



June 5, 2013

Michigan House of Representatives
Lansing, Michigan

Re: SB 163 – Wetland Protection Program Amendments

Dear Representatives:

As you heard from virtually all the stakeholders, maintaining Michigan's assumption of wetland regulation under Section 404 of the Clean Water Act is in the best interest of economic development within the state and protection of these vital resources. The primary purpose of proposed legislation was to correct deficiencies in our program that could result in the program going back to the Environmental Protection Agency (EPA).

The EPA has reviewed the proposed legislation, and although they note SB 163 addresses a number of their concerns, it introduces new problems that places Michigan in the same position of potentially losing the program back to the federal government. A copy of their analysis of SB 163 is attached.

The primary focus of this legislation should be to resolve issue identified in the EPA audit of our program and ensure continued implementation at the state level.

If SB 163, as passed by the Senate, is enacted into law, the environmental community will repetition the EPA to revoke Michigan's authority to implement the program.

Sincerely,

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Elston, Sue

From: Swenson, Peter
Sent: Friday, May 31, 2013 3:00 PM
To: Evans, David; McDavit, Michael W.; Hurd, Kathy; Elston, Sue; Melgin, Wendy; Srinivasan, Gautam; Pallesen, Reginald; Morgan, James; Moulta-Ali, Abu; Katz, Melissa; Bowles, Jack; Borum, Denis; Kaiser, Sven-Erik; Pendergast, Jim; Hyde, Tinka; Henry, Timothy; Haveman, Melanie
Subject: FW: ACTION: Michigan 404
Attachments: MI 404 legislation comments 5-31-13.docx

I am forwarding today's message from Tinka Hyde to MDEQ regarding EPA's comments on the draft legislation.

Once again, thanks to everyone for all of your efforts to review and comment on this.

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From: Tinka Hyde [<mailto:tinka.hyde@gmail.com>]
Sent: Friday, May 31, 2013 2:47 PM
To: fishk@michigan.gov; crealw@michigan.gov
Cc: Swenson, Peter; Henry, Timothy
Subject: Fwd: ACTION: Michigan 404

Bill:

At your request we have completed a review of draft legislation intended to correct deficiencies identified in EPA's program review of MDEQ's Clean Water Act Section 404 program. I am enclosing EPA's comments on the draft legislation.

EPA notes that the draft legislation would correct a number of deficiencies present in the current legislation, including making the scope of farming exemption and the drain maintenance exemption consistent with federal program, and eliminating an exemption for iron and copper mining tailings basins. However, the draft legislation also introduces new inconsistencies with Federal law, regulation, guidance or case law. The enclosed comments focus on identifying such inconsistencies, as well as other provisions which are unclear to EPA.

EPA would be happy to answer any questions you might have on these comments. Thank you for the opportunity to review the draft legislation.

Tinka G. Hyde, Director

Water Division

Enclosure

cc: Kim Fish, MDEQ

EPA comments on Senate Bill No. 163
May 31, 2013

1. Exemptions from 404 permitting:

Sec. 30103(1)

- 30103(1)(d), page 7: Maintenance of agricultural drains. The Bill would exempt maintenance of agricultural drains to restore the design/function as of July 1, 2014. This appears to allow work to expand the capacity of a drainage ditch beyond original contours without a permit until July 1, 2014. The result would be that until July 1, 2014, the language would be inconsistent with the CWA and federal implementing regulations.
- 30103(1)(g) Maintenance of drains, page 7-8: The Bill would exempt maintenance of drains to restore the design/function as of July 1, 2014. This appears to allow work to expand the capacity of a drainage ditch beyond original contours without a permit until July 1, 2014. The result would be that until July 1, 2014, the language would be inconsistent with the CWA and federal implementing regulations.
- 30103(1)(g)(vii), page 8: The exemption for extension of culverts is not consistent with CWA.
- 30103(1)(m), page 9: Controlled access of livestock. EPA seeks clarification of what is being proposed. Construction of crossings involving discharge of fill can only be exempted from 404 for ongoing farming, ranching and silviculture operations.

Sec. 30305

- 30305(2)(h)(i), page 20: The Bill would exempt maintenance of agricultural drains to restore the design/function as of July 1, 2014. This appears to allow work to expand the capacity of a drainage ditch beyond original contours without a permit until July 1, 2014. The result would be that until July 1, 2014, the language would be inconsistent with the CWA and federal implementing regulations.
- 30305(2)(i), page 20: The exemption for drain maintenance does not clarify that sidestepping of the spoil material into areas that are jurisdictional wetlands or other jurisdictional waters requires a permit.
- 30305(2)(l), page 22: The exemption for maintenance or repair of utility lines, where this involves discharges to waters of the U.S., would not be consistent with CWA.
- 30305(2)(m), page 22-23: The exemption for installation of utility lines, where this involves discharges to waters of the U.S., would not be consistent with CWA.
- 30305(2)(o), page 23: The exemption for the placement of biological residues in a wetland (or any Water of the US) is inconsistent with the CWA. Biological materials are

explicitly listed in the statutory definition of “pollutant,” and a variety of seminal court cases discusses the “discharge” of woody wetland vegetation into a jurisdictional wetland in the course of landclearing as a 404-regulated discharge. (See for example *Avoyelles Sportsmen’s League v. Marsh*).

- 30305(4)(a) Excavation, page 14: The second condition (at 30305(4)(a)(ii)) which must be met before a water is considered jurisdictional could lead to situations in which waters protected under CWA Section 404 would not be protected under this part, thereby making this inconsistent with the CWA.
- 30305(4)(f), page 24-25: The exemption for agricultural soil and water conservation practices designed, constructed, and maintained for water quality enhancement is not consistent with the CWA, which has no such exemption unless these are conducted in uplands.
- 30305(5), page 25: Contiguous waters as a result of excavation. The second condition (at 30305(5)(a)(ii)) which must be met before a water is considered jurisdictional could lead to situations in which waters protected under CWA Section 404 would not be protected under this part, thereby making this inconsistent with the CWA.
- 30305(6)(c), page 25: The exemption for the placement of biological residues in a wetland (or any Water of the US) is inconsistent with the CWA. Biological materials are explicitly listed in the statutory definition of “pollutant,” and a variety of seminal court cases discusses the “discharge” of woody wetland vegetation into a jurisdictional wetland in the course of landclearing as a 404-regulated discharge. (See for example *Avoyelles Sportsmen’s League v. Marsh*).

II. Other Provisions

- Section 30311d(6), Page 36, Line 5: Mitigation credit cannot be generated by placing an easement over the impacted area. This provision is inconsistent with the federal mitigation rule.
- Section 30311d(6), Page 36, Line 8: Paying into a fund as a substitute for providing financial assurances is inconsistent with the federal mitigation rule. This does not guarantee the performance of mitigation on the impacted site.
- Section 30311d(7), Page 36: It appears that Michigan is proposing an In-lieu Fee (ILF) mitigation program as a compensation option for some permit applicants. If so, Michigan may wish to modify Sec. 30311d. (1) to include ILF as a mitigation option (along with mitigation banks (a) and traditional permittee-responsible mitigation (b)-(d)).
- Section 30311d(7), Page 36: If Michigan establishes an ILF program, it will need to develop a set of administrative rules for the program consistent with the federal rules governing ILF programs at 40 CFR 230 Subpart J.

- Section 30311d(8), Page 36, Line 27: Any compensatory mitigation rules developed by Michigan will need to be consistent with the federal rules governing compensatory mitigation at 40 CFR 230 Subpart J.
- Sec. 30311d(8)(e), Page 37, line 8: This provision is inconsistent with the federal rules governing compensatory mitigation. Under federal rules, compensation can be provided by three mechanisms: permittee-responsible mitigation, mitigation banks, or ILF mitigation programs. This provision would allow permittee-responsible mitigation to be treated like banks (i.e., generate banked credits) while side-stepping the bank review and approval process.
- 30312(6) and 30312(7), page 39-40: EPA will review any general permits for consistency with federal regulations.
- 30321(5) on page 43: “Contiguous” is used in Michigan’s statutory definition of “wetland” at 30301(m), and is defined by Rule 281.921(1)(b). “Contiguous” is also used in the definition of “adjacent” in the CWA 404(b)(1) Guidelines at 40 C.F.R. § 230.3(b). “Adjacent” is a key term governing the geographic scope of the CWA. Under its assumed 404 program, Michigan must regulate all waters adjacent to inland lakes, ponds, rivers, and streams. The proposed definition of “not contiguous” in 30321(5) of the Bill narrows the State’s current broad definition of “contiguous” and is inconsistent with federal regulation, guidance and case law because it could be interpreted to exclude adjacent waters and wetlands required to be protected under the federal 404 program.
- 30321(6), page 43-44: This provision is inconsistent with federal regulation, guidance and case law. Agricultural drains must be considered in determining connection to waters of the U.S.

