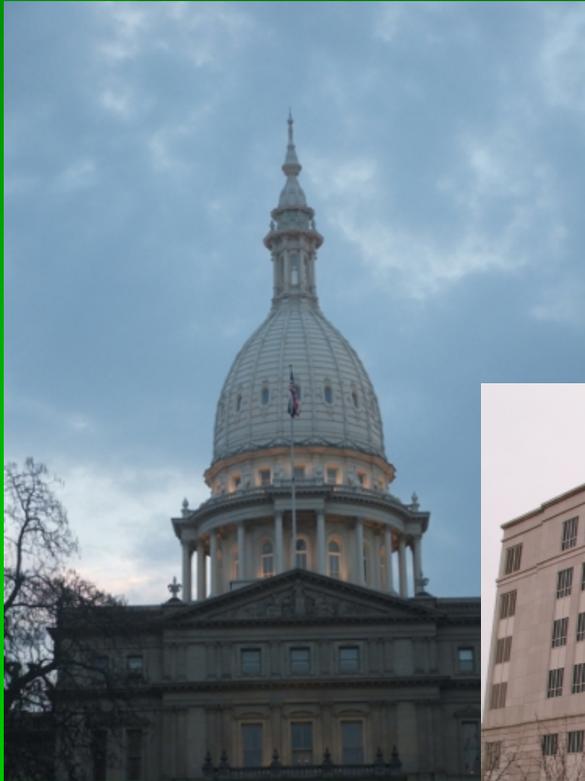


USE OF GUIDANCE DOCUMENTS IN THE ADMINISTRATIVE PROCESS

Separation Of Powers



Constitutional Foundation

- Checks and Balances
- Role of Branches
- Enabling Statute
- Goals, Limits, Funding

Implied Powers Doctrine

- Linked to the Necessary and Proper Clause, US Constitution
- Analogue in state constitutions
- The use of implied powers



Power Vested in the DEQ

- The legislature relies on both enumerated and implied powers to create the DEQ
- The DEQ also relies on those enumerated and implied powers
 - Development of Guidance Docs
 - Self Governance

Constitutional Questions?

- Who can interpret the Constitution?
- What check exists for the DEQ?
- Public concern with executive power



Due Process and Guidance Docs

- Sometimes, DEQ's interpretation is reviewed by an administrative law judge
 - Appeal-able to the circuit court (a hybrid system)
- Other times, controversy goes directly to Circuit Court
- Citizenry can lobby elected officials (or elect new ones) to change the powers of the DEQ or how they are exercised

Pros and Cons of System As It Is

- Advantages:
 - Allows for flexibility
 - More efficient
 - Insulated from Affected Interests
- Cons
 - Less public review
 - Less transparency
 - Insulated from Affected Interests (BUT due process!)
 - Informal (DEQ voluntarily involves)
 - Formal (Legislature, Judiciary)

Takeaway

- DEQ uses Legislative Enactments and Implied Powers
- Legislature and Judiciary are avenues for public to check those powers
- Current system has benefits of efficiency and objectivity, but not much transparency

Generally...What the DEQ Does in Making a Permit Decision

Operational Memos

- What is an Operational Memo, Guidance Document, Guidance Memo, etc?
- What is the Purpose of the documents?
- Who benefits from their use?

Parts of the Administrative Permitting Process

- Authorization/Regulation
 - Applicants are approved or denied for a permitted activity
- Compliance
 - Monitoring of permitted activities
- Enforcement
 - Investigation and mitigation of illegal actions

Walking through the process...

- Legislature drafts and ratifies NREPA, Public Act 451 of 1994
 - MCL 324.3109 (Part 31) – Discharges into state waters
- Promulgation of Rules
 - R323.2222 – Discharge Standards...what is injurious
- Development of Operational Memos
 - Guidesheet V – standards for non-enumerated substances

Part 31 Continued...

- Grants the DEQ the duty of protecting, conserving, and controlling the pollution of the waters of Michigan and the Great Lakes
- Legislation → Promulgation of Rules (if necessary) → Operational Memo

Section 3109

- Restricts discharges into State waters
- Prohibits discharges of substances *injurious* to any of the following:
 - Public health, safety, or welfare
 - Domestic, commercial, industrial, agricultural, recreational, or other uses that are being made or may be made of such waters
 - The value or utility of riparian lands
 - Livestock, wild animals, birds, fish, aquatic life, or plants or to their growth or propagation
 - The value of fish and game
- Does not define injurious

Promulgation of Rules

- Part 22 Rules
 - Authority under NREPA – Part 31
 - In accordance with the APA
 - Defines “Injurious”
 - Provides discharge standards and describes process to develop standards for non-enumerated substances
 - Guidesheet V provides further guidance for those substances not listed within the rule

Other Substances

- Those substances not listed within the rule fall within an “other substances category”
- Whether discharge allowed depends on characteristics
 - Organic/inorganic
 - Site characteristics
 - Injurious/non-injurious
 - Existence of criteria - to use in permitting limits

Guidesheet V

- Helps in the determination of standards for “unknown” substances
- Allows for discharges to occur for unlisted substances, while still assuring that environmental safety will be maintained
 - “If there is not toxicity information available on a substance by which to base a standard, the substance shall not be discharged...”

Other Operational Memos

- Compliance and Enforcement Op Memos
 - Coordination at the district level
 - Claim splitting and issues with compulsory joinder of claims
 - #04-003 Appendix 9F of DEQ Policies and Procedures
- Environmental Areas Compliance and Enforcement
 - Determining whether local, state, or federal agencies should lead prosecution efforts
 - LWMD Guidance Memo 323-97-01

Administrative Procedures Act & the DEQ



Administrative Agencies

- Generally, Administrative Agencies are created to fulfill a function of governance
- Four goals of Administrative Agencies are:
 - 1) Fairness
 - 2) Accuracy
 - 3) Efficiency
 - 4) Acceptability

Constitutional Aspect

- These Administrative Agencies must act within Constitutional parameters by providing due process to those affected by the Agencies' decisions and rules
- These Constitutional parameters have been codified into the Administrative Procedures Act (APA)
- The APA provides a framework that governs hearings, the formulation of rules, and the issuance of permits

Administrative Procedures Act of 1969

Language From The APA:

- AN ACT to provide for the effect, processing, *promulgation*, and *inspection* of state agency rules, determinations, and other matters;
- To provide for state agency administrative procedures and contested cases and appeals from contested cases in licensing and other matters

Administrative Rules Process in a Nutshell

- The basic purposes of the APA are:
 - 1) To govern the issuance of permits and licenses and to provide for public participation in the rulemaking process
 - 2) To govern hearings regarding the issuance of such permits or licenses and;
 - 3) To govern rules promulgated by the Administrative Agencies

Due Process Concerns

- Guaranteed to every individual in the 14th Amendment to the Constitution
- Fairness
 - an individual's right to notice
 - right to participate in the administrative process
 - the right to contest any decisions or rules made

Due Process Concerns

- What Process is “Due” an individual?
- The amount of process due will vary with the nature of the interest that is being affected
- What is a Rule?
 - an Agency regulation that has the force of law
- A Guidance Document is not a rule

Use of Guidance Documents

- Guidance Documents govern the implementation of duties of the DEQ division to which they apply in order to ensure the division's compliance and attention to certain protocols
- A Guidance Document may have a substantial effect upon the rights of a class of people, but that doesn't necessarily mean that the Guidance Document requires promulgation as a rule

What is the Effect of a Rule?

- A rule “binds” *outside* parties
- Guidance Documents bind parties *inside* the agency
- If a person is individually subject to agency action, they are afforded the highest degree of due process

Why Use Guidance Documents?

- Guidance Documents tie back into the idea of Separation of Powers
- They are a way to ensure that agencies like the DEQ are staying within certain parameters when taking action
- There are informal protections against the inappropriate use of Guidance Documents that correspond to the pros and cons