

DEQ Analysis – Part 1

S.B. 1211(H-1)

12/13/18

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

- Any wetland that is not a Water of the United States. In Michigan, the new proposed Waters of the United States rule will only regulate wetlands that touch, or are inundated, by the Great Lakes and certain inland lakes and streams.
- Wetlands that are connected to waterbodies through a non-continuous connection.
- Wetlands that have a man-made physical connection.
- Wetlands contiguous to ponds.
- Wetlands that are essential to the preservation of the state because they support plants or animals of an identified regional importance or provide groundwater recharge documented by a public agency.
- “Prior Converted” cropland designated by the USDA and EPA even if it has reverted to natural wetland.
- Artificially irrigated and flooded lakes and streams that are not Waters of the United States 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 that are not Waters of the United States, 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 United States and the wetlands contiguous to them.

Michigan’s Section 404 program must be as stringent Section 404 of the Clean Water Act or Michigan’s program will be withdrawn.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.**

- If and when the new proposed Trump administration rule goes into effect in Michigan, approximately 3 million of the 6.5 million acres of wetland (approximately half) will no longer be protected under S.B. 1211. In some counties, over 75% of the wetland acreage will not be protected under S.B. 1211. In addition, under the new proposed Trump administration rule, approximately 5000 inland lakes (lakes greater than 5 acres in size) will no longer be federally regulated and are at risk under S.B. 1211.
- If the new proposed Trump administration rule does not go into effect in Michigan, approximately 380,000 wetlands, totaling 550,000 acres (about a ½ million acres), that are not greater than 5 acres in size and not contiguous to the Great Lakes are at risk under S.B. 1211. These include:
 - Wetlands contiguous to ponds: approximately 50,000 wetlands totaling approximately 70,000 acres.
 - 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 under S.B. 1211. 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 under S.B. 1211.

DEQ Analysis – Part 2

S.B. 1211 (H-1)

12/13/18

- 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.
- On December 11, 2018, the Trump administration released a new draft rule which will significantly reduce the number of wetlands protected at the federal level (approximately half of the wetland acreage in Michigan). It also deregulates lakes that do not contribute flow to Section 10 Waters (i.e., those waters regulated under the federal Rivers and Harbors Act), which is at least 5000 inland lakes (about half of the lakes in Michigan). Lakes that will no longer be provided federal protection under the new rule include:
 - Crooked Lake, Alcona County
 - Birch Lake, Bass Lake, Antrim County
 - Big Lake, Baraga County
 - Pearl Lake and Long Lake, Benzie County
 - Thumb Lake (aka. Lake Louise), Charlevoix County
 - Munro Lake, Silver Lake, Cheboygan County

- Hulbert Lake, Chippewa County
- Rice Pond, Bear Lake, Clear Lake, Grey Lake, Perch Lake, Clare County
- Shupac Lake, KP Lake, Kneff Lake, Frog Lake, Kyle Lake, Bear/Hardgrove Lake, Bluegill Lake, Crawford County
- Silver Lake and Swayer Lake, Dickinson County
- Pine Lake, Barnum Lake, Byrum Lake, Genesee County
- Spider Lake, Chandler Lake, Tibbets Lake, Rennie Lake, Arbutus Lake, Muncie Lake, Island Lakes, Prescott Lake, Bagley Lake, Dyer Lake, Bass Lake (Long Lake Township), Bass Lake (Green Lake Township), Grand Traverse County.
- Mud Lake, Little Bass Lake, Welcome Lake, Sand Lake, Iosco County
- Indian Lake, Iron County
- Crooked Lake, and Eagle Lake, Kalamazoo County
- Twin Lake, Little Twin Lake, Starvation Lake, Eagle Lake, Waddell Pond, MacNeil Pond, Bear Lake, Crawford Lake, Kalkaska County
- Big Star Lake, Wolf Lake, Loon Lake, Idlewild Lake, Lake County
- Millers Lake, Bronson Lake, Davis Lake, Nepessing Lake, Elk Lake, McKeen Lake, Lapeer County
- Duck Lake and Mougeys Lake, Leelanau County
- Euler Lake, Clark Lake, Pete Lake, Fonda Lake, Island Lake, Briggs Lake, Pleasant Lake, Hamburg Lake, and Winans Lake, Livingston County
- Perch Lake, Luce County
- Clear Lake, Lake Avalon, Ess Lake, Montmorency County
- Nero Lake, Lost Lake, Long Lost Lake, Tout Lake, Bass Lake, Bear Lake, Townline Lake, Ambrose Lake, Horseshoe Lake, Bear Lake, Grousehaven Lake, Grebe Lake, Jewett Lake, Rifle Lake, Bass Lake, Twin Lakes, Cranberry Lake, Henderson Lake, Big Norway Lake, Bush Lake, Skidway Lake, Ogemaw County
- McCollum Lake, Oscoda County
- Big Bear Lake, Little Bear Lake, Big Lake, Hardwood Lake, Pettifor Lake, West Lake, Martin Lake, Deer Lake, Lake Twenty Seven, Heart Lake, Fawn Lake, Dodge lake, Viking Lake, Section One Lake, Guthrie Lake, Clear Lake, Douglas Lake, Oley Lake, Ward Lake, Dixon Lake, McCoy Lake, O'Rourke Lake, Kassuba Lake, Lake Manuka, Buhl Lakes/ Lake Arrowhead, Five Lakes, Opal Lake, South Twin Lake, North Twin Lake, West Lost Lake, Lost Lake, Ford Lake, Otsego County
- Lake Easau, Lost Lake, Presque Isle County

The new rule can be found at: https://www.epa.gov/sites/production/files/2018-12/documents/wotus_2040-af75_nprm_frn_2018-12-11_prepublication2_1.pdf

- It is expected that based on legal challenges, the three sets of “Waters of the United States” rules will go in and out of effect in different parts of the country as legal challenges to the rules proceed. Because S.B. 1211 ties Michigan’s regulation to the “Waters of the United States,” what is regulated by the state will change with it.
- 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 limits the department's ability for inspections and otherwise makes enforcement under the statutes more difficult.
- S.B. 1211 will decrease water quality. Wetlands, as well as Michigan's headwaters, serve as natural filters for sediments, nutrients, and other pollutants. They house a significant volume of the state's endangered and culturally significant species. They also play a critical role of flood control during periods of high precipitation. Deregulated waters will be altered and filled without providing an alternative means of providing these necessary services.
- S.B. 1211 eliminates community types that have been scientifically reviewed from being listed as rare and imperiled wetland (e.g., all of the forested wetland types).
- S.B 1211 is likely to increase costs to local governments. Unmitigated impacts to wetlands and headwaters would result in a greater need for the establishment and maintenance of man-made drains, flood control structures, stormwater infrastructure, drinking water treatment and wastewater management. These responsibilities rest primarily on Michigan's local governments, which means that local governments will have to pass these costs through to their corporate and private citizens.
- S.B. 1211 limits the ability of local governments to regulate wetlands in their jurisdiction. Because local governments are required to use the definition provided in Part 303, the new exemptions for what is not wetland will mean that local governments will not be able to regulate wetlands that are not Waters of the United States.

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. See comparison of proposed bill and federal language.) In addition, the change to the definition of wetland adds a new parameter (i.e., aquatic life) to defining wetlands that is not part of the federal wetland definition and is not covered in the Army Corps of Engineers delineation manual.