

DEPARTMENT OF  
ATTORNEY GENERAL  
MEMORANDUM

MOA #12003

April 12, 2012

TO: Ronald Olson  
Chief  
Parks and Recreation Division  
Department of Natural Resources

FROM: Robert P. Reichel *RPR*  
First Assistant Attorney General  
Environment, Natural Resources and Agriculture Division

RE: Authority of Michigan State Waterways Commission

Approved:

*S. Peter Manning by RPR*  
S. Peter Manning  
Division Chief *per consent*

**Introduction and Summary**

At its February 23, 2012 meeting, the Michigan State Waterways Commission (Commission) requested legal advice about the scope of its authority and what measures would be needed to change that authority. This memorandum of advice responds to that request. In summary, the Commission is authorized by law to perform an important, but limited role: to *advise* the Department of Natural Resources (DNR) on the administration of Parts 781 (Michigan State Waterways), 783 (Ferry Docks at the Straits of Mackinac), 785 (Cheboygan Lock and Dam) and 791 (Harbor Development) of the Natural Resources and Environmental Protection Act, 1994 PA 451, as amended (NREPA), MCL 324.101 *et seq.* As a legal matter, there are only two ways in which that authority may be changed: Either: (a) enactment of a new or amended statute, or (b) the transfer of some existing statutory authority to the Commission through an executive reorganization order issued by the governor pursuant to Const 1963, art V, § 2. The following discussion explains those conclusions.

**Discussion**

Like all state agencies, commissions or other entities in executive branch of Michigan government, the Commission has only those authorities and powers granted by the Legislature in the relevant statute(s). *Attorney General v Pub Serv Comm*, 231 Mich App 76, 78; 585 NW2d 310 (1998). The Commission was originally created by the Legislature in 1947 PA 320, which was subsequently repealed and is now recodified as Part 781 of NREPQ, MCL 324.78101 *et seq.* Initially, the Commission had the powers and duties now vested in the DNR in MCL 324.78105 (1)(a)-(h) including, but not limited to, the authority to "acquire, construct, and maintain harbors, channels and facilities for vessels in the navigable waters lying within the boundaries of this State." MCL 324-78105(1)(a).

~~However, in Executive Reorganization Order 1973-2, the governor transferred the statutory authority powers, duties, functions and responsibilities of the Michigan State Waterways~~

Commission to the DNR by a Type II transfer,<sup>1</sup> and provided that the Commission was to “serve in an advisory capacity” to the DNR. That change was reflected in statute when 1947 PA 320 was repealed and recodified as Part 781 of NREPA. As noted by the Attorney General, “...the Legislature has empowered the Commission to act in an advisory role to the DNR, recognizing the transfer of all of the powers and duties of the Michigan State Waterways Commission to the Department of Natural Resources by virtue of Executive Order No. 1973-2 and returning to the Michigan State Waterways Commission only the power to ‘serve in an advisory capacity.’” OAG, 1999-2000, No. 7033, pp. 65-67. MCL 324.7809 now provides: “The commission shall advise the department on the administration of this part.”

In OAG 1999-2000, No. 7033, the Attorney General considered whether the offices of a member of the Michigan State Waterways Commission and a member of a township planning commission were incompatible. The Attorney General concluded that they were not, emphasizing the purely advisory nature of the Waterways Commission:

The NREPA grants to the DNR the authority to construct and maintain harbors, channels and facilities for vessels in navigable waters. Section 78105(a). The only authority granted to the Michigan State Waterways Commission is to “advise the department on the administration of this part [781].” Section 78109. (Emphasis added.)

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The Michigan State Waterways Commission gives *advice* to the DNR as to the location and construction of DNR’s proposed facilities. The final decision, however, rests with the DNR, which may accept, reject or ignore the Commission’s advice. [OAG 1999-2000, 7033, pp. 66-67, (Emphasis in original)].

In addition, as noted above, the Commission is similarly charged to “advise the department” on the administration of Part 783 (Ferry Docks at the Straits of Mackinac), MCL 324.78308; Part 785 (Cheboygan Lock and Dam), MCL 324.78504; and Part 791 (Harbor Development), MCL 324.79117.

Finally, the Legislature has charged the Commission with certain responsibilities regarding its own operation. Specifically, the Commission “shall ... make, amend and revise the rules necessary for the administration of the commission’s duties under this part.” MCL 324.78102.<sup>2</sup> In addition, the Commission is required to annually elect from its members, a chairperson and vice-chairperson to serve for 1 year. MCL 324.78102

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<sup>1</sup> Under the Executive Reorganization Act, 1965 PA 380, a “Type II transfer” means “transferring ... an existing department, board, commission or agency to a principal department...” and includes “all of its statutory powers, duties [and] functions...” MCL 16.103(b).

<sup>2</sup> The Commission has adopted Rules and Regulations governing its own functions, dated December 8, 2000 and amended June 20, 2008.

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The second legal question raised at the February 23, 2012 meeting was how the existing authorities of the Commission could be changed. First, as noted above, the powers and duties of administrative agencies and commissions are defined by statute. *Attorney General v Pub Serv. Comm*, 231 Mich App at 78. So, the existing authority of the Commission could be altered by the enactment of a statute amending Part 781 or other relevant provisions of the NREPA. The only other legal mechanism by which the authority of the Commission could be modified is through issuance of an executive reorganization order by the governor pursuant to Const 1963, art V, § 2.

This memorandum of advice conveys the opinion of the Environment, Natural Resources, and Agriculture Division staff and is neither a formal nor informal opinion of the Attorney General.

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