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From: Pung, Katie
Sent: Tue 5/23/2017 8:51:49 PM
Subject: Review of Michigan Clean Water Act Section 404 Permitting Program
[USEPA Review Letter.pdf](#)



May 23, 2017

Scott Pruitt, Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

RE: Review of Michigan Clean Water Act Section 404 Permitting Program

Dear Administrator Pruitt,

On behalf of the Michigan Farm Bureau, the Michigan Chamber of Commerce, and the thousands of individuals and businesses represented by these organizations, we are writing to request a re-review of Michigan's Clean Water Act (CWA) Section 404 Permitting Program—as amended in 2013 by Michigan Public Act 98 (PA 98)—for compliance with the requirements of the CWA for state-administered Section 404 programs.

In 1984, Michigan assumed authority to administer the CWA Section 404 permit program for the discharge of dredged or fill materials into waters of the United States, and has continued to administer the program since that time. In 1997, a request was made by the Michigan Environmental Council to the United States Environmental Protection Agency (EPA) to review the program for compliance with the requirements of Section 404. An informal program review by the EPA was completed in April 2008, which identified a number of deficiencies in Michigan's program. Michigan's response to EPA's findings culminated in the passage of PA 98 in 2013, which made significant amendments to Parts 301 and 303 of Michigan's Natural Resources and Environmental Protection Act (NREPA) in an effort to address the identified programmatic deficiencies. The amended statute was sent to EPA in July 2013 by the Michigan Department of Environmental Quality (MDEQ) as a proposed revision to Michigan's CWA Section 404 program. EPA again reviewed the amended program for compliance, and in December 2016 issued its final determination that the revised program continued to show deficiencies and was therefore noncompliant with Section 404. EPA warned that failure to address these persisting deficiencies would result in revocation of the authority granted Michigan in 1984 to administer the permitting program.

It is our belief that the EPA's final determination regarding Michigan's revised program was in error, as it appeared to discount, if not entirely neglect, a number of mitigating factors and legal principles that would, together, mandate the opposite conclusion: that Michigan's program, as amended, is functionally equivalent to and at least as stringent as the standards imposed by CWA

Section 404 and should therefore be approved, as written. For this reason, we believe a second review of Michigan's amended program is both appropriate and necessary. Attached to this letter is a brief discussion of our primary legal reasons for disagreeing with the agency's conclusion regarding the fourteen (14) sections in NREPA that it identified as nonconforming, and for requesting a second review of Michigan's amended program.

We appreciate your time and attention to this matter, and look forward to working with you and your staff to facilitate a quick and thorough review of Michigan's program so the State can move forward with its implementation and stakeholders can proceed with certainty in planning and executing projects across our great state.

Sincerely,



Carl Bednarski, President
Michigan Farm Bureau



Richard K. Studley, President & CEO
Michigan Chamber of Commerce

Cc: Rick Snyder, Governor, State of Michigan
Heidi Grether, Director, Michigan Department of Environmental Quality
Peter Manning, Division Chief, Michigan Department of Attorney General
Michigan Congressional Delegation
Michigan House & Senate Committees on Natural Resources and Environment

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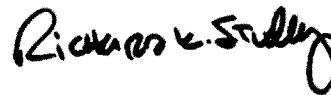
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Appendix A
Legal Arguments Contesting EPA's Decision of Non-Compliance

1.) Section 30103(1)(g)(vii) Exemption for Culvert Replacement, Including Culvert Extensions of Not More Than 24 Additional Feet Per Culvert

EPA found that the exemption for culvert replacement, including the extension of an existing culvert by not more than 24 feet is inconsistent with the CWA because it entails more than maintenance of a structure to its original design and would result in more than a minor impact to the water body. Although a culvert extension does indeed alter the scope of size of the original fill design (which would be prohibited under 40 CFR § 232.3(c)(2)), EPA failed to consider the application of § 232.3(c)(6), which permits the construction or maintenance of roads in accordance with best management practices “to assure that flow and circulation patterns and chemical and biological characteristics of water of the United States are not impaired.” This explicitly includes the practice of “bridg[ing], culvert[ing], or otherwise design[ing]” road fill “to prevent the restriction of expected flood flows.” Many culverts in the state were constructed during a time when engineering knowledge was not as advanced as it is today, and as a result, a number of these culverts do not meet best management practices and are inadequate to prevent the restriction of flood flows and to protect the condition of the road and the transected water body. By denying an exemption for the replacement of a legacy culvert with one that is more appropriately sized to the roadway and water body (limited to no more than 24 feet of additional length), the EPA is acting inconsistently with the underlying purpose of the federal road maintenance exemption, which is to prevent the degradation of roadways and culverts in order to avoid the potential for even greater damage to the water body (such as erosion) should the culvert fail of its intended purpose. Therefore, Michigan’s exemption is both defensible and more logically consistent with the purposes of the analogous federal exemptions.

2.) Section 30103(1)(m) Exemption for Controlled Access of Livestock to Streams

EPA objected to a new exemption for the construction of structures built to provide livestock access to water or to cross streams. The statute explicitly conditions the exemption on construction of the access or crossing in accordance with USDA, NRCS applicable practice standards, however, EPA was not satisfied, since the subsection itself is not explicitly limited to established (i.e., ongoing) farming operations. If one were to consider the livestock crossing exemption (which has no exact federal analogue) in isolation, it certainly could be susceptible to EPA’s argument that it exceeds the scope of the federal farming exemption by not being limited to areas of established and ongoing farming/ranching use. However, statutory sections must be considered in the context of the entire statute, and PA 98 explicitly limits Michigan’s agricultural exemption to activities that are part of “an established ongoing farming, ranching, horticultural, or silvicultural operation.” MCL § 324.30305. Other exemptions throughout Michigan’s law that touch or concern agriculture need not be explicitly limited to areas of established use because they all must be understood in light of the restrictions placed on the overarching agricultural exemption.

Further, as with the culvert maintenance exemption, the purpose of this exemption is to encourage practices that will serve to further the goals of the CWA and Michigan’s law: to wit, the protection of regulated water bodies through the implementation of best-management practices. Requiring a permit to implement such conservation practices on a farm or ranch has the effect of discouraging their implementation, thereby creating a perverse incentive to avoid these practices. Ironically, by taking issue with this exemption, EPA is actually discouraging those activities that would serve to further the purposes and goals of the Act. At some point, the agency must consider functional equivalence rather than mere textual analogy.

3.) Section 30305(2)(m) Exemption for Modification of Utility Line Installation

EPA found this exemption to be problematic both because the term “knifing in” with reference to utility line installation (when the line is less than six (6) inches in diameter) was not defined to explicitly exclude the discharge of fill into regulated wetlands and because there was no direct analogue in federal statute or regulations. The second contention is insufficient grounds to reject a state exemption. The Act does not assert that qualifying state programs are limited to the explicit exemptions contained in federal regulations. The

test, rather, is whether the state program is at least as stringent as the federal program. It is entirely possible that a state could expound on a federal exemption while remaining as stringent in its regulation of discharges to regulated waters. For example, the EPA found Michigan's fencing exemption to be consistent with the federal law even though neither Part 323 of Title 33 or Part 232 of Title 40 explicitly mention fencing. Likewise, allowing the knifing in of utility lines, though not explicitly included in the federal regulations, is not inconsistent with federal law because the practice of knifing does not result in the discharge of additional fill material to wetlands, nor does it change the bottom elevation of wetlands, and therefore would not, by definition, be a prohibited activity. That Michigan chose to clarify this point by including "knifing-in" in its exemption is entirely within its discretion, and does not somehow change the inherently "exempt" nature of the activity. EPA's contention to the contrary lacks any possible factual grounding.

EPA also took issue with the exemption for placement of utility poles and pilings as "the placement of pilings...may, but does not always, include the discharge of fill material." Although this is certainly true, this is the purpose of exemptions – to exempt otherwise unlawful discharges when such discharge is deemed necessary and/or of such minimal impact as to not transgress the purposes of the Act. In this case, the exemption for utility pole placement is explicitly limited to installations with "minimal" (i.e. less than 1 cubic yard) of structural support and that "[minimize] any adverse effect on the wetland." Again, such carefully enunciated constraints demonstrate that this exemption is narrowly tailed to further the purposes of the Act.

4.) Section 30305(2)(o) Exemption for Placement of Biological Residues in Wetlands

EPA objected to this exemption on the grounds that the federal definition of "fill material" specifically includes woodchips, and because the discharge of woody wetland vegetation into a jurisdictional wetland in the course of land clearing has been considered by the courts to be a Section 404-regulated discharge. While citing the case of *Avoyelles Sportsmen's League v. Marsh*, 715 F.2d 897 (5th Cir. 1983) in support of its contention that the placement woody wetland vegetation that is removed from a wetland back into that wetland is *per se* an unlawful discharge of fill material, the EPA ignores cases that have added flexibility to this rule, including, e.g., *Save our Wetlands, Inc. v. Sands*, 711 F.2d 634 (5th Cir. 1983), in which the court noted that mechanized removal of trees from wetlands and incidental fallback associated therewith is not a discharge of dredged or fill material when the activity is not intended to permanently change the area from wetland into non-wetland. Although Michigan's exemption does not include this limitation verbatim, by limiting the exemption to the cutting of woody vegetation and in-place grinding of stumps (as opposed to leveling or addition of other, outside biological residues), it is clear that it is only meant to cover mechanized land-clearing activities that would have a minimal impact on the wetland and that would not result in the conversion of wetland to non-wetland.

5.) Section 30305(4) Exclusions for Incidentally Created Wetlands

EPA took issue with a number of the descriptions of incidentally created wetlands that are expressly excluded from regulation under Michigan's program. One of the exclusions (for wetlands created due to construction or operation of water treatment pods or stormwater facilities) that EPA pointed out as being inconsistent was present in Michigan's law prior to the passage of PA 98 and was not flagged by EPA during its initial review and noncompliant. Therefore, EPA's objection to that section appears to be entirely arbitrary. Further, Part 230 of Title 40 similarly exclude from regulation "[t]reatment ponds or lagoons designed to meet the requirements of the [Act]," and "[s]tormwater control features constructed to convey, treat, or store stormwater," so EPA's conclusion appears to even fly in the face of federal regulations.

The other exclusions flagged by the agency were added or modified by PA 98, but two of them address wetlands incidentally created by structures that drain only *uplands* (which are certainly outside of the purview of the CWA), and the final excludes wetlands created by the adoption and implementation of agricultural conservation practices, which one would think the agency would attempt to encourage, rather than discourage by threatening to pull any incidentally created wetlands within the reach of the Act. To justify its claim that such structures are jurisdictional, EPA relied on guidance documents promulgated by the agency, but cited no sections of statute or regulation to demonstrate that such an expansive reading of the Act's jurisdiction is legally defensible.

6.) Section 30305(5) Exemption for Waters that are Made Contiguous to Regulated Waters as a Result of Commercial Excavation and Mining.

EPA objected to this categorical exemption from regulation on the grounds that artificial structures such as commercial mining and excavation pits may be used to pull waters that would otherwise be non-jurisdictional within the reach of the Act. This conclusion, again, appears to completely ignore the fact Part 230 of Title 40 explicitly excludes from the definition of “waters of the United States” “water-filled depressions created in dry land incidental to mining or construction activity, including pits excavated for obtaining fill, sand, or gravel that fill with water.” It follows that if such features themselves are not jurisdictional, they could also not be used to advance the line of regulation further “inland” (i.e. if a water was not previously jurisdictional by virtue of being within the prescribed distances of regulated waters, it makes no sense that it could *become* jurisdictional if a categorically non-jurisdictional water was created adjacent to it).

7.) Section 30311(7) Consideration of Feasible and Prudent Alternatives

EPA determined that subsection (7) of Michigan’s “prudent and feasible” analysis was inconsistent with Section 230.10(a) of Title 40 by virtue of the guidelines’ presumption that practicable alternatives to citing a project in a regulated wetland exist when the project is not water dependent. Why EPA believes that Section 230.10(a)’s formulation is applicable to this clause is not entirely clear, especially since subsection (4) of Section 30311 already addresses water-dependency by stating that “a permit shall not be issued unless the applicant also shows either [that]: (a) The proposed activity is primarily dependent upon being located in the wetland; [and] (b) A feasible and product alternative does not exist. Clearly, then, subsection (7) does not stand for the proposition that the nature of the activity (i.e. whether it is water dependent or not) shall not be considered when completing the feasible and prudent alternative analysis. Rather, it means that—aside from the water-dependency analysis in subsection (4)—MDEQ will not consider the use to which a permitted structure will be put when considering prudent and feasible alternatives. For example, a food processing facility would be treated the same as an industrial warehouse. We are not aware of any federal provisions that directly prohibit this type of analysis.

8.) Section 30311d(6) Conservation Mitigation Credits for Easement for Impacted Agricultural Sites

EPA’s objection to Michigan’s allowance for a conservation easement with MDEQ *as part* of mitigation requirements appears to be based on the assumption that this section means that such easement would entirely replace other mitigation requirements. The inclusion of the phrase “in part” renders the agency’s interpretation invalid, as it clarifies that a conservation easement would not constitute the sum-total of mitigation required by the department. The remainder of Michigan’s wetland protection act clearly demonstrates that the state continues to adhere to a “no net loss” principal of wetland mitigation.

9.) Section 30321(5) Definition of “Not Contiguous”

EPA objects to Michigan’s limitation of the concept of “contiguity” (which is roughly equivalent to “adjacency” under the federal regulations) to those cases where there is either a direct surface water or interflowing groundwater connection to an otherwise jurisdictional water on the grounds that the federal regulations do not require such physical connection for a water to be deemed a regulated “water of the United States.” Although it is true that in the most recent regulations, the agency extends the jurisdictional reach of the Act to certain bodies of water that are merely within a prescribed proximity to another jurisdictional water, it did so in an attempt to incorporate Justice Kennedy’s “significant nexus” test from *Rapanos v. United States*, 547 U.S. 715 (2006) into the regulations. Michigan’s requirement of some degree of hydrological connection between water bodies is not inconsistent with this principal, and it accomplishes the purposes of the Act by ensuring that those waters that could impact the water quality of other, downstream waters are regulated. Further, Michigan also regulates as jurisdictional isolated waters that are greater than five acres in size. When coupled together, it is highly unlikely that Michigan regulates *less* than would be regulated under the federal program,

notwithstanding the requirement for a hydrologic connection between a water body that is less than five acres in size and other, traditional jurisdictional waters.

10.) Section 30321(6) Use of Agricultural Drains to Establish Jurisdiction

PA 98 changed Michigan law to directly prohibit the use of agricultural drains (defined as a human-made conveyance of water that does not have continuous flow, flows primarily as a result of precipitation-induced surface runoff or groundwater drained through subsurface drainage, and serves agricultural production) to determine whether a wetland is contiguous—and, thus, regulated—to a jurisdictional lake, pond, river, or stream. EPA objected to this addition on the grounds that “[n]othing in federal law excludes consideration of agricultural drains when determining connection to waters of the United States.” As a matter of first principals, EPA does not object to Michigan excluding agricultural drains, *themselves*, from regulation. In fact, the EPA also provides a categorical exemption for certain man-made ditches in its 2015 rule amending the definition of “waters of the United States.” Rather, the agency asserts that even non-jurisdictional waters may be used to demonstrate a sufficient “connection” between an otherwise isolated, non-jurisdictional water to a downstream, jurisdictional water to bring such water within the purview of the Act. In addition to the argument advanced against this premise in the discussion of Section 30305(5), above, it must also be noted that both the majority opinion and Kennedy’s concurring opinion in *Rapanos* strongly criticized the agency for attempting to regulate man-made drainage ditches and indicated in no uncertain terms that the Act’s reach does not extend that far. *See, Rapanos*, at 734, 778-79. To the extent, therefore, that the agency relies on its own post-*Rapanos* guidance document to demonstrate that such waters may be regulated, this document appears to be an unfaithful reading of the court’s opinion.

11.) Section 30321(7) Categorical Exemption for Drainage Structures from Definition of Wetland

As with the previous section, EPA found that the first part of this section was noncompliant on the grounds that a drainage structure could be a regulated wetland if it met the three wetland criteria. This section obviously does not stand for the proposition that an artificial drain could not possibly run through a wetland or that it could not possibly take on wetland characteristics, itself, through neglect or lack of maintenance. Rather, as it states, “in and of itself,” an artificial drainage structure will not be considered a wetland. This is, again, consistent with the opinion of the Court in *Rapanos*, and is in the same vein as the agency’s regulations, which list out a number of man-made structures that are excluded from the definition of “waters of the United States” even though they might manifest all of the characteristics of regulated wetlands or other waters. The Court has clearly endorsed excluding such manmade features from regulation under the Act, and the agency’s decision to the contrary thus does not accord with the law.