



## Fines up to \$10,000 per day for Impacting a Wetland can Ruin your Construction Project

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I am often asked by construction clients for advice *after* construction activities start on a project because the Michigan Department of Environmental Quality has advised the client that they have impacted a wetland with their construction activities. Although there are procedures to take corrective action to eliminate or minimize the impact on a regulated wetland from construction activities, the client is often required to pay fines and penalties for un-permitted construction activities in the wetland, up to \$10,000 per day which can amount to hundreds of thousands of dollars in unexpected project expenses.

To avoid this unexpected expense and exposure in any construction project, it is important for clients to evaluate a construction site for regulated wetlands before commencing work and obtain the necessary permits from the MDEQ before commencing activities in or around wetlands. This article outlines some of the basic regulations involved in determining what wetlands are regulated in Michigan, what permits are available to allow construction activities in wetlands and wetland mitigation requirements if a permit is issued.

The State of Michigan derives its ability to regulate wetlands from the Federal Clean Water Act of 1972. Michigan's Wetland Protection Act, which is now known as Part 303 of the Natural Resources and Environmental Protection Act, 1994 PA 451, as amended, authorizes the State of Michigan through its Michigan Department of Environmental Quality to oversee and regulate certain wetlands located in the state. There are also local regulations and ordinances you must be aware of when beginning a construction project which may require more extensive protections for wetlands depending on the locality. Local wetland protection ordinances may require a contractor who desires to perform work in or around a wetland to comply with larger set backs for construction activities. Local regulations may also regulate wetlands smaller than those regulated by the federal and state rules. You should consult the local government to determine if a wetland ordinance exists.

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Michigan's regulations regarding wetlands set forth in Part 303 generally define a wetland as follows:

Land characterized by the presence of water in a frequency and duration sufficient to support, and under normal circumstances does support, wetland vegetation or aquatic life, commonly referred to as a bog, swamp or marsh *and* which is any of the following:

1. Contiguous to the Great Lakes or Lake St. Clair, an inland lake, pond, river or stream.
2. Not contiguous to the Great Lakes or an inland lake, pond, river or stream, but more than 5 acres in size; except this subparagraph shall not be of effect, in counties of less than 100,000 population until the MDEQ certifies to the commission it has substantially completed its inventory of wetlands in that county.
3. Not contiguous to the Great Lakes, inland lake, pond, river or stream; and 5 acres or less in size if the MDEQ 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 notified the owner; except that this subparagraph may be utilized regardless of wetland size in a county in which subparagraph 2 is of no effect, except for purpose of inventorying, at the time.

Basically what the definition says is, if you have an area on your property where water is present during the year in sufficient amounts to support wetland vegetation, such as cat tails and water lilies, or aquatic life such as fish, frogs and turtles, and the area is contiguous to a Great Lake, inland lake, pond, river or stream; or if not contiguous to one of the Great Lakes, an inland lake, pond, river or stream and the "wet" area is larger than five acres in size, except in a county with a population of less than 100,000, until the MDEQ has substantially completed a wetland inventory for that county; or if the MDEQ determines that the area although it is less than five acres in size needs to be protected and they advise the owner of such, then the property is regulated as a wetland under Part 303.1. 2. 3.

If asked by a client for advise about a construction site and wetlands, I most often recommend that we include as part of the development team an environmental engineer familiar with wetland determinations. The environmental engineer is capable of walking the property to give a brief and informal opinion about whether wetlands exist. You can also ask the MDEQ to perform this inspection for a fee, however, I find it in the best interests of the client to hire its own consultant to establish arguments as needed to limit the scope of the wetland on the property.

If an area on the property is considered a regulated wetland, a permit must be obtained before construction activities can occur *in* the wetland. A permit is required for the following activities:

- a. To deposit or to place fill in a wetland;
- b. Dredge, remove or permit the removal of soil or minerals from a wetland;
- c. Construct, operate or maintain any use or development in a wetland; and
- d. Drain surface water from a wetland.

MCL 324.30304.



In determining whether or not to issue a permit, the MDEQ must consider the following factors:

- a. Whether the permit will be in the public interest;
- b. If the permit is otherwise lawful;
- c. If the permit is necessary to realize benefits from the activities;
- d. No unacceptable disruption to aquatic resources will occur; and
- e. The proposed activity is wetland dependent or no feasible or prudent alternatives exist but to impact the wetland from the construction activity.

MCL 324.30311.

Two types of wetland permits can be obtained. A "general" permit or an "individual site specific" permit. The general permit does not require the MDEQ to hold a public hearing. General permits are issued for more common or minor activities that occur in wetlands during construction including construction of boardwalks and platforms; construction of walkways and driveways through wetlands; construction of utilities and certain well access roads; storm water outfalls, culverts, other drainage work through or across wetlands and minor fills for the construction or expansion of a single family residence where the fill area is not to exceed 1/4 acre.

If an individual site specific permit is required because more extensive wetland impact is to occur, the MDEQ oversight increases. In such event, the MDEQ often requires the client to retain an environmental consultant to oversee the construction activity. The wetland area on the property must be surveyed and mapped, which is often referred to as "demarked"; the MDEQ may require an environmental impact and feasibility study to determine whether or not there are any alternatives available to develop the site without impacting the wetland; a determination of any adverse impacts on aquatic resources and if applicable what wetland mitigation is required.

Wetland mitigation is the idea that if you are to reduce the size of a wetland on your property from construction activities, you will have to construct a new wetland either on the site or nearby in an amount greater than the area that was impacted or lost from the construction. Mitigation is considered an option as part of a permit by the MDEQ when any of the following conditions exist:

- a. The wetland impact is otherwise permissible under Part 303;
- b. No feasible and prudent alternatives to avoid wetland impact exist; and
- c. An applicant has used all practical means to minimize impacts to wetlands.

Various allowable mitigation techniques include restoration of previously existing wetlands; creation and expansion of wetlands; and acquisition of approved wetland credits from a wetland mitigation bank established under Rule 281.951 and adopted under Part 303. Further, a new wetland created for mitigation purposes must be of a similar ecological type of the impacted or destroyed wetland. The amount of wetland that you may have to construct for mitigation depends on the type of wetland you will or have impacted. If the wetland is considered rare or imperiled, then you are required to restore or create five acres of wetland for every one acre of wetland you desire to impact. For forested wetlands, coastal wetlands and wetlands that border inland lakes, you are required to restore two acres for every one acre of wetland impacted. For all other



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wetland types, you are required to restore or create 1.5 acres of wetland for one acre impacted. Under rare circumstances, you may be required to restore or create up to ten acres for every one acre of wetland impacted under subrule 4 of Rule 281.925.

As you can see from the above, constructing in wetlands is highly regulated and complicated. It can be an unexpected expense in a construction project. If you observe or are concerned with wetlands on property that you intend to develop, it is highly recommended that you contact your attorney to discuss options available to you. This early due diligence on a project may help you avoid the unexpected and unintended fines and penalties that can be imposed by the MDEQ for un-permitted construction in a wetland. In addition to fines, you may be required to restore the wetland, perform extensive mitigation and creation of new wetlands to replace the wetland area destroyed from the construction activities.

A little planning ahead of time can save extensive costs in any construction project that involves regulated wetlands.

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