

Michigan Retains Delegated Wetland Authority

The United States Environmental Protection Agency (EPA) has completed a review of the federal Clean Water Act (CWA) wetlands permit program implemented by the Michigan Department of Environmental Quality (MDEQ). Although EPA identified several improvements that should be made to the way MDEQ implements the federal wetlands program, EPA has preliminarily determined that Michigan should retain the wetland authority that EPA delegated to the state in 1984.

When EPA approved Michigan's request for a delegation of federal wetlands permit authority on October 16, 1984, Michigan was the first state to receive such a delegation. Since that time, only one other state (New Jersey) has received a similar delegation of wetland authority.

EPA's review of Michigan's wetland regulatory program was prompted by several factors, including: (a) there have been a number of changes to the relevant federal and state wetland statutes and regulations since 1984; (b) a substantial body of judicial and administrative decisions concerning wetland permitting in Michigan had developed since 1984; and (c) a number of comments and complaints about Michigan's administration of the wetland program had been received by EPA.

EPA's review encompassed all aspects of Michigan's wetland program, including permit processing, permit decisions, enforcement efforts and the adequacy of MDEQ's legal authorities to implement the wetlands program. EPA's review included requesting Michigan to submit an updated wetland program description, a statement from Michigan's Attorney General confirming that state laws and regulations provide adequate authority to implement the wetlands program,

and a compilation of all current, relevant Michigan laws and regulations. The requested information was submitted by MDEQ in June 1999.

EPA also reviewed hundreds of wetland permitting files, enforcement files and citizen complaint files that MDEQ generated between 1995 and 1999, including visits to all thirteen MDEQ district offices and the main MDEQ office in Lansing. EPA also reviewed most of MDEQ's written decisions in administrative hearings regarding wetland permits between 1994 and 1999 and interviewed numerous MDEQ employees in various MDEQ offices. In addition, EPA consulted with the United States Fish and Wildlife Service (USFWS) and the United States Army Corps of Engineers regarding Michigan's wetlands program and held four public comment sessions during 1999 to receive comments from interested members of the public.

As a result of this review, EPA has preliminary determined that MDEQ's implementation of, and authority to implement, the federal wetlands program have certain deficiencies but that these deficiencies do not warrant withdrawal of federal wetlands authority from Michigan at this time because Michigan's laws and regulations are, for the most part, consistent with the CWA. EPA has stated, however, that if adequate corrective actions are not taken by the State of Michigan in a "timely manner," EPA will reconsider whether to commence proceedings to formally withdraw wetlands authority from Michigan.

The first area of concern with Michigan's wetlands authority identified by EPA is that MDEQ has no jurisdiction over non-contiguous wetlands that are ecologically significant or large unless MDEQ determines that the wetland has essential natural resource value. While acknowledging that the extent of CWA jurisdiction over such isolated wetlands has been limited by a recent United States Supreme Court decision [see "Supreme Court Says States Must Regulate Filling of Isolated Ponds," *Michigan Environmental Compliance Update*, March, 2001,

and “EPA and COE Issue Guidance on Isolated Wetlands Authority and Request Comments,” *Michigan Environmental Compliance Update*, March, 2003], EPA contends that the precise limitation on CWA jurisdiction remains unclear. EPA is concerned that Michigan’s authority over isolated wetlands may be narrower than federal CWA jurisdiction. EPA indicated, however, that this concern may be alleviated by the fact that MDEQ has proposed to complete a statewide wetland inventory, which will allow MDEQ to assert jurisdiction over all wetlands larger than five acres.

A second area of concern identified by EPA relates to the range of activities that Michigan law allows in a wetland without requiring a permit. In particular, EPA objects to exemptions for certain agricultural activities, drain creation and improvement activities and iron and copper mining tailings basins. EPA stated that MDEQ has agreed to seek statutory and regulatory amendments to address these issues.

EPA also identified several concerns with MDEQ’s wetland permitting authority. EPA is concerned that MDEQ may not have clear authority to require all permit conditions that are required under federal law and may not have clear authority to revoke and modify issued permits in all the situations provided for by federal law. EPA stated that MDEQ has agreed to promulgate administrative rules to address these concerns. EPA was also concerned that Michigan law does not provide for guidelines for analyzing whether feasible and prudent alternatives to a proposed wetland project exist, whether the proposed project is water dependent, whether federally threatened or endangered species or habitat would be jeopardized by a proposed project and a prohibition on projects that will result in significant degradation of waters of the United States. EPA noted that MDEQ has recently promulgated regulations that address

many of these concerns and has agreed to promulgate additional rules to address the remaining issues.

EPA also found that MDEQ's decisions in administrative hearings on wetland permits have frequently failed to interpret and apply Michigan law in a manner that is consistent with the federal requirements for administering a CWA wetland permit program. Therefore, EPA has concluded that changes must be made to some Michigan statutory provisions and administrative rules to make them more clearly consistent with federal requirements. EPA stated that Michigan has proposed what appear to be effective corrective actions to resolve these concerns, some of which have already been implemented by MDEQ and others that are proposed for future action.

Regarding MDEQ's administration of the CWA wetland permit program, EPA found that, in general, MDEQ "is doing a good job" and operating the program in a manner that is consistent with EPA regulations. EPA did, however, identify a few problems with MDEQ's administration of the wetland permit program. One problem identified was the need for EPA, MDEQ and the USFWS to develop a procedure to coordinate their activities when a potential project may have some effect on a federally threatened or endangered species or critical habitat.

EPA also identified the need for MDEQ to modify its public notice procedures to make them consistent with federal rules. EPA found that MDEQ's procedures were not adequate to ensure that interested members of the public would always have sufficient opportunity to submit comments on proposed permits. EPA noted that MDEQ has partially responded to this concern by implementing an Internet-based public notice system that makes all public notices available on the MDEQ website. EPA will discuss with MDEQ additional measures that need to be taken to address this concern.

In its review of MDEQ's enforcement of wetlands regulations, EPA noted that an average of 800 citizen complaints regarding wetlands are investigated each year and that the MDEQ district offices make "a concerted effort" to address public complaints. EPA concluded that MDEQ has maintained a satisfactory wetland enforcement program designed to identify violations and initiate enforcement actions in a timely manner. EPA found that, overall, MDEQ's enforcement program achieves appropriate injunctive relief through wetlands restoration and wetlands mitigation and obtains adequate penalties for violations.

Although there is no legal requirement for EPA to accept public comment regarding its review of MDEQ's delegated CWA wetland program, EPA accepted public comments on its review for a period of sixty days, ending on March 10, 2003. 68 Fed. Reg. 772 (January 7, 2003).

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