

Summary of Changes in PA 631 of 2018

March 25, 2019

Senate Bill 1211 (now PA 631 of 2018) goes into effect on March 28, 2019. It amends Part 13, Permits; Part 15, Enforcement; Part 301, Inland Lakes and Streams, and Part 303, Wetlands Protection, of the Natural Resources and Environmental Protection Act, 1994 PA 451, as amended (NREPA). Overall, the amendments do not make major changes to the program, but they do add more requirements on the Department of Environment, Great Lakes, and Energy (EGLE) to document decisions and consider federally-defined Waters of the United States (WOTUS) when determining jurisdiction. Small modifications were also made to other enforcement and permitting processes. It is unlikely that the new amendments made by PA 631 of 2018 deregulate wetlands, lakes, or streams. EGLE has Wetland Identification Program and pre-application services available to assist the public in identifying whether there are regulated wetlands on their property.

Below is a summary of the changes in PA 631, which should be used in conjunction with the language provided in the new amendments:

- Part 13 and Part 15 Changes: Requirements were added for the specific documentation needed by EGLE for permit approvals with modification, denials, and civil enforcement actions under Part 301 and Part 303.
- Part 301 and Part 303 Definitions
 - Inland Lakes and Wetlands Definition: The main definition of inland lakes and streams remains the same. The main definition of wetland has been reworded, but the meaning remains the same. However, the amendments do add that artificial or natural lakes, ponds, or impoundments and wetlands that are a WOTUS under the federal Clean Water Act are also regulated. This may lead to changes in what ponds (waterbodies less than five acres in size) are regulated under Part 301 and what wetlands are regulated under Part 303. For example, the following are regulated under the current federal WOTUS Rule:
 - A pond or wetland in the 100-year floodplain of a stream and within 1,500 feet of the ordinary high water mark of that stream.
 - A pond or wetland within 1,500 feet of the ordinary high water mark of a Section 10 or Interstate water.
 - A pond or wetland in the 100-year floodplain of a Section 10 or Interstate water, and has a case-specific significant nexus to a Section 10 or Interstate water.
 - A pond or wetland within 4,000 feet of the ordinary high water mark of a stream or Section 10 or Interstate water, and has a case-specific significant nexus to a Section 10 or Interstate water.
 - A pond or wetland that is an Interstate water.

It is recommended that wetland professionals should first determine whether a wetland meets the five acre and contiguous requirements, and only consider whether a wetland is a WOTUS if the wetland is otherwise unregulated.



In Michigan, the federal WOTUS definition under the 2015 Clean Water Rule is in effect at this time. Because of pending legal action and a potential new rule for the federal definition of WOTUS, the federal definition may change in the future and thus, what is regulated by EGLE would change with it.

The language allowing non-contiguous wetlands less than five acres in size to be regulated if determined to be essential to the preservation of the natural resources of the state has been removed. However, language was added regulating wetlands with the documented presence of state or federal endangered or threatened species and wetlands that are rare and imperiled.

- Other Definitions Changes:
 - The definition of hydric soil from the federal delineation manual and regional supplements which are already in use in Michigan was added.
 - The list of rare and imperiled wetlands was modified.
 - Farm or stock ponds constructed consistent with the exemption under 30305(2)(g) are now not considered ponds for the purposes of the definition of “contiguous.”
 - Voluntary wetland restoration definitions were added to make the bill consistent with the recently passed bills on voluntary wetland restoration. These new definitions do not apply to other sections of the statute (i.e., the definitions should not be used outside of voluntary wetland restoration project reviews).
- Other Amendments:
 - Language clarifying that borrow material for farm and forest road construction and maintenance be taken from upland sources if feasible was added.
 - The amendments remove mention of restoration orders and allow EGLE to determine whether they accept an after the fact permit application on a case-by-case basis.
 - The requirement to create a bi-weekly list of applications has been removed and language that already occurs in Part 301 referring to Website postings has been added.
 - Additional language regarding entering the premises for inspections has been added.
 - The amendments provide that reasonable expert professional witness fees, as determined by the court or an administrative law judge, must be awarded to a landowner that prevails against the EGLE on whether the landowner’s property is wetland.