

AMENDMENTS TO MICHIGAN'S WETLAND PROTECTION ACT, THE ONLY STATE-ASSUMED SECTION 404 WETLANDS PROGRAM

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ABSTRACT

In December, 1992, the Governor of the State of Michigan signed into law two amendments which have modified P.A. 203 of 1979 (Wetlands Protection Act). The two amendments contained several important provisions, though basically causing local wetland ordinances to regulate wetlands consistent with the State statute. By means of P.A. 203, the State of Michigan, via the Department of Natural Resources, has been administering the Section 404 wetlands program since August, 1984. However, during the past few years, anti-wetland regulation forces consolidated sufficient strength to force the amendment of the Wetland Protection Act. Comprised of the Michigan Home Builders Association, developers, real estate firms and others, this group secured introduction and considerable backing for a Senate Bill which called for the elimination of local wetland ordinances, wetland review boards, and wetland buffers. In the committee meetings, which were moderated by a state senator, compromise negotiations were undertaken which focused on establishing a standard wetland definition and use of a single wetland permit application, among other things. The compromise was eventually reached because of a strong response from local governments and environmentalists seeking to preserve this significant regulatory authority. Nevertheless, the wetland use permit system, on the state level, is hampered by staffing and fiscal constraints. Meanwhile, on the municipal and township level, the more pro-active communities are attempting to implement measures to respond to the act amendments to avoid substantive regulatory impediments. To these local communities, wetland preservation is deemed important for environmental reasons, and local residents often regard wetland preservation as a quality of life issue. In contrast, impacted landowners and developers often view wetland protection as a taking and a tool to effect no growth.

INTRODUCTION

Support for wetland preservation in the State of Michigan is inconsistent among the various public and private interest groups. Private developers, realtors, as well as some engineering firms, in particular, have expressed complaints about the lack of accurate wetland maps and the difficulty of obtaining necessary wetland permits (Tilton, 1988). In 1992, this wetland opposition was translated into a number of

legislative initiatives which were focused, in large part, on the elimination of local wetland ordinances. Senate Bill 522, which was backed by the Michigan Homebuilders Association, called for the preemption of wetland regulation at the state level and would have severely curtailed local wetland ordinances.

In December, 1992, the Governor of the State of Michigan signed two amendments which modified Michigan's Wetland Protection Act. These two 1992 amendments contained several important changes, though basically forcing local wetland ordinances to regulate wetlands consistent with the State Statute. Public Act 203 of 1979 (Goemaere-Anderson Wetland Protection Act), is the primary legislation which protects wetlands in Michigan. P.A. 203 defines wetlands identical to the federal wetlands manual, and requires a permit when regulated wetlands are to be developed. Wetlands which are contiguous to lakes, streams, drains, and ponds are regulated, as well as those greater than 5 acres in size (Wyckoff, 1988). There are additional jurisdictional criteria, and in counties of less than 100,000 people, non-contiguous wetlands are not regulated until a wetlands inventory is completed.

ASSUMPTION OF THE 404 PROGRAM

The U.S. Environmental Protection Agency (U.S. EPA) is responsible for the administration of the Clean Water Act, including Section 404 of the Clean Water Act of 1977 (33 U.S.C. 1344). Section 404 provides the basis for the primary federal program governing activities in wetlands. In August, 1984, the U.S. EPA transferred the administrative authority of the Section 404 Wetlands Program to the State of Michigan. The Michigan Department of Natural Resources (Michigan DNR) was able, in part, to assume authority of the Section 404 wetlands program because of the similarity between Section 404 regulations and Michigan's P.A. 203. In addition, the State of Michigan had other related legislation in place, such as P.A. 346 (Inland Lakes & Streams Act), and demonstrated a capability to effectively administer the wetlands program (Cwikiel, 1992).

In practice, the Michigan DNR and the U.S. Army Corps of Engineers jointly administer the federal wetlands regulatory program. The regulatory authority of the Corps of Engineers stems from Section 10 of the Rivers & Harbors Act of 1899 and Section 404 of the Clean Water Act of 1977. The Corps of Engineers has retained jurisdiction over wetland activities occurring in Great Lakes coastal waters and connecting channels, as well as in major tributaries to the upstream limit of navigability (*ibid.*). In places where the Corps of Engineers has jurisdiction, wetland permits are required from both the Corps of Engineers and Michigan DNR. Michigan is currently the only state which has assumed authority over the Section 404 Wetlands Program. Nevertheless, the U.S. EPA maintains oversight authority over major wetland projects, including those involving more than 10,000 cubic yards of wetlands fill.

OVERVIEW OF MICHIGAN'S WETLANDS ACT

Wetland Jurisdiction Criteria

In accordance with P.A. 203 of 1979, as amended, including the Administrative Rules which were promulgated in June, 1988, the following jurisdictional criteria apply to wetlands in counties over 100,000 persons (Dean & Jaworski, 1991):

- All wetlands contiguous to lakes, streams, drains, and ponds, including the Great Lakes.
- All non-contiguous wetlands greater than 5 acres in size.
- Non-contiguous wetlands smaller than 5 acres, provided one of the conditions listed below are met:
 - ~ Wetland is situated within 500 feet of lake, stream, drain or pond, unless it can be proven that no surface or groundwater connection exists.
 - ~ Wetland contains one acre or more of permanent open water.
 - ~ The wetland in question is essential to the preservation of the natural resources of the State, and the Michigan DNR has so notified the landowner.

Wetland Permit Process.

Beginning in 1983, the Michigan DNR started to vigorously enforce the permit requirements of P.A. 203, as well as to cite wetland violations. During these early years, the permit process did not proceed very well, partly because reliable maps showing wetland locations did not exist and a trained cadre of private wetland consultants was not yet available. Although the Michigan DNR had collaborated with U.S. Fish & Wildlife Service in producing the National Wetland Inventory (NWI) Maps, these maps were generated at a scale of 1:24,000 and only approximately 75% of the State was inventoried. After it assumed authority over the Section 404 Wetlands Program in 1984, the Michigan DNR initiated an in-house wetlands training program. By June, 1988, when the Administrative Rules of P.A. 203 were issued, the Michigan DNR's wetlands permit program had matured.

At present, a wetland project typically begins with a wetland delineation by a private wetland consultant or by a public wetland specialist from a community which has a local wetland ordinance. The wetland mapping is performed on either a large-scale topographic map or on an aerial photograph of suitable scale. Surveying in of the staked or flagged wetland boundaries is usually necessary to assure accuracy of the wetland limits. Next, the site plan is prepared by a landscape architect or civil engineer who attempts to avoid encroaching on regulated wetlands. With, or without, the aid of a wetland consultant, a wetland permit form of the Michigan DNR is filled out and a wetlands permit application, complete with necessary drawings, is forwarded to the Michigan DNR for approval.

According to P.A. 203, the Michigan DNR has 90 days to approve or deny the submitted wetland permit application. This 90-day review period commences on the day the permit application is determined to be complete, or on the date of a public hearing, provided such a hearing has been requested. During the first 60 days of the review period, the local community may provide review comments to the Michigan DNR. Unless health, safety, or regional issues are involved, the Michigan DNR generally does not approve a wetlands permit for which the local community has recommended denial. Some developers, and other permit applicants, will attempt to schedule a meeting with the Michigan DNR representative in charge of the permit file just prior to the end of the mandatory review period.

Local Wetlands Ordinances

The original Statute, as well as the amendments to P.A. 203 in 1992, both provide for the enactment of local wetland ordinances by counties, municipalities, and townships. As indicated in Appendix A, 38 local governments in Michigan have established wetland ordinances. Of these, 46% are located in communities in Oakland County. Situated in populous southeast Michigan, Oakland County is the wealthiest county in the state. A previous paper by Jaworski & Manhart (1988), revealed that communities with wetland ordinances tend to be wealthy and currently undergoing considerable residential or commercial growth.

Although some of the local wetland ordinances are special, most are a part of zoning ordinances. Special ordinances are also referred to as regulatory ordinances. Typically, the wetland ordinances contain sections on definitions, activities allowed without a permit, activities requiring a permit, permit requirements, and permit review procedures. As part of the ordinance, many of these communities also maintain a semi-official wetlands map which shows the general location of wetlands within the jurisdiction. However, these local wetland ordinances vary from community to community, particularly in regards to wetland definitions, minimum size of regulated wetlands, width of wetland buffer, and permit review guidelines. Approximately half of these ordinances regulate wetlands as small as two acres and employ a fixed 25-foot wide wetland buffer.

DISSATISFACTION WITH WETLAND PERMIT PROCESS

Even though the Michigan DNR maintains that 90% of all wetland permits applications eventually obtain approval, over the past few years considerable anti-wetland permit sediment has accumulated. Led by the Michigan Homebuilders Association, and inclusive of private developers, realtors, as well as selected attorneys and engineering firms, this group of dissatisfied individuals began to promote the amendment of P.A. 203 of 1979. While admitting that P.A. 203 could benefit from amendment, members of the Michigan DNR and environmental groups were reluctant to recommend legislative redress lest the wetlands act be weakened. However, in 1992, the opposition group began to focus on eliminating and/or restricting local wetland ordinances.

Developers' Dirty Dozen

In 1991 and 1992, a number of bills were introduced into the Senate and House of Representatives of the State of Michigan. Most notable was Senate Bill 522 which was drafted in September, 1991. Senate Bill 522 had the effect of galvanizing the environmental community, and much misinformation began to appear in the media. However, there were 12 points that the Michigan Homebuilders Association was determined to insert in Senate Bill 522. These 12 points of discussion are outlined in Appendix B. The environmental community quickly began to refer to these 12 points as the "dirty dozen".

Although some of the 12 points of discussion contained in Senate Bill 522 were less realistic than others, the Michigan Homebuilders Association was attempting to make a statement about the wetland permit process in Michigan. Of particular concern to this group, was that wetland definitions varied among local wetland ordinances, and that wetland consultants often disagreed when performing wetland delineations. Moreover, there was a general feeling among many developers that there was no standardization in regard to wetland permit applications, and that permit review needed streamlining. The wetlands ordinance of West Bloomfield Township, Oakland County, was singled out as being the most anti-development because of its regulation of wetlands as small as 0.25 acres and its employment of a separate and autocratic wetlands review board. Also, the incorporation of a wetland buffer in the local ordinances was often regarded as an additional taking and another means of reducing the density of development.

Senator Honigman's Committee

Beginning in the Spring of 1992, Senator Honigman of Oakland County chaired a bipartisan committee of informed individuals who were seriously interested in amending P.A. 203. Both the pro-development and pro-environment groups were well represented at the monthly meetings, which usually included approximately 25 individuals. Even though Senate Bill 522 initially served as a basis of discussion, the Legislative Services Council began to draft two senate bills as these meetings progressed. Senator Honigman worked diligently to avoid open confrontation and sought consensus on the various points of debate. What emerged in October, 1992 were two amendments to P.A. 203, which were eventually signed by Governor Engler in December, 1992.

1992 AMENDMENTS TO P.A. 203

The two amendments to P.A. 203 of 1979, are P.A. 295 and P.A. 296 of 1992. These two amendments comprise the first change in Michigan's Wetland Protection Act since it took effect in October, 1980. Although the amendments were effective immediately, local communities have until June, 1994 to be in compliance with the amended wetlands act.

Principal Changes

The overall intent of the amendments is to allow for local regulation of wetlands, but only as provided in the amended state wetlands act. It is apparent that the Michigan Homebuilders Association was willing to accept the development constraints imposed by P.A. 203 with its minimum wetland regulatory size of 5 acres and no wetland buffer, but not amenable to local ordinances which could regulated smaller wetlands and include wetland setbacks.

Outlined below are the principal changes which are contained in the amendments to P.A. 203. Greater detail concerning the amendments is contained in Jaworski (1993) and Fisher (1993).

- ~ Local wetland ordinances shall not provide a different definition of wetlands than is provided in the State Statute, which is identical to the federal definition of wetlands, except that a wetland ordinance may regulate wetlands less than 5 acres in size.
- ~ Upon receiving an application for a wetland use permit involving a wetland that is less than 2 acres in size, the local government shall approve the permit unless it determines that the wetland is essential to the preservation of the natural resources of the community and provides these findings to the applicant.
- ~ Prior to enactment of a wetlands ordinance, the local community must complete and make available to the public, at a reasonable cost, an inventory of all the wetlands within the community.
- ~ Any county, municipality, or township that adopts an ordinance regulating wetlands shall use the same permit form currently being utilized by the Michigan DNR, and each person applying for a wetlands permit shall make application directly to the local government. The local government shall forward a copy of each permit application to the Michigan DNR.
- ~ Though the amendments were silent on the buffer issue, some pro-development attorneys stated that the intent of the amendments was to eliminate wetland buffers on the local level. Case precedent may be necessary to clarify this issue, however.
- ~ With regard to the permit review period, the local community shall review an application in accordance to its wetlands ordinance and shall approve or deny the application within 90 days after receipt. The denial of a permit shall be accompanied by a reason in writing for denial.
- ~ If a wetlands permit is denied at the local level for a proposed wetlands use, the landowner may request a reevaluation of the affected property for property tax assessment purposes.

- ~ Local ordinances shall not require a wetlands use permit for uses and activities that are authorized without a permit under the State Statute.
- ~ The wetland permit applicant shall not be required to submit to more than one public hearing at the local level.
- ~ The local decision-making body which approves site plans, plats, and other related matters, shall be the same entity which will process wetland use applications. (This stipulation is intended to eliminate the need for wetland review boards).

Impact on Local Wetland Ordinances

As a result of these two amendments to P.A. 203, all 38 of the wetland ordinances must be revised prior to June, 1994, or risk being out of compliance. Those communities which have previously adopted wetland ordinances, but did not prepare wetland inventories, must do so and disseminate the findings to the public prior to June, 1994. Because the amendments did not specify a scale or level of detail for these wetland inventory maps, communities could employ National Wetland Inventory Maps and other available data sources including soil survey maps.

To assist local communities with wetland ordinances in addressing the amendments, a voluntary advisory group entitled the "Southeast Michigan Wetland Coalition" has been established. This paper, as well as the works by Jaworski (1993) and Fisher (1993), are part of that community assistance program. Other informal efforts are underway, including the providing of consulting by private environmental firms. The Michigan DNR is also responding by increasing its educational function to include a wetlands identification workshop to be held in June, 1993.

There are three issues, however, which will be somewhat difficult for local governments with wetland ordinances to resolve. These issues include: 1.) regulation of wetlands smaller than 5 acres, particularly those under 2 acres in size; 2.) review of wetland permit applications within 90 days, especially when site plan and other approvals require much more time; and, 3.) the establishment of wetland buffers of setbacks. In order to regulate wetlands smaller than 2 acres, specific field evaluation procedures must be established and the landowners notified of the results of such investigations. The 90-day review period can be addressed by providing an option for applicants to waive the 90-day limit until associated approvals have been obtained. With regard to buffers, some effort is being expended on the notion of establishing setbacks from natural features, such as wetlands, and including such provisions in appropriate zoning ordinances.

PERSPECTIVES ON AMENDMENTS TO P.A. 203

Although it may be too soon to be conclusive, it appears that wetland ordinances on the local level in Michigan will not be abandoned. The Michigan DNR has announced open support for local jurisdictions for several reasons,

including the value of community's "eyes and ears" regarding unpermitted wetland activities. Most of the 38 communities with ordinances recognize that the State of Michigan has very limited staff and financial resources. Moreover, if local communities wish to address related matters of stormwater management, flood control, and erosion control, it is necessary to provide for wetland protection through local ordinances.

It is also important to realize that the amendments were, in large part, a result of serious criticisms levelled at wetland protection in Michigan by pro-development forces. These changes in Michigan's Wetland Protection Act may eventually be regarded as healthy, mid-course adjustments to environmental preservation that is less well accepted than floodplain protection. As the wetland debate continues at the federal level (Alper, 1992), the Michigan Homebuilders Association, and other groups in Michigan will continue addressing the taking issue, insisting on tax relief for unbuildable areas, and taking public entities to court who capriciously deny wetland use permits. Thus, if these amendments help provide for a more standard definition of wetlands, streamline the permit application process, and encourage local communities to be more flexible in their review of environmental permits, then perhaps the anti-wetland sentiment in Michigan has been reduced somewhat.

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APPENDIX A

COMMUNITIES WITH WETLANDS ORDINANCES (Per Michigan DNR, May 10, 1993)

| <u>Community</u> | <u>County</u> |
|----------------------------|----------------|
| Addison Township | Oakland |
| Ann Arbor, City of | Washtenaw |
| Argentine Township | Genesee |
| Auburn Hills, City of | Oakland |
| Augusta Township | Washtenaw |
| Bloomfield Township | Oakland |
| Brandon Township | Oakland |
| Brighton Township | Livingston |
| Brownstown Township | Wayne |
| Burt Township | Cheboygan |
| Charleston Township | Kalamazoo |
| Clarkston, Village of | Oakland |
| Clyde Township | St. Clair |
| Fenton, City of | Genesee |
| Green Oak Township | Livingston |
| Grosse Ile Township | Wayne |
| Hamburg Township | Livingston |
| Hayes Township | Charlevoix |
| Independence Township | Oakland |
| Lake Angelus, City of | Oakland |
| LaSalle Township | Monroe |
| Meridian Township | Ingham |
| Milford Township | Oakland |
| Mundy Township | Genesee |
| Novi, City of | Oakland |
| Oakland Township | Oakland |
| Orchard Lake, Village of | Oakland |
| Orion Township | Oakland |
| Oxford Township | Oakland |
| Pinckney, Village of | Livingston |
| Rochester Hills, City of | Oakland |
| Saugatuck Township | Allegan |
| Southfield, City of | Oakland |
| Waterford Township | Oakland |
| West Bloomfield Township | Oakland |
| White Lake Township | Oakland |
| Whitewater Township | Grand Traverse |
| Wixom, City of | Oakland |
| <u>Not Yet Adopted</u> | |
| Brighton, City of | Livingston |
| Scio Township | Washtenaw |

Some ordinances in this list require a DNR permit prior to the issuance of local development. Other ordinances require a separate local wetlands review and permit.

APPENDIX B

POINTS OF DISCUSSION ON SENATE BILL 522

1. All local ordinances would uniformly use the state definition of wetlands found in the Goemaere-Anderson Wetlands Preservation Act.
2. All local units must complete and make available to the general public, without cost, a wetlands inventory map prior to enacting a local ordinance. The local ordinance must allow for public hearings on the map and the map must be certified by the DNR. Those local units with wetlands ordinances already in place, would have one year to complete such a map or would lose their ability to enforce the ordinance. The state would have the option of either adopting the local wetlands map as part of its wetlands inventory, or doing its own mapping of the local unit. If the state did its own mapping of the local unit, that map would control.
3. Builders/developers/farmers would be given 100% density credit. If a 20 acre parcel contained 5 acres of wetlands and the density requirements was 1 dwelling per acre, the builder/developer would be allowed to build 20 dwellings on the 15 non-wetland acres.
4. Local units of government and individuals enforcing a local ordinance would be required to be certified as competent by the DNR and would have to use the DNR manual.
5. There would be one central board making zoning decisions.
6. Local wetlands permits would have to be approved or denied in 60 calendar days, and a written reason to give for any denial. Approval of the permit would be automatic on day 61.
7. Decisions on wetlands permitting, including approvals, denials and conditions, must be based solely on the standards of ordinance. No decision or conditions not related to the protection of the wetland, will be permitted. Any unit doing so, would automatically lose their authority to enforce their local ordinance.
8. All local ordinances would allow for mitigation within the county.
9. All local ordinances will contain language stating that "If a permit is denied for a proposed wetlands activity, the landowner may request a reevaluation of the affected property for assessment purposes, to determine its fair market value under the use restriction (Sec. 16 Goemaere-Anderson Wetland Protection Act).
10. All local ordinances shall contain language substantially similar to Sec. 17 (judicial review to protect wetlands owners rights) of the Goemaere-Anderson Wetland Protection Act.

11. All municipalities with a local ordinance would be required to formally notify owners of record of the possible change in the status of their property (Sec. 20 Goemaere-Anderson).
12. All municipalities with a local ordinance would be subject to the "takings" language of Sec. 21 of the Goemaere-Anderson Act.