



WHITE

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SEE NO EVIL

**The Gutting of
Michigan's Wetlands Protections**

September 1998

About PEER

Public Employees for Environmental Responsibility (PEER) is an association of resource managers, scientists, biologists, law enforcement officials and other government professionals committed to upholding the public trust through responsible management of the nation's environment and natural resources.

PEER advocates sustainable management of public resources, promotes enforcement of environmental protection laws, and seeks to be a catalyst for supporting professional integrity and promoting environmental ethics in government agencies.

PEER provides public employees committed to ecologically responsible management with a credible voice for expressing their concerns.

PEER's objectives are to:

1. **Organize** a strong base of support among employees with local, state and federal resource management agencies;
2. **Monitor** land management and environmental protection agencies;
3. **Inform** policymakers and the public about substantive issues of concern to PEER members; and
4. **Defend** and strengthen the legal rights of public employees who speak out about issues of environmental management.

PEER recognizes the invaluable role that government employees play as defenders of the environment and stewards of our natural resources. PEER supports resource professionals who advocate environmental protection in a responsible, professional manner.

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About This Report

This PEER white paper is written by employees within the Michigan Department of Environmental Quality (DEQ). Although many of the issues addressed in this report are indicative of the entire agency, the material within is based specifically on one DEQ division — the Land & Water Management Division (LWMD).

Michigan's wetland regulatory program has long been touted as one of the best state programs in the country. In this report, LWMD employees detail how the very agency charged with protecting Michigan's diminishing wetlands has deliberately and systematically aided in their illegal destruction, primarily by undermining essential enforcement efforts.

This report is the first in a series of PEER white papers written by DEQ employees documenting political manipulation of environmental regulation within the agency. The authors remain anonymous not only to avoid inevitable retaliation but also because of their firm belief that the facts within this report speak for themselves. All representations contained in this white paper are independently verifiable.

According to its own employees, since its creation three years ago DEQ has isolated, undercut and controlled its own wetlands protection staff. Within the LWMD, exces-

sive emphasis on permitting has come at the expense of enforcement, resulting in a strategy aimed at approving projects that destroy Michigan's valuable wetland resources. Worse, pressure has been brought to bear on staff to ensure that wetland violations are overlooked or ignored altogether.

Employees charge that the state wetland program once regarded as a model for the nation is now just a shadow of its former self and no longer adequately protects the 5.5 million acres of wetland resources remaining in Michigan.

The relentless political assault that has weakened the program during this decade has occurred primarily outside the legislative arena and therefore, for the most part, out of public view. At the very least, the story of employees' daily struggle to put science before politics can now be told. It is PEER's sincere hope that this white paper will have a larger impact — helping the remaining wetlands protectors at DEQ do their jobs and serve the public.

PEER is proud to serve conscientious public employees who have dedicated their careers to the faithful execution of the law. We stand ready to assist these individuals in promoting environmental ethics and government accountability within their agency.

Jeffrey Ruch
PEER Executive Director



I. Executive Summary

In the past 200 years, an estimated 50 percent of Michigan's wetlands have been drained, filled, converted or otherwise lost. Development pressure threatens the state's dwindling wetland resources. According to public employees charged with resource protection in Michigan, a generation of effort to protect remaining wetlands has been largely dismantled by Governor John Engler through policies designed to prevent law enforcement in the recently created Department of Environmental Quality.

As a consequence, thousands of environmentally sensitive acres of Great Lakes shorelines, inland lakes and streams are being developed at a rapid pace – many illegally. In fact, hundreds of citizen complaints of wetlands violations are ignored or never even entered into the agency's computer tracking system. An estimated 80 percent of all regis-

tered complaints are simply closed without investigation. This "see no evil" approach to wetlands protection will be felt primarily by future generations of Michiganders.

This report traces how, under the Engler Administration, the DEQ has systematically undermined the state's once-solid wetland protection program by gutting wetland compliance efforts, diluting permit standards, intimidating dedicated resource professionals to issue more permits at the expense of enforcement, and appointing anti-environmental administrative law judges.

Currently, the DEQ has de-emphasized wetlands enforcement to the point of non-existence:

- *No Enforcement Personnel.* The split engineered by the Engler Administration



See No Evil. A "protected" wetland being filled in for development is an all-too-familiar sight in Michigan.

between the DNR and DEQ has effectively removed enforcement officers from environmental regulatory matters within the purview of DEQ. Fully 93 percent of the trained law enforcement officers stayed with DNR, leaving the DEQ — Michigan's premier environmental regulatory agency — with only a handful of cops on the beat.

Today, there is no position within DEQ dedicated solely to enforcing and pursuing wetlands protection. Citing personnel shortages flowing from budget cuts and the absence of enforcement staff, DEQ field personnel are being directed by their own chain of command to ignore wetlands violations.

- *Disincentives to Enforce.* In DEQ, field biologists have been told that enforcement should be one of their lowest priorities. Field personnel who persist in pursuing violations are transferred or reassigned, leaving remaining staff with a clear message that enforcement cases are no longer welcome. For instance, criminal prosecutions for wetlands violations in 1996 dropped to nearly half the average number of cases per year between 1991 and 1995.
- *Political Interference.* The Engler Administration's developer-friendly policies have also made it possible for elected

legislators to intervene into ongoing enforcement cases. A prime example is the myriad of DEQ-sponsored exemptions to the Milliken-era wetlands statutes.

- *Criminal Prosecution Barriers.* The DEQ centralized approval of criminal referrals, removing career staff who were familiar with the facts and the law of individual cases and vesting decision-making in one position per district. This centralization has created a potential internal enforcement bottleneck that makes it much easier for top agency managers to throttle criminal complaints before they can be referred for prosecution. Pending criminal prosecutions have also been sidetracked by management intervention, crippling both the credibility of the enforcement program and the morale of field staff.

At DEQ, and particularly within LWMD, Governor Engler's regulatory rollbacks threaten to hamstring enforcement efforts for years to come. To a large degree, the wetlands program has become a "paper tiger" in which developers know that there will be no consequences for violating the law.

DEQ's "business friendly" emphasis under the Engler Administration illustrates a clear and unmistakable lack of commitment to the environmental values held dear by the majority of Michigan's citizens.

II. Evolution to Devolution

“Strong, enforceable wetlands protections are critical to the water sources that make the Pere Marquette River, and hundreds of other wetland-origin trout streams...in the nation, so valuable.”

– William Kier, *Fisheries, Wetlands and Jobs: The Value of Wetlands to America's Fisheries* (1998)

Long before the area now known as Michigan was settled, the region was almost one-third wetlands. It is estimated that Michigan once contained 11.2 million acres of wetlands, including marshes, swamps and riparian areas around lakes and streams.

As settlement increased nationally, vast wetland areas were drained, primarily for agriculture. As cities and towns grew, still more wetlands were filled for development, resulting in rapid wetland loss across the country. By the 1950s, Michigan had lost an estimated 71 percent of its wetlands. Overall, Michigan has lost an even greater percentage of its wetlands than the entire United States.

During the 1970s, public awareness of the valuable functions served by wetlands — natural flood control, water quality, wildlife habitat, recreation — increased, as did efforts to protect remaining wetlands. At the time, Lake Erie was considered a “dead” body of water; many of Michigan’s major rivers were nothing more than open sewers; and millions of acres of wetlands in the state had been lost to agriculture or paved over for urban sprawl.

As citizens began to understand and appreciate the extent of environmental damage, they demanded action from elected officials. Congress responded by passing laws to clean up the nation’s air and water. In Michigan, Governor William G. Milliken set in motion a major legislative effort to preserve, protect and restore the state’s natural resources. Beginning in 1969 and throughout his three terms in office, Gover-

nor Milliken led historic efforts to clean up and protect Michigan’s lakes, streams and wetlands.

Protecting a Natural Heritage

In 1980 Milliken set the standard for the protection of wetlands by signing into law the Goemaere-Anderson Wetland Protection Act (Act 203). Among other things, this law created a state policy to protect the public against the loss of wetlands and made explicit findings about the benefits wetlands provide. It also established a permit program regulating certain polluting activities in wetlands around lakes and streams.

Act 203 was preceded by the Great Lakes Submerged Lands Act, the Great Lakes Shoreline Management and Protection Act and the Inland Lakes and Streams Act. Together these statutes provided protection for Michigan’s 38,504 square miles of Great Lakes bottomland, 3,083 miles of shoreline, 11,037 inland lakes, millions of acres of wetlands and thousands of miles of rivers and streams.

Michigan’s resource protection laws were considered so comprehensive that in 1984 the U.S. Environmental Protection Agency (EPA) delegated administration of Section 404 of the Clean Water Act to the state, making Michigan the first state in the nation to assume this federal regulatory program. (New Jersey is the only other state to assume the 404 Program, having been delegated that authority in the mid-1990s.)

The enormous responsibility for protecting Michigan’s natural resources by administering these environmental laws was assigned to the state’s Department of Natural Resources (DNR). Within the DNR, the LWMD became the lead division to implement and enforce land and water interface statutes.

A Reputation for Excellence

During the 1980s the LWMD was comprised of a core group of resource professionals located in the Lansing headquarters and a much smaller group of field biologists scattered in district offices throughout the state.

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The LWMD was led by two experienced, strong-willed and highly skilled Division Chiefs: Karl Hosford (1978-1986) and Dennis Hall (1986-1991). These two Division Chiefs were deeply committed to the mission of protecting Michigan's wetland and water resources. Under their leadership, the LWMD recruited highly dedicated and motivated staff to accomplish this important task.



Fragile Legacy. *Approximately three-fourths of Michigan's wetlands have been lost*

The Division soon became widely recognized as a strong advocate for sound environmental management and protection. During the mid to late '80s, LWMD earned a reputation as one of the nation's best wetland regulatory programs.

LWMD staff subsequently found themselves embroiled in highly publicized and controversial development projects but due to the strict criteria in the statutes, many highly destructive projects were denied or significantly modified before being approved.

This was possible, in part, because of the strong support the program received from the highest levels of state government. For example, DNR Director David Hales (1988-91) not only understood but promoted the value of wetlands. He boasted about the agency's goal to restore two

million acres of historically drained wetlands in the state.

Anatomy of a Regulatory Process

In Michigan, anyone desiring to work within state regulated wetlands, the Great Lakes or an inland lake or stream must obtain a permit from the LWMD. Field biologists in this Division have two major job functions: 1) They evaluate applications for projects proposing impacts to state regulated wetlands, inland lakes and streams or the Great Lakes; and 2) They investigate alleged unauthorized activities occurring within these protected areas, seek compliance, and pursue enforcement action when necessary.

When a complaint is received in a LWMD field office, the information is recorded on a complaint form and then entered into

the district's computer system. The complaint is assigned a "file number" and a hard copy file is prepared. The file is then referred to the individual LWMD field staffer assigned to the county where the alleged violation occurred. From that point on, it is that staffer's responsibility to investigate the complaint and to determine appropriate enforcement action.

LWMD field staff face an extremely difficult dilemma. Their number one priority has always been permitting, followed by enforcement. While realizing that evaluating applications and issuing permits is their primary responsibility, they also understand that a strong emphasis on enforcement is needed to make the entire program effective. After all, the permitting program is only as good as the enforcement program; the two intertwined

duties complement each other. Permitting without enforcement is a sham.

During the late '80s, Michigan's economy prospered and development activity exploded. LWMD field staff were deluged with thousands of permit applications and hundreds of violations. Staff struggled to maintain control of the situation while continuing to protect the state's natural resources. In an effort to deal with increasing work loads, some district offices experimented with establishing separate enforcement staff. This concept involved committing one biologist to full time enforcement duties, leaving the rest of the staff to concentrate 100 percent of their time on the permitting function.

Both the permitting and the enforcement operations improved under this dual role system, creating a "win-win" situation. The permitting process became more efficient and timely because staff were no longer concerned about enforcement. Similarly, once the enforcement biologist was relieved of burdensome permitting responsibilities, enforcement successes increased as well.

The Beginning of Descent

In November of 1990, John Engler was elected Michigan's new Governor. At the very time when increased staffing and funding were necessary to deal with the added pressures on Michigan's natural resources and the ever-increasing work loads within LWMD, the opposite was about to occur.

Engler, a fiscal conservative, came to power touting the need for smaller government, less regulation and reduced taxes. He quickly identified state employees as one of his major targets. In March of 1991, only a few months after taking office, Governor Engler targeted the DNR for sizeable budget cuts. Within the LWMD, many veteran field staff were laid off or transferred to other divisions.

At the direction of Governor Engler, DNR Director David Hales was replaced by Real Estate Division Chief Rollie Harnes. LWMD Chief Dennis Hall was removed from his position and reassigned to a token position in the DNR front office. Hall was replaced by Larry Witte, a former division chief in the front office who had little to no relevant experience in wetlands management.

The appointments of Harnes and Witte were seen as attempts by the Governor to weaken natural resource protection efforts. It was widely accepted that these individuals were "Yes Men" who would follow orders sent down from the Governor's office.

In November of 1991, Governor Engler issued Executive Order #1991-31, which removed citizen oversight by eliminating 30 years of volunteer boards and commissions involved in agency decision making. He effectively removed the authority of the Natural Resources Commission (NRC) to oversee the DNR, which it had been doing since 1929.

As the controlling body over DNR, the NRC set agency policy after receiving input from the public on major conservation and environmental issues. Authority to hire and fire the DNR director also rested with the commission. Even though the NRC's seven members were appointed by the Governor, the staggered nature of the terms made it difficult for a Governor to control the NRC. This system had been designed specifically to keep politics out of natural resources decisions.

Despite being challenged in court, Governor Engler's executive order was eventually found to be within his authority to issue. Encouraged by this legal victory, the Governor continued his assault on the DNR by cutting the agency's budget and leaving vacant positions unfilled.

The climate within LWMD and the entire agency quickly deteriorated. Remaining LWMD field staff not only had to deal with staggering work loads, they also had to cope with increased pressure both internally (from new DNR management) and externally (from the governor's office, legislators and development interests) to speed up permit processing, deny fewer applications, and reduce the backlog of contested case hearings (appeals of application denials).

As a consequence, LWMD field staff were forced to spend more and more time on expediting permit reviews, leaving much less time for enforcement activities than in the past. More change was yet to come.



New Direction. DEQ is under pressure to issue more wetlands permits. The path to new development is paved over drained, filled and damaged riparian ecosystems.

III. Divide and Conquer

“The Governor has completed his systematic dismantling of the DNR. The accumulated effect of relaxed regulations and control will be felt for generations.”

– Tom Washington, Executive Director of the Michigan United Conservation Clubs

In August of 1995, Governor Engler issued an executive order splitting the DNR in half to create a new agency — the Department of Environmental Quality (DEQ). Beginning in October of that year, the DEQ assumed control over all environmental protection and selected land use responsibilities in the state. The DNR retained regulatory authority over hunting, fishing, parks, recreation and forestry.

With the creation of the DEQ, Engler effectively consolidated his power over environmental policy and management in Michigan. The DEQ director would be appointed by and remain answerable only to the governor. As Engler’s spokesman John Truscott explained, “there should be accountability in the process and the Governor believes the accountability should rest with him.”

The governor named Russell Harding as the director of the new DEQ. As a DNR Deputy Director, Harding had been harshly criticized both inside and outside of the agency for being soft on polluters. In March of 1995, Attorney General Frank Kelley had even called for Harding’s resignation during negotiations over amendments to pollution laws that eased clean-up standards and made it harder to prove liability.

Once free from the DNR and the Natural Resource Commission, and now answerable only to Governor Engler, Director Harding set about establishing the DEQ as an agency primarily concerned with accommodating Michigan’s business and industry interests than protecting natural resources and enforcing environmental laws.

Harding began his tenure by advocating a de-emphasis in traditional enforcement methods such as criminal prosecution and civil litigation. In their place he advocated “innovative strategies” to allow industry to voluntarily comply with environmental regulations. The DEQ’s mission statement reflects Harding’s “business friendly” philosophy:

“The [DEQ] will drive improvements in environmental quality for the protection of public health and natural resources to benefit current and future generations. This will be accomplished through effective administration of agency programs, providing for the use of innovative strategies, while helping to foster a strong and sustainable economy.” [emphasis added]

As further proof of where his sympathy lies, Director Harding has led a national campaign to chip away at U.S. Environmental Protection Agency oversight authority. Like Engler, Harding has attacked EPA for “meddling” in state issues.

A Rocky Relationship

No sooner had the DNR split been announced when conflicts began to arise. The fact that the two, now distinct, resource agencies would be forced to compete for the same state funds caused considerable confusion and concern. Would field offices continue to be shared by employees of different agencies? How would the facilities be managed? Who would pay for what?

Of greater concern was the fact that upper management of the two agencies were openly suspicious and in some cases hostile toward one another. Past working relationships were strained.

Prior to the splitting of the DNR, the LWMD had extremely close working relationships with the Wildlife, Fisheries, and Law Enforcement Divisions. Fisheries and Wildlife biologists were available for scientific expertise and DNR’s conservation officers were on hand around the state to provide investigative and law enforcement assistance to LWMD staff.

The working relationships between employees of the two agencies were significantly altered

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after the DNR split. LWMD was moved into the newly created agency while the Fisheries, Wildlife and Law Enforcement Divisions remained under the DNR. Much of the LWMD's ability to conduct day to day activities suddenly depended on staff located in another entity of state government, with its own priorities and bureaucratic processes.

While many DNR Fisheries and Wildlife biologists, and LWMD field staff are still housed in the same facilities, working relationships have suffered. Most employees try to con-

tinue to work together as they did before the split, but agency philosophies and priorities have made this difficult.

This situation is expected to grow worse now that there are plans to move DNR staff into separate facilities in many parts of the state. When this occurs, LWMD's ability to protect Michigan's natural resources will be further weakened. The physical separation will also magnify the fractionalized relationship between two major state environmental agencies.

No Cops on the Beat

At one time all DNR divisions had assistance from the Law Enforcement Division's 210 conservation police force, of whom 200 were uniformed conservation officers (COs). The other 10 specialized in investigating environmental violations (ECOs). Under the old DNR, LWMD staff worked almost exclusively with the COs, who were available to investigate alleged violations and to assist in prosecutions.

After the DNR split, the ECOs were assigned to the DEQ while the COs remained with the DNR. DEQ's total certified police force consists of approximately 15 officers (that number includes supervisors), meaning that the number of trained officers available to investigate and prosecute violations of Michigan's environmental laws has been reduced by 93 percent due to Gov. Engler's actions.

IV. Just Say No...To Enforcement

“What we’re not doing anywhere near what we’d like to do is compliance and enforcement... We need to do a better job of balancing permit processing and compliance and enforcement.”

– former Division Chief Witte

Inside the DEQ, the LWMD remains vulnerable. A key objective of the division — enforcement — has been severely compromised. Case in point: In accordance with the DEQ’s mission statement to help foster a strong and sustainable economy, the Division Chief verbally directed LWMD staff to focus all efforts on issuing permits and resolving contested case hearings.

Under the new direction established by DEQ Director Harding, LWMD field staff have been advised essentially to ignore enforcing the land-water interface statutes and focus on permitting. Field employees who openly embrace this new approach have been rewarded and praised as exemplary employees, primarily because they have been able to issue their permits faster and reduce or eliminate their backlogs of applications.

Former LWMD Chief Witte, a staunch defender of efforts to streamline the permitting process, and an advocate for cooperating with developers and realtors, oversaw a Division that reduced the permit application backlog from about 1,850 in 1991 to just a few hundred today.

It is clear that DEQ officials have responded, in part, to criticism from legislators and development interests that wetland permit processing is too slow and too many applications are rejected. But a report released in August 1997 by the Michigan United Conservation Clubs found that only 6 percent of the wetland permits it reviewed were denied. The report also noted most permits were processed quickly (in 90 days or less) and that “on balance, the [wetland] program is administered with fairness and efficiency to applicants.”

While enforcement is still supposedly a significant part of every field biologist’s duties, in order to accomplish LWMD’s overall objective — permitting — in some district offices the majority of new complaints are never even entered into the computer tracking system. Existing cases are often closed without action, new violations are sometimes ignored, and hundreds of complaints are simply “closed out” with no investigation whatsoever.

Between 1991 and 1994, on average 144 cases were closed annually for “miscellaneous” reasons, including “death of the landowner, subsequent investigation showing lack of jurisdiction, action taken under another statute” and so on. Without explanation, in 1995 that number increased to 299; in 1996, DEQ closed 285 cases without investigation.

Employees insist that under the DEQ, more and more wetlands cases are closed by default. An over-emphasis on permitting is cited as the key reason for the lack of time, which in turn results in violations getting too old to investigate. Not only are top DEQ and LWMD officials completely aware of this widespread enforcement inaction, they actually provide a de facto endorsement of the policy by failing to remedy the problem.

No Enforcement, No Problem

In 1993, LWMD leadership directed a group of experienced field staff to develop a “Compliance and Enforcement Manual,” to be used by all division field staff. These draft guidelines were completed and submitted to the leadership team along with written recommendations for staffing needs.

In order to adequately administer a reasonably effective enforcement program, the committee recommended that the Division create 12 new compliance/enforcement positions, to be established as follows:

- two positions in the Upper Peninsula;
- two positions in the southeast (Detroit area) District Office; and

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So Much for Follow-Up

In 1996, Michigan's Auditor General, an independent arm of the Legislature, reviewed enforcement complaints made in three DEQ district offices. These offices received 1,200 wetland violation complaints in 1994 and 1995. In two of the district offices, 28 percent of complaints reviewed by auditors showed no evidence of follow-up. In many of the files where follow-up had occurred, there was no indication that the complaint had been resolved. A third district office, which assigned just one person to handle all investigations of violations, showed some evidence of follow-up for all 50 complaints reviewed — but this was the only district office in the state with such a staff person.

The Auditor General's report noted: "Follow-up of complaints is an important part of a regulatory program. It identifies violations, works to bring violators into compliance with laws and regulations, and provides an incentive for property owners to apply for proper permits. Under the Department of Environmental Quality, enforcement has also dramatically declined. Criminal prosecutions for wetlands violations have dropped nearly in half, falling from an average of 28 criminal prosecutions per year between 1991-95 to just 15 in 1996 — DEQ's first full year in existence.

- one position each in the Cadillac, Gaylord, Mio, Bay City, Grand Rapids, Shiawassee, Plainwell and Jackson District Offices.

The committee's staffing recommendations were not supported by DEQ decision-makers.

In May of 1997, for the first time ever, LWMD field staff received a written list of priorities. These priorities, listed in order of importance, are:

1. *Permits*
2. *Contested Cases* (appeals of permit denials)
3. *Legislative inquiries*
4. *Pre-application meetings*
5. *Enforcement*
6. *Reports*

As this list indicates, enforcement is considered a low priority for LWMD field staff. Because workloads are so heavy, virtually all staff time can be spent on permitting responsibilities alone. Contested case hearings and legislative inquiries must be handled as they arise, with staff having no control over when these issues will surface. Between these top three priorities, LWMD staff can easily spend all of their time. Technically, if LWMD employees attempt to enforce the statutes they administer, they are in violation of the division's written directives.

Even as the new priorities were being set for LWMD field staff, a program review request was prepared and submitted by the Division,

identifying compliance and enforcement needs. That document states, in part:

"Without some level of compliance and enforcement effort, the permit program becomes a paper tiger. Existing field staff are committed to implementing the Director's priorities for the division of reducing the permit and contested case backlogs. Without a change in priorities or the addition of staff, the Department target of compliance will not be met."

This document directly contradicts the LWMD's current approach, stating that, for example, "over 400 complaints" must be investigated to achieve minimum enforcement. It also notes that "for those found in non-compliance and where the perpetrator will not comply, criminal or civil enforcement is appropriate" to the tune of "two criminal cases per county per year and the initiation of two to three large civil cases per year per geographic area."

The only way to accomplish these enforcement objectives, according to this memo, is by adding new LWMD staff or by changing the priorities of existing staff to allow the permit and contested case backlogs to build higher. The document calls for a minimum of four new "enforcement" field staff positions, an estimate that falls far short of even the earlier estimates made by LWMD's own enforcement committee.



Step 1. The removal of all vegetation is usually the first step towards converting a wetland.



Step 2. The excavation of ditches to drain the wetland is a common violation in Michigan.



Step 3. The illegal placement of fill within the wetland completes the conversion to upland developable property.

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Clashing Perspectives

Currently, the entire LWMD field staff consists of 48 full time biologists, engineers and technicians, all of whom are designated as permitting positions. There are no LWMD field positions devoted specifically to enforcement.

DEQ is currently in the process of hiring additional employees to be assigned to district offices with the highest workloads. But the intent is not to address staff enforcement concerns, but to tackle the permitting backlog. As LWMD Acting Chief Richard Powers reasoned in an August, 1998 letter to the Michigan Environmental Council (MEC), the DEQ has been "hard pressed to keep up with the permit issuance workload over the past couple of years."

The agency claims to have initially considered establishing enforcement or "compliance specialist" positions. In his letter to MEC, Powers insisted, however, that "very few of our experienced field staff expressed any interest in a full-time compliance specialist position" because enforcement work "tends to be controversial and thankless, leading to employee stress and burnout." For these reasons, he says, DEQ was concerned about "retaining experienced compliance staff for any length of time" and therefore opted to allocate staff resources for permitting work.

The rationale used by DEQ management to devote resources to permitting over enforcement needs contrasts sharply with that of many rank-and-file LWMD staff, who view the acute lack of positions devoted solely to compliance as the major weakness in the wetland regulatory program. Field staff also note that pay increases or promotions have never been offered as a way to compensate, reward or retain experienced staff for taking on "stressful" enforcement work.

Too Many Chiefs, Not Enough Indians

In October of 1997, Director Harding made it even more difficult for LWMD staff to address enforcement concerns by ordering that all criminal referrals must go through the Chief of the Criminal Investigations Section (CIS). In the past, LWMD field staff were free to decide which cases warranted enforcement action and to work directly with local conservation officers and county prosecutors.

After considerable confusion and criticism from staff, the CIS Chief Scales "clarified" Director Harding's order to mean that all referrals had to go through one of his officers. This officially terminated LWMD field staff's option to work through DNR conservation officers, as had been the standard practice.

This policy also required that all serious violations be funneled through one officer who would be responsible for all DEQ violations within a large geographic area, generating considerable criticism. Field staff realized that having all DEQ criminal violations channeled through one officer per district would bring criminal referrals virtually to a stand-still.

There are currently 13 such non-supervisory environmental conservation officers within the DEQ (8 experienced officers and 5 newly hired officers in training). Two environmental conservation officers are assigned to Wayne County (Detroit area) and one officer to the rest of the Detroit Metropolitan area (surrounding three counties). This leaves 12 environmental officers to cover the remaining 79 counties statewide.

In addition to being responsible for pursuing violations of the statutes administered by the LWMD, these officers are also expected to assure compliance with other DEQ statutes relating to the work of other agency divisions, including: the Surface Water Quality Division, the Air Quality Division, the Environmental Response Division, the Geological Survey Division, the Waste Management Division, the Storage Tank Division, and the Drinking Water and Radiological Health Division.

With his directive, Director Harding effectively created an entirely new level of bureaucracy within the DEQ. While implementing procedures to speed up the process of getting a permit, he made it more difficult and time consuming for DEQ staff to pursue enforcement actions.

Harding's directive also removed the decision making function from the individual field employee (who is most familiar with the facts of the case), placing that burden on an environmental conservation officer who may have no direct knowledge of the issue at hand.

This officer must also handle case referrals from eight different divisions within the agency.

Field staff have been highly critical of the Director's new criminal referral procedures. While most staff have considered it an insurmountable obstacle to effective enforcement, others have secretly defied the directive. Regardless, the entire criminal referral process has become complex and inefficient.

Too Little, Too Late

On August 31, 1998, after nearly three years of uncertainty and confusion, LWMD field staff were notified about an agreement between DNR's Law Enforcement Division (LED) and DEQ's Criminal Investigation Section setting forth guidelines for what to do when an environmental violation is reported or discovered.

According to the "memorandum of understanding," the greatest burden continues to fall on LWMD staff, as they are still responsible for inspecting sites, verifying violations, and initiating enforcement action. If the responsible party fails to respond in a timely manner or

refuses to remedy the violation, staff must prepare and submit a detailed referral package to CIS. If CIS refuses the case, LWMD has the option of referring the matter to LED — resulting added work for field staff.

The agreement clearly states that the CIS is the primary point of contact for LWMD program enforcement matters. This set-up keeps in place the ineffective process of funneling all criminal referrals through one officer in each district. DNR's LED staff are allowed to provide basic enforcement assistance for minor offenses (i.e., "ticket writing"), and can conduct some site inspections. However, even in these rare cases, LWMD field staff are still responsible for necessary follow-up action.

These latest procedural guidelines do little to address the time-constraint problems facing LWMD field staff, nor do they improve the existing inefficient criminal referral process. The agreement does, however, acknowledge the serious enforcement deficiency within DEQ. Coming three years after the DNR split, it is fair to say that this step is too little and far too late.



V. Friendly Fire

"We finally got rid of [him]."

– state legislator boasting about the removal of a DEQ field biologist

Despite the many obstacles in their path, many LWMD field employees have continued trying to protect Michigan's natural resources by enforcing the law. In the course of their duties, these dedicated employees have often angered the developers or landowners who violate the law. These violators often complain to the Governor's office, to their legislators, or to the DEQ Director's office about "overzealous" enforcement.

In response to such complaints, in many cases the DEQ field employee involved becomes the focus of attention, rather than the illegal activities that initiated the investigation. Often it is the employee who does his or her job "too well" who faces some form of reprimand from agency leaders.

In some cases, the internal criticism for being "too enforcement minded" leads to an employee being labeled a trouble maker. In most cases, the more an employee tries to enforce the law, the worse it becomes for the employee.

Avoiding Conflict

DEQ employees have a disincentive to pursue strong enforcement cases against polluters. Indeed, the more a field biologist can avoid doing enforcement, the easier his or her job becomes.

To most field employees, it is simply not worth the hassle (or potential career risk) to anger Lansing supervisors to the extent that total avoidance of all enforcement issues is not uncommon. As one field staffer was told by a supervisor, "we [DEQ] do business differently now [since the DNR split]."

Despite intense pressure from management to change, enforcement remains a high priority for some field staff. But as the demand to expedite permits continues to increase, it has become impossible to administer an adequate or effective enforcement program. This means that the minimal amount of staff time available for en-

forcement must be used sparingly. Staff are forced to pursue only the most environmentally damaging or flagrant violations where there is a very high probability of success.

The negative implications of this strategy are two fold. First, the violations pursued are often the most controversial and usually lead to legislative complaints. Secondly, without adequate manpower or resources, many violations simply fall between the cracks.

Even when an enforcement case is given priority, it is far from certain that the violator will ultimately be held responsible for their actions by the DEQ decision makers. There is no guarantee that a field staffer's hard work and effort will result in a polluter eventually being forced to repair environmental damage and/or pay a significant penalty.

Shooting the Messenger

There exists within DEQ the very real possibility that the public servant responsible for pursuing a case against a violator will be the one to end up paying the price. In several highly celebrated cases in recent years, proposed permit decisions by line staff have been overturned after political intervention from developers, legislators, or upper DEQ management itself.

The following are real cases that are unfortunately quite typical in today's DEQ, in which the agency's over-riding mandate to staff is to issue permits, not to protect the resource. Based on information obtained from the DEQ through record requests, these cases highlight very serious problems relating to the agency's lax enforcement.

Playing Hard Ball

One case involved an individual who owned 80 acres of property, virtually all of which was state regulated wetlands, that was developed without obtaining necessary state permits. DEQ staff from a LWMD district office investigated and found that a house, septic system, barn, shed, pond and a network of roads and drainage ditches had been illegally installed on the property. Spoils from various



Illegal Access. Each year hundreds of unauthorized roads and driveways are constructed through Michigan's wetlands. Few of these violations are ever investigated by DEQ.

excavations dotted the landscape where wetlands had been filled.

LWMD proposed a compromise to the violator that would allow the house, driveway, septic system, barn, shed and pond to remain. In exchange, the violator was ordered to remove the access roads, backfill the drainage ditches and remove spoils from around the pond. Rather than comply and avoid enforcement action, the violator refused the DEQ offer and hired an attorney.

After lengthy delays and no follow-up restoration work by the violator, LWMD threatened to refer the case to the Michigan Attorney General's Office for legal action. The violator responded by contacting a State Representative and Senator for assistance. After meeting with the politicians and the violator, the LWMD Regional Supervisor significantly reduced the previous requirements for resolving the violation to a token restoration effort. In addition, the LWMD staffer working the case was removed from the case and forbidden from further involvement.

In January of 1997, DEQ Director Harding initiated further retaliatory action against the LWMD staffer involved in the case by ordering his removal from the district. Harding's actions were prompted, he said, by a request from four state legislators from the employee's district who claimed to be acting on complaints from constituents that the staffer in question too vigorously enforced wetlands laws. One of the legislators openly boasted at a public meeting after the employee's reassignment, "We finally got rid of [him]."

Considered a highly respected supervisor and experienced employee — a recipient of LWMD's "Employee of the Year" award — this career regulatory biologist has since been reassigned to a specially created desk job in the Lansing headquarters. In his new position, the employee no longer has any direct involvement in the regulatory process. Despite still being considered a supervisor, he supervises no one. He was replaced in his district with a staff engineer with no wetland program experience, familiarity with related

laws or academic background for the job.

The removal of this veteran employee sent shock waves through the division. This unprecedented reassignment was widely viewed as sending a message to all LWMD employees as to the consequences of opposing the DEQ's "new way of doing business."

In mid-1997, another veteran LWMD wetland supervisor, with more than a decade of experience and a reputation as a strong proponent of wetlands protection, was relieved of his duties. This time the employee was given no official duties or new responsibilities. He resigned from the DEQ in February of 1998.

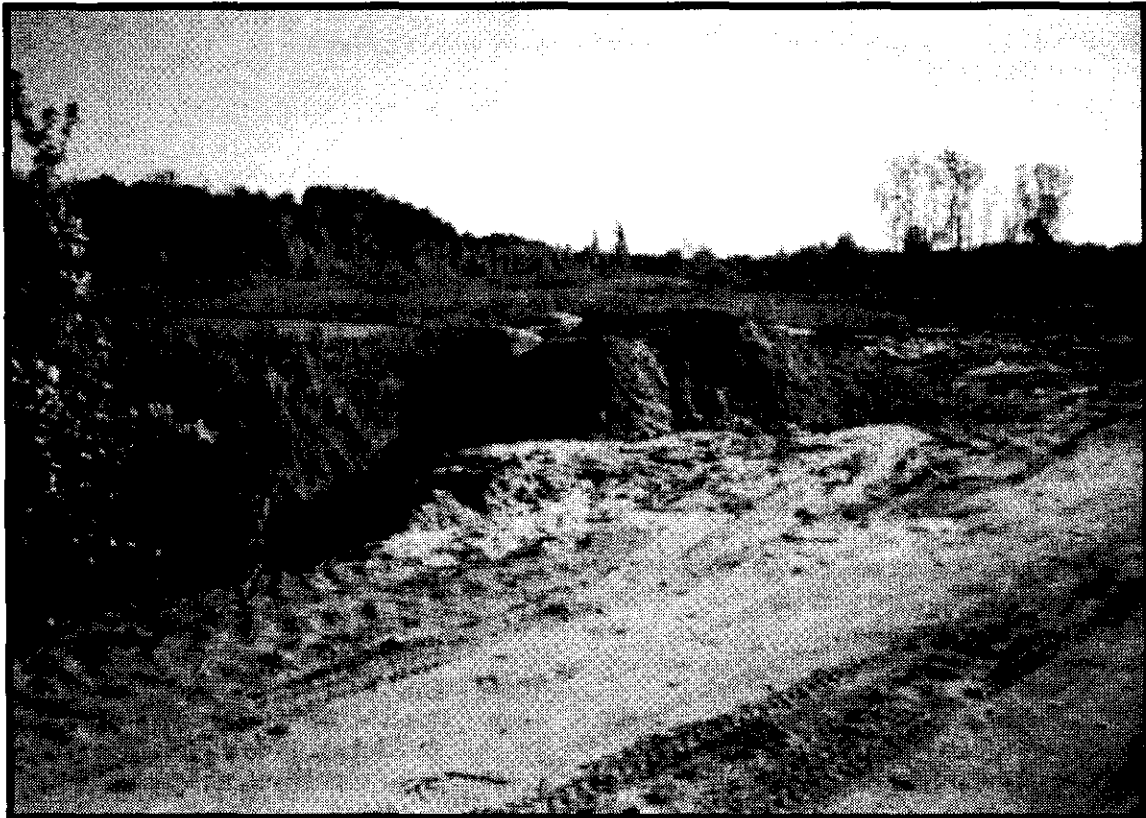
Changing the Rules

In February of 1997, during a routine site inspection of a proposed subdivision, a DEQ floodplain engineer observed standing water, sedges and reed canary grass on the site — features characteristic of wetlands. Fur-

ther review confirmed the presence of wetlands on the National Wetlands Inventory map. Just to be sure, the engineer requested a field biologist inspect the site to verify wetland characteristics and to deal with the complications of having state regulated wetlands within the proposed subdivision.

The District Supervisor — considered one of the most experienced field biologists within LWMD — inspected the site and confirmed existence of wetlands on the property. He discovered several small pockets of wetlands in the southern portion of the site and a "significant" wetland on the northern portion. He also identified approximately 8" to 12" of standing water in portions of the wetland, along with a variety of wetland vegetation.

Although the site appeared to have a history of horse training and farming, the area had clearly reverted to wetlands. Many of the wetland features were either ignored or overlooked by the applicant during assessment of the site conditions. Because of the presence of an adjacent



Hot Property. High quality wetlands contiguous to Michigan's 11,000 inland lakes are often illegally dredged and filled to create canals and waterfront residential developments.

Michigan Department of Environmental Quality

stream, the wetlands fell under the protection of Michigan's Wetlands Protection Act.

LWMD staff notified the applicant in writing that state regulated wetlands had been identified on the property. LWMD requested that the applicant hire a wetland consultant to delineate the wetland boundaries in the field, and submit a wetland map and report to the DEQ.

The applicant separated the project into phases and submitted a wetland report for Phase I in April of 1997. This report identified four small wetland areas, with three of them being regulated under state law. Because the developer agreed to stay out of the three regulated wetlands, no DEQ permit was required for this phase of the project. LWMD informed the applicant, however, that wetlands would be affected by the other proposed phases of the project, a finding with which the wetland consultant concurred.

In follow-up, the applicant's consultant submitted a wetland delineation and jurisdictional report for the rest of the property (known as Phase II). No wetlands were identified on the property. What this report totally ignored was that DEQ staff had previously identified a "significant" wetland on the property, a fact which the consultant had even confirmed during a prior telephone conversation with LWMD staff. The consultant's report clearly omitted the fact that the property owner had illegally destroyed the wetland sometime between March and September, 1997.

Before LWMD staff could take appropriate enforcement action, the applicant contacted DEQ Deputy Director Chad McIntosh, who then set up a meeting with the Division Chief, the Assistant Chief and DEQ district staff. Afterwards, two prominent local citizens – a Circuit Court judge and an attorney – faxed letters to McIntosh at his request, claiming to have personal knowledge of the property and insisting the property had been actively used as a working farm until its sale to developers.

That same day McIntosh sent a letter to the consultant involved, notifying him that Phase II of the proposed subdivision project would be exempt from regulation under Section 324.30305(3) of the Wetland Protection Act which states:

"An activity in a wetland that was effectively drained for farming before October 1, 1980 and that on and after October 1, 1980 has continued to be effectively drained as part of an ongoing farming operation is not subject to regulation under this part."

The exemption McIntosh cited only applies to historic wetlands that have been drained and *continuously* farmed since 1980. LWMD staff had clearly documented that the site was not in a farming operation at the time of inspection. They also had identified the presence of "significant wetlands" with standing water and saturated soils.

McIntosh chose to ignore his expert staff and arbitrarily disregarded state law. He also involved local officials in a case in which they had no business being part of. His actions were, unfortunately, quite typical of today's DEQ. Well connected and/or politically influential individuals routinely receive special treatment from high level DEQ officials. Decisions based on politics rather than science are all too familiar at DEQ, particularly within LWMD.

Off the Hook

Not only do Lansing supervisors openly pressure field staff to back off on enforcement cases, they sometimes even sabotage cases that await trial. They sometimes get help from administrative law judges who overturn staff permit denials on appeal or rewrite legal precedents to favor wetlands destruction. In a review of more than a dozen contested case rulings, the Michigan Environmental Council found the judges – these hearing officers happen to be hired by the DEQ Director – ruled against wetland protection in virtually every instance.

Once such case occurred when a permit was issued to allow a landowner to fill in a specified wetland area for the construction of a home. The landowner was cited the following year for violating the permit, but refused to remove the unauthorized wetland fill.

After a year-long investigation by DNR's Law Enforcement Division, and the violator's sub-



Open Season. The unauthorized filling of wetlands is a common sight. Lax enforcement by DEQ has resulted in an “open season” on Michigan’s wetlands.

sequent refusal to comply with a warrant, the landowner was arrested. After repeated trial delays, a LWMD supervisor agreed to the postponement of criminal proceedings pending the outcome of an administrative hearing by the department.

None of the relevant violations were addressed during the hearing. The department’s administrative law judge ruled the violator had done nothing wrong. He blamed the agency for failing to notify the landowner about modifications to his original permit application – staff had added the words “NO FILL” to areas

where the permittee planned to only cut trees. Based on this ruling, in addition to weakening the DEQ’s case (in essence, letting the landowner “off the hook”), the applicant was allowed to fill wetlands even beyond his original proposal.

Shocked by the judge’s ruling, the DEQ employees believed that the basis for the decision needed to be contested. However, the LWMD supervisor persuaded the local prosecutor that the case was no longer worth the agency’s expenditure of time and money to pursue.



Rendering Judgement. The plug is pulled on yet another of Michigan's wetlands.

VI. Can't Get There From Here

“In the 20 years since the state’s first wetland protection act, the principle that you don’t lightly destroy these damp and watery stretches of ground if there is a feasible and prudent alternative should have become familiar and accepted...Wetlands protection regularly comes under assault from those who contend it hampers development or interferes with property rights.”

– Detroit Free Press editorial,
September, 1997

At the end of the 1997 fiscal year, Director Harding requested information on the state of LWMD’s permit program and “successes” in the wetland program. In a four page response, Division Chief Witte cited numerous steps he had taken to promote regulatory relief and consistency in Michigan. These steps included:

1. *Amendment of the wetlands laws to add exemptions and limit jurisdiction for:*
 - activities in restored wetlands
 - activities in historically drained wetlands
 - activities where NPDES permits have been issued
 - activities in wetlands that incidentally develop as part of construction projects.
2. *The re-issuance of general permit categories for minor activities in wetlands.*
 - This new general permit allows the DEQ to issue permits under defined categories without public noticing or hearings. This greatly reduces the time required to get a permit. The new general permit now contains a category for wetland fills of up to one-half acre in size for single family residences.

Other “major successes” were identified in the wetland program, including reduced time frames

for obtaining a permit. Only four percent of the applications received by LWMD went beyond the statutory time limits.

The reduced backlog of contested case hearing was also touted. The number of cases pending in October of 1995 was 199; the number of pending cases as of September of 1997 stood at 84 — a 58 percent drop in pending cases.

Truth Hurts

Conspicuously absent from the list of accomplishments and successes was any reference to LWMD’s compliance program or the mention of a single wetland enforcement case.

The Chief’s memo failed to note how the Division’s perceived “successes” were obtained. It is evident that the DEQ does not want the public to know the following details:

DEQ ignores staff input in setting program objectives. Despite field staff opposition to exemptions to the Wetlands Protection Act, the LWMD leadership team actively developed and supported these exemptions at Director Harding’s urging. Many of the state’s high quality wetlands have since become unregulated acreage because of these new exemptions.

LWMD staff are pressured to issue any permits that fall within the general permit categories. Field staff are now expected to permit virtually all wetland fills up to a half-acre in size for single family residences. Field staff who object are criticized and face possible reassignments.

Time frames for processing permits have been reduced because field staff were told not to do enforcement. Issuing permits is the top priority. Compliance work is far down on the list of “things to do.”

The backlog of contested case hearings (appeals of denied permits) has been reduced because LWMD supervisors have overruled field decisions. Under direct orders from Harding, Division supervisors began issuing “bad permits” just to reduce the number of cases. The number



Newly Exempt. Wetlands such as this marsh, once protected under state law, have been removed from jurisdiction due to recent amendments proposed by DEQ management and passed by the Legislature.

of new contested case hearings is also down because field staff are now reluctant to deny applications.

The public's complaints of illegal dredging and filling of wetlands within the Great Lakes and Michigan's inland lakes and streams are virtually ignored. Statewide, LWMD only inspects an estimated 20 percent of the complaints it receives from the public. Approximately 80 percent are simply "closed out" without ever being investigated.

Road to Nowhere

In the wake of the Auditor General's 1996 findings, and pressure from environmental groups, the Legislature recommended the establishment of a computer wetland complaint follow-up tracking system for DEQ, which is supposed to be on-line by October 1, 1998. But the new tracking system is not designed to trigger or improve enforcement efforts. Its purpose is simply to collect data.

Presently, each DEQ district office has its own tracking system, which headquarters cannot access. The new computer system will allow Lansing to link instantly to district enforcement records, but this technological improvement alone will not affect the amount of enforcement (or lack thereof) taking place in the field. Lansing's ability to "get the numbers" easier and faster is merely a convenient smokescreen by which DEQ management can ensure "business as usual."

The Bottom Line

The people of Michigan must understand that the agency responsible for protecting Michigan's environment and natural resources is deliberately deceiving them. Today's business friendly DEQ has created a facade that the land and water interface statutes are being enforced. Nothing could be further from the truth.

When the LWMD — the DEQ Division responsible for protecting Michigan's wetlands,



Backhoe To The Future. Development threatens to eat up Michigan's remaining wetlands.

lakes and streams, and other natural resources — openly brags that its accomplishments consist of adding exemptions to reduce jurisdiction, making it easier and faster to get permits, reducing the number of appeals, and that it considers enforcement to be of little or no concern, the public should take notice and demand accountability.

Moreover, no governor in Michigan's history has ever exerted so much direct authority over the state's natural resources. Governor Engler's heightened role in environmental protection efforts has caused concern among many about resulting adverse impacts on Michigan's remaining wetlands. The Lone Tree Council's Terry Miller decried the "new attitude" that persists at the highest levels of the DEQ:

"[I]nstead of implementing its primary mission to protect and preserve Michigan's natural resources, private development is now seen as more important than the public trust; political favors are administered more readily than public law; and those who attempt to honor their professional obligations to the public are removed rather than advanced...We

see a pattern here. From the appeal process, to overriding and removing field staff — we fear for the future of Michigan's wetlands."

Many DEQ employees agree with agency critics that with the election of Governor Engler and his appointment of Russell Harding as DEQ Director, wetland protection has deteriorated. This situation is getting worse, not better.

In the process of the agency's decline, Michigan is losing more and more dedicated and experienced resource professionals whose ethics either cause them to voluntarily leave their positions or force their involuntary departure at the hands of political expediency.

After creating this figurative "monster" — the DEQ — in 1995, the Governor stated that there should be accountability in the process and that accountability should rest with him. By his own words and actions, John Engler is responsible for the current dismal state of environmental protection programs in Michigan. For this reason, in the eyes of Michigan's public employees, he should be judged accordingly.

