

State Notes

TOPICS OF LEGISLATIVE INTEREST

July/August 2009



A History of Michigan's Wetland Protection Program and Comparison with the Federal Program **By Josh Sefton, Fiscal Analyst**

In her fiscal year (FY) 2009-10 budget recommendation, Governor Granholm proposed elimination of the existing State program that manages wetlands in Michigan. The State's wetland program is administered by the Michigan Department of Environmental Quality (MDEQ). Under current law, the MDEQ provides regulatory oversight of the State's wetlands and issues permits to residents who wish to develop wetlands in certain ways. Although many other states also have wetland regulations, Michigan is one of only two states (New Jersey being the other) that have been authorized by the Environmental Protection Agency (EPA) to issue permits that also include Federal permit authorization for wetland alteration. In the rest of the nation, a permit is required from the United States Army Corps of Engineers (USACE) for work in wetlands, lakes and streams. The Governor estimates that \$2.1 million will be saved under her plan.

In 1972, Congress enacted the Federal Water Pollution Control Act, more succinctly known as the Clean Water Act (CWA). Though the Act had many regulatory effects, Section 404 of the CWA provided regulatory authority over physical alteration of the nation's waters - including wetlands - to the EPA and the USACE jointly. In 1977, Congress amended the CWA to allow states to manage the Section 404 Program in wetlands and waters other than "traditionally navigable waters" (such as the Great Lakes) in order to streamline the regulatory process and to help alleviate some of the regulatory and funding burden from the USACE. Additionally, Section 401 of the CWA allows states to veto federally issued permits in certain cases through a water quality certification.

The State of Michigan was the first state to be authorized to administer the Section 404 program. The legal basis for Michigan's program stems from a combination of several statutory authorizations designed to protect the State's lakes, streams, wetlands, Great Lakes, and shorelines. The first of these laws was the 1955 Great Lakes Submerged Lands Act (Public Act 247). The Great Lakes Submerged Lands Act was initially meant to establish ownership of the Great Lakes lake bottoms as property that belongs to the State and is available for public enjoyment, and to establish a permitting process for alteration of the bottomland. With the passage of the 1972 Inland Lakes and Streams Act (Public Act 346), regulatory authority was expanded to protect inland lakes, rivers, and streams as well as wetlands below the ordinary high water mark of these water bodies. In 1979, the Goemaere-Anderson Wetlands Protection Act (Public Act 203) expanded wetland protection and defined how wetlands should be managed and under which conditions a permit is necessary to take certain actions. Finally, in 1984, the State and the EPA reached an agreement that gave full authority to administer Section 404 of the CWA to the MDEQ. In the mid-1990s, all of Michigan's environmental regulations were codified into the Natural Resources and Environmental Protection Act; Public Act 451 of 1994; Public Acts 247, 346, and 203 became Parts 325, 301, and 303, respectively.

Every year, the MDEQ processes between 4,000 and 6,000 permit applications for work at the land and water interface; 1,500 of them relate directly to wetlands.¹ Because Section 404.2.g.1 of the CWA does not allow states partial enforcement, giving control of wetlands regulation back to the USACE also would give back the regulation of the release of dredge or fill material into lakes and rivers.¹

¹ Michigan Poised to Surrender Wetlands Control to Feds. *Environmental News Service*. 4/6/09. Accessed 7/21/09. URL: <http://www.ens-newswire.com/ens/apr2009/2009-04-06-091.asp>



Table 1 and the following discussion give a detailed comparison of key points of difference between the current regulation provided by the MDEQ and what likely would be provided by the USACE.

Table 1

Comparison of Michigan's Current Program, New Jersey's Current Program, and Army Corps of Engineers Jurisdiction*			
	Michigan Department of Environmental Quality (MDEQ)	New Jersey Department of Environmental Protection (NJDEP)	United States Army Corps of Engineers (USACE)
Scope of Lands Regulated	<p>Wetlands are regulated by MDEQ if they are:</p> <ul style="list-style-type: none"> • Connected to the Great Lakes, Lake St. Clair, an inland lake, pond, or a river or stream. • Located within 1,000 feet of one of the Great Lakes or Lake St. Clair, or 500 feet from an inland lake, pond, river, or stream. • Not contiguous to the Great Lakes, an inland lake, pond, river, or stream, but more than five acres in size. • Not contiguous to the Great Lakes, an inland lake, pond, river or stream, but less than five acres in size if the Department determines protection of the wetland area is essential, and the MDEQ has notified the property owner. <p>These criteria lead to the protection of approximately 95.0% of the wetlands in Michigan.</p>	<p>Wetlands regulated under New Jersey's Freshwater Wetlands Protection Act (FWPA) are very similar to the types specified in the original 1977 Clean Water Act. In addition, depending on the type of wetland and its importance to the local ecosystem, a transitional "border" of 25-150 feet surrounding the wetland is also regulated.</p> <p>Activities within this transition area are regulated as though they were part of the wetland.</p> <p>Additionally, NJDEP has a system for ranking wetlands by their relative importance to the local ecosystem. The ranking a given wetland earns helps determine what activities may be done and how large the transition area must be.</p>	<p>The USACE will regulate:</p> <ul style="list-style-type: none"> • Traditional navigable waters. • Wetlands adjacent to traditional navigable waters. • Nonnavigable tributaries of traditional navigable waters where the tributaries typically flow continuously year-round or at least flow seasonally. <p>The USACE must determine jurisdiction based on a fact-specific analysis to determine a significant nexus for:</p> <ul style="list-style-type: none"> • Nonnavigable tributaries that are not permanent; • Wetlands adjacent to streams that are not relatively permanent (approximately 36.0% of Michigan's streams); • Wetlands adjacent to but not directly abutting nonnavigable tributaries; • Isolated wetlands not physically connected to inland lakes or streams (approximately 17.0% of all Michigan wetlands); • Wetlands adjacent to isolated lakes and ponds. <p>Because of the US Supreme Court case that established jurisdiction based on a significant nexus finding, it is not clear what percentage of Michigan's wetlands would be protected by USACE.</p>
Activities Regulated	<ul style="list-style-type: none"> • Deposit of fill material. • Removal of soil or minerals. • Construction, operation, or maintenance for any use or development. • Drainage of surface water. 	<ul style="list-style-type: none"> • Deposit of fill material • Driving of pilings. • Removal of soil or minerals. • Disturbance of the water table. • Placement of obstructions. • Destruction of plant life characteristic of a wetland area. 	<ul style="list-style-type: none"> • Discharge of dredge or fill material.

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Institutional Capabilities	Total staff: 78 10 Field offices: <ul style="list-style-type: none"> • Cadillac • Gaylord • Grand Rapids • Jackson • Kalamazoo • Lansing • Bay City • Warren • Gwinn • Crystal Falls 	Total staff: Approximately 80	Total staff: 38 Six Field offices: <ul style="list-style-type: none"> • Detroit • Grand Haven • Bay City • Marquette • Sault Ste Marie • South Bend, Indiana
Jurisdictional Determination (JD)	Wetlands are regulated unless noncontiguous to the Great Lakes, an inland lake, pond, river, or stream, and are less than five acres in size. No formal JD is required.	NJDEP does a jurisdictional determination of whether an area is a wetland or transitional border to a wetland. The process is similar to how the USACE does it. Like USACE JDs, JDs from NJDEP are good for five years. Part of the JD is the determination of the type of wetland a piece of property is classified as, as mentioned above.	A JD is necessary to determine if jurisdictional waters are present or absent at a site. A JD is good for five years, and may be appealed through the Corps' administrative appeals process. Currently, JDs are taking approximately 12 weeks to be approved. Alternatively, applicants can elect to use a preliminary JD to voluntarily waive questions regarding CWA jurisdiction over a particular site. This allows the process to move more quickly; however, preliminary JDs may not be appealed. The Corps has the goal of processing preliminary JDs in 60 days.
Permit Authorizations	One permit process provides authorization under all statutes administered by Land and Water Management Division. In addition, it authorizes the following: <ul style="list-style-type: none"> • Sections 401 and 404 of the CWA; • Coastal Zone Consistency Certification; • Coordination with endangered species programs; • Screening with the Federal historic preservation program. These authorizations are at no additional cost to the applicant.	General Permits are valid for five years, and similar to the Federal permit, cover section 404 of the CWA. Two areas within New Jersey, the Hackensack Meadowlands and Pinelands, are exempt from FWPA except in cases where the discharge of fill material or dredging is concerned. The commissions that regulate these two areas have the authority to regulate activities more strictly than the FWPA.	The USACE permit covers Section 404 of the CWA only; other authorizations are up to the applicant to apply for separately. These separate authorizations may involve additional costs to the applicant.

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Permit Review Time	<p>Michigan law requires that permits be issued within 90 days of receipt of the completed application; 150 days if a hearing is to be held.</p> <p>Average time for permit reviews is 60 days.</p>	<p>New Jersey law requires that permits be issued or denied within 180 days of receipt of the completed application.</p> <p>If an application is submitted but not complete, or more information is required, the applicant must be notified of this within 30 days.</p> <p>Average time for general permit reviews is 75 days.</p>	<p>Federal law has no established time frame for permit decisions.</p> <p>Average time for permit reviews is 120 days. This does not include time required for a JD or preliminary JD, which adds an additional 60-90 days.</p>
Permit Costs	<ul style="list-style-type: none"> • Minor Project Categories - \$50. • General Permit Categories for minor activities - \$100. • Transfer of existing permit responsibility coverage and liability - \$250. • Minor revision to an existing permit - \$250. • Major Project Categories listed under Part 303 - \$2,000. <p>All projects not listed above - \$500.</p>	<ul style="list-style-type: none"> • Most General Permit authorizations - \$600 • General permits 16 (wildlife management), 25 (septic repair), and 17 on public land – No charge. • Multiple General Permit authorizations for one site - \$600 + \$240 per additional site. • General Permit authorization extension - \$240. • General Permit authorization modification - \$240. • Other major projects may incur higher fees. <p>In addition, property developers may be required to participate in New Jersey's mitigation program. In New Jersey, for every acre of wetlands disturbed, two acres of normal land must be converted into or protected as wetlands. Large "mitigation banks" exist to help developers comply.</p>	<ul style="list-style-type: none"> • Noncommercial activity - \$10. • Commercial or industrial activity - \$100. <p>The district engineer will make the final decision as to the amount of the fee and notify the applicant of the fee when the Corps issues the permit.</p> <p>No fees are charged for: transferring a permit from one property owner to another, Letters of Permission, activities authorized by a general permit, or permits to government agencies.</p>
Enforcement	<p>If a violation is confirmed, a violation notice is sent and the violator is offered the opportunity to correct the violation in a timely manner.</p> <p>If the recipient fails to comply, the MDEQ may escalate the enforcement action. This generally happens in cases where preceding administrative</p>	<p>Two regional enforcement offices handle reported violations. If a violation is confirmed, fines of up to \$10,000 per day per violation may be given in addition to civil and criminal penalties.</p> <p>If it is determined that restoring the area to its original state would cause even more harm to</p>	<p>If a violation is confirmed, a warning letter is usually sent to the violator if the work is already complete. If the work is ongoing, a cease and desist order is sent to the violator.</p> <p>To comply, the violator may choose to immediately remove fill material and restore the site. The case then may be closed,</p>

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	<p>actions have been unsuccessful. However, serious violations, previous compliance history, or the applicable Federal enforcement response policy for a delegated program also may result in escalation.</p> <p>Violations are typically resolved through after-the-fact permits, voluntary restoration, consent agreements, civil litigation, and criminal prosecution. From 2004-2006, in cases where enforcement action was pursued, approximately 30.0% of the cases were resolved with after-the-fact permits (many involving some level of restoration), and 54.0% by voluntary restoration.</p>	<p>the area, an after-the-fact permit may be issued, but only after the appropriate fines and penalties have been assessed against the violator.</p> <p>Otherwise, the violator may be required to restore the area to its original condition.</p>	<p>provided the violator did not commit a willful violation of the CWA.</p> <p>If immediate restoration cannot be obtained, the Corps determines whether the unauthorized activity may be authorized by an after-the-fact permit, or if the site must be restored. In approximately 10.0% of cases an after-the-fact permit is issued; more than 66.0% of cases are resolved by some form of restoration.</p>
Appeals Process	<p>If an application is denied, the applicant may appeal to the MDEQ Director requesting a contested case hearing pursuant to the State Administrative Procedures Act.</p> <p>Any person or organization with proper standing can appeal a permit action.</p>	<p>An applicant can appeal to the Commissioner of the New Jersey Department of Environmental Protection on an application decision. The case will be referred to the Office of Administrative law which will hold a hearing on the matter in the form of a contested case. After the hearing the judge may affirm, reject, or modify the original decision.</p>	<p>Only Letters of Permission, Individual Permits, and Jurisdictional Determinations can be appealed, and they must be appealed by the applicant. The division engineer must receive the appeal within 60 days.</p>
<p>* Michigan and USACE information is summarized from a side-by-side comparison by Tip of the Mitt Watershed Council. A full comparison of MDEQ and USACE is available at: http://www.watershedcouncil.org/protect/policy%20and%20advocacy/state-issues/state-issues/saving-michigans-wetlands-protection-program/files/State_Federal_Wetland_Program_Comparison.pdf</p>			

An inspection of the table above shows how unique Michigan's program is relative to the other two wetlands programs in the country. The permits are more expensive for businesses and individuals than they are under USACE jurisdiction. Shorter turnaround times and the convenience of applying for multiple permits at once, as the MDEQ program provides, are what Michigan's residents get for this extra cost. Additionally, 95.0% of Michigan's wetlands are protected by the 78 people directly and indirectly involved in the wetlands program. It is almost a certainty that this 95.0% figure would be reduced if the program passed back to the USACE to realize the \$2.1 million savings. Exactly how many acres of Michigan's wetlands would no longer be protected will be unknown until the transition was complete.