

# APPENDIX E: Michigan's Wetland Law – Complete Administrative Rules

## WETLAND PROTECTION

[By authority conferred on the department of environmental quality by section 30319 of Act No. 451 of the Public Acts of 1994, as amended, being §324.30319 of the Michigan Compiled Laws]

### R 281.921 Definitions.

#### **Rule 1.**

(1) As used in these rules:

- (a) “Act” means Act No. 203 of the Public Acts of 1979, being S281.701 et seq. of the Michigan Compiled Laws.
- (b) “Contiguous” means any of the following:
  - (i) A permanent surface water connection or other direct physical contact with an inland lake or pond, a river or stream, one of the Great Lakes, or Lake St. Clair.
  - (ii) A seasonal or intermittent direct surface water connection to an inland lake or pond, a river or stream, one of the Great Lakes, or Lake St. Clair.
  - (iii) A wetland is partially or entirely located within 500 feet of the ordinary high watermark of an inland lake or pond or a river or stream or is within 1,000 feet of the ordinary high watermark of one of the Great Lakes or Lake St. Clair, unless it is determined by the department, pursuant to R 281.924(4), that there is no surface water or groundwater connection to these waters.
  - (iv) Two or more areas of wetland separated only by barriers, such as dikes, roads, berms, or other similar features, but with any of the wetland areas contiguous under the criteria described in paragraph (i), (ii), or (iii) of this subdivision. The connecting waters of the Great Lakes, including the St. Marys, St. Clair, and Detroit rivers, shall be considered part of the Great Lakes for purposes of this definition.
- (c) “General permit” means a permit which, as authorized by section 10 of the act, is issued for categories of minor activities, as defined in subdivision (f) of this subrule.
- (d) “Individual permit” means a permit which, as authorized by sections 7, 8, and 9 of the act, is issued for categories of activities that are not classified as minor.
- (e) “Inland lake or pond, a river or stream” means any of the following:
  - (i) A river or stream which has definite banks, a bed, and visible evidence of a continued flow or continued occurrence of water.
  - (ii) A natural or permanent artificial inland lake or impoundment that has definite banks, a bed, visible evidence of a continued occurrence of water, and a surface area of water that is more than 5 acres. This does not include lakes constructed by excavating or diking dry land and maintained for the sole purpose of cooling or storing water and does not include lagoons used for treating polluted water.
  - (iii) A natural or permanent artificial pond that has permanent open water with a surface area that is more than 1 acre, but less than 5 acres. This does not include ponds constructed by excavating or diking dry land and maintained for the sole purpose of cooling or storing water and does not include lagoons used for treating polluted water.
- (f) “Minor activities” means activities that are similar in nature, that will cause only minimal adverse environmental effects when performed separately, and that will have only minimal cumulative adverse effects on the environment.
- (g) “Wetland vegetation” means plants that exhibit adaptations to allow, under normal conditions, germination or propagation and to allow growth with at least their root systems in water or saturated soil.

(2) As used in the act:

- (a) “Electric distribution line” means underground lines below 30 kilovolts and lines supported by wood poles.
- (b) “Electric transmission line” means those conductors and their necessary supporting or containing structures located outside of buildings that are used for transmitting a supply of electric energy, except those lines defined in subdivision (a) of this subrule.
- (c) “Pipelines having a diameter of 6 inches or less” means a pipe which is equal to or less than what is commonly referred to as a 6-inch pipe and which has an actual measured outside diameter of less than 6.75 inches.

(3) Terms defined in the act have the same meanings when used in these rules.

History: 1988 MR 6, Eff. July 8, 1988.

### R 281.922 Permit applications.

#### **Rule 2.**

(1) An application for a permit shall be made on a form prescribed and provided by the department.



(2) An application for a permit shall not be deemed as received or filed until the department has received all information requested on the application form, the application fee, and other information authorized by the act and necessary to reach a decision. The period for granting or denying an application begins as soon as all such information and the application fee are received by the department.

(3) Application fees shall be submitted to the department with the initial submittal of an application form. The fee shall be paid by check, money order, or draft made payable to: "State of Michigan."

(4) An application may be considered to be withdrawn and the file for the application may be closed if an applicant fails to respond to any written inquiry or request from the department for information requested as a part of the application form within 30 days of the request or such longer period of time as needed by the applicant to provide the information agreed to, in writing, between the applicant and the department.

(5) Upon request, the department shall provide any person with a copy of a permit application and supporting documents consistent with all provisions of Act No. 442 of the Public Acts of 1976, as amended, being S15.231 et seq. of the Michigan Compiled Laws.

(6) Decisions reached by the department which deny or modify an application for a permit shall be supported by written documentation to the applicant based upon the applicable criteria contained in section 9 of the act. The department shall create a form based on the criteria from section 9 of the act to be completed and placed into each application file. When a proposed activity involves a coordinated review by federal agencies as provided for under the act and section 404 of title IV of the clean water act of 1977, 33 U.S.C. S1344, the department shall prepare a fact sheet pursuant to 40 C.F.R. S124.8 (April 1, 1983) and 40 C.F.R. S233.39 (April 1, 1983) for inclusion in the application file.

History: 1988 MR 6, Eff. July 8, 1988.

## R 281.922a Permit application review criteria.

### **Rule 2a.**

(1) The department shall review a permit application to undertake an activity listed in section 30304 of the act according to the criteria in section 30311 of the act.

(2) As required by subsection 30311(4) of the act, a permit applicant shall bear the burden of demonstrating that an unacceptable disruption to aquatic resources will not occur as a result of the proposed activity and demonstrating either of the following:

(a) The proposed activity is primarily dependent upon being located in the wetland.

(b) There are no feasible and prudent alternatives to the proposed activity.

(3) A permit applicant shall provide adequate information, including documentation as required by the department, to support the demonstrations required by section 30311 of the act. The department shall independently evaluate the information provided by the applicant to determine if the applicant has made the required demonstrations.

(4) A permit applicant shall completely define the purpose for which the permit is sought, including all associated activities. An applicant shall not so narrowly define the purpose as to limit a complete analysis of whether an activity is primarily dependent upon being located in the wetland and of feasible and prudent alternatives. The department shall independently evaluate and determine if the project purpose has been appropriately and adequately defined by the applicant, and shall process the application based on that determination.

(5) The department shall consider a proposed activity as primarily dependent upon being located in the wetland only if the activity is the type that requires a location within the wetland and wetland conditions to fulfill its basic purpose; that is, it is wetland-dependent. Any activity that can be undertaken in a non-wetland location is not primarily dependent upon being located in the wetland.

(6) An alternative is feasible and prudent if both of the following provisions apply:

(a) The alternative is available and capable of being done after taking into consideration cost, existing technology, and logistics.

(b) The alternative would have less adverse impact on aquatic resources. A feasible and prudent alternative may include any or all of the following:

(i) Use of a location other than the proposed location.

(ii) A different configuration.

(iii) Size.

(iv) Method that will accomplish the basic project purpose. The applicant shall demonstrate that, given all pertinent information, there are no feasible and prudent alternatives that have less impact on aquatic resources. In making this demonstration, the applicant may provide information regarding factors such as alternative construction technologies; alternative project layout and design; local land use regulations and infrastructure; and pertinent environmental and resource issues. This list of factors is not exhaustive and no particular factor will necessarily be dispositive in any given case.

(7) If an activity is not primarily dependent upon being located in the wetland, it is presumed that a feasible and prudent alternative exists unless an applicant clearly demonstrates that a feasible and prudent alternative does not exist.

(8) Unless an applicant clearly demonstrates otherwise, it is presumed that a feasible and prudent alternative involving a non-wetland location will have less adverse impact on aquatic resources than an alternative involving a wetland location.

(9) An area not presently owned by the permit applicant that could reasonably be obtained, utilized, expanded, or managed in order to fulfill the basic purpose of the proposed activity is a feasible and prudent alternative location.

(10) An alternative may be considered feasible and prudent even if it does not accommodate components of a proposed activity that are incidental to or severable from the basic purpose of the proposed activity.



(11) An alternative may be considered feasible and prudent even if it entails higher costs or reduced profit. However, the department shall consider the reasonableness of the higher costs or reduced profit in making its determination.

(12) The department may offer a permit for a modification of an activity proposed in an application if the proposed activity cannot be permitted under the criteria listed in section 30311 of the act and if the modification makes that activity consistent with the criteria listed in section 30311 of the act.

(a) The applicant may accept the permit for the modification of the proposed activity by signing it and returning it to the department within 30 days of the date of the offer. The permit shall be considered issued upon countersignature by the department.

(b) The permit application is considered denied if the applicant does not sign and return the permit for the modification of the proposed activity to the department within thirty days of the date of the offer. The permit applicant may then appeal the denial pursuant to sections 30307(2) and 30319(2) of the act.

(c) The date on which the modification is offered shall be considered the date of the department's approval or disapproval of the application pursuant to section 30307(2) of the act.

History: 2000 MR 6, Eff. Apr. 27, 2000.

## R 281.923 Permits.

### Rule 3.

(1) An application for a proposed activity which is within a general permit category may be processed and issued by the department without the noticing or hearings specified under sections 7, 8, and 9 of the act. The department may process, by public notice, an application which would normally qualify under a general permit category to allow more opportunity for public review and comment. Categories of minor activities will be established in the general permit in accordance with section 10 of the act. The factors set forth in sections 3 and 9 of the act shall be considered in determining whether such a permit is in the best interest of the public.

(2) Applications for activities that are not classified as minor shall be reviewed through the process prescribed under sections 7, 8, and 9 of the act. The department may issue an individual permit 21 days after the mailing of notification of the permit application if comments of nonobjection have been received from the municipality, if a public hearing has not been requested, and if the proposed activities are otherwise in accordance with the act.

(3) If the department does not approve or disapprove the permit application within the time provided by section 8(2) of the act, the permit application shall be considered approved and the department shall be considered to have made the determination required by section 9 of the act.

(4) When a project involves activities regulated under Act No. 247 of the Public Acts of 1955, as amended, being S322.701 et seq. of the Michigan Compiled Laws, or Act No. 346 of the Public Acts of 1972, as amended, being S281.951 et seq. of the Michigan Compiled Laws, or the act, the applicant shall submit 1 application for all activities regulated under these acts. Only 1 permit for these activities will be issued or denied by applying the criteria of the appropriate acts. If a permit is issued, conditions shall reflect the requirements of all appropriate acts.

(5) A permit may be issued for a period extending until the end of the following calendar year. A permit may be issued for a longer period of time if agreed to, in writing, between the applicant and the department. Before a permit expires, extensions of time may be granted by the department upon receipt of a written request from the permit holder explaining why such an extension is needed to complete the project. Up to two 12-month extensions shall be granted if there is no change in the activity for which the permit was originally issued. Administrative fees shall not be required for such extensions.

(6) Any permit issued under the act does not obviate the necessity of receiving, when applicable, approval from other federal, state, and local government agencies.

(7) Any permit issued by the department under the act may be revoked or suspended, after notice and an opportunity for a hearing, for any of the following causes:

- (a) A violation of a condition of the permit.
- (b) Obtaining a permit by misrepresentation or failure to fully disclose relevant facts in the application.
- (c) A change in a condition that requires a temporary or permanent change in the activity.

History: 1988 MR 6, Eff. July 8, 1988.

## R 281.924 Wetland Assessments.

### Rule 4.

(1) When performing wetland assessments, as required by section 30321 of Act No. 451 of The Public Acts of 1994, as amended, being §324.30321 of the Michigan Compiled Laws, the department shall utilize criteria consistent with the definition of "wetland" provided in section 30301(d) of Act No. 451 of the Public Acts of 1994, as amended, being §324.30321(d) of the Michigan Compiled Laws, and shall provide a written wetland assessment report to the person who owns or leases the property or his or her agent within 30 days of the on-site evaluation, whether the parcel contains wetland or nonwetland, or both, and the basis for the determination. The department shall assess a parcel or any portion of a parcel as identified by the person making the request.



(2) When performing wetland assessments, the department shall rely on visible evidence that the normal seasonal frequency and duration of water is above, at, or near the surface of the area to verify the existence of a wetland. Under normal circumstances, the frequency and duration of water that is necessary to determine an area to be a wetland will be reflected in the vegetation or aquatic life present within the area being considered. A wetland that has not been recently or severely disturbed will contain a predominance, not just an occurrence, of wetland vegetation or aquatic life. If there is a predominance of wetland vegetation, and if there is no direct visible evidence that water is, or has been, at or above the surface, then the department shall use the following characteristics of the soils or substrate to verify the existence of a wetland:

- (a) The presence of a soil that is saturated, flooded, or ponded long enough during the growing season to develop anaerobic conditions in the upper part of the soil that favor the growth and regeneration of wetland vegetation.
- (b) Physical or chemical characteristics of a soil column that provide evidence of the current and recent degree of saturation or inundation. Characteristics, such as a gleyed or low chroma matrix, mottling, or chemically demonstrated anaerobic conditions, can be utilized to identify the current and recent depth and fluctuation of the water table or inundation.

(3) If the department makes a determination that a wetland otherwise outside of the jurisdiction of the act is essential to the preservation of the natural resources of the state under section 30301(d)(iii) of Act No. 451 of the Public Acts of 1994, as amended, being §324.30321(d)(iii) of the Michigan Compiled Laws, the department shall provide the findings, in writing, to the legal landowner or lessee stating the reasons for the determination. In making the determination, the department must find that 1 or more of the following functions apply to a particular site:

- (a) It supports state or federal endangered or threatened plants, fish, or wildlife specified in section 36501 of Act No. 457 of the Public Acts of 1994, as amended, being §324.36501 of the Michigan Compiled Laws.
- (b) It represents what the state has identified as a rare or unique ecosystem.
- (c) It supports plants or animals of an identified regional importance.
- (d) It provides groundwater recharge documented by a public agency.

(4) Upon the request of a person who owns or leases a parcel of property or his or her agent, the department shall determine if there is no surface or groundwater connection that meets the definition of "contiguous" under R281.921(l)(b)(iii). The department shall make the determination in writing and shall provide the determination to the person making the request within a reasonable period of time after receipt of the request.

(5) (1) A person who requests a wetland assessment shall submit a form provided by the department. The form shall contain all information required under section 30321(3) of Act No. 451 of the Public Acts of 1994, as amended, being §324.30321(3) of the Michigan Compiled Laws, and shall be accompanied by a check for the appropriate fee as set forth in this rule.

(2) All fees are nonrefundable.

(3) A person who owns or leases a parcel of property or his or her agent may request any of the following 3 levels of wetland assessment with corresponding levels of fees:

(a) For a fee of \$50.00, the department will provide copies of wetland information immediately available for an identified area, including state and federal maps on file with the department that show the approximate location of wetlands on the parcel. In addition, information specified by section 30321(e), (f), and (g) of Act No. 451 of the Public Acts of 1994, as amended, being §324.30321(e), (f), and (g) of the Michigan Compiled Laws, regarding regulatory processes, limitations, and appeals will be provided to a person who makes a request. Since the information and maps provided will not be based upon an on-site review, they will be useful for planning purposes, but the department will not certify where wetlands are and are not specifically located on the given parcel.

(b) For a fee of \$200.00 for 1 acre or less, the department will perform an on-site assessment of a parcel or portion of a parcel that has its boundaries marked by the person who makes the request, to identify and describe areas that are and are not wetland on the site, unless identification and description are not possible under the conditions of the site, as outlined under (4), below. The fee for the service will increase by \$50.00 per acre for an assessment area larger than 1 acre. If the assessment report determines that the area assessed or part of the area assessed is not wetland, then the report will state that the department lacks jurisdiction over the area that is not wetland, if any, and that the determination that an area is not wetland is binding on the department for 3 years from the date of the assessment.

(c) For a fee of \$150.00 for 1 acre or less, the department will perform an on-site review of a mapped, flagged, and other wise identifiable area to confirm specific boundaries established by a professional wetland consultant between wetlands and areas that are not wetlands. The fee for the service will increase by \$15.00 per acre for larger parcels. The wetland and nonwetland boundaries delineated must be flagged by a wetland consultant representing the person who made the request. The boundaries must have been established utilizing methods and procedures consistent with Act No. 451 of the Public Acts of 1994, as amended, being §324.30319 et seq. of the Michigan Compiled Laws and these rules. If the department finds substantial errors during the confirmation process and the person making the request wishes to proceed, then the department will require that a new delineation by a consultant representing the person who made the request be completed and that new fees in the amount of 1/2 of the original fee be submitted for the on-site confirmation of the new delineation and the assessment report. If the assessment report determines that the area assessed or part of the area assessed is not wetland, then the report will state that the department lacks jurisdiction over the area that is not wetland and that the determination that an area is not wetland is binding on the department for 3 years from the date of the assessment. If documentation of the specific boundary is desired, then the person who is making the request will provide, for department approval, an acceptable and reproducible survey of the agreed upon boundaries.

(4) If recent severe disturbances of the site have occurred, for example, removal of native vegetation, disturbance of soils, or diversion of drainage, making it impossible during a routine site visit to determine whether or not the area requested for assessment contains or has contained wetland or nonwetland, then the department will provide the person who made the request with a report that specifies the reasons for its inability to make a determination. The department will include with the report a description of the necessary technical information to be provided by the person who made the request in order for the department to make a final assessment or confirm a delineated boundary.

History: 1988 MR 6, Eff. July 8, 1988; 1998 MR 7, Eff. July 18, 1998.

## R 281.925 Mitigation.

### **Rule 5.**

(1) As authorized by section 30312(2) of the act, the department may impose conditions on a permit for a use or development if the conditions are designed to remove an impairment to the wetland benefits, to mitigate the impact of a discharge of fill material, or to otherwise improve the water quality.

(2) The department shall consider mitigation only after all of the following conditions are met:

- (a) The wetland impacts are otherwise permissible under sections 30302 and 30311 of the act.
- (b) No feasible and prudent alternative to avoid wetland impacts exists.
- (c) An applicant has used all practical means to minimize impacts to wetlands. This may include the permanent protection of wetlands on the site not directly impacted by the proposed activity.

(3) The department shall require mitigation as a condition of a wetland permit issued under part 303 of the act, except as follows:

- (a) The department may waive the mitigation condition if either of the following provisions applies:
  - (i) The permitted wetland impact is less than 1/3 of an acre and no reasonable opportunity for mitigation exists.
  - (ii) The basic purpose of the permitted activity is to create or restore wetlands or to increase wetland habitat.
- (b) If an activity is authorized and permitted under the authority of a general permit issued under section 30312(1) of the act, then the department shall not require mitigation. Public transportation agencies may provide mitigation for projects authorized under a general permit at sites approved by the department under a memorandum of understanding between the department and public transportation agencies.

(4) The department shall require mitigation to compensate for unavoidable wetland impacts permitted under part 303 of the act utilizing one or more of the following methods:

- (a) The restoration of previously existing wetlands.
- (b) The creation of new wetlands.
- (c) The acquisition of approved credits from a wetland mitigation bank established under R 281.951 et seq.
- (d) In certain circumstances, the preservation of existing wetlands. The preservation of existing wetlands may be considered as mitigation only if the department determines that all of the following conditions are met:
  - (i) The wetlands to be preserved perform exceptional physical or biological functions that are essential to the preservation of the natural resources of the state or the preserved wetlands are an ecological type that is rare or endangered.
  - (ii) The wetlands to be preserved are under a demonstrable threat of loss or substantial degradation due to human activities that are not under the control of the applicant and that are not otherwise restricted by state law.
  - (iii) The preservation of the wetlands as mitigation will ensure the permanent protection of the wetlands that would otherwise be lost or substantially degraded.

(5) The restoration of previously existing wetlands is preferred over the creation of new wetlands where none previously existed. Enhancement of existing wetlands is not considered mitigation. For purposes of this rule, wetland restoration means the reestablishment of wetland characteristics and functions at a site where they have ceased to exist through the replacement of wetland hydrology, vegetation, or soils.

(6) An applicant shall submit a mitigation plan when requested by the department. The department may incorporate all or part of the proposed mitigation plan as permit conditions. The mitigation plan shall include all of the following elements:

- (a) A statement of mitigation goals and objectives, including the wetland types to be restored, created, or preserved.
- (b) Information regarding the mitigation site location and ownership.
- (c) A site development plan.
- (d) A description of baseline conditions at the proposed mitigation site, including a vicinity map showing all existing rivers, lakes, and streams, and a delineation of existing surface waters and wetlands within the proposed mitigation area.
- (e) Performance standards to evaluate the mitigation.
- (f) A monitoring plan.



(g) A schedule for completion of the mitigation.

(h) Provisions for the management and long-term protection of the site. The department shall, when requested by the applicant, meet with the applicant to review the applicant's mitigation plan.

(7) An applicant shall provide mitigation to assure that, upon completion, there will be no net loss of wetlands. The mitigation shall meet the following criteria as determined by the department:

(a) Mitigation shall be provided on-site where it is practical to mitigate on site and where beneficial to the wetland resources.

(b) If subdivision (a) of this subrule does not apply, then an applicant shall provide mitigation in the immediate vicinity of the permitted activity if practical and beneficial to the wetland resources. "Immediate vicinity" means within the same watershed as the location of the proposed project. For purposes of this rule, a watershed refers to a drainage area in which the permitted activity occurs where it may be possible to restore certain wetland functions, including hydrologic, water quality, and aquatic habitat functions. Watershed boundaries are shown in Figure 1 in R 281.951.

(c) Mitigation shall be on-site or in the immediate vicinity of the permitted activity unless the department determines that subdivisions (a) and (b) of this subrule are infeasible and impractical.

(d) The department shall require that mitigation be of a similar ecological type as the impacted wetland where feasible and practical.

(e) If the replacement wetland is of a similar ecological type as the impacted wetland, then the department shall require that the ratio of acres of wetland mitigation provided for each acre of permitted wetland loss shall be as follows:

(i) Restoration or creation of 5.0 acres of mitigation for 1.0 acre of permitted impact on wetland types that are rare or imperiled on a statewide basis.

(ii) Restoration or creation of 2.0 acres of mitigation for 1.0 acre of permitted impact on forested wetland types, coastal wetlands not included under (i) of this subdivision, and wetlands that border upon inland lakes.

(iii) Restoration or creation of 1.5 acres of mitigation for 1.0 acre of permitted impact on all other wetland types.

(iv) 10 acres of mitigation for 1.0 acre of impact in situations where the mitigation is in the form of preservation of existing wetland as defined in subrule (4) of this rule.

(f) The department may adjust the ratios prescribed by this rule as follows:

(i) The ratio may be increased if the replacement wetland is of a different ecological type than the impacted wetland.

(ii) If the department determines that an adjustment would be beneficial to the wetland resources due to factors specific to the mitigation site or the site of the proposed activity, then the department may increase or decrease the number of acres of mitigation to be provided by no more than 20 percent. This shall not limit the amount which a ratio may be increased under subdivision (f)(i) of this subrule.

(g) The mitigation shall give consideration to replacement of the predominant wetland benefits lost within the impacted wetland.

(h) The department shall double the required ratios if a permit is issued for an application accepted under section 30306(5) of the act.

(i) The department shall determine mitigation ratios for wetland dependent activities on a site-specific basis.

(8) Except where mitigation is to occur on state or federally owned property or where the mitigation is to occur in the same municipality where the project is proposed, the department shall give notice to the municipality where the proposed mitigation site is located and shall provide an opportunity to comment in writing to the department on the proposed mitigation plan before a mitigation plan is approved by the department.

(9) An applicant shall complete mitigation activities before initiating other permitted activities, unless a concurrent schedule is agreed upon between the department and the applicant, and an adequate financial assurance mechanism is provided by the applicant.

(10) The department may require financial assurances to ensure that mitigation is accomplished as specified.

(11) An applicant shall protect the mitigation area by a permanent conservation easement or similar instrument that provides for the permanent protection of the natural resource functions and values of the mitigation site, unless the department determines that such controls are impractical to impose in conjunction with mitigation that was undertaken as part of state funded response activity under Act No. 451 of the Public Acts of 1994, as amended.

(12) An applicant, with the approval of the department, may provide all or a portion of the mitigation through the acquisition of approved credits from a wetland mitigation bank established under R 281.951 et seq. One credit shall be utilized for each acre of mitigation required under subrule (7) of this rule.

History: 1988 MR 6, Eff. July 8, 1988; 2000 MR 6, Eff. Apr. 27, 2000.

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