



U.S. EPA Region 5 Updates

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CWA § 404(g) Program Assumption





Clean Water Act Section 404 Assumption

- Section 404 of the Clean Water Act (CWA): Requires permits for discharge of fill material into Waters of the U.S.
- Michigan is one of two states to have assumed the 404 permitting program.
- The state program must be consistent with the CWA and implementing regulations.



EPA Oversight

- Program Approval
- Permit Review-general permits and major discharges
- State and federal program modifications



Assumption Process

- Governor submits a full and complete description of the state's program to EPA, including:
 - An Attorney General statement that state laws allow the state to carry out the program
 - A MOA with the Army Corps of Engineers that describes which waters are assumed
 - The state program must be consistent with the CWA and implementing regulations.



Assumable Waters

“navigable waters (other than those waters which are presently used, or are susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce shoreward to their ordinary high water mark, including all waters which are subject to the ebb and flow of the tide shoreward to their mean high water mark, or mean higher high water mark on the west coast, including wetlands adjacent thereto)” CWA § 404(g)



Why Now?

- Interest from States and Tribes
- Inconsistent Interpretation



Assumable Waters Subcommittee

- Charged to advise EPA on how to clarify which waters can be assumed by states and tribes
- Members
- Recommendation
- EPA Action . . .



Important Dates

- 1984: Michigan's 404 program approved.
- 1997: petition to withdraw Michigan's Section 404 program.
 - EPA initiated program review
- 2008: EPA's findings identifying corrective actions published.
- 2013: Michigan Legislature passed PA 98.
- 2016: EPA issues a decision on Michigan Program Changes



PA 98 Michigan Wetland Program Changes

- Eliminate inconsistent exemptions
 - Construction of mining tailings basins and water storage areas.
- Modify some exemptions
 - Drain Maintenance
 - Farming
 - Maintenance of Public Streets
 - Utility Lines Maintenance



Other Changes

- Jurisdiction
- New exemptions
- Permit fees
- Mitigation



Exemptions CWA Section 404(f)

- Established (ongoing) farming, ranching, and silviculture activities such as plowing, seeding, cultivating, minor drainage, harvesting for the production of food, fiber, and forest products, or upland soil and water conservation practices
- Maintenance (but not construction) of drainage ditches
- Construction and maintenance of irrigation ditches
- Construction and maintenance of farm or stock ponds
- Construction and maintenance of farm and forest roads, in accordance with best management practices
- Maintenance of structures such as dams, dikes, and levees



EPA's Review Process

- MDEQ notification of PA 98
- EPA Public Notice and Hearing
- Legal and regulatory interpretation of program changes
 - Including discussions with MDEQ, AG correspondence, and public comment review
- Final Decision by the Regional Administrator



Approvals

Disapprovals

PA 98 Provision—with descriptor	Decision
Sec. 1307 Permit Processing Timeframes	Approved.
Sec. 30101a. Statement of Purpose	Approved.
Sec. 30103(1)(d)(i) and (ii) Exemption for Maintenance of Agricultural Drains	Approved.
Sec. 30103(1)(e) Modification of Waste Treatment Exemption	Approved.
Sec. 30103(1)(f) Modification of Minor Drainage Exemption	Approved.
Sec. 30103(1)(g)(i)-(vi) and (viii) Modification of Drain Maintenance Exemption	Approved.
Sec. 30103(3) Definition of Agricultural Drain Added	Approved.
Sec. 30104 Changes in Michigan's Fee Requirements	Approved.
Sec. 30105(3) and (5) Modification of Public Notice Provisions	Approved.
Sec. 30105(8)(b) Modification of Maintenance and Repair of Existing Pipelines Provision	Approved.
Sec. 30105(9) Modification of Section Authorizing Conditions for a Minor Project Category or General Permit	Approved.
Sec. 30105(11) General Permit for Drain Activities	Approved.
Sec. 30305(2)(d) Modification of Exemption for Grazing	Approved.
Sec. 30305(2)(e) Modification of Exemption for Farming, Horticulture, Agriculture, Silviculture, Lumbering and Ranching	Approved.
Sec. 30305(2)(h) Modification of Agricultural Drain Maintenance Exemption	Approved.
Sec. 30305(2)(i) Exemption for Drain Maintenance	Approved.
Sec. 30305(2)(j) Modification of Road Maintenance Exemption	Approved.
Sec. 30305(2)(j) Deletion of Farm Production and Harvesting Exemption	Approved.
Sec. 30305(2)(k) Modification of Maintenance of Public Streets Exemption	Approved.
Sec. 30305(2)(l) Modification of Utility Line Maintenance Exemption	Approved.
Sec. 30305(2)(o) Deletion of Construction of Tailings Basin Exemption	Approved.
Sec. 30305(4)(a) Modification of Wetlands Incidentally Created as Part of Sand, Gravel or Mineral Mining Exemption	Approved.

Sec. 30305(8) Definition of Agricultural Drain
Sec. 30306(1)-(6) Modification of Application Requirements
Sec. 30306(7) Modification of Conditional Permits Under the Act
Sec. 30306b Modification of Application Fees and Other Requirements
Sec. 30311(5)-(6) Consideration of Feasible and Prudent Alternatives
Sec. 30311a Deletion of Former Sections 30311a(2)-(4)
Sec. 30311d(5) Compensatory Mitigation Ratios
Sec. 30311d(6) Conservation Mitigation Credits for Easements
Sec. 30311d(7) Stewardship Fund
Sec. 30311d(8)(a)-(e) Compensatory Mitigation Rulemaking
Sec. 30311d(9)(a),(b), and (c) Rulemaking to Encourage Mitigation
Sec. 30311d(10) Mitigation Bank Funding Program
Sec. 30312(5) General Permit Authority
Sec. 30312(6) General Permit for Blueberry Farming
Sec. 30312(7) General Permit for Blueberry Farming
Sec. 30321(7) Defines Drains, Ditches, etc. as Not Being Wetlands
Sec. 30328 State Program Limited to Navigable Waters and waters of the U.S.

PA 98 Provision—with descriptor	Decision
Sec. 30103(1)(g)(vii) Modification of Drain Maintenance Exemption	Disapproved.
Sec. 30103(1)(m) Exemption for Controlled Livestock Access	Disapproved.
Sec. 30305(2)(m) Modification of Utility Line Installation Exemption	Disapproved.
Sec. 30305(2)(o) Exemption for Placement of Biological Residues in Wetlands	Disapproved.
Sec. 30305(4)(b) Modification of Exemption for Wetlands Created as a result of Construction or Operation of a Waste Treatment Pond or Storm Water Facility	Disapproved.
Sec. 30305(4)(d) Modification of Exemption for Wetlands Created as a Result of Construction of Drains to Remove Excess Soil Moisture from Upland Areas Primarily Used for Agriculture	Disapproved.
Sec. 30305(4)(e) Exemption for Wetlands Formed in Roadside Ditches	Disapproved.
Sec. 30305(4)(f) Exemption for Wetlands Created as a Result of Agricultural Soil and Water Conservation Practices	Disapproved.
Sec. 30305(5) Contiguous Waters as a Result of Excavation	Disapproved.
Sec. 30311(7) Consideration of Feasible and Prudent Alternatives	Disapproved.
Sec. 30311d(6) Conservation Mitigation Credits for Easements for Impacted Agricultural Sites	Disapproved: the f
Sec. 30321(5) Definition of "Not Contiguous"	Disapproved.
Sec. 30321(6) Use of Drains to Establish Jurisdiction	Disapproved.
Sec. 30321(7) Defines Drains, Ditches, etc. as Not Being Wetlands	Disapproved: the fi and of itself, is not

Approved.



Approvals

- Changes that don't make Michigan's program inconsistent with the CWA
- Changes that are consistent with the CWA



Disapprovals

- Provisions requiring small language changes
- Exemptions
- Jurisdictional provisions-incidentals wetlands



Next Steps





Other Updates

National Wetland Conditional Assessment
Wetland Mitigation Performance Measures
Stream Mitigation

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