

Wetland Advisory Council

(created under P.A. 120 of 2009)

Initial Report

October 1, 2010

Introduction

Formed under P.A.120 of 2009, the Wetland Advisory Council (Council) is charged with a programmatic and statutory review of the Michigan Wetlands Program. The Council met initially in January 2010 and has diligently worked to accomplish the responsibilities assigned it by the Act. The diversity of the membership as well as the input sought by the Council has provided an exceptional informational background to develop strategies.

As outlined in the law, the first report to the Governor, Legislature, and the Director of the Department of Natural Resources and Environment (DNRE) is due October 1, 2010. The final report is expected on August 15, 2012. Specific recommendations to the charges made to the Council are contained in this report. Also identified are the substantive issues that the group will confront over the next two years.

To state the obvious, the issue of wetland and inland lake and stream preservation is complicated. Beyond the divergent interests involved, the constitutional, social, and political constraints that impact the program are significant. The Council understands the realities of the state's ability to administer the program and is working within that reality.

Each member of the Council has been dedicated, diligent, and open during the process. Each has added value to the effort and is seriously committed to a solution that is fair and efficient. The candid and civilized discussion has positively moved the recommendations forward. The content of this report reflects that constructive spirit.

The Council would like to express its appreciation to the DNRE Staff for their ongoing responsiveness and cooperation in this process.

List of Members

Joseph Rivet, Council Chair	Representing the association of drain commissioners
Jeff Auch	Representing a conservation district
Dan Coffey	Representing the statewide association of realtors
Gary Dawson	Representing natural gas or electric utilities
Sue Elston	Representing the United States Environmental Protection Agency
Randy Gross	Representing the statewide association of manufacturers
Susan Harley	Representing statewide environmental protection organizations
Tom Hickson	Representing the statewide association of local units of government
Jeff King	Representing a wetland professional who regularly submits permit applications
Erin McDonough	Representing statewide conservation organizations
John Niemela	Representing the general public
Chris Reidy	Representing USDA's Natural Resources Conservation Service
Lee Schwartz	Representing the statewide association of home builders
Steve Shine	Representing the Michigan Department of Agriculture
Mindy Koch, Deputy Director	Representing the Michigan Department of Natural Resources and Environment
Grenetta Thomassey	Representing watershed organizations
Donald Uzarski	Representing university professor with wetland science expertise
Currently Vacant	Representing the largest statewide farm organization
Todd Wyett	Representing businesses
John Konik	Liaison from the United States Army Corps of Engineers

Statutory Charges

By October 1, 2010, the Council shall submit a report to the governor, the department, and the standing committees and appropriations subcommittees of the Legislature with primary responsibility over issues pertaining to natural resources and the environment. The report shall evaluate and make recommendations on all of the following:

(a) Improving the overall efficiency of the program under this part, including all of the following aspects of the permit application, review, and decision-making process:

(i) The quality of applications submitted.

(ii) The effect of mandatory decision-making time frames on meeting the purposes of this part, and, if appropriate, the time frames that should apply to decision-making under this part.

(b) The point in the department's process of decision-making on a permit application at which the possibility of mitigation should be considered.

(c) Actions necessary to adopt and implement measures determined by the United States environmental protection agency to support consistency with the requirements of section 404 of title IV of the federal water pollution control act, 33 USC 1344, as set forth in "Final Report Results of the United States Environmental Protection Agency Region 5 Review of Michigan Department of Environmental Quality's Section 404 Program", dated May 2008.

(9) By August 15, 2012, the Council shall submit a report to the governor, the department, and the standing committees and appropriations subcommittees of the legislature with primary responsibility over issues pertaining to natural resources and the environment. The report shall evaluate and make recommendations on all of the following:

(a) Improving coordination and reducing duplication of effort with the United States army corps of engineers.

(b) Potential long-term changes in program structure, including all of the following:

(i) Scientific methods to achieve more consistent and accurate determinations of wetland functions and values for reviewing applications for permits, watershed planning, conservation plans, and other purposes. These methods include rapid wetland assessment and landscape level wetland assessment.

(ii) The appropriate role of local units of government and conservation districts in the administration of this part.

(iii) A certification process for wetland professionals. The Council shall consider information reported under section 30303b in evaluating and making recommendations under this subparagraph.

(iv) The definition of wetland and wetland delineation methods, including the role of hydric soils as a factor in wetland delineation. In making recommendations under this subparagraph, the Council shall evaluate differences in the state and federal wetland programs.

(c) The appropriate means and level of program funding under this part.

(d) Minor project categories and general permits under section 30312b(1) to (3).

(e) The appropriateness of the provisions of section 30304b as a means of reducing regulatory burdens from dual federal and state regulation.

(f) The promotion of the development of wetland mitigation banks.

Statutory Charges (continued)

(g) Ways for the public and interested parties to advise the department on a continuing basis concerning the administration and enforcement of this part.

(h) Appropriate regulation of the siting, construction, and operation of cranberry production activities, in light of the benefit of cranberry production activities to the economy, the regulatory approach of other states, and other factors.

(i) The feasible and prudent alternative standard under section 30311 and consistent application of the standard.

(j) Methods to assist both of the following in successfully obtaining permits under this part in a timely manner:

(i) Individuals proposing a use or activity for their personal homesite.

(ii) Nonprofit organizations.

Approach/Methods

To this point, the Council has used a consensus model for operating and developing recommendations. The agreed upon recommendations are presented as such in the following pages. Items that require additional consideration have been identified and resolution is expected in the final report. In the event a point is reached where consensus is not possible, the Council will consider alternative approaches to providing recommendations.

The Council has met regularly since January 2010. All meetings are noticed and open to the public. It utilized the following approach to completing its work:

- The initial phase of the work involved in-depth presentations from DNRE staff regarding current methodology and program administration. Additional presentations were made to provide baseline knowledge for all members.
- The Council analyzed the requirements and responsibilities it was charged with under P.A. 120 of 2009 and gathered all necessary information.
- The Council created three committees to complete work on the issues due in the October 1, 2010, report. They are as follows:
 - Permit Processing and Efficiency
 - United States Environmental Protection Agency (EPA) Program Review Response
 - Program Efficiency and Mitigation Sequencing
- The Council held two public meetings to take input on proposed recommendations and general comments on the program itself. (Meetings were held in Bay City on August 11, 2010, and Holland on August 18, 2010).
- The committees met and forwarded recommendations to the Council.
- Initial Council recommendations were developed.

A copy of all Council meeting agendas, minutes, as well as presentations that were received, are available on the DNRE's Web site: "michigan.gov/dnre". Any additional materials and correspondence are also on file and available for public inspection.

Recommendations

Section 30329 (8)(a):

Improving overall efficiency of the program under this part, including all of the following aspects of the permit application, review, and decision-making process:

(i) The quality of applications submitted.

- General lack of knowledge on behalf of the public, generally affects the quality and completeness of applications. Individual landowners need assistance and information on necessity of permits and the permit process. Public and local governments are also unaware of services and programs the DNRE provides (e.g., Wetland Identification Program; preapplication meetings). **The DNRE should continue efforts with Michigan Wetland Association to provide outreach; and develop an outreach strategy for the public and stakeholder groups including local governmental units.**
- The DNRE continues to shift permit application responsibilities to field offices, and the DNRE's value stream mapping evaluation showed efficiency of this methodology. In most cases, minor/general permits are processed completely in field offices while major projects (utilities and large scale developments) and projects requiring public notice are processed first through the Permit Consolidation Unit in Lansing before being sent to the field offices. In general, the methodology of utilizing field offices has expedited the permit processing time frames for applicants. **The DNRE should further the decentralization approach for permit processing. Additionally, the DNRE field offices should facilitate the ability of field staff to work with applicants to meet appropriate permit requirements through the existing preapplication meeting process. This change in permit processing will require sufficient training and quality control measures to assure consistency in program implementation.**
- The DNRE permit database management system is outdated and unable to provide valuable information to the DNRE, applicants, and the public. The database is limited in capacity to store information, manage permits, interact with other computer software, provide program reports, and is not compliant with security and revenue reconciliation standards. **Updates to the DNRE's permit database management system are necessary for improved program efficiency of the Wetlands Program, as well as management of other NREPA programs. The DNRE should provide measurable objectives to improve efficiency and customer service that will be achieved through management system upgrades.**
- There is a clear need for technology upgrades within the DNRE's Water Resources Division. Many of the possible efficiencies and improvements identified by the subcommittee require improved technology (including the ability to successfully shift the majority of the permit application review operations to the field offices). **The Council supports full appropriation of existing funds and the implementation of procedures and purchasing necessary for the acquisition of improved technology.**
- Preapplication meetings are beneficial to both the DNRE and applicants, especially those that are nonprofessionals. **The Council supports an immediate amendment to extend the October 1, 2010, statutory sunset from Section 30306b of Part 303, Wetlands Protection, as well as Section 30104b of Part 301, Inland Lakes and Streams, of the NREPA, so the DNRE can continue to conduct preapplication meetings when requested.**

The existing permit application form for projects impacting the environment, the DNRE/United States Army Corps of Engineers Joint Application package, is comprehensive for several programs. It is considered cumbersome and complicated and often leads to submissions that are "administratively incomplete." Further development of minor and general permits will impact current application requirements. **The Council recommends a review of the existing form be undertaken by an independent professional. A comparison with New Jersey and other states is suggested. The review should include form design, content requirements, technological enhancements, organizational requirements, and processing.**

Recommendations (continued)

- P.A. 120 of 2009 created and required the increased use of general and minor permit categories. **The Council supports the expansion of general and minor permit categories. It further recommends the DNRE involve stakeholders and other interested citizens in the development of these categories.**

(ii) The effect of mandatory decision-making time frames on meeting the purposes of this part, and, if appropriate, the time frames that should apply to decision-making under this part.

A statutory change to Part 13, Section 1307(1) [MCL 324.1307(1)] to allow an applicant, with concurrence of the DNRE, the option of extending the permit processing period longer than the 20 percent of the processing period currently allowed. **The Council recommends the language be changed to: “at the request of the applicant, the permit processing period shall be extended for 120 days. The permit processing period may be extended beyond 120 days up to 1 year from the date the application is administratively complete upon mutual consent of the applicant and the department.”**

Additional program efficiency recommendations:

(b) The point in the department’s process of decision-making on a permit application at which the possibility of mitigation should be considered.

- State law is consistent with federal language with individual permits evaluated for mitigation sequentially (avoid, minimize, compensate/mitigate). With the federal requirement of “no net loss” the DNRE requires mitigation for all projects that would result in the loss of wetlands other than general permit authorizations. Staff is authorized to waive review of mitigation for impacts less than 1/3 acre, and when the basic project purpose is to create or restore wetland. All applicants are required to submit a mitigation plan if a project proposes to impact/fill wetlands. Regardless of proposed impacts submitted within the application, the DNRE will review to assure avoidance and minimization prior to consideration of mitigation. **To assure DNRE staff and applicant can coordinate project avoidance, minimization, and mitigation requirements the development of a procedure to extend timelines is necessary to assist applicants. Procedures for extension of timelines should include consensual agreement between both parties (DNRE and applicant).**

(c) Actions necessary to adopt and implement measures determined by the United States environmental protection agency to support consistency with the requirements of section 404 of title IV of the federal water pollution control act, 33 USC 1344, as set forth in "Final Report Results of the U.S. Environmental Protection Agency Region 5 Review of Michigan Department of Environmental Quality's Section 404 Program", dated May 2008.

Following their review of the Michigan Wetlands Program and extensive discussions with the DNRE and the Department of Attorney General, the EPA identified twenty (20) remaining issues that deviated or were not in compliance with Section 404 of the Clean Water Act. Many other questions raised by the EPA were satisfied by the initial state response. The Council has broken those remaining issues down into three categories. The first is issues already addressed by the DNRE; the second is issues with completed Council recommendations; and the third is those issues that require more consideration. Those issues requiring more consideration will have recommendations developed for the Council’s final report.

For the following issues identified by the EPA, the italic text represents changes required by the EPA; the bold text is the Council’s recommendation. Included dates are deadlines established to complete the required modifications.

Recommendations (continued)

Resolved Issues:

- *Promulgate a new Part 301 rule requiring consideration of cumulative impacts before new minor permit categories are established. No further action required. However, the Council will continue to discuss the changes in order to assist in clarifying regulatory requirements.*
- *Complete Wetland Inventories in all counties. The subcommittee believes no further action on the inventory is required. The Council recommends the DNRE develop additional Web links to state and local inventories, and also track inventories developed under local ordinances.*
- *Ensure that field staff include documentation for permit decisions in every file. The Council believes the actions already taken by the DNRE are sufficient and that no further action is required.*
- *Provide public notices to all interested parties by mail and by one other method. The Council believes the actions already taken by the DNRE are sufficient and that no further action is required.*

Recommendations:

- *Clarify exemption for road maintenance in §324.30305(2)(k) to be consistent with federal exemption. The Council recommends that the DNRE proceed with rulemaking to clarify this issue in cooperation with the Michigan Department of Transportation and other appropriate stakeholders. DUE DATE: July 31, 2012*
- *Eliminate exemptions for tailings basins associated with iron and copper mining, found in §324.30305(2)(o). The Council recommends that the DNRE proceed with development of a formal proposal to amend Part 303 to eliminate the exemption for iron and copper tailings basins, in cooperation with the Council. DUE DATE: July 31, 2012*
- *Limit exemptions in §324.30305(2)(l) and (m) to activities that are exempted by the Clean Water Act. The Council recommends that the DNRE work with utility interest groups in the development of suitable amendment language, and simultaneously develop general permit or minor project categories for previously exempted activities. DUE DATE: July 31, 2012*
- *Develop administrative rules under Parts 301 and 303 to set a 5-year permit term limit. This is partially completed. The Council recommends that the DNRE proceed with administrative rulemaking to establish consistent 5-year permit limits. DUE DATE: July 31, 2012*
- *Amend rules under Parts 301 and 303 to clarify a permit will become effective on the date when signed by both parties. The Council recommends that the DNRE proceed with administrative rulemaking to resolve this issue. DUE DATE: July 31, 2012*
- *Promulgate rules under Part 301 that are consistent with the federal regulations with respect to the DNRE's authority to revoke a permit. The Council recommends that the DNRE work with the Department of Attorney General to complete administrative rules that are consistent with state law and federal requirements. DUE DATE: July 31, 2012*

Recommendations (continued)

- *Revise the EPA-DNRE Memorandum of Agreement (MOA) to ensure the DNRE will provide notice of and provide 30-day public comment period on enforcement settlements and ensure that the DNRE will not oppose intervention by any citizen when permissive intervention in a state action is authorized by Michigan law. **The Council recommends the DNRE pursue revision of the Section 404 Program MOA with the EPA with a goal of completing revisions by the target date. DUE DATE: December 31, 2010***
- *Develop a method to screen minor and "walk-in" permits for threatened and endangered species impacts. **The DNRE should finalize administrative action with the United States Fish and Wildlife Service and EPA by new due date with the final DRAFT procedure (that also complies with the state threatened and endangered species statute) presented to the subcommittee for final recommendations to the Council. DUE DATE: December 31, 2010***
- *Develop a method for notifying and allowing comment by another state whose waters may be affected by a discharge. **The Council recommends that the DNRE draft appropriate procedures and incorporate as part of the MOA. DUE DATE: December 31, 2010***
- *Promulgate rules under Parts 301 and 303 that incorporate the Section 404(b)(1) Guidelines by Reference. **The Council recommends that the DNRE proceed with rulemaking to incorporate the Section 404(b)(1) Guidelines under Parts 301 and 303 in cooperation with appropriate stakeholders. DUE DATE: July 31, 2012***
- *Promulgate rules under Parts 301 and 303 that require staff to consider impacts to threatened or endangered species during permit review. **The Council recommends that the DNRE initiate actions necessary to complete rulemaking in cooperation with appropriate stakeholders. DUE DATE: July 31, 2012***

Further Considerations Required:

- *Amend Part 303 to explicitly state exemptions apply only to discharges that occur in areas of ongoing farm, silviculture, or ranching operations. **The committee intends to further discuss this issue to clarify the need for the amendment and the impact on the public. DUE DATE: July 31, 2012***
- *Amend §324.30305(2)(e) to require a permit for discharges that allow an area to be converted from one exempted use to another. **The Council intends to further discuss this issue to clarify the need for the amendment and the impact on the public. DUE DATE: July 31, 2012***
- *Amend §324.30305(2)(h) to delete mention of straightening, widening, or deepening. Clarify that exemption is limited to true drain maintenance activities. **The Council intends to further discuss this issue to clarify the need for the amendment and the impact on the public. DUE DATE: July 31, 2012***
- *Promulgate rules under Part 301 that will define maintenance, operation, or improvement consistent with the federal definition of "Maintenance." **The Council intends to further discuss this issue to clarify the need for rulemaking under Part 301 and the impact on the public. DUE DATE: July 31, 2012***
- *Eliminate exemptions for agricultural drainage. **The Council will continue to work with the DNRE to explore the legal need for and practical impact of deletion of the limited Part 303 exemption for drainage of isolated wetlands, given the impact of Part 301 requirements. DUE DATE: July 31, 2012***

Recommendations (continued)

- *Develop guidance under Part 303 regarding proper use of feasible and prudent alternatives analysis and water dependency test. **The Council recommends that the DNRE provide the previous guidance on feasible and prudent alternatives and pertinent federal requirements. Council members and others may provide comments regarding desirable changes to the rescinded guidance to the DNRE and the committee. The DNRE will work with the committee to revise the previous guidance as necessary to meet the October 15, 2010, deadline set by P.A. 120 of 2009. DUE DATE: October 15, 2010***

Other Recommendations

The process by which permit applications involving Wetland Restoration Projects are considered is currently problematic for many involved parties. The subcommittee received input from various users of this process, as well as a presentation from DNRE staff. While the actual number of permit applications that result from wetland restoration projects constitute a relatively small percentage of current DNRE workload, there is considerable interest in this process by Council members. The DNRE currently requires all wetland restoration projects to be permitted regardless of applicant. Federal and state agencies, including agencies such as the DNRE's Wildlife Division, United States Department of Agriculture's Natural Resources Conservation Service, and United States Fish and Wildlife Service with expertise in wetland restoration currently must meet DNRE permit requirements. In other states, federal agencies are often authorized to carry out restoration activities under Nationwide General Permit #27. The DNRE has also issued a general permit for wetland restoration activities; some resource agencies do not believe that permit requirements in Michigan are consistent with those in other states. **The Council will continue to evaluate and consider recommendations in the next report.**