Attorney Writes

"Wetlands!" (not swamps)

By Clifford H. Bloom, Esq.
Law, Weathers & Richardson, P.C.
800 Bridgewater Pl • 333 Bridge St NW
Grand Rapids, Michigan 49504-5320

In Michigan, the regulation of wetlands often suffers from urban legends (or should I say, rural legends!). In this column, I hope to dispel some of those myths and to foster a better understanding of wetlands regulations.

Modern wetlands regulation was born with the passage of the federal Clean Water Act (the "Federal Act"). Under the Federal Act, the U.S. Army Corp of Engineers is charged with administering and enforcing the wetlands component of that statute in the Great Lakes region. Shortly after the Federal Act was enacted, Michigan became only one of two states to "opt out of" the federal regulatory scheme by adopting its own wetlands protection statute (*MCL 324.30301 et seq.*; the "Michigan Wetlands Act"). Given that the Michigan Wetlands Act is at least as strict or stricter than the federal statute, the federal government has generally allowed Michigan to enforce its own wetlands statute so long as it does so vigorously. Initially, the Michigan Wetlands Act was enforced by the Michigan Department of Natural Resources ("DNR"). However, after the old DNR was split into two agencies [the "new" DNR and the Michigan Department of Environmental Quality ("DEQ")], the DEQ has since been charged with enforcing the Michigan statute.

Under the Michigan statute, a "wetland" is defined as: *land characterized by the presence of water at a frequency and duration sufficient to support, and that under normal circumstances does support, wetland vegetation or aquatic life, and is commonly referred to as a bog, swamp, or marsh and which is any of the following:*
(i) Contiguous to the Great Lakes or Lake St. Clair, an inland lake or pond, or a river or stream.
(ii) Not contiguous to the Great Lakes, an inland lake or pond, or a river or stream; and more than 5 acres in size; except this subparagraph shall not be of effect, except for the purpose of inventorying, in counties of less than 100,000 population until the department certifies to the commission it has substantially completed its inventory of wetlands in that county.
(iii) Not contiguous to the Great Lakes, an inland lake or pond, or a river or stream; and 5 acres or less in size if the department determines that protection of the area is essential to the preservation of the natural resources of the state from pollution, impairment, or destruction and the department has so notified the owner; except this subparagraph may be utilized regardless of wetland size in a county in which subparagraph (ii) is of no effect; except for the purpose of inventorying, at the time. MCL 324.30301(i).

It should be noted that the Michigan statute generally does not regulate wetlands under five (5) acres in size and which also are not contiguous to the Great Lakes, an inland lake or pond, or a river or stream (unless certain other standards are met).

Theoretically, if enforcement of the Michigan Wetlands Act is not vigorous enough, the federal government (through the U.S. Army Corp of Engineers) could step back in and administer and enforce the federal statute in Michigan. There are some areas of Michigan where both the DEQ and the U.S. Army Corps of Engineers currently enforce their respective statutes as to the same property, such that there is theoretically "concurrent jurisdiction." That sometimes includes properties along the Great Lakes coastline of Michigan and certain navigable rivers and major waterways.

Prior to 1995, local governments in Michigan could adopt their own regulatory ordinances for wetlands which were stricter than either the federal or state statutes. That alarmed various developer groups, who were able to prompt the Michigan legislature to adopt an amendment to the Michigan Wetlands Act which partially pre-empted/precluded local governments from regulating wetlands. Thereafter, local governments could still regulate wetlands by local ordinance, but in a very limited fashion, which also tends to be expensive for the municipality involved since the pre-emption statute requires extensive inventories, procedures, etc. Accordingly, very few local governments have chosen to regulate wetlands.

Some lay people in Michigan believe that if a wetland is present, it cannot lawfully be filled or altered. On the other extreme, some people believe that Michigan's entire wetlands regulatory scheme is a joke and that the DEQ will always give permits to destroy or significantly alter any wetland. In fact, the truth probably lies somewhere in between those extremes.

It must always be kept in mind that the DEQ is an agency which appears to be virtually under siege at any given time. First and foremost, funding for the DEQ (including wetlands enforcement) has been woefully lacking over the years and that deficiency keeps getting worse with every passing year. Second, two diametrically opposed forces constantly pressure and criticize the DEQ. On the one side, developers, business groups, chambers of commerce and some landowners frequently view the DEQ as an antiquated and obstructionist governmental agency which is mired in red tape and which drives business out of Michigan. On the other hand, environmental groups often assert that the DEQ is weak, grants too many permits for the alteration or destruction of wetlands and is not living up to its statutory mandates. If one looks at the averages over the last half dozen years, out of every 100 wetland applications submitted, the DEQ approves approximately 81 to 93 requests and denies about 7 to 19. It should be noted, however, that contained within the permit approval figures are a significant number of applications which were initially denied and which the DEQ later approved when the applicant modified its proposal to scale back the amount of wetlands destroyed, increase mitigation, or otherwise limit the impact of the proposed development. What is the process for property owners to be able to lawfully fill or alter wetlands? Initially, the landowner must file a wetland fill or alteration application with the DEQ.

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Quite often, the property owner will use the services of a wetlands consultant or expert (many of whom formerly worked for the DEQ or other regulatory agencies). Normally, the DEQ will send notice of the application and request to the local governmental unit, the county, the DNR, the county drain commissioner, various other governmental entities, and all adjacent property owners. Those persons and entities typically will have 20 days to comment or file an objection regarding the wetlands application with the DEQ.

Anyone who receives such a notice also has the right to file (within 20 days) a request for a public hearing with the DEQ. One frustrating aspect of the process is when the DEQ may initially deny an application after a public hearing, but later grants a permit when the applicant modifies the application – without the DEQ providing additional notice to area property owners or the governmental unit involved.

DEQ permits can take a variety of forms. Some permits allow the filling and destruction of an entire wetlands. However, those permits will often involve "remediation" elsewhere, which requires the applicant to create new artificial wetlands in some other area. This mitigation process has been severely criticized as many experts believe artificially created wetlands are not as good and do not last as long as natural wetlands. Sometimes, the DEQ will allow a partial filling of wetlands (a smaller area) but will not approve the original application which would destroy an entire wetlands.