

HOUSE BILL No. 5992

March 24, 2010, Introduced by Reps. Warren, Scripps, Roberts, Cushingberry, Kennedy, Liss, Ebli and Smith and referred to the Committee on Great Lakes and Environment.

A bill to amend 1994 PA 451, entitled
"Natural resources and environmental protection act,"
by amending sections 30301, 30304b, 30311a, and 30329 (MCL
324.30301, 324.30304b, 324.30311a, and 324.30329), section 30301 as
amended and sections 30304b, 30311a, and 30329 as added by 2009 PA
120.

THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

1 Sec. 30301. (1) As used in this part:

2 (a) "Beach" means the area landward of the shoreline of the
3 Great Lakes as the term shoreline is defined in section 32301.

4 (b) "Beach maintenance activities" means any of the following
5 in the area of Great Lakes bottomlands lying below the ordinary
6 high-water mark and above the water's edge:

1 (i) Manual or mechanized leveling of sand.

2 (ii) Mowing of vegetation.

3 (iii) Manual de minimis removal of vegetation.

4 (iv) Grooming of soil.

5 (v) Construction and maintenance of a path.

6 (c) "Council" means the wetland advisory council created in
7 section 30329.

8 (d) "Debris" means animal or fish carcasses, zebra mussel
9 shells, dead vegetation, trash, and discarded materials of human-
10 made origin.

11 (e) "Department" means the department of ~~environmental quality~~
12 **NATURAL RESOURCES AND ENVIRONMENT.**

13 (f) "Director" means the director of the department.

14 (g) "Environmental area" means an environmental area as
15 defined in section 32301.

16 (h) "Exceptional wetland" means wetland that provides physical
17 or biological functions essential to the natural resources of the
18 state and that may be lost or degraded if not preserved through an
19 approved site protection and management plan for the purposes of
20 providing compensatory wetland mitigation.

21 (i) "Fill material" means soil, rocks, sand, waste of any
22 kind, or any other material that displaces soil or water or reduces
23 water retention potential.

24 (j) "Grooming of soil" means raking or dragging, pushing, or
25 pulling metal teeth through the top 4 inches of soil without
26 disturbance of or destruction to plant roots, for the purpose of
27 removing debris.

1 (k) "Landscape level wetland assessment" means the use of
2 aerial photographs, maps, and other remotely sensed information to
3 predict and evaluate wetland characteristics and functions in the
4 context of all of the following:

5 (i) The wetland's landscape position and hydrologic
6 characteristics.

7 (ii) The surrounding landscape.

8 (iii) The historic extent and condition of the wetland.

9 (l) "Leveling of sand" means the relocation of sand within
10 areas being leveled that are predominantly free of vegetation,
11 including the redistribution, grading, and spreading of sand that
12 has been deposited through wind or wave action onto upland riparian
13 property.

14 (m) "Minor drainage" includes ditching and tiling for the
15 removal of excess soil moisture incidental to the planting,
16 cultivating, protecting, or harvesting of crops or improving the
17 productivity of land in established use for agriculture,
18 horticulture, silviculture, or lumbering.

19 (n) "Mowing of vegetation" means the cutting of vegetation to
20 a height of not less than 2 inches, without disturbance of soil or
21 plant roots.

22 (o) "Nationwide permit" means a nationwide permit issued by
23 the United States army corps of engineers under 72 FR 11091 to
24 11198 (March 12, 2007), including all general conditions, regional
25 conditions, and conditions imposed by this state pursuant to a
26 water quality certification under section 401 of title IV of the
27 federal water pollution control act, 33 USC 1341, or a coastal zone

1 management consistency determination **OR CERTIFICATION** under section
2 307 of the coastal zone management act of 1972, 16 USC 1456.

3 (p) "Ordinary high-water mark" means the ordinary high-water
4 mark as specified in section 32502.

5 (q) "Path" means a temporary access walkway from upland
6 riparian property directly to the shoreline across swales with
7 standing water, not exceeding 6 feet in bottom width and consisting
8 of sand and pebbles obtained from exposed, nonvegetated bottomlands
9 or from the upland riparian property.

10 (r) "Person" means an individual, sole proprietorship,
11 partnership, corporation, association, municipality, this state, an
12 instrumentality or agency of this state, the federal government, an
13 instrumentality or agency of the federal government, or other legal
14 entity.

15 (s) "Rapid wetland assessment" means a method for generally
16 assessing the functions, values, and condition of individual
17 wetlands based on existing data and field indicators.

18 (t) "Rare and imperiled wetland" means any of the following:

19 (i) Great Lakes marsh.

20 (ii) Southern wet meadow.

21 (iii) Inland salt marsh.

22 (iv) Intermittent wetland or boggy seepage wetland.

23 (v) Coastal plain marsh.

24 (vi) Interdunal wetland.

25 (vii) Lakeplain wet prairie.

26 (viii) Lakeplain wet-mesic prairie.

27 (ix) Northern wet-mesic prairie.

- 1 (x) Wet-mesic prairie.
- 2 (xi) **WET-MESIC SAND PRAIRIE.**
- 3 (xii) **WOODED DUNE AND SWALE COMPLEX.**
- 4 (xiii) ~~(xi)~~ Wet prairie.
- 5 (xiv) **COASTAL FEN.**
- 6 (xv) ~~(xii)~~ Prairie fen.
- 7 (xvi) ~~(xiii)~~ Northern fen.
- 8 (xvii) ~~(xiv)~~ Patterned fen.
- 9 (xviii) ~~(xv)~~ Poor fen.
- 10 (xix) ~~(xvi)~~ Muskeg.
- 11 (xx) ~~(xvii)~~ Rich conifer swamp.
- 12 (xxi) **RICH TAMARACK SWAMP.**
- 13 (xxii) ~~(xviii)~~ Relict conifer swamp.
- 14 (xxiii) ~~(xix)~~ Hardwood-conifer swamp.
- 15 (xxiv) ~~(xx)~~ Northern swamp.
- 16 (xxv) ~~(xvi)~~ Southern swamp.
- 17 (xxvi) ~~(xxii)~~ Southern floodplain forest.
- 18 (xxvii) ~~(xxiii)~~ Inundated shrub swamp.
- 19 (u) "Removal of vegetation" means the manual or mechanized
- 20 removal of vegetation, other than the manual de minimis removal of
- 21 vegetation.
- 22 (v) "Water dependent" means requiring access or proximity to
- 23 or siting within an aquatic site to fulfill its basic purpose.
- 24 (w) "Wetland" means land characterized by the presence of
- 25 water at a frequency and duration sufficient to support, and that
- 26 under normal circumstances does support, wetland vegetation or
- 27 aquatic life, and is commonly referred to as a bog, swamp, or

1 marsh, and which is any of the following:

2 (i) Contiguous to the Great Lakes or Lake St. Clair, an inland
3 lake or pond, or a river or stream.

4 (ii) Not contiguous to the Great Lakes, an inland lake or pond,
5 or a river or stream; and more than 5 acres in size.

6 (iii) Not contiguous to the Great Lakes, an inland lake or pond,
7 or a river or stream; and 5 acres or less in size if the department
8 determines that protection of the area is essential to the
9 preservation of the natural resources of the state from pollution,
10 impairment, or destruction and the department has so notified the
11 owner.

12 (2) The department and local units of government shall apply
13 the technical wetland delineation standards set forth in the United
14 States army corps of engineers January 1987 wetland delineation
15 manual, technical report Y-87-1, and appropriate regional United
16 States army corps of engineers supplements, in identifying wetland
17 boundaries under this part, including, but not limited to, section
18 30307.

19 Sec. 30304b. (1) The department shall pursue an agreement with
20 the United States army corps of engineers for the corps to issue
21 state programmatic general permits under section 404(e) of title IV
22 of the federal water pollution control act, 33 USC 1344, for
23 activities regulated under this part in waters over which the corps
24 retains jurisdiction under section 404(g)(1) of title IV of the
25 federal water pollution control act, 33 USC 1344.

26 (2) This subsection applies beginning January 1, 2011. This
27 subsection applies to an application for a permit under this part

1 only if the application is for an activity or use in waters over
2 which the corps retains jurisdiction under section 404(g)(1) of
3 title IV of the federal water pollution control act, 33 USC 1344,
4 and if the corps has not issued a state programmatic general permit
5 for the activity or use. In such a case, if requested by the
6 applicant in the application, all of the following apply:

7 (a) The department shall approve or deny the application for a
8 permit under this part not more than 30 days after the corps grants
9 or denies an application for a permit for the project under section
10 404(a) of title IV of the federal water pollution control act, 33
11 USC 1344, or by the end of the processing period otherwise provided
12 for in section 1301, whichever is later. If a project proposed in a
13 permit application processed under this subsection also requires
14 authorization under 1 or more of parts 31, 301, 315, 323, 325, ~~or~~
15 **AND** 353, the requirements of this subdivision also apply to the
16 department's decision under that part or parts.

17 (b) Subject to subsection (3), if the corps grants a permit
18 for the project, the department shall grant a permit under this
19 part without conditions or limitations other than those imposed by
20 the corps unless any of the following apply:

21 (i) The wetland is a rare and imperiled wetland.

22 (ii) The wetland is regionally significant for the protection
23 of fisheries, wildlife, or migratory birds.

24 (iii) The site is described in section 30309(a), (e), or (g).

25 (iv) The proposed project involves a use or activity not
26 regulated under section 404(a) of title IV of the federal water
27 pollution control act, 33 USC 1344.

1 (v) THERE IS AN UNRESOLVED VIOLATION OF THIS PART INVOLVING
2 THE PROPERTY.

3 (3) The department shall inform the applicant in writing of
4 the basis for a finding that ~~the requirements of subsection~~
5 ~~(2)(b)(i), (ii), (iii), or (iv), are met~~ OR (v) APPLIES and the specific
6 reasons why denial of the permit or the imposition of additional
7 conditions or limitations on the permit is consistent with this
8 part and rules promulgated under this part.

9 (4) Subsections (2)(b) and (3) apply only to the department's
10 decision under this part notwithstanding that the project proposed
11 in the application also requires authorization under 1 or more of
12 parts 31, 301, 315, 323, 325, and 353.

13 Sec. 30311a. (1) A guideline, bulletin, interpretive
14 statement, or form with instructions under this part shall not be
15 given the force and effect of law. A guideline, bulletin,
16 interpretive statement, or form with instructions under this part
17 is not legally binding on the public or the regulated community and
18 shall not be cited by the department for compliance and enforcement
19 purposes.

20 (2) ~~Within 1 year after the effective date of the 2009~~
21 ~~amendatory act that added this subsection~~ BY NOVEMBER 6, 2010, the
22 department shall adopt a new guidance document for the evaluation
23 of feasible and prudent alternatives. The guidance document shall
24 be consistent with findings and recommendations of the United
25 States environmental protection agency's region 5 review of the
26 program under this part. The department shall develop the guidance
27 document in consultation with interested parties, including the

1 council.

2 (3) Before the guidance document under subsection (2) takes
3 effect, the department shall not deny an application for a permit
4 required under section 30304 because of the availability of a
5 feasible and prudent alternative based solely on consideration of
6 statewide alternatives, higher cost, or reduced profit unless both
7 of the following apply:

8 (a) The proposed denial has been reviewed by a department
9 deputy director.

10 (b) The department has requested information from the Michigan
11 economic development corporation and applicable regional and local
12 economic development authorities relative to the project and
13 considered the information received.

14 (4) Before the guidance document under subsection (2) takes
15 effect, the processing period specified under section 1301 for a
16 permit required under section 30304 is extended if department staff
17 have proposed denying the permit for reasons set forth in
18 subsection ~~(7)~~-(3). Notwithstanding section 1307(1), the extension
19 shall be for not more than 45 days.

20 (5) The department shall not file a request for rule-making
21 under section 39 of the administrative procedures act, 1969 PA 306,
22 MCL 24.239, for rules addressing the evaluation of feasible and
23 prudent alternatives before October 1, 2012.

24 Sec. 30329. (1) The wetland advisory council is created within
25 the department. The council shall consist of the following:

26 (a) The director of the department or his or her designee. The
27 director of the department shall invite a representative of the

1 United States army corps of engineers, a representative of the
2 United States environmental protection agency, and a representative
3 of the United States department of agriculture natural resource
4 conservation service to also serve as members of the council.

5 ~~—— (b) The director of the department of natural resources or his~~
6 ~~or her designee.~~

7 (B) ~~(e)~~ The director of the department of agriculture or his
8 or her designee.

9 (C) ~~(d)~~ The following members appointed by the senate majority
10 leader:

11 (i) One individual representing a statewide association of home
12 builders.

13 (ii) One individual representing a statewide conservation
14 organization.

15 (iii) One individual representing a statewide association of
16 local units of government.

17 (iv) One individual representing a statewide association of
18 manufacturers.

19 (D) ~~(e)~~ The following members appointed by the speaker of the
20 house of representatives:

21 (i) One individual representing a statewide environmental
22 protection organization.

23 (ii) One individual representing the largest general statewide
24 farm organization.

25 (iii) One individual representing a statewide association of
26 realtors.

27 (iv) One drain commissioner representing an association of

1 county drain commissioners.

2 (E) ~~(f)~~—The following members appointed by the governor:

3 (i) One individual representing a watershed organization.

4 (ii) One individual representing natural gas or electric
5 utilities.

6 (iii) One individual representing a conservation district.

7 (iv) One individual representing a statewide association of
8 businesses.

9 (v) One individual representing the general public.

10 (vi) A university professor with expertise in wetland science.

11 (vii) A wetland professional who regularly submits applications
12 for permits and obtains permits from the department.

13 (viii) **ONE INDIVIDUAL REPRESENTING INDIAN TRIBES.**

14 (2) The appointments to the council under subsection (1) shall
15 be made ~~not later than 30 days after the effective date of the~~
16 ~~amendatory act that added this section~~ **BY DECEMBER 6, 2009, EXCEPT**
17 **THAT THE APPOINTMENT UNDER SUBSECTION (1) (E) (viii) SHALL BE MADE NOT**
18 **LATER THAN 30 DAYS AFTER THE EFFECTIVE DATE OF THE AMENDATORY ACT**
19 **THAT ADDED THAT SUBPARAGRAPH.**

20 (3) An appointed member of the council shall serve for a term
21 of 3 years. If a vacancy occurs on the council, the vacancy shall
22 be filled for the unexpired term in the same manner as the original
23 appointment. The appointing officer may remove a member of the
24 council for incompetence, dereliction of duty, malfeasance,
25 misfeasance, or nonfeasance in office, or any other good cause.

26 (4) The first meeting of the council shall be called by the
27 director of the department. At the first meeting, the council shall

1 elect from among its members a chairperson and any other officers
2 that it considers necessary or appropriate. After the first
3 meeting, the council shall meet at least quarterly, or more
4 frequently at the call of the chairperson or if requested by 2 or
5 more members.

6 (5) A majority of the members of the council constitute a
7 quorum for the transaction of business at a meeting of the council.
8 A majority of the members present and serving are required for
9 official action of the council.

10 (6) The business that the council may perform shall be
11 conducted at a public meeting of the council held in compliance
12 with the open meetings act, 1976 PA 267, MCL 15.261 to 15.275. A
13 writing prepared, owned, used, in the possession of, or retained by
14 the council in the performance of an official function is subject
15 to the freedom of information act, 1976 PA 442, MCL 15.231 to
16 15.246.

17 (7) Members of the council shall serve without compensation.
18 However, a member of the council representing the department of
19 ~~natural resources, OR the department of agriculture , or the~~
20 ~~department~~ shall serve without additional compensation.

21 (8) By October 1, 2010, the council shall submit a report to
22 the governor, the department, and the standing committees and
23 appropriations subcommittees of the legislature with primary
24 responsibility over issues pertaining to natural resources and the
25 environment. The report shall evaluate and make recommendations on
26 all of the following:

27 (a) Improving the overall efficiency of the program under this

1 part, including all of the following aspects of the permit
2 application, review, and decision-making process:

3 (i) The quality of applications submitted.

4 (ii) The effect of mandatory decision-making time frames on
5 meeting the purposes of this part, and, if appropriate, the time
6 frames that should apply to decision-making under this part.

7 (b) The point in the department's process of decision-making
8 on a permit application at which the possibility of mitigation
9 should be considered.

10 (c) Actions necessary to adopt and implement measures
11 determined by the United States environmental protection agency to
12 support consistency with the requirements of section 404 of title
13 IV of the federal water pollution control act, 33 USC 1344, as set
14 forth in "Final Report Results of the U. S. Environmental
15 Protection Agency Region 5 Review of Michigan Department of
16 Environmental Quality's Section 404 Program", dated May 2008.

17 (9) By August 15, 2012, the council shall submit a report to
18 the governor, the department, and the standing committees and
19 appropriations subcommittees of the legislature with primary
20 responsibility over issues pertaining to natural resources and the
21 environment. The report shall evaluate and make recommendations on
22 all of the following:

23 (a) Improving coordination and reducing duplication of effort
24 with the United States army corps of engineers.

25 (b) Potential long-term changes in program structure,
26 including all of the following:

27 (i) Scientific methods to achieve more consistent and accurate

1 determinations of wetland functions and values for reviewing
2 applications for permits, watershed planning, conservation plans,
3 and other purposes. These methods include rapid wetland assessment
4 and landscape level wetland assessment.

5 (ii) The appropriate role of local units of government and
6 conservation districts in the administration of this part.

7 (iii) A certification process for wetland professionals. The
8 council shall consider information reported under section 30303b in
9 evaluating and making recommendations under this subparagraph.

10 (iv) The definition of wetland and wetland delineation methods,
11 including the role of hydric soils as a factor in wetland
12 delineation. In making recommendations under this subparagraph, the
13 council shall evaluate differences in the state and federal wetland
14 programs.

15 (c) The appropriate means and level of program funding under
16 this part.

17 (d) Minor project categories and general permits under section
18 ~~30312b(1) to (3)~~ **30312B**.

19 (e) The appropriateness of the provisions of section 30304b as
20 a means of reducing regulatory burdens from dual federal and state
21 regulation.

22 (f) The promotion of the development of wetland mitigation
23 banks.

24 (g) Ways for the public and interested parties to advise the
25 department on a continuing basis concerning the administration and
26 enforcement of this part.

27 (h) Appropriate regulation of the siting, construction, and

1 operation of cranberry production activities, in light of the
2 benefit of cranberry production activities to the economy, the
3 regulatory approach of other states, and other factors.

4 (i) The feasible and prudent alternative standard under
5 section 30311 and consistent application of the standard.

6 (j) Methods to assist both of the following in successfully
7 obtaining permits under this part in a timely manner:

8 (i) Individuals proposing a use or activity for their personal
9 homesite.

10 (ii) Nonprofit organizations.

11 (10) This section is repealed effective April 1, 2013.