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FEBRUARY 12, 2019 | ARTHUR SIEGAL

## Showdown Over MDEQ Review Panels?



As we previously blogged, Governor Whitmer recently issued two Executive Orders and one Executive Directive, all focusing on the environment. One of the Governor's Executive Orders made a number of changes to the MDEQ. Citing the EO's dissolution of two government panels and reorganization of a third, the Michigan House voted to overturn this EO and the Senate is moving in the same direction.

After the House vote, the Governor held a meeting with the press where she repeatedly said that the House had "voted against clean drinking water." When asked about the EO's panels, she said they had only met twice, weren't essential and stood in the way of cleaning up Michigan's water. This is not intended to be an exhaustive legal analysis of all the questions raised but a few factors that are not receiving much attention of yet.

## The Panels in Question

The Rules Committee's charge is to review draft rules to ensure that the proposed rules: (a) do not exceed the law's rule-making delegation of authority; (b) reasonably implement and apply the law authorizing the rules and are consistent with other applicable laws; (c) are necessary and suitable to achieve their purposes in proportion to the burdens they create; (d) are as clear and unambiguous as reasonably appropriate; (e) based on sound and objective scientific reasoning. At the end of the process, the law still leaves the ultimate regulatory decisionmaking with the Director of the MDEQ and the Governor.

The Environmental Permit Review Commission is to advise the DEQ Director on (1) disputes related to permitting applications and (2) contested cases regarding a permit decision. If a permit applicant challenges a permitting decision and the dispute is not resolved informally, the Director selects and convenes a three-person Panel from the 15 person Commission. The Panel hears both sides and makes a recommendation to the Director and applicant. The Director issues a written decision that either agrees or disagrees with the Panel's recommendations.

In a contested case regarding a permit, an administrative law judge (ALJ) would preside, make the final decision, and issue the final decision for the DEQ. Any party to the case may seek review of the ALJ's decision by a three-person Panel selected from the Commission. The Panel's review would be limited to the record in the contested case and the Panel could adopt, remand, modify, or reverse, in whole or in part, a final decision and order. The Panel's decision would become the DEQ's final decision.

## On the Governor's side

There is no question that the Governor is legally authorized to reorganize the State's administrative agencies. After the House vote, the Governor asked the Michigan Attorney General for an opinion on the legality of the Environmental Rules Review Committee and the Environmental Permit Review Commission. The Governor cited an April 2018 letter from the US

EPA that raised questions about how these laws would impact federal programs where Michigan has been delegated authority to administer – including the Clean Water Act and the Clean Air Act. Advocates of the Panels state that the bills on which EPA commented were revised in response to EPA's comments. However, in its letter, EPA indicated that it would likely request that the program revisions be submitted for review and would ask for an Attorney General opinion clarifying the laws' impacts on the federal programs. That has not happened yet.

## On the Legislature's side

The Governor's statements regarding clean water and the panels are hyperbole. The Rules Panel was only [appointed in October of 2018](#) and the Permit Panel was [appointed in August](#). That there have only been two meetings thus far proves nothing regarding their efficiency or impact on Michigan's environment. The Governor seems to be conflating the fight over these two panels with her entire EO, brushing off a question about the possibility of reissuing the EO without eliminating the panels.

## The legal issue at stake

No one questions the Governor's right to reorganize the DEQ. That authority is clear in the Constitution and State law. However, my research hasn't found anything addressing this exact issue. What this may turn on is a discussion regarding the separation of powers between the Legislature and the Governor and an arcane definition in the Executive Organization Act of 1965 which defines a "type III transfer" as one abolishing an existing commission and its powers and functions are transferred to a principal department of the State. Are the functions transferred when a legislative process has been eliminated? Does the Governor have the right to effectively undo laws passed by a prior administration by executive fiat?

These are the kinds of arcane question lawyers live for and everyone else dreads. Time will tell but it does seem like the Governor is trying to prove she won't be pushed around – whether that is a good use of her political capital when most Michiganders care more about the roads and schools than they do about two panels, remains to be seen.

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