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**ENVIRONMENTAL
REGULATION IN MICHIGAN**
A BLUEPRINT
FOR REFORM

BY RUSS HARDING

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Environmental Regulation in Michigan: A Blueprint for Reform

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CONTENTS

- Purpose 2
- Principles 4
- Proposals: Statutory Change..... 5
 - No regulation without representation..... 5
 - Legislative approval of regulatory proposals 5
 - Periodic review and sunset of regulations 6
 - No more stringent than federal requirements 6
 - Permit issuance deadlines 7
 - Fiscal notes on regulations..... 7
 - Regulatory bill of rights..... 8
- Proposals: Regulatory Administration..... 9
 - Single permitting agency 9
 - Shed regulatory programs to other levels of government 10
 - Wetland permitting 10
 - Superfund program..... 11
 - State cleanup and remediation program..... 11
 - Solid waste program 12
 - Groundwater discharge regulation..... 12
 - Privatization opportunities 13
 - State permitting report card..... 13
- Postscript..... 14

PURPOSE

Michigan suffers from an inability to attract and retain jobs. Business taxes and labor policy receive much attention, but state-level regulatory reform may be the most important factor in reversing our job losses.*

Most businesses desiring to locate or expand in the state must enter through the regulatory gate before they can invest and create jobs. State air and wetland permits are the two environmental requirements that most often hinder businesses that would like to locate or expand in Michigan. The state's tax or labor policy makes little difference if a business cannot obtain an operating permit or license in a timely fashion. The regulatory gate in Michigan has all too often become a regulatory barrier.

Businesses take these problems seriously. The Michigan Chamber of Commerce's policy on regulatory reform states: "Michigan's current regulatory burden is having a negative impact on our state's economic competitiveness. Dramatic changes are needed at the Department of Environmental Quality. ... Michigan needs to develop a more consistent, predictable regulatory structure that helps to both encourage economic growth and protect the natural resources."† And in a state "turnaround plan" published by Business Leaders for Michigan, a key step is state regulatory reform, with the group observing that the 10 best states at attracting jobs and people are "[w]ell-run, fiscally stable, competitive locations with a user-friendly regulatory climate."

* Michigan's regulatory problem is not limited to state government, but regulatory reform in local government is beyond the scope of this discussion.

† See http://www.michamber.com/mx/hm.asp?id=environbond#hit_last.

The Department of Environmental Quality was merged with the Department of Natural Resources in October 2009 to create the Department of Natural Resources and Environment.

Michigan needs a sensible regulatory system more than ever, as technology provides businesses more flexibility in locating and moving their operations. Much is made of loss of jobs to foreign competition, but the bigger threat facing Michigan is job loss to other states, such as Indiana, that have fewer regulatory barriers. For example, Michigan's wetland statute and implementation of federal wetland law are more stringent than in most states Michigan competes with for jobs.

The good news is Michigan's uncompetitive regulatory bureaucracy can be fixed with common-sense reform; it does not require the polarizing debates that often surround changes in tax and labor policy. However, fixing the regulatory problem will require decisive and bold action from elected and appointed officials. We must streamline the state's dysfunctional regulatory system so that it protects human health and the environment while encouraging job growth and providing regulatory certainty.

PRINCIPLES

The following principles should be adhered to in legislating and administering regulatory requirements in Michigan:

- Environmental protection and economic development are not mutually exclusive, and both goals can be accomplished by utilizing sound conservation principles.
- State government should perform only core regulatory functions — specifically, making final permit and enforcement decisions, rather than conducting routine administrative tasks that can be performed by the private sector.
- All state regulatory procedures should ensure that law-abiding parties are treated fairly and promptly, rather than being subjected to arbitrary, belated or open-ended decisions by state regulators.
- State regulatory requirements should be set by elected officials — not by state administrative personnel, who are not accountable to voters.

PROPOSALS

Statutory Change

NO REGULATION WITHOUT REPRESENTATION

When the Legislature passes a bill, it often omits many of the details needed to make the bill complete. To address this shortcoming, the Legislature requires a regulatory agency, such as the Department of Natural Resources and Environment, to write regulations to supplement the bill's language. Hence, the agency drafts the regulations, revises them after taking testimony at "public hearings" and promulgates the regulations as law.

These regulations are effectively laws, but unfortunately, they have never been voted on by the people's representatives in the Legislature. Moreover, agency hearings typically involve less public participation than the legislative process does, and legislators often complain that the regulations distort the bill's intent.

The Legislature should end this unresponsive and undemocratic process for all regulations — not just environmental rules — in the following ways:

1. Legislative approval of regulatory proposals

The Legislature should amend the Administrative Procedures Act to strip agencies of the power to propose binding regulations. Instead, the agencies should be directed to draft proposed legislation specifying the details necessary to supplement the original bill. The proposed legislation would then be reviewed, amended and approved — or rejected — by the Legislature. In effect, regulatory agencies would serve as a second, technically informed Legislative Service Bureau, helping to draft specialized laws, but not approving them.

2. Periodic review and sunset of regulations

All regulations that have been promulgated by agencies should include a provision that they will sunset in five years unless they are reviewed and specifically reauthorized by the Legislature prior to the expiration date. All existing regulations should be reviewed on a rotating basis to determine if they have achieved their intended results and have been cost-effective. Regulations like wetland rules that impose significant costs on businesses and residents should receive the highest priority for review. Any regulations found to be ineffective or not cost-effective should be rescinded.

3. No more stringent than federal requirements

If legislators cannot agree on legislative approval of regulatory proposals, they should at least pass a law that prevents state agencies from promulgating regulations more stringent than federal requirements without approval of the Legislature. State regulators frequently generate rules that exceed federal restrictions with little or no oversight from elected officials. While it may be appropriate in certain instances to adopt regulations more stringent than federal law in order to protect human health or the environment, this should be done only with explicit authorization from the Legislature and not be left to the discretion of unelected regulators.*

* Also see <http://www.mackinac.org/6956>.

PERMIT ISSUANCE DEADLINES

In theory, state agencies must issue permits within legislatively specified timeframes. In practice, these requirements lack teeth.

The Legislature should impose genuine deadlines. Agencies should be required to issue permits within 30 days for straightforward cases, such as most wetland permits, and within 60 to 90 days for the most complex cases, such as air permits for auto assembly plants. The Legislature should stipulate that if an agency fails to act within the specified timeframe, permits will be deemed approved and the applicant refunded any permit application fees. Georgia, Virginia and South Carolina have implemented this requirement.[†]

FISCAL NOTES ON REGULATIONS

The Administrative Procedures Act should be amended to require that the House and Senate fiscal agencies prepare fiscal notes for each set of regulations proposed. The notes would estimate the cost of regulatory enforcement to state government and the cost of regulatory compliance to businesses and individuals, thereby making the expense transparent to voters and policymakers. Such fiscal notes are already required for state legislation.

[†] Some argue that the federal government would rescind Michigan agencies' power to issue permits if applicants began receiving permits by default when deadlines were missed. This outcome would follow only if there were a widespread failure to issue timely permits — an unlikely event.

REGULATORY BILL OF RIGHTS

State law should provide for a regulatory bill of rights. This list should stipulate that if a permit applicant meets the requirements of state law, the permit will be issued in a timely manner by the responsible agency. It should also specify that all permit applicants be treated fairly and their applications be adjudicated without political interference. This recommendation does not introduce any new reforms, but is nonetheless important in sending a clear signal to the regulated community that they have a guarantee of fair treatment in the regulatory process.

PROPOSALS

Regulatory Administration

SINGLE PERMITTING AGENCY

Currently, the Department of Natural Resources and Environment is responsible for both issuing and enforcing environmental permits. The culture of the agency often fosters a negligent attitude toward prompt adjudication of permit applications. The agency's mission of protecting the environment often conflicts with the agency's role of fair and timely permitting. The governor should sign an executive order that separates environmental permitting from enforcement by creating a new, dedicated permitting agency, while leaving environmental enforcement with the DNRE. The new permitting agency would provide a one-stop shop for all individuals and businesses needing state permits or licenses, including nonenvironmental ones.*

This organizational change would send a clear signal that Michigan is serious about improving its regulatory climate. Creation of a permitting agency would not require hiring new employees, but rather involve transferring permitting and licensing employees from existing agencies. The new agency would be directly responsible to the governor and subject to statutory direction from the Legislature. In contrast to the current priorities at the DNRE, the primary mission of the new agency would be to adjudicate permits and licenses in a timely manner.

* The state requires a variety of business permits and licenses. Barbers must obtain licenses, for instance (see http://www.michigan.gov/statelicensesearch/0,1607,7-180-24786_24788-79920--,00.html).

SHED REGULATORY PROGRAMS TO OTHER LEVELS OF GOVERNMENT

The executive office should review all regulatory programs to determine if the state should continue to administer them or return the responsibility to the federal government. Most state environmental regulatory programs, such as water, air and hazardous waste, result from federal laws that states have the option of administering. States administer federal regulatory programs when they believe they can do a better job than the federal government. However, the cost versus benefit of some state-operated environmental regulatory programs is questionable. The following environmental regulatory programs should be considered for elimination or return to the federal government:^{*}

1. Wetland permitting

This program should be returned to the federal government and the state wetland law repealed. Extensive federal wetland laws would still apply in Michigan, but Michigan's wetland regime would now be similar to those in other states.[†]

Michigan is one of only two states that operate the wetland permitting on behalf of the U.S. Army Corps of Engineers. The state wetland permitting program is more expansive and difficult to comply with than the federal program; this is a major obstacle for both landowners and businesses

* Some in the regulatory community may be concerned that return of environmental programs to the federal government could lead to difficulty, since they would be required to deal with the U.S. Environmental Protection Agency. This concern may be valid for some programs, such as air permitting, but it should not be for either wetland regulation or contaminated property cleanup. The EPA has limited jurisdiction in both programs and less restrictive requirements than does the state.

† Also see <http://www.mackinac.org/10486> and <http://www.mackinac.org/9504>.

attempting to develop property and create jobs in the state. In *Rapanos v. United States*, the U.S. Supreme Court ruled that the federal government has jurisdiction only on wetland directly connected to waters of the nation. Return of the wetland program would save the state approximately \$2 million in state general fund money currently allocated to maintaining a state wetland program.

2. Superfund program

Superfund is a federal program that addresses cleanup of the most contaminated land and water sites in the nation. Currently, the state operates this program, but there is little advantage in its doing so. The U.S. Environmental Protection Agency makes all the final decisions, and most Superfund sites in the state are in the final stage of remediation, with the remedy for cleanup having already been selected.

3. State cleanup and remediation program

During the 1990s, Michigan lawmakers amended Michigan cleanup law to set clear standards for outcome-based remediation that allowed landowners and potential investors to remedy contaminated property and invest in it with certainty. This reform ended the owners' previously open-ended cleanup obligations and led to considerable private investment in restoring and developing brownfield sites.

The positive statutory changes made to this program in the 1990s have been largely undone by bureaucratic fiat, and the program has become a barrier to redevelopment. Terminating this program would allow prospective developers to deal directly with the federal government, which has adopted many of the positive changes Michigan pioneered in the 1990s.

4. Solid waste program

The regulation of solid waste should be done by local government. Landfills are local concerns, and local governments have the most at stake to ensure the sites are properly operated. The state has appropriately established landfill construction standards, but should leave the enforcement of those standards to local government.

5. Groundwater discharge regulation

The state Auditor General has repeatedly found this program to be ineffective. In most cases, requiring groundwater permits for each individual discharge should be replaced with general permits that authorize categorical discharge limits, such as limits for car washes. This change would better protect the environment, as there is currently very little enforcement to ensure that individual groundwater discharge permits are being complied with. A small staff could be retained for enforcement purposes.

PRIVATIZATION OPPORTUNITIES

An executive order should be issued directing all state agencies with regulatory functions to identify opportunities for privatization wherever feasible. For example, state environmental laboratories could be closed and their work competitively contracted to competent private firms.*

In addition, some states create a list of private firms approved to prepare and review environmental permit applications to ensure that the applicant meets or exceeds all state and federal regulatory requirements. State officials would still maintain final decision-making authority. Privatization of permitting functions would shorten permit review periods, save the state money and provide state officials the flexibility to adapt to changes in future workloads without hiring or laying off employees.

STATE PERMITTING REPORT CARD

The executive branch should establish a report card that tracks the performance of issuing state-required permits and licenses. Aggressive goals that exceed statutory requirements should be established, tracked and reported to the public on a regular basis.



Michigan can no longer afford to conduct business as usual. State elected officials must make bold transformational changes to cumbersome state regulatory programs that hinder job creation. Expecting better results while continuing to do business the same way places the state's economic future at risk. Amid brutal competition with other states, Michigan needs every strategic advantage possible to attract new jobs. Fortunately, it is not too late to revamp the current state regulatory system. The recommendations in this report need to be adopted without delay.

* Also see <http://www.mackinac.org/6911>.

POSTSCRIPT

Future economic prosperity in Michigan will depend upon the state's ability to compete in the global marketplace. It will be difficult for Michigan to contend for jobs without a reformation of its current regulatory process. Adoption of the recommendations discussed here is essential to reclaiming Michigan's world-class economic status.

A good quality of life requires not just protecting our abundant natural resources, but allowing the state's residents and businesses to prosper as well. In other words, a healthy human environment requires freedom. Michigan will come closer to that environment by adopting common-sense regulatory reform.

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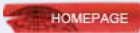
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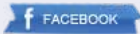
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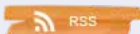
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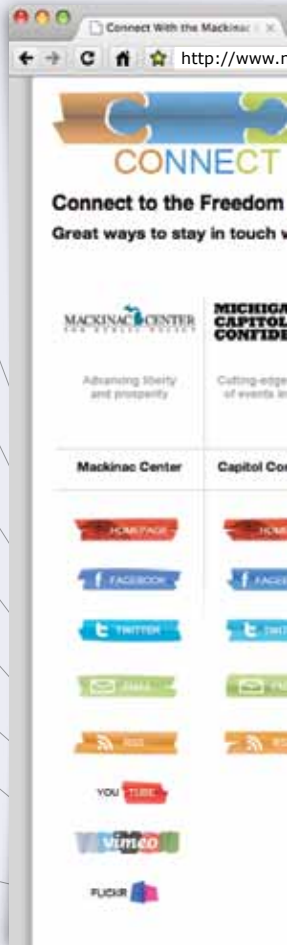
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