



MICHIGAN DEPARTMENT OF  
ENVIRONMENT, GREAT LAKES, AND ENERGY

## Recent Changes to Parts 301 and 303 in 2018 PA 631

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# PA 631 Amendments

## No major changes to Michigan's 404 Program

- EGLE does not anticipate major regulatory differences
  - » Amendments do not deregulate wetlands, lakes or streams
  - » EGLE does not consider the amendments a change to our 404 Program
- Adds requirements on EGLE to document decisions and consider additional criteria in making jurisdictional determinations.
- Minor modifications to definitions and processes.

# PA 631 Amendments, Parts 13 & 15

- Requirements were added in Part 13 for the specific documentation needed by EGLE for permit approvals with modification and permit denials under Part 301 & 303.
- Requirements were added in Part 15 for the specific documentation and process taken for civil enforcement actions under Part 301 & 303.

# PA 631 Amendments, Parts 301 & 303

No significant changes to the way wetlands, lakes/ponds, and streams are regulated by EGLE

- We continue to regulate based on previous criteria
  - » Main definitions were not changed under 301 or 303
- Criteria were added to the main definitions.
  - » now additionally consider **Waters of the U.S.** (WOTUS) for lakes and wetlands

# PA 631 Amendments, Part 301

- Previous definition of inland lakes and streams did not change
  - » Bed, bank, evidence of continued flow, etc.
- Now additionally consider **Waters of the U.S.** (WOTUS)
  - » Potential regulation of some ponds that were previously unregulated under Part 301 based on the current CWR?
    - Unlikely because of CWR exceptions for ponds created in upland.

## PA 631 Amendments, Part 303

- Previous definition of wetland regulatory criteria to determine if a wetland is “contiguous” did not change
  - » Within 500 FT, surface connection, or >5 AC
- Now must additionally consider **Waters of the U.S. (WOTUS)**
  - » Consider main definition criteria first before needing to determine if the wetland is WOTUS
  - » Could potentially result in regulation of some small non-contiguous wetlands that were previously unregulated based on the current CWR

# Waters of the United States

- Previously Rapanos Guidance was in effect nationwide.
- Now, the federal definition under the **2015 Clean Water Rule is in effect** in 22 states including Michigan.
- Trump Rule proposed in 2019.
- Because of pending legal action and a potential new federal rule for the federal definition of Waters of the United States, **the federal definition may change in the future** and thus, what is regulated by DEQ would change with it.

# Examples of WOTUS under 2015 CWR

A pond or wetland that is any of the following:

- within the 100-year floodplain of a stream AND within 1,500 feet of the OHWM of that stream,
- within 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,
- within 1,500 feet of the OHWM of a Section 10 or Interstate Water,
- within 4,000 feet of the OHWM of a stream, Section 10 or Interstate Water, AND has a case-specific SIGNIFICANT NEXUS to a Section 10 or Interstate Water
- Is an Interstate Water



# Significant Nexus

- A water has a **significant nexus** when any **single function** *or combination of functions* performed by the water, alone *or together* with similarly situated waters in the region, **contributes significantly** to the **chemical, physical, or biological** integrity of the nearest traditionally navigable (e.g., Section 10) water.
  - Functions performed Alone
  - Functions performed with Similarly Situated Waters in the region

# Significant Nexus

## Relevant Functions:

- (A) Sediment trapping, (B) Nutrient recycling, (C) Pollutant trapping, transformation, filtering, and transport, (D) Retention and attenuation of flood waters, (E) Runoff storage, (F) Contribution of flow, (G) Export of organic matter, (H) Export of food resources, and (I) Provision of life cycle dependent aquatic habitat (such as foraging, feeding, nesting, breeding, spawning, or use as a nursery area) for species located in a traditionally navigable water.

# WOTUS Examples



Search By

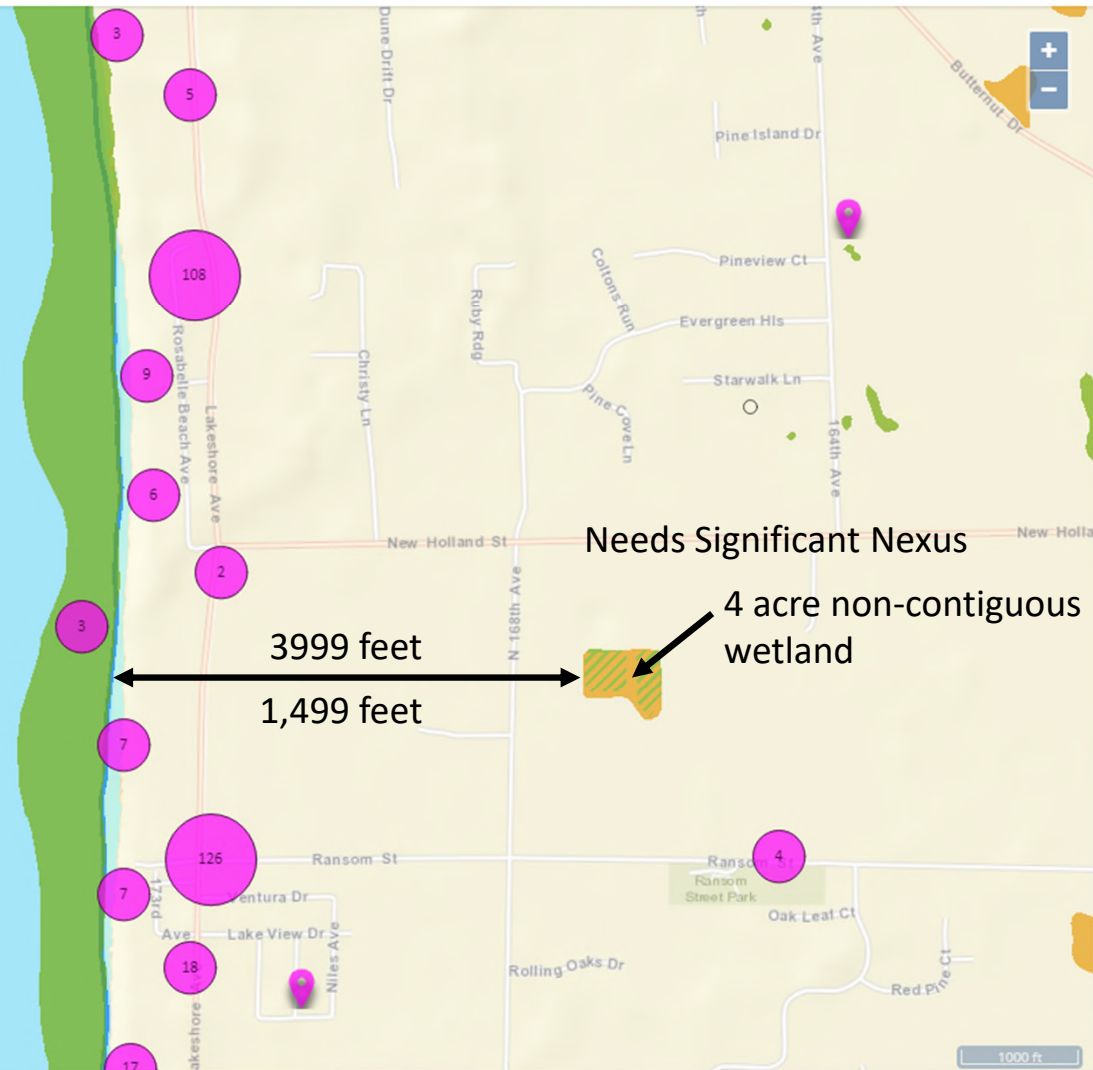
# Made-up Scenarios

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## PA 631 Amendments, Part 303 cont.

- Added hydric soils definition
- Added that farm ponds constructed under the exemption cannot make a wetland contiguous
- Clarified farm and forest roads exemption to include borrow material be taken from upland
- Added Voluntary Wetland Restoration definitions
- Clarified after-the-fact application acceptance allowances
- Added website posting of applications

## PA 631 Amendments, Part 303 cont.

- Added language regarding property entry for inspections
- Added that expert witness fees be awarded to prevailing landowner for contested WIPs
- Changes regarding Rare and Imperiled Wetlands and Threatened and Endangered Species Wetlands jurisdiction

# PA 631 Amendments, Part 303 cont.

- **Rare and Imperiled Wetlands / Threatened and Endangered Species**

- *Removed:*

- The language allowing non-contiguous wetlands less than 5 acres in size to be regulated “*if* determined to be essential to the preservation of the natural resources of the state”.

## PA 631 Amendments, Part 303 cont.

- **Rare and Imperiled Wetlands / Threatened and Endangered Species**
  - *Added:*
    - Language regulating wetlands with the **documented presence of state or federal endangered or threatened species** and **wetlands that are rare and imperiled as defined in 30301(1)(I).**



# Rare and Imperiled Wetlands

*DNR can recommend changes every 5 years*

- Great Lakes marsh
- Southern wet meadow
- Inland salt marsh
- ~~• Intermittent wetland~~
- Coastal plain marsh
- Interdunal wetland
- Lakeplain wet prairie
- Lakeplain wet-mesic prairie
- ~~• Northern wet-mesic prairie~~
- Wet-mesic prairie
- Coastal fen
- Wet prairie
- Prairie fen
- Northern fen
- Patterned fen
- Poor fen
- Muskeg
- ~~• Rich conifer swamp~~
- Relict conifer swamp
- ~~• Hardwood conifer swamp~~
- ~~• Northern Swamp~~
- ~~• Southern Swamp~~
- Southern floodplain forest
- ~~• Inundated Shrub Swamp~~

# Rare and Imperiled Wetlands

- EGLE staff use Michigan Natural Features Inventory (MNFI) Element Occurrence (EO) data in MiWaters
  - Keep in mind that not all Rare/Imperiled communities are mapped.
- Consult MNFI online abstracts

# Rare and Imperiled Wetlands

- Attempt to qualitatively assess the potential Rare/Imperiled Wetland community associated with a project location.
  - Relative size of the wetland complex, indicator species documented, dominance of species, relatively high diversity apparent.

# Rare and Imperiled Wetlands

- A current, real example...
  - Wetland less than 5 acres in size, more than 500 feet from a pond/lake/stream, and no overland connection.
  - However, the site inspection(s) revealed that a “PA 631-listed **Southern Wet Meadow**” community is likely present...

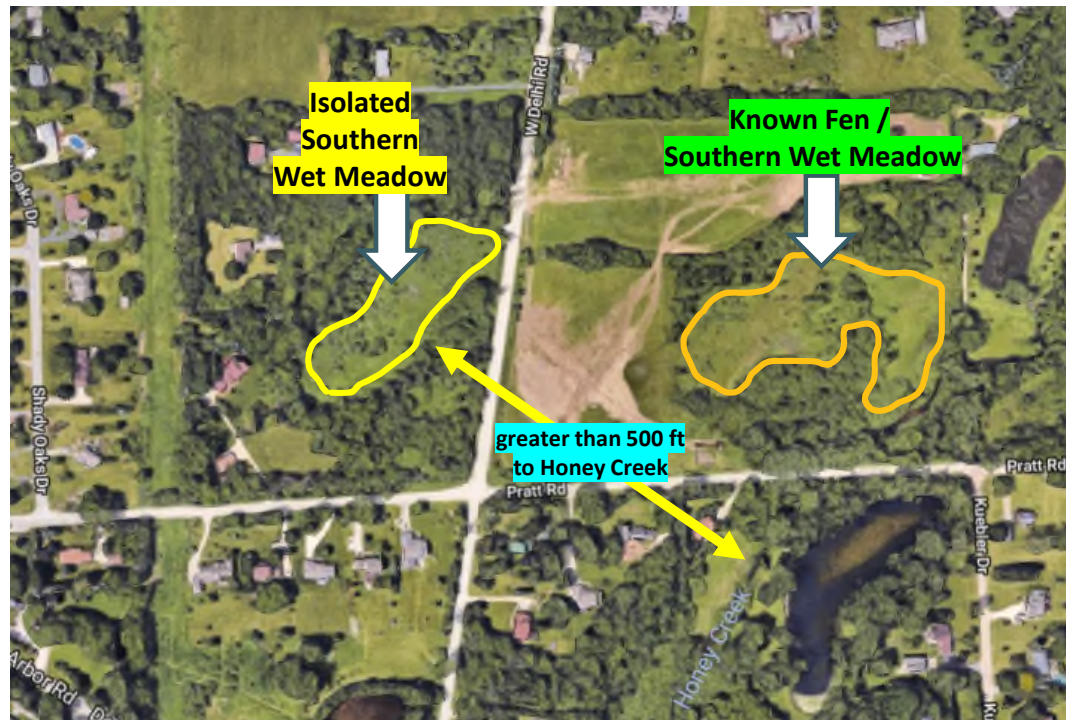
## Rare and Imperiled Wetlands

- **Southern Wet Meadow community** is likely present, based on:
  - the prevalent vegetation species present
  - the community structure
  - its apparent size and quality
  - proximity to a *known* Southern Wet Meadow “fen”
    - The nearby fen was identified and documented during a previous WIP review.

**If confirmed, this otherwise “isolated” wetland would now be regulated by EGLE**

# Rare and Imperiled Wetlands

- An example...



# Documented Presence of State or Federal Endangered or Threatened Species

- EGLE staff use MNFI Element Occurrences (EOs) in MiWaters.
  - Relatively recently documented occurrences, i.e. 20 years or less
- **Site review(s) to determine if habitat is actually present for EO species.**
- **Consult MNFI abstracts on line.**
- During a typical site visit (e.g., to delineate a wetland), it is normally difficult to document T&E species presence – *even if a species is actually present.*
  - Difficult to locate because of seasonality and amount of survey time necessary.
  - **If there is a recent EO of a T&E species near the project wetland – *and the specific habitat is obviously present* – then that may be adequate to now regulate the wetland.**

# Take Away Points

- No expected major changes in regulatory status of most wetlands, lakes and streams in Michigan
- Recommended that a determination be made on previous wetland, lake, and stream criteria and only consider whether a it is considered a WOTUS if it is otherwise unregulated.
- WOTUS determination for our program would not go through the USACE JD process. WOTUS definition is tied to our definitions but it is under state law and is not a bifurcated program.
- Consult MNFI abstracts for Rare and Imperiled and/or Threatened and endangered species information
- Document habitat community present and/or suitability for listed species
- Contact EGLE for a WIP or pre-application meeting.



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