

Wetland Advisory Council

Final Report

February 2013

Michigan Wetlands Meeting
Joseph Rivet, Bay County Drain
Commissioner

Drain Commissioners and Wetlands



WAC Establishment

- **Reasons**
 - E.P.A. Program Audit
 - State Budget
 - On-going Legislative Concerns
- **Established under Public Act 120 of 2009**
 - 20 Members
 - Bi-partisan Appointments
 - Punt

WAC Members

WETLAND ADVISORY COUNCIL

- Jeff Auch
Representing a conservation district
- Dan Coffey
Representing the statewide association of realtors
- Gary Dawson
Representing natural gas or electric utilities
- Sue Eiston
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
- Russ Mason
Representing the Michigan Department of Natural Resources
- Erin McDonough
Representing statewide conservation organizations
- John Niemela
Representing the general public
- Chris Reidy
Representing USDA's Natural Resources Conservation Service
- Joseph Rivet
Representing the association of drain commissioners
- Lee Schwartz
Representing the statewide association of home builders
- Steve Shine
Representing the Michigan Department of Agriculture
- Jim Sygo, Interim Director – or his designee
Representing the Michigan Department of Environmental Quality
- Grenetta Thomassey
Representing watershed organizations
- Donald Uzarski
Representing university professor with wetland science expertise
- Carrie Vollmer-Sanders
Representing the largest statewide farm organization
- Todd Wyatt
Representing businesses
- John Konik
Liaison from the United States Army Corps of Engineers

WAC

- **The Council has met regularly from January 2010 through July 2012. 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 MDNRE staff 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 to the Legislature. They are as follows:
 - Permit Processing and Efficiency
 - 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 8.11.10 and Holland 8.17.10)
- The committees met and forwarded recommendations to the Council.
- Initial Council recommendations developed on a consensus basis.
- Final Report was consensus – differing issues were referred to the Legislature

WAC Preliminary Report

October 1, 2010

- Increased deadlines for issuing permits
- Recommending decentralizing permit process
- Recommended updates for technology/Data Base
- Improve Public Outreach/Education
- Adopt presented feasible and Prudent alternative analysis and water dependency test
- Approved the administrative changes necessary to comply with E.P.A. Audit

WAC Charge

Report to Legislature August 15, 2012

- Improved Coordination with U.S. Corp of Engineers
 - Reduce burdens of dual Fed/State Regulations
- Long-term Program Structure to Include:
 - Role of local Governments
 - Certification of Wetlands Professionals
 - Scientific Method for Assigning Wetland Function & Value for Permit Purposes.
 - Wetland Definition & Delineation Methods – Role of Hydric Soils
 - Minor & General Permit Categories
 - Appropriate level of Funding
 - Promotion of Wetland Mitigation Banks
 - Feasible & Prudent Alternative
 - Public Involvement
 - Cranberries
 - Homeowner/Non profit customer Assistance

WAC Final Report

- The Council was unanimous in its belief that Michigan should retain its designation as an approved Section 404 Program, making the assumption that necessary legislative changes can be positively concluded.
- It has concurred with the many programmatic improvements made by the Michigan Department of Environmental Quality (MDEQ) over the two-and-one-half year period the Council was active.
- The Council is supportive of the current direction and approach taken by the MDEQ to administer the program going forward.
- The work of the Council has been consensus based.
- The report contains notes of concern by individual members where relevant.
- The Council declined to take positions on issues that it was not charged with under 2009 PA 120.
- A major factor in the creation of the Council involved a state response to a United States Environmental Protection Agency (USEPA) review of the state's administration of the approved Clean Water Act 404 Program.
- Of the 22 issues identified, 19 were addressed by the MDEQ internally or through the Council.
- The remaining three issues relate to exemptions for utilities, drains, and agriculture practices from regulation under the Michigan program. These issues require statutory changes. The Council debated these issues but, for a variety of reasons, including the legislative process beginning before the completion of its work, did not come to consensus. Therefore, no recommendations on statutory language are contained in this report. Resources Division.

WAC Recommendations

- *Improving coordination and reducing duplication of effort with the United States Army Corps of Engineers.*
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- The Council has reviewed the MDEQ/United States Army Corps of Engineers (USACE) joint permit application form, as well as the 2011 Memorandum of Understanding between the MDEQ and the USEPA concerning the administration of the Clean Water Act Section 404. The Council believes there is coordination between the entities and this coordination has reduced the burden on applicants. The Council has made a recommendation in its October 1, 2010, report to have the application and its processing independently reviewed.
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- *Potential long-term changes in program structure, including all of the following:*
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- *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.*
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- The Council recommends that: 1) the MDEQ use Michigan Rapid Assessment Method (MIRAM), and other scientific methods for wetland monitoring, for evaluating potential preservation sites, and as one tool when there is a dispute regarding the benefits derived from a wetland (e.g., functions and values or quality of a wetland); 2) the MDEQ continues to develop MIRAM as a tool to be used by staff and consultants, and work with the MIRAM Development Committee to further calibrate the method and provide future training; 3) MIRAM is used when a permit applicant requests its use as a potential tool to resolve a disagreement between MDEQ staff and a permit applicant or consultant; and 4) that the MDEQ establishes a database which documents the use of MIRAM on individual permit applications by staff and/or consultants and that such a database be shared with stakeholders as part of a program review before additional implementation.
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WAC Recommendations

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- (ii) *The appropriate role of local units of government and conservation districts in the administration of this part.*
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- The Council believes the pilot program under Section 324.30303b(1) should be considered a success and that the MDEQ continues the program. The MDEQ recognizes the value of local programs operated pursuant to
- Section 324.30303b(1) by local units of government, conservation districts, not-for-profits, and wetland professionals to assist landowners and others seeking assistance to pursue the activities in 324.30303b(1). The preliminary indications are that the pilot programs with qualified and properly trained personnel have had a positive effect on the quality of permit applications and have improved the efficiency of program delivery.
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- The Council recommends that the program continues, but qualify to provide the services described in
- Section 30303b(1), each participant must:
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- Possess qualified (proper educational or experience background) staff to carry out the services to be provided;
- Have the qualified staff trained by the MDEQ in the services they will deliver;
- Clearly spell out what services the participants will provide and not provide pursuant to this section and only provide services for which their personnel are qualified and trained;
- Submit annual reports to the MDEQ and participate in a quarterly conference call with the MDEQ indicating what services the participants have provided in the preceding year;
- Enter into a Memorandum of Understanding with the MDEQ that will extend five years, but be subject to unilateral revocation by the MDEQ annually;
- Operate in a way that is revenue neutral for the MDEQ except for the MDEQ's review of annual reports and issuing of Memoranda of Understanding between the participants and the MDEQ.

WAC Recommendations

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- *(iii) A certification process for wetland professionals. The council shall consider information reported under section 30303b in evaluating and making recommendations under this subparagraph.*
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- The Council recommends a certification process not be pursued. Although a well-intentioned idea, in practice, it is not feasible due to economic and technical constraints. Establishing a certification program would require significant financial investment to establish a certification protocol and a long-term annual investment to provide a unit within the MDEQ to ensure proper compliance with the certification. Without a strong compliance program, there is no way to ensure that wetland professionals would work within the limits of any certification or licensing program. Wetland professionals can have tremendous pressure placed on them by clients that often want to minimize the extent of jurisdictional waters on their property. Without proper oversight, there is a significant likelihood of potential abuse of any certification or licensing.
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- *(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.*
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- The Council recommends that draft legislation be prepared that would reinstitute the 2-parameter (Michigan Department of Natural Resources [MDNR]/MDEQ-administered in 1980-2009) approach to wetland delineations, as compared to the existing, relatively new (2010-2011) 3-parameter approach. The Council also recommends that language be proposed as part of any draft legislation that would provide an option for an applicant to use a 3-parameter approach during a formal MDEQ Wetland Assessment or contested case (not permitting) process if they choose.
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- Staff, consultants, environmental groups, and the regulated community recognize that in the vast majority of cases the use of hydric soils for delineation is an unnecessary expense. Although, all agree including hydric soils is the more scientific approach. Although the size of the parcel impacted may be small, the economic or practical impact to the property owner can be significant. The property owner must retain the right to utilize the three part analysis including consideration of relic hydric soils. Protection of private property rights remains an essential part of our government system and must remain a critical factor in the wetland regulation process.
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- It should be noted that although this is a consensus recommendation, some Council members have expressed concern about deviating from the federal standard. Ultimately, the cost savings to applicants with virtually no change in outcomes led to the recommendation.

WAC Recommendations

- *The appropriate means and level of program funding under this part.*
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- The Council recommends a funding strategy outlined in the Public Sector Consultants Report Michigan Wetland Program – Options for Long-Term Funding. In summary, this includes General Fund or unclaimed bottle deposit funding on a permanent basis along with making the fee structure current with existing policy and practice. Rationale for the recommendations is contained in the report. It is included as *Attachment 1*.
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- The report indicates that the existing fee structure for the Wetland Permit Program covers only about 15 percent of the program costs. This percentage is far below other programs within the MDEQ. Increasing fees would reduce the burden on the general or other funding source required to administer the program. Significantly increasing the level of fees would have the added impact of discouraging applications to disturb wetlands. Although substantially increased fees are not the recommendation of the Council, there were members of the Council that advocated that position.
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- The Council would like to thank the Erb Family Foundation for providing the funding to complete the Public Sector Consultants Report, as well the Michigan United Conservation Clubs for acting as fiduciary.
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- *Minor project categories and general permits under section 30312b(1) to (3).*
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- The Council recommends the ongoing implementation of the General and Minor Permit categories issued by the MDEQ on October 31, 2011. It further recommends the Minor and General Permit categories be reviewed every five years or as pertinent issues arise as part of an ongoing stakeholder program review. Finally, it recommends the Legislature put in place an appropriate fee structure for the permitting process. The Minor and General Permit categories are *Attachment 2*.
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- *The appropriateness of the provisions of section 30304b as a means of reducing regulatory burdens from dual federal and state regulation.*
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- The Council has examined the value of USACE nationwide permits as well as discussed State Programmatic General Permits. The Council believes there exists opportunity to reduce regulatory burdens by the development and implementation of Supplemental Permit/General Permits (GP). Due to the issuance of General and Minor Permit categories and the recent enactment of 2012 PA 247 concerning shoreline wetland regulation, the statewide permits have not been fully explored.
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- The Council recommends the MDEQ continue to explore obtaining State Programmatic General Permits available under Section 404 to reduce instances of dual federal and state regulatory jurisdiction.

WAC Recommendations

- *The feasible and prudent alternative standard under section 30311 and consistent application of the standard.*
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- The Council reviewed and is satisfied with new Feasible and Prudent Alternative Standards presented by the MDEQ on September 22, 2011, which are consistent with USEPA's review of the Section 404 Program (WRD-003, August 2011, Attachment 3). The Council recommends continued implementation and utilization of those standards.
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- *Methods to assist both of the following in successfully obtaining permits under this part in a timely manner:*
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- *Individuals proposing a use or activity for their personal home site.*
- *Nonprofit organizations.*
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- As noted in recommendations numbers 2 (ii) and 4, the Council makes recommendations to continue and improve the General and Minor Permit categories. This new permitting option addresses nearly all personal home site activities requiring a permit. This also services most non-profit group circumstances.
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- The Council was made aware of concerns related to permitting of wetland restoration projects by various non-profit groups. The Council also considered the concept of allowing the MDNR permitting authority for all wetland restoration and enhancement projects. The Council found several difficulties with this alternative, including the limited number of projects and complexity of dual agency permitting.
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- Included in the general permitting is a category for Wetland Habitat Restoration and Enhancement. The general permit is expected to address many concerns and facilitate more efficient permitting for these projects.
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Wetlands Program Issues

- **Administration**
 - **Director Dan Wyant Involvement**
- **Legislature * SB 163**
- **Interest Groups**
 - **Drain Commissioners**
 - **Farm Bureau**

WAC

- **Thank you**
- **Discussion**