

**Proposed Repeal of Michigan's Wetland Program and  
Relinquishing Clean Water Act Section 404 Authority to Federal Agencies  
March 12, 2009**

**Proposed Action**

In her 2009 State of the State Address, Governor Granholm proposed relinquishing responsibility for administering the federal "wetlands program" back to the federal government. This proposal recognizes that the state is facing severe economic challenges and duplicative services should be eliminated wherever possible. The Governor is effectuating this proposal through the Michigan Department of Environmental Quality's (MDEQ) fiscal year (FY) 2010 budget by eliminating all funding for the wetlands program, saving the state just over two million dollars. The Governor is also recommending the repeal of Part 303, Wetlands Protection (Wetlands Act), of the Natural Resources and Environmental Protection Act, 1994 PA 451, as amended (NREPA).

The cost of Michigan's wetlands program is 4.0 million of which 2.1 million is appropriated from the state's general fund. The remainder of the money comes from a combination of permit fees and Michigan Department of Transportation program funds (\$1.5 million), and the federal government (\$.4 million).

The MDEQ's Environmental Advisory Council has determined that as the result of decreasing appropriations and loss of staff with an increasing workload, the MDEQ faces a significant structural imbalance between meeting its assigned legal responsibilities for protecting wetlands (and other sensitive natural features) and the funding it is afforded to meet those responsibilities.

The MDEQ previously sought legislative approval to increase the amount of money the program collects through fees for service so as to eliminate the program's structural funding shortfall. These proposals were not sufficiently supported by payers, interest groups, and legislators, and therefore, were not approved.

Given the severe general fund shortfall for FY 2010, the Governor's recommendation was made after a careful analysis showed that the program was not sustainable at its current funding levels and, based on prior efforts to secure increased permit fees, future support for fee increases appeared unlikely.

**Federal Implications**

Michigan's wetland statute, in combination with administrative rules implementing it, established a regulatory structure equivalent to the federal law. This provides the legal basis to assume responsibility for administering the federal program protecting the nation's wetlands under Section 404 of the Clean Water Act (CWA). The United States Environmental Protection Agency authorized Michigan to administer the CWA Section 404 Program in August 1984, except for the Great Lakes and connecting channels, where federal law requires the United States Army Corps of Engineers (USACE) to retain permitting authority.

Michigan and New Jersey are the only states that have assumed the authority to administer the Section 404 Program. The USACE administers the Section 404 Program including the issuance of permits in all other states.

While only two states have been authorized to administer the Section 404 Program, other states require state wetland permits for certain activities. Seven of the eight Great Lakes states administer state wetland protection programs. Both state and federal wetland permits are required in these states.

Because of recent court decisions, the jurisdictional scope of the federal wetland law is not clear and is decided on a case-by-case basis. However, it is clear that Michigan's law covers more wetlands than does federal law. For example, Michigan's law requires a permit for draining or filling a wetland not contiguous to a lake, river, or stream that is over five acres in size. Such an "isolated" wetland would only be covered under federal law if the USACE found that it had a "significant nexus" to traditional navigable waters.

One of the most significant differences between the federal and state programs is the time required for issuance of a permit. Michigan's law requires that permits be issued within 90 days of receipt of a completed application (or 150 days if a hearing is held). There is no mandatory time frame for the USACE to make a permit decision under federal law. The time needed for a USACE decision can be significantly extended if the USACE must first determine whether it has federal jurisdiction over the wetland in question.

### **History in Michigan**

The Goemaere-Anderson Wetland Protection Act—now Part 303, Wetlands Protection of the NREPA—was passed in 1979. Wetlands are a significant factor in the health and existence of other natural resources of the state, such as inland lakes, ground water, fisheries, wildlife, and the Great Lakes themselves. Michigan's wetland statute recognizes a host of benefits provided by wetlands including flood and storm control; providing unique habitat for many forms of wildlife, waterfowl, and rare, threatened, or endangered species; filtering pollution from our water resources; and controlling erosion. These benefits often play a vital role in recreation and tourism, and benefit the overall economy and quality of life in Michigan. MDEQ processes approximately 1500 wetland permit applications a year.

### **Impacts to Applicants**

#### Coordination with other state and federal laws

As a service to permit applicants, MDEQ considers compliance with other legal requirements, such as screening and coordination with the federal endangered species law, when considering a wetland permit application. As a result, the issuance of a state permit embodies these other legal requirements. Elimination of the state wetland program would require applicants for federal permits to ensure compliance with these other legal requirements.

### Inland Lakes and Streams Program

Return of the Section 404 Program will also impact permits for dredge and fill activities in inland lakes and streams, such as seawall construction, road crossings and culvert placement, and maintenance dredging. Relinquishing authority to issue Section 404 Program permits would mean that state-issued permits for activities in inland lakes and streams will no longer provide authorization under federal law. Therefore, any fill activity in an inland lake or stream will require separate state and federal permits. Approximately 3000 to 4000 permit applications annually fall into this category.

### Water Quality Certification

Section 401 of the Clean Water Act requires that any applicant for a federal permit obtain certification from a state agency that the activity will not result in a violation of state water quality standards. Relinquishing authority to issue Section 404 Program permits means that an applicant for the federal permits will need to obtain a state certification under Section 401. There is no apparent source of funding to support MDEQ processing of such requests.

### **Local Wetland Regulations**

Beyond describing state responsibilities to protect wetlands, Part 303 authorizes local units of government to adopt local ordinances for that purpose. Local governments will be able to regulate wetlands to the extent appropriate under general land use authorities if Part 303 is repealed. However, the provisions of Part 303 that standardize local wetland regulations would no longer apply.

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