The Past, Present, and Future of Wetlands Permitting in Michigan

By Sharon R. Newlon

We've come a long way from the days when swampland was viewed only as an environmental nuisance, a health risk, and something to be pawned off on an unsophisticated buyer. Do wetlands still pose challenges to property developers? Absolutely. But we now understand that wetlands are also a valuable resource, both as a benefit to the environment and as a commodity that can be developed and sold to support other economic development. Who should control this valuable resource? Under the Goemaere-Anderson Wetland Protection Act, Michigan became the first state given authority to administer

federal wetlands protection laws, and it remains one of only two authorized state programs.[1] However, recent revisions to Michigan's wetlands program passed in 2013 Public Act 98 (PA 98) have raised the question of whether Michigan should continue to be entrusted with stewardship over federal wetlands in the state.

Wetlands values

Protecting wetlands as a valuable resource was not a consideration in the early days of our country and state. Wetlands were viewed as contributors to malaria, cholera, and other waterborne and mosquito-transmitted diseases, as well as an impediment to property development. Over the years, however, we have come to a better understanding of the value of wetlands to our environment and communities. Wetlands provide habitat for fish, birds, and other wildlife; stabilize shorelines and provide floodwater storage; and reduce the impacts of urban runoff by filtering sediments, nutrients, and chemicals that would otherwise reach groundwater and surface waters that serve as the sources of our drinking and irrigation water. Wetlands have been called "the kidneys of the Great Lakes."[2] Wetlands also have a long history of use in agriculture, supporting subsistence crops like rice in the Far East and the cultivation of blueberries in Michigan. Aesthetically, wetlands contribute to the scenic shorelines of our state, which support our tourism industry. Nonetheless, continuing economic growth can still conflict with these valuable natural resources, requiring careful stewardship over programs designed to promote both.

The past—U.S. EPA delegation and challenges to Michigan and federal authority

Federal and Michigan wetlands authority

In the early days of the twentieth century, the federal government first began protecting wetlands in conjunction with bird conservation.[3] These early laws were designed to fund the purchase of wetlands as public wildlife preserves, not to curb the rights of private property owners.[4] The federal regulation of wetlands on private property arose from legislation designed to keep the nation's navigable waters open for navigation. In 1899, the Rivers and Harbors Act gave the U.S. Army Corps of Engineers (Corps) authority over projects involving dredging, filling, and construction within navigable waters of the United States.[5] In 1972, arguably in response to a June 22, 1969, fire on the Cuyahoga River reported in *Time* magazine, significant amendments to the Federal Water Pollution Control Act (later the Clean Water Act) gave the newly created U.S. Environmental Protection Agency (U.S. EPA) authority to regulate the deposit of fill material and other pollutants into the waters of the United States.[6]

Neither the U.S. EPA nor the Corps interpreted its authority to extend to wetlands until a 1975 case found that the Corps was interpreting its jurisdiction too narrowly given the Clean Water Act's broad definition of the term "navigable waters."[7] In response, the Corps issued regulations confirming jurisdiction over not only navigable waters, but also their tributaries and wetlands.[8] In 1977, the Clean Water Act was amended to confirm federal authority over discharges of dredge and fill material to adjacent wetlands and allow that authority to be delegated to states.[9] In 1979, Michigan enacted the Goemaere-Anderson Wetland Protection Act, which prohibited filling or dredging of wetlands without a permit,[10] and in 1984, the U.S. EPA officially delegated authority over federal wetlands permitting programs to Michigan.[11]

Challenges to the Michigan wetlands program

In February 1997, the Michigan Environmental Council and Lone Tree Council questioned Michigan's implementation of the federal wetlands program, asking the U.S. EPA to ensure its reform or withdraw Michigan's authority to implement it.[12] The U.S. EPA treated the request as a petition to withdraw Michigan's authority and began a review of the Michigan program as a whole.[13] In 2003, the U.S. EPA issued a preliminary report of its review, stating it would not formally withdraw Michigan's authority but would request corrective actions to the program.[14]

FAST FACTS

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Following public comment, further discussions with the Michigan Department of Environmental Quality (MDEQ), and additional analysis, the U.S. EPA issued a final report in May 2008 identifying 20 corrective actions and timetables for their completion.[15] Corrective actions requiring legislative changes included (1) limiting the farming exemption to established, ongoing farming concerns; (2) revising the drain maintenance exemption to exclude straightening, widening, and deepening of drains; (3) making the exemption for road maintenance consistent with federal regulations; (4) eliminating exemptions for agricultural drainage and tailing basins; and (5) limiting exemptions applicable to utility, gas, and oil lines.[16] The report gave the MDEQ up to 36 months to implement the necessary legislative changes.

In 2009, Governor Granholm proposed ceding wetlands permit authority back to the U.S. EPA as a cost-cutting measure.[17] However, Michigan environmental groups opposed the plan and it was never implemented.

Challenges to federal wetlands authority

While Michigan environmental groups were challenging the state's authority over federal wetlands, Michigan property owners were challenging the federal government's authority over the state's wetlands. In 2006, the United States Supreme Court heard a consolidated appeal of two Michigan wetlands cases, *Rapanos v United States*[18] and *Carabell v United States Army Corps of Engineers*.[19] Rapanos was accused of illegally filling wetlands located miles away from any navigable water. Carabell appealed the denial of a Corps permit to fill hydraulically isolated wetlands in support of a condominium project.[20] In both cases, the appellants argued that federal jurisdiction did not extend to the wetlands on their properties because those wetlands were not adjacent to navigable waters. The United States Supreme Court's decision was split. In a plurality opinion written by Justice Scalia, four justices voted to reverse and remand both cases, stating that wetlands should be regulated only if there was a continuous surface connection between the wetlands and a relatively permanent water body connected to navigable waters. In a dissenting opinion written by Justice Stevens, four justices would have affirmed the underlying decisions. Justice Kennedy concurred with the result of the plurality opinion but not with its rationale; instead, he advocated a case-by-case determination of whether the wetland had a significant nexus to navigable waters, meaning it could significantly affect the chemical, physical, and biological integrity of other covered waters. Because no opinion received a majority, there remains a question as to whether the plurality's rationale, Justice Kennedy's rationale, or both should be considered as the resulting law of the case.

Since *Rapanos* and *Carabell*, the federal agencies have struggled to establish guidelines for determining which wetlands are adjacent to waters of the United States. The U.S. EPA commissioned a study by the Science Advisory Board, which was released in draft form in 2013 and titled *Connectivity of Streams and Wetlands to Downstream Waters*. Based in part on this study, the U.S. EPA and the Corps published a proposed rule further defining "[w]aters of the U.S."[21] In the meantime, the Michigan legislature sought to clarify what constitutes regulated wetlands in the recent amendments of PA 98.

The present—revisions to Michigan's wetlands program

Several competing interests contributed to the adoption of PA 98. Legislative revisions were required to comply with the U.S. EPA's final report on Michigan's wetlands program. A Wetland Advisory Council created in 2009 to evaluate Michigan's wetlands program had recommended improvements to the program.[22] The legislature wanted to respond to changes in federal wetlands regulation, including national permits and the *Rapanos* and *Carabell* decisions, and support economic and agricultural development in Michigan.

On July 2, 2013, PA 98 was signed into law. PA 98 corrects issues identified in the U.S. EPA's 2008 final report, clarifying the extent of drain, road, and utility line maintenance exemptions; limiting the exemption for installation of utility lines; and eliminating the exemption for tailing basins.[23] PA 98 responds to council recommendations by increasing the minor permit fee and promoting wetland mitigation banks. PA 98 addresses changes in federal regulation, including development of new general and minor permit categories consistent with nationwide permits and establishing when a wetland would be considered "not contiguous" to waters of the United States or inland lakes and streams. Under PA 98, a wetland is not contiguous if the MDEQ

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determines there is no direct physical contact and no surface water or interflowing groundwater connection between the wetlands and a jurisdictional body of water. PA 98 also establishes a general permit for blueberry farming in wetlands.

PA 98 expands certain permitting exemptions including those for projects associated with grazing livestock; wetlands incidentally created by sand, gravel, and mineral mining operations; and placement of biological residues from wetland activities such as in-place tree stump grinding. In lieu of exemptions, general permits are to be established for common drain activities such as culvert extensions, drain realignments, bank stabilization, and spoil placement. PA 98 requires the MDEQ to make wetland mitigation rules more flexible and allows the MDEQ to accept conservation easements as mitigation and establish a stewardship fund as an alternative to financial assurances. Finally, PA 98 ominously states that Michigan's wetlands program will be automatically repealed 160 days after publication of a decision by the U.S. EPA to withdraw approval of the state program.

The future—The U.S. EPA's formal review and potential termination

U.S. EPA public hearing and comment period on PA 98

Though widely supported by business and agricultural interests, PA 98 was opposed by environmental interest groups.[24] Substantial changes to state programs authorized under Section 404 of the Clean Water Act are not effective until approved by the U.S. EPA.[25] On October 23, 2013, the U.S. EPA issued a notice of public hearing on Michigan's proposed program revisions, to be held on December 11, 2013, with a request for comments by December 18, 2013.[26] At an informational meeting before the public hearing, the U.S. EPA said it was particularly interested in public input on two questions: (1) Do the changes in PA 98 address the concerns raised in the U.S. EPA's program review? and (2) Are other proposed changes introduced by PA 98 consistent with the Clean Water Act and federal regulations? The U.S. EPA would likely approve or disapprove of specific proposed revisions, and only approved revisions would become part of Michigan's authorized program. The U.S. EPA did not provide a timeline for completion of its review.

The U.S. EPA's website indicates that it received 100 written comments on the proposed revisions to Michigan's program. The majority of the written comments supported the revisions, and politically, the comments fell generally along the same lines as support and opposition of PA 98. Supportive comments noted how PA 98 responded to the U.S. EPA's program review. Negative comments raised concerns over the definition of "contiguous," changes to mitigation requirements, and concerns that reduction of wetlands could increase flooding. One comment suggested the U.S. EPA postpone its evaluation until it acts on its own proposed rule for the definition of "waters of the United States."

The future of wetlands regulation in Michigan

Although environmental groups have largely criticized PA 98, it is unlikely they will seek formal withdrawal of state program approval. Studies of Michigan's wetlands program by environmental groups have generally advocated continuing the program. A 2009 study by the National Wildlife Federation noted that Michigan's program is significantly broader than the federal program and may protect more than 900,000 acres (about 17 percent) of Michigan's wetlands that might not receive federal protection.[27] The study also noted Michigan approved only about half of the wetland acreage impacts sought in permit applications.[28] The study concluded, "while we believe there are shortcomings in the current Michigan wetlands program…returning the program to federal administration under Section 404 would neither result in a stronger, more

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comprehensive program, nor likely result in any substantial cost savings overall."[29]

In the meantime, the benefits of Michigan's stewardship over wetlands are evident throughout the state. Larger wetland mitigation banks are now a preferred mitigation technology, and the MDEQ's website currently lists 14 approved banks in its registry, not including the Ganzhorn transportation mitigation bank in the Upper Peninsula and others in development such as the Parmenter Marsh in the Shiawassee River watershed. In support of the expansion of Detroit Metro Airport, Wayne County established the Crosswinds Marsh, a mitigation bank that is one of the largest man-made wetlands in the country. Wayne County Parks manages this property of more than 1,000 acres as a welcoming public park and wildlife refuge.

Based on the U.S. EPA's description of the PA 98 approval process, it is unlikely the U.S. EPA will withdraw Michigan's authority over wetlands permitting. Therefore, we can expect Michigan will continue to implement both state and federal wetlands programs and that various agency and stakeholder efforts to improve them will go on. ■

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ENDNOTES

1. See 40 CFR § 233, Subpart H.
2. See Reyer, Wolf & Murray, *Protecting and Restoring the Kidneys of the Great Lakes: An Assessment of Wetlands Programs in Michigan, Minnesota, Ohio and Wisconsin* (July 2009), available at <http://online.nwf.org/site/DocServer/Wetlands_Report_July_2009.pdf?docID=10661>. All websites cited in this article were accessed May 20, 2014.
3. In 1903, President Theodore Roosevelt issued an executive order to establish Pelican Island, Florida as the first national bird reservation.
4. See, e.g., 16 USC 715.
5. 33 USC 403.
6. 33 USC 1251.
7. See *Natural Resources Defense Council, Inc v Callaway*, 392 F Supp 685 (D DC, 1975).
8. See 40 FR 31320. In 1977, in response to comments, the Corps revised its definition of wetlands. 42 FR 37128.
9. 33 USC 1344(g)(1).
10. See 1979 PA 203, which was repealed and is now Part 303 of the Natural Resources and Environmental Protection Act (NREPA), 1994 PA 451.
11. See 40 CFR 233.70 and notice of program approval, 49 FR 38948. The approval also references Michigan's Inland Lakes and Streams Act, now Part 301 of NREPA, as part of the delegated program. The Corps retained permitting authority over dredge and fill projects associated with the Great Lakes, their connecting channels, and the adjacent wetlands. The U.S. EPA retained review authority for projects involving large amounts of fill or impacting critical environmental areas including wetland/water projects involving more than 10,000 cubic yards of fill, projects affecting designated fish and wildlife sanctuaries, and projects impacting waters of other states. For projects over which the Corps and U.S. EPA retained authority, the state and federal authorities have joint jurisdiction.
12. See EPA, *Final Report Results of the U.S. Environmental Protection Agency Region 5 Review of the Michigan Department of Environmental Quality's Section 404 Program* (May 2008), p 1 ("Final Report"), available at <http://www.oregon.gov/dsl/PERMITS/docs/404_michigan_program_eval_051308.pdf>.
13. *Id.*
14. 68 FR 772; see also *EPA, Results of the U.S. Environmental Protection Agency Region 5 Review of the Michigan Department of Environmental Quality's Section 404 Program* (November 2002) ("Preliminary Report"), available at <http://www.epa.gov/r5water/wshednps/pdf/mi_404_program_review.pdf>.
15. Final Report, n 12 *supra* at 3.
16. *Id.* at 108–111.
17. In March 2009, the MDEQ submitted a letter to the U.S. EPA providing notice of the potential transfer of the wetlands permitting program back to the U.S. Letter to Lisa Jackson, U.S. EPA administrator, from Steven Chester, MDEQ director (March 31, 2009).
18. *Rapanos v US*, 547 US 715; 126 S Ct 2208; 165 L Ed 2d 159 (2006).
19. *Carabell v US Army Corps of Engineers*, 391 F3d 704 (CA 6, 2004).
20. A state permit for the Carabell development had been issued following a contested case hearing. *In re Carabell*, MDEQ Final Determination and Order (September 30, 1999).
21. See U.S. EPA, *Clean Water Act definition of "Waters of the U.S."* <http://water.epa.gov/lawsregs/guidance/wetlands/CWAwaters.cfm> and 79 FR 22188. The public comment period on the proposed rule is open until July 21, 2014.
22. See 2009 PA 120 and Final Report, Wetland Advisory Council (August 15, 2012).
23. See generally 2013 PA 98; see also Senate Legislative Analysis, SB 163, June 12, 2013.
24. See Legislative Analysis, n 23 *supra* at 11–13.
25. 40 CFR § 233.16.
26. 78 FR 63185.
27. Reyer, n 2 *supra* at 22.
28. *Id.* at 28. It is not clear how PA 98's definition of "not contiguous" may affect these estimates.
29. *Id.* at 36.