General opinion clarifying permit effective dates, the opportunity to comment, review and appeal afforded other interested parties, and the legislation's impact on federal program deadlines.

Please do not hesitate to contact me or have your staff reach out to Bertram C. Frey, Deputy Regional Counsel, at (312) 886-1308, if you have any questions or comments, or would like additional assistance.

Sincerely yours,



Cathy Stepp
Regional Administrator