



Ensuring the Waters of the Great Lakes Basin Are Healthy, Public, and Protected for All

January 18, 2024

House Committee on Natural Resources, Environment, Tourism, and Outdoor Recreation
Chair Laurie Pohutsky
Majority Vice Chair Jenn Hill
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Re: Comments in support of HB5205, detailing legal jeopardy created for Michigan by 2004 and 2005 NREPA Part 31 amendments, MCL 324.3103(2)

Dear Members of the House Committee on Natural Resources, Environment, Tourism, and Outdoor Recreation:

On behalf of For Love of Water (“FLOW”), a Great Lakes advocacy center based in Traverse City, I offer the following written testimony in support of House Bill 5205, repealing the clause at MCL 324.3103(2) that restricts EGLE’s regulatory authority, undermining a non-discretionary agency regulatory duty.¹ Our mission is to ensure that the waters of the Great Lakes basin are healthy, public, and protected for all. HB 5205 will facilitate these goals.

Summary

Michigan sits at the heart of the most extraordinary and valuable fresh surface water system in the world, a magnificent natural endowment that defines and informs our state’s character, values, and geography. Surveys consistently confirm the overwhelming bipartisan appreciation and concern Michigan citizens share for the protection of our waters.

Amendments made by the 2004 and 2005 Michigan state legislature to Part 31 of the Michigan Natural Resources and Environmental Protection Act (NREPA) have created ongoing and increasingly severe legal jeopardy for the state, with growing likelihood of litigation and administrative actions as Michigan falls out of compliance with a variety of legal obligations due to regulatory neglect. If unremedied, this situation will continue to cause unlawful pollution of the state’s water and natural resources and become more costly and embarrassing for Michigan’s leadership, with consequences including the potential loss of authority to implement federal environmental regulatory programs.

¹ Specifically, the clause reading: “ (2) ... notwithstanding any rule-promulgation authority that is provided in this part, except for rules authorized under section 3112(6), the department shall not promulgate any additional rules under this part after December 31, 2006.”

The current law barring EGLE from fulfilling its obligations to protect Michigan’s waters and environment violates the mandatory constitutional duty imposed on the legislature to enact legislation “to protect the air, water, and natural resources of the state from pollution, impairment or destruction.”² The regulatory ban also threatens Michigan’s delegated authority to implement and enforce the federal Clean Water Act and Resource Conservation and Recovery Act.

Michigan’s rule promulgation process is replete with safeguards to ensure administrative rule-making that is well informed, competent, transparent, and advances the public interest. Rule-making requires a regulatory impact statement and cost benefit analysis of the benefits and burdens of proposed rules. The numerous checks and balances incorporated into the rule-making process include public hearings, public comment, and review by the bipartisan Joint Committee on Administrative Rules.

Part 31 of NREPA mandates that the “department shall protect and conserve the water resources of the state and shall have control of the pollution of surface or underground waters of the state and the Great Lakes.” MCL 324.3103. This important responsibility must be aided by the most up-to-date science through the input of well-informed environmental professionals dedicated to overseeing the protection of our water resources. FLOW therefore urges passage of HB5205.

Discussion

The goal of MCL 324.3103(2), to prevent ongoing environmental regulation, had and continues to have unintended consequences, including forcing Michigan to fall out of compliance with federal regulations and blocking efforts to protect public health by updating existing regulatory standards to reflect current science. Michigan Environmental Council has published a detailed analysis of these detrimental impacts to public health, environmental protection, and Michigan’s economy, which FLOW endorses.

Michigan has a great deal to protect through mindful regulation. Our Great Lakes hold 95 percent of all fresh surface waters in the United States. Our biologically abundant watersheds, coastal dunes, and distinct ecosystems are unique on the planet. Science affirms that our inland lakes, rivers, streams, and wetlands are an integrated, interconnected, mutually dependent hydrologic system providing priceless services and benefits to all citizens. Michigan’s natural resources are magnificent, unparalleled, and sublime – a natural treasure demanding extraordinary legislative and regulatory safeguarding. The obstacles created by MCL 324.3103(2) are antithetical to Michigan’s values, laws, environmental legacy – and even the tourism catchphrase on most of our license plates, Pure Michigan.

These comments focus narrowly on the legal jeopardy created for Michigan by the persistent failure to exercise necessary and proper regulatory authority, in particular:

1. Ongoing violations of NREPA
2. Ongoing violations of Michigan Constitution Article 4, Section 52
3. Threats to Michigan’s delegated authority to implement and enforce the Clean Water Act

² Mich. Const. 1963, art. 4, sec. 52 (“The legislature shall provide for the protection of the air, water and other natural resources of the state from pollution, impairment and destruction.”).

Ongoing violations of NREPA

MCL 324.3103(2) improperly bars promulgation of rules by the Department of Environment, Great Lakes, and Energy (“EGLE”), contrary to its mandatory obligations under the same statute and implementing regulations.

- a. Part 31, Section 3103(1) mandates:

The department shall protect and conserve the water resources of the state and shall have control of the pollution of surface or underground waters of the state and the Great Lakes, which are or may be affected by waste disposal of any person.³

- b. Part 31 also mandates that EGLE, when considering and issuing permits, shall prevent water pollution from any substance that may affect the quality of the waters of Michigan:

The department shall issue permits that will assure compliance with state standards to regulate municipal, industrial, and commercial discharges or storage of any substance that may affect the quality of the waters of the state.

* * *

The department shall take all appropriate steps to prevent any pollution the department considers to be unreasonable and against public interest in view of the existing conditions in any lake, river, stream, or other waters of the state.⁴

- c. Michigan Administrative Code Rule 323.2137 requires:

When applicable, a permit issued by the department shall contain terms and conditions deemed necessary by the department to ensure compliance with ... effluent standards and limitations...⁵

- d. Part 17, NREPA (the Michigan Environmental Protection Act, hereafter “MEPA”) imposes a duty to prevent and minimize likely degradation of the water and natural resources or public trust in those resources, as acknowledged by the Michigan Supreme Court:

(MEPA) marks the Legislature’s response to our constitutional commitment to the ‘conservation and development of the natural resources of the state . . .!’ Const.1963, art. 4, s 52.... But the (MEPA) does more than give standing to the public and grant equitable powers to the Circuit Courts, it also imposes a duty on individuals and organizations both in the public and private sectors to prevent or minimize degradation of the environment which is caused or is likely to be caused by their activities.⁶

³ NREPA, Part 31, Sec. 3103(1), MCL 324.3103(1).

⁴ MCL 324.3106.

⁵ Mich Admin. Code, R 323.2137.

⁶ Ray v Mason County Drain Comm’r, 393 Mich 294, 304-306 (1975). Michigan Constitution art. 4 sec. 52 is addressed in the next section, immediately below.

MCL 324.3103(2) limits or prohibits EGLE from fulfilling constitutional duties imposed on it through MEPA, and other non-discretionary duties created by NREPA, creating a conflict within state law that is increasingly likely to give rise to legal challenges.

Ongoing violations of Michigan Constitution

Michigan's Constitution does not allow state legislators or regulators to neglect their environmental protection duties. MCL 324.3103(2) was unconstitutional from its inception, pursuant to Art. 4, Sec. 52:

The conservation and development of the natural resources of the state are hereby declared to be of paramount public concern in the interest of the health, safety and general welfare of the people. The legislature shall provide for the protection of the air, water and other natural resources of the state from pollution, impairment and destruction.

As noted in describing the duties imposed on the EGLE by the MEPA, the enactment of environmental laws, such as the MEPA and Part 31, “marks the Legislature’s response to our constitutional commitment” to protect the air, water, and natural resources from pollution.⁷ In 1974, the Michigan Supreme Court expressly held that Article 4, section 42 of our constitution places a mandatory duty on the legislature to enact laws that fulfill this constitutional commitment.

The threshold question before us is whether the second sentence of art. 4, s 52, prescribes a *mandatory* duty or whether it is merely *declaratory*. Utilizing the primary construction rule of ‘common understanding, ‘it is clear that the sentence must be read as a mandatory command to the legislature.⁸ ... Thus, we hold that art. 4, s 52, created a *mandatory* duty on the part of the legislature to act to provide for the protection of the air, water and other natural resources of the state from pollution, impairment and destruction.

Given the mandatory legislative duty imposed by art. 4, s 52.... (l)egislation need not specifically refer to other legislation it affects to be read *in pari materia*⁹ (citations omitted). The Legislature is only enjoined to enact legislation protecting natural resources from pollution, impairment and destruction. The responsive action of the Legislature can be in specific provisions, in pertinent enactments, or in the form of generally applicable legislation....¹⁰

Michigan law currently bars EGLE from promulgating rules needed to protect the air, water, and natural resources of the state from pollution, impairment or destruction. The amendments disrupt, are contrary to, and in violation of the mandatory duty imposed on the Legislature by article 4, section 52.

⁷ Id., at 304.

⁸ Petition of Highway US-24, in Bloomfield Twp., Oakland Cnty., 392 Mich. 159, 179–80 (1974), emphasis in original.

⁹ Meaning on the same subject or matter or in a similar case. NOTE: It is a doctrine in statutory construction that statutes that are *in pari materia* must be construed together. Merriam Webster Legal Dictionary.

¹⁰ Id., at 182-83.

Complementing this constitutional mandate is the Public Trust Doctrine, embodying a set of foundational principles, long recognized by Michigan law, that require proper stewardship of Great Lakes resources. The doctrine creates a fiduciary responsibility of stewardship on the part of government for the preservation of these resources and for the benefit of the public, creating further grounds to challenge MCL 324.3103(2).

Threats to Michigan's delegated authority to implement and enforce the Clean Water Act, Resource Conservation and Recovery Act, and other federal environmental laws

The inability to update Michigan water quality standards to keep pace with evolving pollution control standards developed by the US Environmental Protection Agency (USEPA) under the federal Clean Water Act may result in withdrawal of Michigan's delegated authority to run its own NPDES (National Pollutant Discharge Elimination System) permitting program. In circumstances with many parallels to Michigan's, in 2015 Wisconsin was the subject of a [Citizen Petition for Corrective Action or Withdrawal of NPDES Program Delegation](#), co-signed by 14 Wisconsin organizations and tribal governments.

This action to remove Wisconsin's delegated NPDES authority led to extended intervention by and negotiation with USEPA, heightened scrutiny of Wisconsin's Clean Water Act permitting, and enforceable agreements to strengthen Wisconsin's water quality regulation. Michigan is in a similarly vulnerable position, lacking the authority to bring its NPDES program into full compliance with current Clean Water Act interpretations and standards at the federal level. Pursuant to 40 CFR § 123.63(a)(1):

The (EPA) Administrator may withdraw program approval when a State program no longer complies with the requirements of this part, and the State fails to take corrective action. Such circumstances include the following:

- (1) Where the State's legal authority no longer meets the requirements of this part, including:
 - (i) Failure of the State to promulgate or enact new authorities when necessary; or
 - (ii) Action by a State legislature or court striking down or limiting State authorities.

Michigan is well across this line. Among the many neglected water quality rulemakings noted in EGLE's 2023-2024 Annual Regulatory Plan are:

1. Update the definition of "bioaccumulative chemical of concern" to reflect federal Final Water Quality Guidance for the Great Lakes System. MAC R. 323.1043(1)
2. Update the standard for "total body contact recreation" to include new technology for detecting E. coli bacteria. MAC R. 323.1062(1).
3. Add language recognizing additional human health concerns for body contact with water contaminated by algal toxins and high pH levels. MAC R. 323.1100(2).
4. Update a 1997 reference to the state list of designated trout streams to reflect streams that should receive that level of protection under the Clean Water Act. MAC R. 323.1100(7). 40 C.F.R. § 131.3(f).

5. Update procedures for aquatic toxicity evaluation to reflect current scientific consensus and eliminate ambiguity. MAC R. 323.1057.
6. Revise the table of drinking water and non-drinking water standards providing Human Noncancer Values for Protection of Human Health so that an annual literature review will reflect the most current science in Michigan's rules, even if rulemaking authority is once again rescinded. MAC R. 323.1057, Table 7.
7. Make PFAS (per-and polyfluoroalkyl substances) a designated polluting material. MAC R. 323.1201–R. 323.1221.

Michiganders deserve to be protected by current science, and they have the right to the full protection of the federal Clean Water Act. The state would do better to expend EGLE's resources on programs and services, rather than protracted negotiations with citizen plaintiffs and EPA.

Recommendations

As threats to Michigan's waters and the people, animals, and biota that rely on them evolve, state agencies must be nimble to respond appropriately. To protect Michigan's precious waters from further pollution and her taxpayers from costly legal jeopardy, FLOW recommends immediate repeal of MCL 324.3103(2), via HB5205.

Sincerely yours,

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