

	WATER RESOURCES DIVISION POLICY AND PROCEDURE		DEPARTMENT OF ENVIRONMENTAL QUALITY
Original Effective Date: August 8, 2000	Subject: Part 31 - Compensating Cut for Fill in Floodplains		Category: <input type="checkbox"/> Internal/Administrative <input type="checkbox"/> External/Non-Interpretive <input checked="" type="checkbox"/> External/Interpretive
Revised Date:	Program Name: Water Resources Program		Type: <input checked="" type="checkbox"/> Policy <input type="checkbox"/> Procedure <input type="checkbox"/> Policy and Procedure
Reformatted Date: March 24, 2014	Number: WRD-031	Page: 1 of 4	

A Department of Environmental Quality (DEQ) Policy and Procedure cannot establish regulatory requirements for parties outside of the DEQ. This document provides direction to DEQ staff regarding the implementation of rules and laws administered by the DEQ. It is merely explanatory; does not affect the rights of, or procedures and practices available to, the public; and does not have the force and effect of law.

Note: This policy and procedure was previously division guidance memo No. 31-00-01.

ISSUE:

The Water Resources Division's (WRD) floodplain engineering field staff issue permits to place fill in regulated floodplains. The permitted activities may result in the loss of floodplain storage and long-term impacts to downstream areas if compensating cut is not required.

AUTHORITY:

The Floodplain Regulatory Authority found in Part 31, Water Resources Protection, of the Natural Resources and Environmental Protection Act, 1994 PA 451, as amended, provides the authority to require compensating cut for fill placed in floodplain areas.

DISCUSSION:

1. The attached Attorney General's opinion, dated January 8, 1976, indicates that the WRD has the authority to require permits for the occupation (residential, commercial or industrial), filling, or grading of any portion of the floodplain, not just the floodway.
2. Section 3104(1) of Part 31 designates the DEQ as *"the state agency to cooperate and negotiate with other governments, governmental units, and governmental agencies in matters concerning the water resources of the state, **including, but not limited to, flood control** . . . The department shall have control over the alterations of natural or present watercourses of all rivers and streams in the state to assure that the channels and the portions of the floodplains that are the floodways are not inhabited and are kept free and clear or interference or obstruction that will cause any undo restriction of the capacity of the floodway."* (emphasis added)
3. Section 3107 of Part 31 states that, *"the department may promulgate rules and issue orders for the prevention of harmful interference with the discharge and stage characteristics of streams. The department may ascertain and determine for record and in making its order the location and extent of floodplains, stream beds, and channels and the discharge and stage characteristics of streams at various times and circumstances."*

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"Harmful interference" is defined in R 323.1311(g) as *"causing an increased stage or change in direction of flow of a river or stream that causes, or is likely to cause, any of the following: i) Damage to property, ii) A threat to life, iii) A threat to personal injury, iv) Pollution, impairment, or destruction of water or other natural resources."*

Hydrologic analysis of the watersheds that have been studied documents the cumulative impacts on a stream's stage and discharge characteristics when floodplain storage is lost. The cumulative loss of floodplain storage will ultimately increase flood discharges and thus cause an increase in flood stages.

4. Section 3108(1) of Part 31 states that *"a person shall not occupy or permit the occupation of land for residential, commercial, or industrial purposes or fill or grade or permit the filling or grading for a purpose other than agriculture of land in a floodplain, stream bed, or channel of a stream, as ascertained and determined for the record by the department, or undertake or engage in an activity on or with respect to land that is determined by the department to interfere harmfully with the discharge or stage characteristics of a stream, unless the occupation, filling, grading, or other activity is permitted under this part."* (emphasis added)

R 323.1315(3) states that, *"An encroachment in the floodplain, landward of the floodway limits, which, acting alone or in combination with existing or future similar works, does not cause harmful interference may be permitted."* (emphasis added)

Clearly a permit is required to fill in the floodplain. Unless it can be shown that filling of the floodplain will not cause "a harmful interference," an application to fill in the floodplain can be denied unless compensating cut is provided to prevent harmful interference.

5. As with other floodplain activities, it is up to the applicant to demonstrate that their project will not cause a harmful interference with the stage and discharge characteristics of a stream. R 323.1313(2) states that *"An application for a permit to place an encroachment not excluded under R 323.1312 in a floodplain, channel, or floodway shall include a site location and a property map showing limits of the proposed encroachment as it relates to the drainage course. R 323.1313(3) states that "The department may ask for the following additional information in order to analyze the effects that a proposed encroachment, acting alone or in combination with existing or future similar works, has on stage or discharge characteristics of the stream:"* (emphasis added). Some of the information that may be requested includes: *"cut and fill limits, volume of cut and fill, and a hydraulic report, based on water surface profile computations, which evaluates the effect of the proposed encroachment on stage and discharge characteristics for a range of discharges up to and including the 100-year flood discharge. The report shall be prepared and sealed by an engineer licensed in Michigan."*

GUIDANCE/ACTION:

The following guidance is provided to staff for the requirements of compensating cut for fill placed in regulated floodplains.

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1. The WRD has the regulatory authority under Part 31 to require compensating cut for fill placed in regulated floodplains if the proposed project, acting alone or in combination with existing or future similar works (cumulative impacts), causes a harmful interference with the stage or discharge characteristics of a stream (either upstream or downstream). Where practicable, compensation shall be provided at approximately the same elevations as were displaced. If the WRD determines that the proposed project, acting alone or in combination with existing or future similar works, will not cause a harmful interference with the stage or discharge characteristics of a stream, then compensating cut will not be required. Generally, compensating cut will **not** be required for fill volumes of less than 300 cubic yards as a single and complete project, unless there is evidence that it will cause a harmful interference.

2. The collective analysis of the watersheds studied so far supports the conclusion that the stage and discharge characteristics of the majority of streams in the state will be adversely impacted if floodplain filling continues without any requirement to provide compensation. Six areas were evaluated through detailed hydrologic/hydraulic studies to determine the impact due to the loss of floodplain storage. The studies confirm the necessity for requiring compensating cut to offset further increases in flood elevations. Compensating cut is required in the following areas at the following rates:
 - a. Clinton River Forks area - land areas within the 100-year floodplain of the Clinton River and branches within Clinton Township and Macomb Township, Macomb County. Compensating cut for fill is required at a one-to-one ratio.
 - b. Saginaw River - land areas within the 100-year floodplain of the Saginaw River and tributaries, including Cheboyganing and Dutch Creeks, between the cities of Saginaw and Bay City, Saginaw and Bay Counties. Compensating cut for fill is required for 70 percent of the proposed fill volume below the 100-year floodplain elevation.
 - c. Shiawassee flats - land areas within the 100-year floodplain of the lower reaches of the Shiawassee, Cass, Flint, Tittabawassee, and Bad Rivers within Saginaw County. Compensating cut for fill is required for 97 percent of the proposed fill volume below the 100-year floodplain elevation.
 - d. Snake Creek - land areas within the 100-year floodplain of Snake Creek in the city of Midland, Midland County. Compensating cut for fill is required at a one-to-one ratio.
 - e. Rush Creek - land areas within the 100-year floodplain of Rush Creek in Georgetown Township and the city of Hudsonville, Ottawa County. Compensating cut for fill is required for 90 percent of the proposed fill volume below the 100-year floodplain elevation.
 - f. Frank and Poet Drain - land areas within the 100-year floodplain of the Frank and Poet Drain in the city of Trenton, Wayne County. Compensating cut for fill is required at a one-to-one ratio.
 - g. Compensating cut for fill shall be provided on-site at a one-to-one ratio in other areas to the extent practicable. The applicant shall demonstrate that they have used and or considered all feasible and prudent means to avoid and minimize the amount of fill placed in the floodplain. Some options that the applicant should consider include (this is not intended to be a complete list):
 - 1) Reducing the building size thereby minimizing the fill footprint.
 - 2) Reducing the number of building lots.

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- 3) Leaving parking lot and driveway areas at existing grade.
- 4) Elevating structures on piers.
- 5) Using another location.

If fill in the floodplain cannot be eliminated, the applicant must provide an evaluation as to the feasibility of providing on-site compensation. If on-site compensation is not feasible, the applicant must provide an evaluation as to the feasibility of providing compensation off site, as close to the fill area as possible.

3. The amount of compensating cut for fill placed in a regulated floodplain may be reduced or eliminated if the applicant provides a valid study, to the DEQ's satisfaction, that documents no harmful interference with the stage or discharge characteristics of a stream will result from the cumulative impacts of long-term filling of the floodplain. Per Section 3104(4) of Part 31, the DEQ shall assess the applicant an additional \$1500 to cover the DEQ's cost of reviewing the study.
4. As a part 31 permit condition, the applicant shall be required to obtain a Letter of Map Revision (LOMR) if the proposed or actual cut or fill occurs in the mapped portion of a floodplain of a community that participates in the National Flood Insurance Program. If applicable, the LOMR shall be obtained before a local building permit is issued.

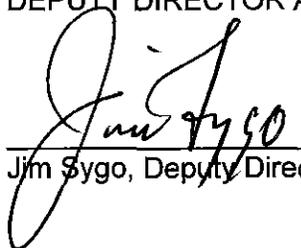
ATTACHMENT: Department of Attorney General's January 8, 1976, opinion regarding floodplain authority.

DIVISION CHIEF APPROVAL:



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Water Resources Division

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LANSING
48913

January 8, 1976

RECEIVED

JAN 13 1976

Hydrological Surv.

Ralph W. Purdy
Deputy Director and Executive Secretary
Water Resources Commission
Department of Natural Resources
Stevens T. Mason Building
Lansing, Michigan 48926

Dear Mr. Purdy:

You have requested my opinion as to the jurisdiction of the Water Resources Commission and municipal units of government over floodplain alteration and occupancy. You have asked:

1. Does the Water Resources Commission have authority to regulate the occupation or alteration of the entire floodplain or is its jurisdiction limited to the floodway?
2. If the response to No. 1 above is in the affirmative, must the Commission issue an order and permit for every such alteration or occupation?
3. Does a local unit of government have authority under existing zoning laws of this State to execute land use plans, ordinances and regulations to control those lands within its corporate jurisdiction which are vulnerable to flooding?

Sumner (info)

7C Steinborn 1-9-76

*Sept 12, 1975
letter*

Col. Steingard

*File
1/16/76*

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STATE FLOODPLAIN REGULATION

The entitlement of 1929 PA 245; MCLA 323.1 et seq; MSA 3.521 et seq, provides in relevant part:

"An act to create a water resources commission . . . to have control over the alteration of the watercourses and floodplains of all rivers and streams with powers to make rules governing the same; . . . to prohibit the obstruction of the floodways of the rivers and streams of this state; . . . and to provide penalties for violation of this act."

The substantive provisions of the act affecting watercourses, floodplains and floodways presently provide:

"Sec. 2a . . . The commission shall have control over the alterations of natural or present watercourses of all rivers and streams in the state to assure that the channels and the portions of the floodplains that are floodways are not inhabited and are kept free and clear of interference or obstruction which will cause any undue restriction of the capacity of the floodway . . ." MCLA 323.2a(1); MSA 3.522(1)(1)

"Sec. 3. The commission shall be authorized to bring any appropriate action in the name of the people of the state of Michigan, either at law or in chancery as may be necessary to enforce any and all laws relating to . . . the obstruction of the floodways of the rivers and streams of this state. . . ." MCLA 323.3; MSA 3.523

"Sec. 5a. The commission shall have the authority to make regulations and orders for the prevention of harmful interference with the discharge and stage characteristics of streams. It shall have the authority to ascertain and determine for

record and in making its order the location and extent of floodplains, streambeds and channels and the discharge and stage characteristics of streams at various times and circumstances." MCLA 323.5a; MSA 3.525.

"Sec. 5b. A person shall not occupy or permit the occupation for residential, commercial or industrial purposes of lands or to fill or grade or permit the filling or grading for any purposes other than agricultural, of lands in the flood plains, stream bed or channel of any stream, as ascertained and determined for record by the commission, or to undertake or engage in any activity on or with respect to the lands which is determined by the commission to harmfully interfere with the discharge or stage characteristics of a stream, unless the occupation, filling, grading or other activity is permitted by an order or rule of the commission or by a valid permit issued therefor by the department of natural resources under the provisions of law." MCLA 323.5b; MSA 3.526.

→ Prior to undertaking any of the activities described in the statute, a person must obtain a permit from the Water Resources Commission authorizing such action. Such a permit is required if the activity is to be carried out in any portion of the floodplain. The statute does not distinguish between a "floodplain" and a "floodway". The entitlement and substantive provisions above quoted evidence an intent, not only to prohibit obstruction of floodways, but also to regulate floodplains.

→ The requirement for obtaining a permit being mandatory, your second question must be answered in the affirmative.

→ Addressing your third question, the governing body of a county, city, village, or township may, within the lawful exercise of authority granted by law, adopt zoning ordinances regulating the location, height, and size of structures within the floodplains of any stream or other watercourse situate within the political boundaries of the governmental unit. 1945 PA 245; MCLA 323.1 et seq., does not preempt the field of floodplain regulation.

The granting of regulatory powers to the Water Resources Commission does not necessarily result in a preemption or abrogation of similar authority of a municipal corporation. More precisely, approval by the Commission of a proposed encroachment does not mean that the proposed activity may not be subject to the imposition of further requirements by a local governing body.

The authority to enact ordinance creating zones of land use is contained in various enabling statutes, each pertaining to different kinds of local governmental units.

The statute pertaining to home rule cities, cities of the fourth class, special charter cities and incorporated villages is 1921 PA 207; MCLA 125.851 et seq; MSA 5.2931 et seq. The statute pertaining to townships is 1943 PA 184; MCLA 125.271 et seq; MSA 5.2963(1) et seq. The statute pertaining to unincorporated areas of a county in which no township zoning has been adopted is 1943 PA 184; MCLA 125.201 et seq; MSA 5.2961(1) et seq.

In Miller v Fabius Township, 366 Mich 250, 256 (1962), the Michigan Supreme Court quoting with approval, 37 Am Jur, Municipal Corporations, §165, p 790, said:

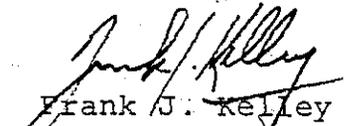
"It has been held that in determining whether the provisions of a municipal ordinance conflict with a statute covering the same to object, the test is whether the ordinance prohibits an act which the statute prohibits. * * *

"The mere fact that the State, in the exercise of the police power, has made certain regulations does not prohibit a municipality from exacting additional requirements. So long as there is no conflict between the two, and the requirements of the municipal bylaw are not in themselves pernicious, as being unreasonable or discriminating, both will stand. The fact that an ordinance enlarges upon the provisions of a statute by requiring more than the statute requires creates no conflict therewith, unless the statute limits the requirement for all cases to its own prescription. Thus, where both an ordinance and a statute are prohibitory and the only difference between them is that the ordinance goes

further in its prohibition, but not counter to the prohibition under the statute, and the municipality does not attempt to authorize by the ordinance what the legislature has forbidden or forbid what the legislature has expressly licensed, authorized, or required, there is nothing contradictory between the provisions of the statute and the ordinance because of which they cannot coexist and be effective. Unless legislative provisions are contradictory in the sense that they cannot coexist, they are not deemed inconsistent because of mere lack of uniformity in detail.' (Emphasis supplied)"

My examination of 1929 PA 245; supra, leads me to conclude that no attempt has been made to preclude a home rule city, city of the fifth class, special charter city, organized township, charter township, village or county from adopting and enforcing zoning ordinances reasonable and uniform in their content and application regulating or prohibiting construction or placement of structures within the floodplain, streambed or channel of a watercourse, whether natural or artificial, so long as the ordinance or any permit issued thereunder does not permit construction activity prohibited by the Water Resources Commission.

Very truly yours,


Frank J. Kelley
Attorney General