

“DEQ Reorganizes Just In Time for Sweeping New Permit Policies”

By: Joseph E. Quandt

The DEQ has reorganized once again, and not a moment too soon. The Legislature, with its typical “carrot and stick” approach provided its stick to the DEQ on September 9, 2004. This new stick provides sweeping new environmental permit policies for many environmental programs including wetlands, shorelines, sand dunes, etc.

The stick I am referring to is the stick which the Legislature promised earlier this year would come along with its last minute funding of DEQ water programs such as groundwater discharge permits. You may recall that earlier this year, the DEQ ran out of money to run several of its water permitting programs, the net effect of which was to shut those programs down. The Department sent warning letters to persons regulated by those permits, hoping that the Legislature would be bombarded with phone calls from these angry permittees and the Legislature would be forced to provide extra funding for these programs. In this instance, the Department received exactly what it wished for in that the Legislature did indeed take notice, but not in the way DEQ had hoped. The Legislature took action by renewing and funding these water permit programs but provided that the DEQ must address the Legislature’s frustration with the length of time it takes to process DEQ permits. The result is House Bill 5876 which was signed by the Governor on September 9, 2004 and became law on September 10, 2004.

This new statute provides numerous changes to Michigan’s permit policies under several important environmental programs such as wetlands, soil erosion, flood plain, lakes and streams projects, oil and gas well permits, etc. to name just a few. This new permit regimen established by the Legislature requires that the DEQ act on a permit within a specified period of time (usually 90 days or less) unless a public hearing is required. Even if a public hearing is required, there is still a limited period of time upon which the DEQ may act to approve or deny a permit application. The DEQ is not required to act on “administratively incomplete” applications, but must inform applicants within thirty days of submittal that the application is incomplete. If the DEQ fails to advise the applicant of the deficiency, all permit applications under these programs are considered complete. Accordingly, even if an application is deficient on the 31st day, the application is considered complete and the Department must act upon the application as though it were complete. Failure of the Department to act upon a permit application within the specified period of time will require that the Department refund part of the application fee and possibly part of the annual renewal cost of the application. In some circumstances, such as wetland and solid waste permits, the permit is considered approved if not acted upon within the deadline.

A bigger reason for the Department to act upon permit applications in a timely fashion is the fact that the Director of the DEQ must provide to the Legislature an explanation as to why the Department failed to act in a timely manner on *each* permit application which the Department fails to process in conformance with the statute. This essentially creates a legislative referendum on the Director’s ability to manage his staff in a way which will achieve timely permit processing.

In an effort to meet these new challenges, the Department has significantly reorganized its staff to meet these and other challenges. The reorganization appears to follow an organizational structure which groups environmental staff into specific programs, naming those groups based on the number of staff within those groups. The largest of these groups is the Water Bureau which will now manage most ground water, surface water and other water programs. Clearly, this bureau will receive most of the permit attention created by the new statute. Other organizational changes include a reshuffling of staff within previously existing divisions such as the Remediation and Redevelopment Division, Air Quality Division and Waste and Hazardous Materials Division. Out of this new organizational structure also comes smaller groups such as the Office of Great Lakes, Office of Geological Survey, Office of Administrative Hearings and Office of Criminal Investigations.

This new law will have some significant fallout in other areas. Specifically, part of the statute will require that the Department place timing limitations on local units of government in permit programs which require local unit of government input and approval. This will certainly tax the resources not only of state governmental staff but local units of government as well. Likewise, the new law will require that the Office of Administrative Hearings schedule hearings within 30 to 60 days of a permit denial and issue a decision immediately thereafter. I can tell you from personal experience after waiting for administrative decisions for up to a year, that this is a welcome change. However, since the mandated change comes along without any additional funding to hire more administrative law judges, the result could be unsound decisions based upon a forced rush to judgment.

Another possible unsavory implication of the new law is the fact that it extends the “after the fact” or ATF provisions of other programs allowing individuals who conduct regulated activity without permits the opportunity to merely apply for the permit (at an increased fee) after they are caught. This could increase the scofflaw approach of some who believe that it is better to ask for forgiveness than for permission. Since the new program provides a limited “down side” to conducting the activity without permission in the first place, this approach to regulated activity would likely increase in popularity.

While the Legislature is to be congratulated for its initiative in attempting to expedite permit application reviews, it has also allowed some special interests to benefit in a manner which may not serve the environment. Thus, the new law has some good, some bad and some ugly. Perhaps Teddy Roosevelt was correct when he opined that fans of law or sausage should not witness either of them being made. The new permit requirements took immediate effect on September 10 and are now law.

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