

**WETLAND ADVISORY COUNCIL AGENDA
FEBRUARY 12, 2010**

**MICHIGAN UNITED CONSERVATION CLUBS
11:00 AM – 2:00 PM**

1. Welcome / Review of Agenda and Meeting Minutes
2. Section 404 Program Consistency Measures (Sue Elston and Peg Bostwick):
Review of requirements, status, and preliminary discussion by Council.
3. Schedule for Council Meetings: Dates, Times, Locations
4. Formation of Technical Subcommittees
5. Initiate Discussion of Permit Application Process (as time allows)

**Wetland Advisory Council Meeting
MUCC Conference Room
Friday, February 12, 2010**

Council Members Present: Joseph Rivet, Mindy Koch, Susan Harley, Randy Gross, Grenetta Thomassey, Jeff Auch, Gary Dawson, Jeff King, Dan Coffey, Chris Reidy, Sue Elston, Russ Mason, John Konik, Erin McDonough, Steve Shine, Tom Hickson, Don Uzarski, Carrie Vollmer-Sanders

DNRE Staff Present: Liz Browne, Kim Fish, Peg Bostwick, Russ Mason, Al Stewart, Lynda Jones

Council Members Absent: Erin McDonough, John Niemela, Lee Schwartz, Todd Wyett

Joseph Rivet, Chair, indicated that there were three issues that needed to be reviewed before the October deadline: 404 Review; Permit Application; Mitigation Timing in the Review Process.

The Chair also distributed a draft document "Principles and Procedures" which sets guidelines on how the council can proceed as a team in meeting the goals of the Legislative reports.

Introduction of New Attendees: Mindy Koch is the new representative for the DNRE. Russ Mason will be sitting in on the meetings, but not as a voting member. Mindy is the Resource Management Deputy Director in DNRE that oversees the new Water Resources Division that will house the wetlands program.

The question was posed to the council if an attendee is unable to make the meetings, could someone attend in their place? The individual could attend since it is a public meeting, but they would be unable to vote.

Presentation by Peg Bostwick and Sue Elston, Section 404 Program Consistency Measures - see addendum for presentation summary; PowerPoint presentation posted on WAC Web page.

Discussion of the "Summary of Corrective Actions" document. The document is a timetable of actions that are needed to address the issues identified by the USEPA's audit of the wetland program.

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The council meeting was formally called to order.

The group discussed the possibility of setting subcommittees in the near future. Examples of types of subcommittees could be:

- Legislative Language
- 404 Guideline Issue

A member read from the report that stated, the council shall evaluate and make recommendations to the Legislature. A member stated there is no need for council members to spend time crafting statutory language, but rather to review the language generated by the department.

A member suggested a possible subcommittee topic could be mitigation. When the department issues a permit, they are required to look at mitigation. The sequencing of the decision-making process is to avoid, minimize, and then mitigate. There are regulated entities that have turned that around to say, "I have a Cadillac mitigation plan and I shouldn't have to avoid or minimize. I should be able to impact as much as I want." That is not consistent with federal regulations and was discussed during the legislative process. The Legislature included this issue in the council's charges.

The LWMD worked up internally a workload reduction plan because the division was not getting fees, additional resources, and needed to change the way they did business. The division had a plan approved through the Director that had a number of steps the division would take to redirect staff resources to the important issues and not spend time on lower priority issues. The Environmental Advisory Council supported the recommendations and they wanted the division to move forward with the plan before eliminating the program.

A council member suggested that the council could benefit from a number of baseline items (e.g., number of applicants that are out there, common problems with the applications received, number of applications processed within the mandatory timeframes, staffing levels). The LWMD agreed to provide this information available, along with the EAC report and workload reduction plan at the next council meeting.

Discussion held on how often the council should meet and where.

Decided that the meetings could be held around the state and hosted by the individual members.

A member suggested that a conference call be set up for individuals that can not make a meeting.

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A member suggested that a field trip would be helpful.

Individual council members that would like to host a meeting can provide Lynda Jones the possible location(s) and what month(s) would work.

The chair indicated the next meeting will consist of:

1. Presentations during the first hour. ½ hour presentation by James Sallee, ½ hour presentation by Don Uzarski.
2. The second portion of the meeting could focus on specific issues (permitting, permit applications, concerns, etc.). Council members are to bring any specific concerns they have to the meeting.
3. During the third portion of the meeting the department will provide specific suggestions on overall efficiencies, the EAC recommendations, and the division's wish list (with the expectation that all items are not possible, but the council should be made aware).

Mindy Koch indicated that next month we could have a presentation from LWMD that lays out the application process information as well as the number information. She was under the impression that this group was made up of the individuals (or representatives from associations) that had problems or were involved with the permits and engaged in the review process and could bring to the table the discussion of what was heard at the legislative level when the bill was passed. A presentation provided would put everybody on the same level playing field. Staff could bring their concerns and things they have heard and council members could bring their concerns and then perhaps we think about whether there is a need to break down into subcommittees.

Staff indicated that we should also include in the presentation information on the application process, the form, and some of the mechanisms we have tried to provide training or guidance to property owners on how to get through this process.

The previous meeting minutes were briefly discussed and there were no comments.

The next meeting will be held on Friday, March 26, 2010, from 11:00-2:00 at the Michigan Association of Realtors Building, 720 North Washington Street, Lansing, Michigan.

Addendum
February 12, 2010 Meeting of the Wetland Advisory Council
Presentation Notes

**Ms. Peg Bostwick, DNRE, and Ms. Sue Elston, USEPA – Section 404
Program Consistency Measures**

[See WAC Web page for PowerPoint presentation]

The final notice of EPA's findings was in the Federal Register in July of 2008. The department started gathering information and looking at what needed to be done to accomplish the audit findings. The department expected to proceed with the rulemaking process in early 2009. Instead, in 2009 we had a proposal for significant reform of our Wetland Program. Early in the process the department suggested that those reforms include the measures that we needed to achieve federal consistency. This was brought up in the legislative workgroup meeting, but the outcome was that the actions would be deferred until the Wetland Advisory Council could look at the whole process.

1. Complete wetland inventories in all counties.
Was done December 2006 and EPA has recognized it.

2. Amend Part 303 of the NREPA to explicitly state exemptions apply only to discharges that occur in areas of ongoing farming, silviculture or ranching operations. In federal law the exemptions are parallel, but it is clear that these exemptions apply only to ongoing activities. You can not convert a natural undisturbed wetland and start farming without a permit. That is consistent with the way the DNRE has operated and consistent with the Supreme Court decision we have in one of these cases. It is not clear in statute and EPA has asked us to clarify this point, which would have to be as an amendment. An example of when we have problems with this is when we receive an application to clear a parcel, typically a forested wetland with the statement that is being done for silviculture purposes or for farming purposes. Once it is cleared, all of a sudden it is going to be converted to upland development (condos, residential development, etc.) The Department of Attorney General has told us that if there is a wet meadow a farmer can plow and plant it, it is an exempt activity. That is inconsistent with federal law. In 1993 there was a Memorandum of Agreement with all the federal agencies that had a five year provision. If within five years you went back and farmed again it was o.k. and had not reverted back to wetland status in terms of being regulated. If you have to place additional drainage or tile that would be a conversion. The MOA expired, but this is a general practice. Amendment language has not been drafted.

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3. Amend Section 324.30305(2)(e), exemption for farming and forestry activities, to clarify that a permit is required to allow conversion from one exempted use to another (e.g. from silviculture to farming). The DNRE was going to start with rulemaking and then go forward from there. The Chair asked if there could be single-section amendments.
4. Amend 324.30305(2)(h) to delete mention of straightening, widening, or deepening. Clarify that exemption is limited to drain maintenance activities. The federal exemption of drain maintenance limits the maintenance activities to historic width, depth and location. The DNRE's goal is to amend Part 303 to make it consistent with Section 404.
5. Promulgate rules under Part 301 that will define maintenance, operation or improvement consistent with the federal definition of "maintenance."
The department has interpreted the drain maintenance exemption under Part 301 as being the historic width, depth, and location; but it doesn't exactly say that in the exemption language. Our goal is to clarify Part 301 in the rules so that it is consistent with Section 404. If you have a drain and it is filled with sediment, you can take it back to the initial elevation, but you can not make it deeper, wider, etc.
There is a General Permit category that allows you to reshape the banks to prevent excessive erosion.
6. Promulgate Part 303 Rule – clarify exemption for road maintenance (must be within existing footprint of the road). The state has an exemption for road maintenance where you can maintain or improve streets and roads in the right-of-way but you can not add lanes or deviate from the existing location. You can resurface and repave but not widen the road into a wetland area. We have had a couple of cases where the judiciary system (county) has interpreted this differently and we have entire roads that were built where there were no roads. Federal law makes it clear you can maintain roads but you can not increase the footprint. Joseph Rivet asked if the County Road Association was involved in the legislative process of keeping the Wetlands Program. Liz Browne indicated that Mr. John Niemela, the member of the public on the council, is a member of the County Road Association, but was not involved in the process. Mindy Koch suggests that we work with MDOT and inform them of what we are working on and invite them to attend.
7. Amend Section 24.30305(2)(j) and (o), to eliminate exemptions for drainage of isolated wetland for agricultural production, and for iron and copper mine tailings basins. There is no parallel federal exemption. The first is an exemption for certain kinds of agricultural drainage and it has no parallel in federal law. The current exemption says that you can drain a wetland that is isolated, it is limited to wetlands that are not contiguous to a lake or stream, and that they have to be part of commercial farming operation. The second

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item that is unrelated is an old exemption for iron and copper mining tailings basins. These structures are exempt under Part 303, but are not exempt under Part 301 or dam safety. We require permits under these other statutes.

8. Amend Part 303 to limit exemptions for oil and gas pipelines and electric power lines to activities exempted under Clean Water Act. EPA indicates that some of these activities are regulated under the Section 404 Program. Overhead wires are not regulated. Trenching and pipelines through a wetland may be regulated. Our goal is to come up with criteria for what is regulated and what is not regulated, consistent with federal law.
9. Promulgate rule under Part 301 to require consideration of cumulative impacts when establishing new minor permit categories are established. Completed in statute by PA 120 amendments.
10. Promulgate rules to set a 5 year permit term limit under Parts 301 and 303. Under Part 303 this was added in the PA 120 amendments. Part 301 we have a five-year permit for general permits but we need to get one in rules for individual and minor project categories.
11. Promulgate rules under Parts 301 and 303 to clarify that a permit becomes effective on date when signed by both parties. Currently we issue a permit, without applicant's signature, send it out, and it is good the day it is issued. Need to implement an administrative step of getting the applicant to sign their permit accepting the conditions of their permit.
12. Promulgate rule under Part 301 to assure consistency with federal regulations with respect to authority to revoke a permit by clarifying factors to be considered as "cause" for revocation. Not an issue for Part 303, and not a significant issue since there has only been one permit revoked under Part 301.
13. Promulgate rules Under Parts 301 and 303 that incorporate the Section 404(b)(1) Guidelines by reference. Basically, the guidelines address the need for consideration of alternatives, there are certain prohibitions against violating state water quality standards and effluent standards, a project can not jeopardize a threatened or endangered species. There is also a set of criteria saying that we should not issue a permit if there is going to be significant resource degradation individually or cumulatively and the applicant has to take steps to minimize the impacts. Current state law is consistent with this language, but this will pick up the federal language and drop it into the administrative rules for Part 303.

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14. DNRE will promulgate rules under Parts 303 that require staff to consider impacts to threatened or endangered species during permit review.
15. Promulgate rules under Part 303 regarding proper use of feasible and prudent alternatives analysis and water dependency test. There was a misunderstanding of how the state interprets feasible and prudent alternatives. The federal government uses "practicable alternatives." Within the EPA review document, the discussion on the different court cases through the Administrative Appeals process starts on Page 51. The public comments that were received begin on Page 77. EPA determined that the Administrative Law Judge was not making some decisions consistent with federal standards. The department's guidance was rescinded in accordance with PA 120 amendments; new guidance to be developed within 1 year. Consider discussing this issue further in a subcommittee setting.
16. Develop a new 404 Program MOA between DNRE and EPA that would include providing a public notice period on enforcement settlements (department is currently doing this), and ensuring that the department will not oppose citizen intervention when authorized under state law.
17. Ensure that field staff includes documentation of permit decisions in every file. A new form was developed in 1999 titled, "Project Review Report" and is currently being used in the field.
18. DNRE must provide public notices to interested parties by mail and by one other method. The department was providing the notices by mail and we have now developed CIWPIS on-line which provides a second method. This item is complete.
19. Develop a method to screen minor and "walk in" permits for threatened and endangered species impacts. Occasionally the department receives a minor project that could potentially have impacts to a listed species. We set up a draft procedure in coordination with the U.S. Fish and Wildlife Service and our state's endangered species program. We have used this procedure on a trial basis for 3-4 years. We will have Russ Mason, DNRE Wildlife, review the draft procedure before it is finalized.
20. Develop method for notifying and allowing comment by another state whose waters may be affected by a Michigan permit. The department does not typically have projects that affect other states. We are required by federal program regulations to provide notice with these states. We do not have a formal process for this and we will take care of this by the MOA. The MOA was to be completed by 7/31/09, but at the time we were unsure if the wetland program would continue, and action on addressing these issues was suspended.