

DEQ Analysis – Part 1

S.B. 1211(S-1)

12/5/18

The draft bill removes protection of the following types of wetlands, lakes, and streams. These wetlands, lakes, and streams will be able to be filled, dredged, constructed on, etc. without any type of permitting process.

- Wetlands that are connected to waterbodies through a non-continuous connection.
- Wetlands that have a man-made physical connection.
- Wetlands contiguous to ponds.
- Artificially flooded wetlands (for example, managed wetlands like Maple River flooding).
- Wetlands that are essential to the preservation of the state (for example, small non-contiguous wetlands with threatened and endangered species and rare wetland types).
- “Prior Converted” cropland designated by the USDA and EPA even if it has reverted to natural wetland.
- Uses within wetlands (for example, maintained utility corridors or golf course fairways in wetlands, the storing and treating stormwater from parking lots and roadways in wetlands).
- Artificially irrigated and flooded lakes and streams and the wetlands contiguous to them (for example, Maple Lake, Wixom Lake, Belleville Lake, Ford Lake).
- Artificial lakes and ponds and non-permanent artificial streams, and the wetlands contiguous to them (for example, Millennium Park lakes, Cedar Lake Estates, Stonewater Lakes, Emerald Lakes, Island Lake).
- Any non-permanent stream that is not a Water of the U.S. and the wetlands contiguous to them.

Deregulation of many of these areas is not consistent with Section 404 of the Clean Water Act. Michigan’s Section 404 program must be as stringent Section 404 of the Clean Water Act or Michigan’s program will be withdrawn. Furthermore, any amendments that are found inconsistent with Section 404 the federal Clean Water Act by the EPA will still be regulated under federal law.

Based on GIS analysis, we estimate that this bill puts the following resources at risk of not being protected. **Furthermore, tying regulation to Waters of the U.S. means that jurisdiction determinations will be made on a case-by-case basis which will lead to time delays and other difficulties for the regulated community.**

- Approximately 380,000 wetlands, totaling 550,000 million acres, that are not greater than 5 acres in size and not contiguous to the Great Lakes are at risk. These include:
 - Wetlands contiguous to ponds: approximately 50,000 wetlands totaling approximately 70,000 acres.
 - Artificial wetlands (e.g., managed wetlands): at least 10,000 wetlands, totaling approximately 50,000 acres, of artificially flooded wetlands in Michigan.
 - Wetlands contiguous to impoundments: at least 5,000 wetlands, totaling approximately 10,000 acres.
 - Wetlands contiguous to artificial lakes: at least 2,000 wetlands, totaling approximately 3,000 acres.
 - Wetlands contiguous to non-permanent streams: approximately 75,000 wetlands, totaling approximately 130,000 acres.
 - Specific estimations for wetlands that are connected to waterbodies through a non-continuous connection, have a man-made physical connection, are essential to the preservation of the state, and are ‘Prior Converted’ cropland reverted to natural wetland are not available.
- At least 4,200 of the 11,000 lakes in Michigan are at risk. These include:
 - Impoundment lakes: approximately 2,600 lakes.
 - Artificial lakes: at least 1,600 lakes.
- EPA estimates that 60 percent of streams nationwide are non-permanent, which means that approximately 21,600 miles of the 36,000 miles of streams in Michigan are at risk.

DEQ Analysis – Part 2

S.B. 1211 (S-1)

12/5/18

- S.B. 1211 Removes protection of thousands of wetlands, lakes and streams in Michigan (see Part 1).
 - Inland lakes and streams are protected under the public trust. The basic tenant of the public trust doctrine is that certain natural resources are of such importance to the public that they are incapable of purely private ownership and control and need governmental protection. The public trust doctrine was first codified in Roman law, was later incorporated into English common law, and then was incorporated into American common law (as early as 1842 when it was adopted by the Supreme Court). In 1926, the Michigan Supreme Court described the public trust as a high, solemn and perpetual trust, which it is the duty of the State to forever maintain.
 - Wetlands provide important benefits to society and are critical to the health and existence of the other natural resources of the state, such as inland lakes, streams, ground water, fisheries, wildlife, and the Great Lakes. Benefits provided by wetlands include flood and storm control through water storage, wildlife and waterfowl habitat (e.g., breeding, nesting, and feeding habitat), protection and recharging of groundwater, pollution and sedimentation treatment, and nursery grounds for fish. Wetlands are also protected under the public trust.
 - The Michigan Constitution provides that “The conservation and development of the natural resources of the state are hereby declared to be of paramount public concern in the interest of the health, safety and general welfare of the people. The legislature shall provide for the protection of the air, water and other natural resources of the state from pollution, impairment and destruction.
 - Small wetlands that are contiguous to lakes and streams (many of which will no longer be protected under the bill) provide important societal benefits, including water quality and flood storage, especially in urban and suburban areas.
- S.B. 1211 requires that waters meet the federal definition of “Waters of the United States.” The federal definition of “Waters of the United States” is unclear and is in complete legal flux. The 2015 Obama administration “Clean Water Rule” is currently in effect in Michigan. Due to current legal action, the “Clean Water Rule” is in effect in 22 states, but not in the other 23 states where the pre-Obama is in effect. The Trump administration has announced that it will be releasing a draft rule in the near future that will replace both of these rules.
- S.B. 1211 removes state control on what is regulated because it cites the federal definition. Michigan will no longer have control over what wetlands, lakes and streams it regulates. When the federal definition changes, what is regulated by Michigan will also change.
- S.B. 1211 substantially changes Michigan’s definitions of wetlands, lakes and streams. Those definitions have provided clear, predictable and stable regulation in Michigan for 40 years and have case law associated with them. The definitions proposed in the bill are confusing, will be difficult to implement, and hard to understand for the regulated community. Tying Michigan’s program to a non-stable and complicated federal standard will lead to time delays, lack of clarity, and lack of predictability.

- S. B. 1211 allows unlimited dredging for borrow material in wetlands that are not “Waters of the United States” even if feasible and prudent alternatives exist.
- S. B. 1211 reduces fines, limits the department’s ability for inspections, and otherwise makes enforcement under the statutes more difficult.

Note: Some other changes in the bill (not listed here) may not be of concern, but they are currently inconsistent with federal law because of the way they are worded. (For example, the language on storm water or wastewater control features)