

Michigan's Clean Water Act Section 404 Program

The Michigan Commission of Agriculture and Rural Development (Commission) appreciates the opportunity to provide comments in support of the revisions to Michigan's Clean Water Act (CWA) Section 404 program as passed by the Michigan Legislature and signed by Governor Rick Snyder.

The Commission is a bipartisan body of five citizens appointed by the Governor with the advice and consent of the Michigan Senate. The members represent Michigan geographically, politically, and agriculturally. Commissioners are in a unique position as participants in Michigan's food and agriculture sector and active members in their local regions to understand the intersection between food production and environmental stewardship. To this end, the Commission encourages partnerships between government, private industry, and citizens to achieve the common goals of protecting the public health, growing our economy, and preserving our natural resource heritage.

The Commission has specific decision-making responsibilities delegated to them, including under the Natural Resources and Environmental Protection Act (NREPA): (1) ensuring productive Michigan farmland for future generations; (2) determining agriculture purpose within surface water discharge provisions; (3) approval of conservation easement practices; (4) approval of Michigan Agriculture Environmental Assurance Program (MAEAP)¹ conservation practices; (5) development and approval of voluntary groundwater stewardship practices; (6) definition of agriculture purpose for water diversions; (7) approval of water conservation measures within the Generally Accepted Agriculture and Management Practices (GAAMPs); and (8) approval of scoring for purchase of development rights within the Farmland Preservation Program.²

The Commission believes that the revisions to Michigan's Clean Water Act Section 404 program embodied in the Michigan Department of Environmental Quality (MDEQ) administrative changes accomplished between 2008 and 2012 and Public Act 98 of 2013 (PA 98) resolve concerns expressed in the 2008 Environmental Protection Agency (EPA) program review while recognizing Michigan's unique landscapes.

Growing Michigan's \$94 billion food and agriculture industry while protecting Michigan's environment are part of Governor Snyder's Ten Point Plan to reinvent Michigan. The Commission supports these goals and finds PA 98 helpful in attaining them by:

- Identifying the unique nature of blueberry production
- Increasing mitigation flexibility
- Eliminating numerous agricultural exemptions of concern to EPA

¹ MAEAP is a comprehensive, voluntary, proactive program designed to reduce farmers' legal and environmental risks through a three-phase process: 1) education; 2) farm-specific risk assessment; and 3) on-farm verification that ensures the farmer has implemented environmentally sound practices. The program's three systems — Farmstead, Cropping and Livestock — each examine different aspects of the farm.

² Natural Resources and Environmental Protection Act, PA 451 of 1994 (1994): 1298.

- Allowing common sense drain maintenance reforms that recognize the close proximity of MDEQ field staff to elected drain commissioners work
- Recognizing the strength of local decision making in a post-Rapanos, fiscally austere atmosphere.

Treatment of Blueberry Production

The continued growth of Michigan's blueberry industry is important to the overall food and agriculture sector's growth, but also to meeting state and national goals of increased fruit and vegetable consumption. This growth is particularly appropriate in Michigan because blueberries are a wetland plant and the state has abundant, naturally acidic "blueberry soils."

Blueberries are native to Michigan. Lowbush blueberries are common in the Upper Peninsula and the northern forests of the Lower Peninsula. Highbush blueberries are more common in the lower half of the Lower Peninsula. Blueberries were gathered by native populations long before European settlers arrived.

The development of the modern blueberry industry began in the early 1900s. In Michigan, Dr. Stanley Johnston led the development of the Michigan industry, establishing a test planting in the 1920s on Michigan State University's South Haven Agricultural Research Farm. Commercial planting soon followed. Blueberry acreage reached 2,200 acres by 1950 and 9,700 acres by 1976. Today, Michigan has almost 21,000 acres of blueberries on about 600 farms,³ producing farm gate revenue of \$129 million.⁴ Largely because of the natural soil advantage, Michigan is the number one state in highbush blueberry production with growers producing over 100 million pounds of blueberries every year, constituting nearly 20 percent of all national production.

Michigan's blueberry industry is concentrated in southwest Michigan where there are abundant, naturally acidic "blueberry soils." Typical sites are in low topographic positions with a shallow water table. Soils are mostly acidic sandy loams and loamy sands. These mineral soils form on sandy outwash plains or ancient lake bottoms. Some blueberries are on acidic muck soils formed when small lakes filled with organic matter. Many of these soils are poorly drained. These low, cold sites with wet, acidic soils are poorly suited for crops other than blueberries or cranberries.⁵ According to Michigan State University Extension's Carlos Garcia-Salazar, who works extensively with Michigan blueberry farmers, all blueberry production in western Michigan occurs on wetlands and they do well there because the groundwater is five to six feet below the surface.

Members of the Commission and employees of MDARD and MDEQ visited a site in southwest Michigan in October of 2012. The stumps had been ground with no woodchips leaving the site and minimal movement of dirt in preparation of conversion to blueberry production. Despite having blueberry fields around it, the site had been flagged as a possible Section 404 violation. It was

³ Longstroth, Mark and E. Hanson. "The Michigan Blueberry Industry." *Michigan State University Extension*. Michigan State University. 2012. Web. 26 Nov. 2013.

⁴ Michigan Commission of Agriculture and Rural Development. *Resolution in Support of Utilizing Hydric Soils For Blueberry Production*, Velmar Green, Chair. (East Lansing, MI, 2012)

⁵ Longstroth, Mark and E. Hanson. "The Michigan Blueberry Industry." *Michigan State University Extension*. Michigan State University. 2012. Retrieved Nov. 26, 2013 from www.msu.edu

difficult to see how this would not be viewed at worst as a dormant wetland moving to a non-dormant wetland before potentially becoming a dormant wetland again.

Blueberry Production Potential Supported by Reasonable Regulation

Michigan must continue to expand its production capacity to maintain its leadership in the national and global marketplace. Worldwide highbush blueberry demand is expected to nearly double between 2010 and 2015, as blueberries are an important part of the healthy eating movement. In fact, since 2005, blueberry consumption per capita in the United States has increased from 0.45 pounds to 1.3 pounds per person and there is room for continued growth. Blueberry production in Michigan's abundant naturally acidic soils can help meet this demand for healthy food products and help our nation reach its objective to reduce obesity. In addition to domestic production, blueberry exports to China and other parts of Asia provide a unique opportunity for Michigan to improve economic investment, increase employment, and assist in the balance of trade. The Commission supports the continued cooperative effort of MDEQ and EPA to allow for flexibility to utilize hydric soils for the production of blueberries in a manner that assures long-term maintenance of the hydric soil characteristics while allowing economically viable growth in production of this significant Michigan specialty crop.

It is prudent for MDEQ to continue to exercise their strong record of responsible permitting through the creation of a new General Permit and minor project categories as long as said categories are consistent with nationwide permits. The General Permit for blueberry farming, allowing for minimal drainage and earth movement, recognizes MDEQ's ability to make decisions based on the specific site, and requiring a conservation easement as a mitigation tool until the wetland is restored. The term "minimal" as it relates to earth moving and drainage is refined further with the requirement that the drainage and earth movement cannot convert the wetland into a non-wetland and the forbiddance of roads, ditches, reservoirs, pump houses, and secondary support facilities for shipping, storage, packaging, parking, and similar purposes. MDEQ is working on parameters of the General Permit when more than minimal drainage or earth moving is required. We expect MDEQ will soon have the proper guidelines in place so that the permit can be submitted to EPA for a timely decision in order to avoid missing an entire growing season. The importance of the General Permit for the continued growth of the Michigan blueberry industry cannot be overstated. Several producers have placed proposed farm expansions on hold pending development of the permit.

PA 98 also codifies a helpful practice previously in rule – if a property owner believes that a wetland smaller than five acres within 500 feet of an inland lake or stream or 1,000 feet of a Great Lake has no connection to those water bodies, a request can be made for an MDEQ determination on whether said wetland is regulated.

QOL Agency Partnership Makes the Michigan Wetland Story Even Better

The State of Michigan has a strong track record with conservation easements. MDARD maintains 116 permanent easements, protecting 26,000 acres of Michigan farmland and open space, both purchased and donated. Since 1994, they have been monitored annually using a baseline report developed when the easement was executed. The program has been recognized through the awarding of \$5 million in grant money for acquisition from the United States Department of Agriculture Natural Resource Conservation Service. MDARD also maintains 42,000 agreements protecting 3.2 million acres of farmland through temporary conservation easements as part of its

Farmland Preservation program. The department also manages 6,711 Conservation Reserve Enhancement Program (CREP) contracts protecting 72,177 acres of land and 3,500 wetland acres in permanent easements. The proposed blueberry conservation easements would be an opportunity to blend MDARD's current programs through the creation of "temporary" easements with the stronger language contained in permanent easement agreements.

Mitigation is one of the most significant hurdles for producers in the permit process. The allowance of flexibility in mitigation ratios by allowing consideration of function and values instead of a strict ratio demonstrates the commitment to outcomes over process. PA 98 also requires MDEQ to work with MDARD to develop a Blueberry Production Assistance Program to assist farmers with complying with the new statutory requirements. MDARD has a strong record of employing education and outreach to attain measurable outcomes and this will continue the strong partnership between the Quality of Life agencies by creating a wetland ombudsman to assist those interested with wetland issues. Development of a wetland mitigation toolbox including a wetland mitigation bank will be part of the responsibilities of the wetland ombudsman.

Additionally, the development of a Stewardship Fund, which producers would be required to fund, would further ensure the return to wetland. Details are being developed to ensure that the payments into the fund are significant enough to cover worst case scenario concerns.

Biomass Residuals

The exemption in PA 98 for the placement of biomass residuals from in-place grinding of stumps down to twelve inches is another common-sense tool that balances environmental protection with economic opportunity, allowing the continued expansion of an industry that "minimally borrows" wetlands in Michigan. The stumps and roots are ground, likely to a level no greater than 12 inches below ground level and the material doesn't leave the site or become discharged. When the blueberry production ends, minimal changes will be needed to restore and preserve the functions and values that wetlands provide, unlike other developments such as a big box store and associated parking lot.

EPA Program Concerns Addressed

This process began with the Michigan Legislature recognizing the importance of a comprehensive and consensus-based discussion with the passage of PA 120 in 2009, creating the Wetland Advisory Council (Council). The Council was comprised of a vast array of stakeholders representing MDEQ, EPA, MDARD, the Michigan Department of Natural Resources, county drain commissioners, local units of government, wetland professionals, conservation organizations, farm organizations, watershed organizations, businesses, and the general public. Two meetings were held in Holland and Bay City to receive comments from the public. The Council was charged with examining Michigan's existing wetland regulation in response to deficiencies pointed out by EPA and to propose corrective actions. The Council was unanimous in its belief that Michigan should retain its designation as an approved section 404 Program,⁶ reiterating the same position the state arose to when budget constraints led then Governor Jennifer Granholm to propose sending the wetland authority back to the federal government. At the time, organizations such as Public Employees for Environmental Responsibility (PEER) spoke loudly in favor of the state maintaining its authority,

⁶ Wetland Advisory Council, *Final Report* (Lansing, MI, 2012), 9.

saying “local officials know local conditions and therefore, often deliver the best, more responsive service to the public.” Conservation organizations in particular were very adamant on state assumption. PEER called the state law “far more protective than federal law.”⁷ In that instance, the end result was the budget for the wetland program was not cut, while the overall MDEQ budget was cut 39 percent, further demonstrating Michigan’s commitment to maintaining its delegated authority, even at a high cost.

With that foundation, the Council arrived at a 2012 final report that made ten recommendations. Moreover, the Council and MDEQ were able to address 19 of the 22 issues identified by EPA, leaving three issues addressing exemptions for utilities, drains, and agriculture to the Michigan Legislature.

The Legislature responded with SB 163, which enjoyed bipartisan support in both chambers on its way to becoming Public Act 98 of 2013. The changes made in PA 98 are innovative and focused on outcomes, balancing the requirements of federal law with Michiganders’ knowledge of Michigan wetlands, lakes, and streams, while providing more flexibility in permitting and mitigation.

PA 98 limits exemptions for agricultural and drain maintenance that farmers in Michigan have enjoyed since 1984, when Michigan became the first state in the nation to meet CWA requirements. This addresses one of the most significant concerns raised in the EPA 2008 final report. As of October 1, 2013, the only farming activities allowed in wetland areas without a permit would have to be part of an established ongoing farming operation. Activities that convert a forested area to a farming use would not be part of an established ongoing use. This aligns Michigan’s farming exemption with the federal exemption by narrowing the scope of the exemption and requires a permit for any new agricultural expansion into a wetland. PA 98 also eliminates the exemption of discharges associated with bringing a wetland into farming use as long as the wetland is owned by a person engaged in farming.

Agricultural Drain Maintenance

The exemption for the improvement, including straightening, widening, and deepening of both agricultural and non-agricultural drains necessary for the production or harvesting of agricultural products is eliminated under Parts 301 and 303. This is another example of limiting a longstanding exemption in Michigan statute that EPA considered much broader than the federal exemption. Farmers have long enjoyed the authority to maintain their own private drains necessary for field work, even when such maintenance included straightening, deepening, and widening. Under the changes contained in PA 98, agricultural drains could be maintained without a Part 303 permit as long as the activities only went to the location, depth, and bottom width of the drain as built or modified at any time before July 1, 2014; the maintenance is performed by the landowner or as required by the Michigan Drain Code; and the maintenance does not include any modification that would result in additional wetland drainage or conversion to a use to which it was not previously subject.

⁷ Stade, Kristen (2009, April 3). Michigan Gives Feds Notice of Surrendering Wetlands Program. *Peer.org*. Retrieved Nov. 26. 2013 from www.peer.org.

In allowing spoils to be placed where they have previously been placed, drain commissioners retain their ability to provide the same level of drainage service that they previously have had without having to obtain a permit. The spoil placement permit exemption allows necessary drain maintenance to continue without the need for a petition, which likely would have led to significant costs for the agricultural community.

A new General Permit category for county drains under parts 301 and 303 was created in PA 98. The new permits would not require individual public notice or a public hearing, but would rely on the strong relationship of county drain commissioners and MDEQ field staff on activities that are similar in nature and will cause only minimal adverse effect when performed separately and with only minimal cumulative adverse effects on the environment. MDEQ staff's proximity to projects that would fall under this new General Permit allow for regular observation that could result in a determination that a specific activity occurring within a General Permit category is likely to cause more than minimal adverse effects on the environment or aquatic resources requiring an individual permit application. There are numerous reasons that activities would not be allowed to be executed under the new General Permit, such as association with sensitive natural resources, proximity to other projects, and the characteristics of the aquatic resources. PA 98 does not mandate blinders and safeguards are still in place.

The allowance of existing culverts to be extended up to 24 feet without a permit means less delay in ensuring that modern-day farming equipment, which is often larger, can move from field to field safely.

Minimizing Livestock Impact

PA 98 allows an exemption for the controlled crossing and watering of livestock, including fencing and post placement if the fence were designed to control livestock, limit access, did not exceed 4.5 feet in height, and used an amount of material that did not exceed that of a woven wire fence using 10 horizontal wires with 6 inch vertical spacing and posts. The allowance of fencing without a minor project permit will ensure cattle crossings in a timely fashion while limiting the trampling of stream banks and ensuring that potential adverse impacts are minimized. Most importantly, fencing must be constructed in accordance with applicable practice standards set by the United States Department of Agriculture, Natural Resources Conservation Service. EPA's concerns seemed to revolve around crossings with discharges of fill and that should not be part of an exemption for crossing construction.

PA 98 also exempts from Part 303 regulation of agricultural soil and water conservation practices designed, constructed, and maintained for the purpose of enhancing water quality.

MDEQ Best Positioned to Steward Michigan's Wetland Resources

The work completed by MDEQ through administrative changes since 2008 and the Legislature through the creation of the Wetlands Advisory Council and passage of PA 98 ensures Michigan producers a greater level of jurisdictional certainty in the wake of the Rapanos decision. Michigan's delegated authority has been the focus of a thorough and thoughtful discussion over what wetlands constitute waters of the United States.

PA 98 protects the resource while maintaining the timeliness of MDEQ. While a permit review by the Army Corps of Engineers could take 120 days after a possible jurisdictional determination of 90 days, an MDEQ decision can only take 90 days or up to 150 days if a public hearing is required.

EPA oversight is maintained through their sampling of one to two percent of the applications processed each year, including those for the projects with the largest impacts or those with potential impacts to especially sensitive natural resources, such as federal threatened or endangered species. In addition, MDEQ's Land and Water Management Division issues an annual report to EPA summarizing all other actions taken during the year.

MDEQ's proximity to the regulatory subject is an asset to the environmental community. Because MDEQ staff are located in multiple district offices, they have a stronger knowledge of local resources and are better positioned to complete site inspections, including identification of wetland boundaries and rare resources.⁸ Indeed, the 2008 EPA report noted that "MDEQ field staff are doing a good job of administering the permit program" and "are able to visit the majority of project sites before making a permit decision."

Further, if EPA no longer grants Section 404 authority to MDEQ, the Legislature included in PA 98 a repeal of MDEQ's Part 303 which would no longer be available to provide assistance to local officials. MDEQ staff in ten offices have significant local knowledge and established relationships with local communities, as well as a history of providing assistance to local officials.

Meanwhile, financial pressures and jurisdictional uncertainty at the federal level have made it increasingly difficult for EPA to be proactive in identifying Section 404 violations of the Clean Water Act. A 2009 Evaluation Report conducted by the EPA Office of Inspector General found that EPA identifies Section 404 violations through a "passive, reactive method of relying on complaints and referrals from external sources," primarily due to "limited field presence." The report argued that without an effective framework or strategy, EPA cannot be assured that it is sufficiently protecting wetlands and other surface waters from Section 404 violations and the current system does not provide the EPA with the necessary inputs to make informed decisions about the allocation of resources for 404 enforcement.⁹

EPA CWA Section 404 enforcement has likely only become more difficult since 2009 due to jurisdictional uncertainty created by the 2006 United States Supreme Court Case, *Rapanos v. United States*. In a March 2008 memo, EPA reported that it dropped 77 potential CWA Section 404 enforcement actions between July 2006 and December 2007 because it was uncertain it could establish jurisdiction under the CWA. The EPA Office of Inspector General Report found that EPA's formal agreements with states (Michigan and New Jersey) "enable them to carry out the policies, regulations, and procedures necessary to administer the permit program established under Section

⁸ Michigan Department of Environmental Quality, Land and Water Management Division, *Wetland Program Question and Answer Document*, by Land and Water Management Division, Elizabeth Browne, Chief (2009), 14.

⁹ U.S. Environmental Protection Agency, Office of Inspector General, *EPA Needs a Better Strategy to Identify Violations of Section 404 of the Clean Water Act*, by Ira Brass, Dan Engelberg, Byron Shumate, Danielle Tesch, Andre von Hoyer II, and Michael Wagg. Report No. 10-P-009 (2009), 24.

404.” EPA also stated that recent court decisions, such as Rapanos, greatly impacted the amount of resources needed to determine jurisdiction.

The Rapanos case and others caused EPA to issue revised guidance in 2011 on identifying waters protected by the CWA. The cases have caused intense debate over words such as “adjacent” and “neighboring.” The 2011 revised guidance “clarified” that a wetland may be adjacent to jurisdictional water if resident aquatic species such as amphibians, turtles, or ducks use both the wetland and the jurisdictional water body for part of their life cycle.

This guidance was followed by a September 2013 draft scientific report commissioned by the EPA Office of Research and Development, “Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence.” The draft report reached three main conclusions, including a finding of insufficient information to generalize about wetlands and open-waters located outside of riparian areas and floodplains and their connectivity to downstream waters. The EPA notice of the draft science report indicated EPA is seeking input on the report and that revisions to the conclusions will be considered based on the input before a final report. This input and final report will be followed by a draft rule, which was last week announced to be unveiled yet this year.

Perhaps more than ever, EPA needs the work of states willing to assume Section 404 responsibility. There are multiple incentives for a state to assume administration, including elimination of a high percentage of duplication in state and federal permitting programs, reduced costs for program applicants and often faster permit processes, more effective resource management at the watershed level, drawing on localized expertise and integration of wetland management with other state or tribal land use management and natural resource programs, incorporation of state goals into the overall permit process, and improved consistency and stability in the regulation of dredge and fill activities across multiple levels of state government.¹⁰ Examples of all of these benefits are easily found in Michigan.

A number of states have examined the pros and cons of state assumption of Section 404, yet it seems there are few takers. Upon request of the Virginia General Assembly, a 2012 report to the Governor, *Study of the Costs and Benefits of State Assumption of the Federal Section 404 Clean Water Act Permitting Program* concluded that “in lieu of, or until a stable funding mechanism is identified, the Commonwealth could explore working with the Corps...”¹¹ A 2008 EPA survey of states to whom EPA provided grants to explore Section 404 assumption found a host of barriers, including lack of state program equivalency, lack of state implementation funds, and unwillingness to pay for something the feds are already doing. Todd Ambs, former water administrator for the Wisconsin Department of Natural Resources said Wisconsin considered state assumption of Section 404 duties during his tenure but found the feasibility low. According to Ambs, “there are no doubt

¹⁰ The Association of State Wetland Managers, Inc. and The Environmental Council of the States, *Clean Water Act Section 404 Program Assumption, A Handbook for States and Tribes*, (August, 2011), 36.

¹¹ Virginia Department of Environmental Quality, *Study of the Costs and Benefits of State Assumption of the Federal Section 404 Clean Water Act Permitting Program: A Report to the Honorable Robert F. McDonnell, Governor and the General Assembly of Virginia*, (December, 2012), 75.

many reasons” that only Michigan and New Jersey have assumed 404 authority, but “one of the main reasons is that this is a much harder program to manage, compared to Section 402 programs.”

Meanwhile, an April, 2009, U.S. EPA Office of Inspector General Special Report, *Congressionally Requested Report on Comments Related to the Effects of Jurisdictional Uncertainty on Clean Water Act Implementation*, found that “it has been difficult for EPA to craft jurisdictional determination guidance that is both legal and usable for field staff. Ideally, one would need several years of biotic observations before he/she could actually determine whether a ‘significant nexus’ exists.” The amount of time and proximity needed to accomplish this level of observation is more likely to occur at the state level than the federal level. An Associate Regional Counsel in EPA Region 5 said there were jurisdictional issues for enforcement in most EPA Region 5 States, where state-level wetlands enforcement is lacking, and specifically singled out Michigan as the only EPA Region 5 State with a decent enforcement program.¹²

Conclusion

Michigan is proud of its history as the first state, and still only one of two states, to administer Section 404 of the Clean Water Act and understands that consistency with federal regulations is required in order for EPA to delegate authority over the federal wetland program to the state. The Michigan Commission of Agriculture and Rural Development appreciates MDEQ’s attentiveness to the agricultural community’s concerns and believes that the state has made the necessary changes administratively and within PA 98 to address areas that were inconsistent with the federal program while still affording the flexibility to respond to the needs of the unique Michigan landscape. It is a compromise of continued conversation, with long enjoyed agricultural exemptions eliminated and key flexibilities maintained. MDEQ has an almost three decades long record of protecting Michigan wetlands based on trust, open communication, and experience with EPA. The agricultural community looks forward to continuing the growing partnership that it enjoys with MDEQ.

Submitted by:

Michigan Commission of Agriculture and Rural Development
525 W. Allegan Street
P.O. Box 30017
Lansing, MI 48909
(517) 284-5718

¹² U.S. Environmental Protection Agency, Office of Inspector General, *Congressionally Requested Report on Comments Related to Effects of Jurisdictional Uncertainty on Clean Water Act Implementation*, by Bill A. Roderick, Acting Inspector General. Report No. 09-N-0149 (2009), 14.