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Farmers Win Some And Lose More in Michigan Wetland Amendments

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Public Act 98 of 2013 signed by Gov. Rick Snyder on July 2, 2013 brought about long-expected changes to Michigan's wetland statute (see related article). In the face of the inevitable changes, pro-farming stakeholders including the Michigan Farm Bureau, MBG Marketing, the Department of Agriculture and representatives of numerous farms did all they could to preserve important farming exemptions in the Michigan statute. In the end, the farming stakeholders were successful in several areas but overall lost the major battle, allegedly to appease U.S. EPA.

P.A. 98 does provide many potential benefits to farmers. These include the following:

- Exempts incidentally created wetlands in agricultural drains constructed to remove excess soil moisture from upland areas;

- Requires the DEQ to develop a blueberry production assistance program in coordination with the Department of Agriculture and Rural Development;

- Puts the burden on the DEQ to determine whether a wetland is contiguous to a Great Lake, Lake St. Clair, an inland lake or pond, or a river or stream where there is no direct physical contact and no surface water or interflowing groundwater connection to such a body of water;

- Prohibits the DEQ from considering agricultural drains in determining whether a wetland is contiguous to the Great Lakes or Lake St. Clair, an inland lake or pond, or a river or stream; and

- Clarifies that Michigan's delegated authority over the federal wetland program applies only to "navigable waters" and "waters of the United States" as defined in the federal statute, federally promulgated rules and court decisions (which then prohibits the DEQ from relying on U.S. EPA guidance documents on determining jurisdictional waters).

- The elimination of the general agricultural exemption (discussed below) is not effective until October 1, 2013;

While these changes are important, they do not outweigh P.A. 98's elimination of the general farming exemption. Even though the DEQ did not publicly recognize it, the Michigan Supreme Court interpreted this exemption as allowing the conversion of wetlands to farmland through the use of the agricultural practices listed and those that were of the same kind, class, character or nature. **Beginning October 1, 2013, farmers will need a permit to farm in wetlands unless they had done so continuously prior to 1980. Unless the farmers fit within one of the general permits that the DEQ is now required to develop by the end of the year, then they will have to obtain a wetland permit before farming in a wetland, and that means facing the permit's mitigation requirement**. Although P.A. 98 gives the DEQ more flexibility in setting the mitigation ratio (i.e. the number of acres that have to be created for each acre of wetland impacted) the mitigation will be expensive and often cost prohibitive.

Sadly, this result was not necessary. The Michigan Farm Bureau had presented a very workable solution that would have both preserved Michigan's delegated authority of the Clean Water Act's wetland program and provided Michigan farmers with broader exemptions in wetlands that are not subject to federal jurisdiction. The DEQ supposedly ran this past U.S. EPA which purportedly rejected it. Why the U.S. EPA would care about how Michigan regulates non-jurisdictional wetlands is anybody's guess, especially given that 20-some states do not have their own wetland programs and thus non-jurisdictional wetlands in those states are completely unregulated.

P.A. 98 will not put an end to the differences between farmers and the DEQ. Rather the focus of the differences will largely shift to whether areas in dispute are wetlands at all and if so whether they meet the wetland definition under the state statute.