

Important Developments in Michigan Environmental Law

- U.S. Supreme Court may hear important wetlands jurisdiction case
- DEQ adopts important Operational Memoranda

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The last several months have seen some important developments in environmental law, both on the state and national scene. On the national level, the U.S. Supreme Court will soon decide whether or not federal jurisdiction over wetlands under the Clean Water Act can extend to “isolated” wetlands that are not part of navigable waterways. On the state front, the MDEQ has adopted some controversial and significant guidance to Michigan’s primary environmental clean-up program which will affect the cost of environmental clean-ups in Michigan.

First, on the federal level, Section 404 of the Federal Clean Water Act regulates, among other things, dredging and filling of wetlands when the wetlands are connected, adjacent or contiguous to other federally-regulated waterways. What may be adjacent or contiguous has been a subject of significant debate for as long as the regulations have been in place. The U.S. Supreme Court decided long ago that a wetland does not necessarily have to physically touch regulated navigable waters of the United States to be regulated. Subsequent decisions out of the federal courts of appeal have gradually expanded the jurisdiction which the U.S. EPA and U.S. Army Corps of Engineers may enjoy under the Clean Water Act. However, much of this law was cast into question when the U.S. Supreme Court issued a decision in *United States v Solid Waste Association of Northern Cook County* which held that federal jurisdiction may not extend to isolated wetlands which are not immediately adjacent or contiguous to federally-regulated waters. A recent federal case arising out of Michigan asked the court to put a finer point on this position. In this most recent challenge, a Michigan resident was found criminally culpable for impacting wetlands and the defendant in that case appealed to the U.S. Supreme Court. The U.S. Supreme Court remanded the case back to the Michigan federal district court for a decision on whether or not the wetland in question was subject to federal regulation under the *Solid Waste* decision referenced above. The district court found that under the new analysis, the wetland was not regulated but the Sixth Circuit Court of Appeals in Cincinnati (which governs Michigan federal courts) overturned the federal district court’s decision and reinstated the defendant’s conviction. The case is now back in front of the U.S. Supreme Court and many believe that the country’s highest court will, indeed, place further limitations on federal jurisdiction of wetlands.

An important development with respect to state environmental issues is the Michigan Department of Environmental Quality’s recent adoption of several controversial Operational Memorandums. Operational Memorandums are unique animals in the administrative legal framework. These memorandums are not binding law, but are strong recommendations of the agency. Thus, even though the memorandum may not be binding on the regulated community, it

will certainly be less than likely that you will advance any regulatory goal without compliance with these memoranda. One of the memorandums significantly alters the methods for sampling and analyzing for hazardous substances. Although the memorandum is highly technical in nature, the net result of the memorandum is that a broader range of contaminants will need to be analyzed under greater regulatory scrutiny in order to receive MDEQ approval. The net result is that since there are larger groups of chemicals which must be tested and since the laboratory methods for testing have become more rigorous, costs for environmental testing will increase significantly.

Another one of these technical memorandums deals with sampling methods and analysis for testing areas where groundwater contaminants may enter surface water bodies. Prior DEQ rules allowed for "mixing zones" which would calculate the groundwater's tendency to dilute and diffuse when entering the surface water body. These state regulations followed federal law and rules which allow for a discharge of certain contaminants, within limits, so long as those contaminants meet federal guidelines. The net effect of the DEQ's new technical memorandum will be to significantly limit the ability to demonstrate compliance with these limitations. Thus, it is likely that significant resources may be expended to deal with groundwater contaminants even when they pose no practical threat to the environment. Many of these changes are likely to be challenged, as some of them appear to contravene the very statutes which they are adopted to enforce. Further revisions of these memorandums appear likely.

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