STATE OF MICHIGAN
DEPARTMENT OF ENVIRONMENTAL QUALITY
LANSING

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GOVERNOR

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DIRECTOR

TO: Members of the Michigan Congressional Delegation

FROM: Dan Wyant, Director

DATE: September 17, 2012

SUBJECT: State Assumption of the Clean Water Act Section 404 Funding

The Michigan Department of Environmental Quality (MDEQ) is requesting your help on an important issue that will greatly impact Michigan's ability to continue to be a national leader in wetland, lakes, and streams regulation and policy development. Specifically, the MDEQ is seeking federal funding for State Assumption of the federal Clean Water Act (CWA) Section 404 Program. Enabling states to leverage federal dollars to administer this program will provide significant annual cost savings to the federal government.

As we know, the CWA is a sweeping statute enacted to restore and maintain the integrity of the Nation's waters. To achieve this goal, several CWA programs were specifically designed by Congress to be delegated to, and administered by, the states. Most significantly, 46 states have delegated authority to administer the CWA Section 402 National Pollutant Discharge Elimination System (NPDES) program for point source discharges. By contrast, while the statute allows for states to assume authority to administer the program that regulates the discharge of dredged or fill material into navigable waters, including wetlands, only two states – Michigan and New Jersey – have this authority today.

As you know, Michigan is blessed by our water resources. The Great Lakes define the shape and character of our state with 3,288 miles of freshwater shoreline, more than any other state. In addition, Michigan has 11,000 inland lakes, 36,000 miles of rivers, and 5.5 million acres of wetland. Even before Michigan was a state, our residents recognized the importance of our water resources for transportation, hunting and trapping, agriculture, drinking water, commerce, and industry.

In 1972, the same year that Congress passed the CWA, Michigan passed a state lakes and streams statute and then in 1979 passed a wetland statute with the expressed intention of assuming the CWA Section 404 Program. In 1984 Michigan became the first state to receive approval to administer the CWA Section 404 Program. Over the past 28 years, we have issued over 100,000 permits. We currently authorize about 4,000 projects annually under the Section 404 Program, with no federal funding for program operation. Although limited funds are available for program development from the United States Environmental Protection Agency State Wetland Program Development Grants, no federal funding is provided for the implementation of the Section 404 Program.

The Section 404 Program in Michigan is administered through a combination of state laws. State assumption of the program provides benefits to both the regulated community and the citizens of Michigan. Prime examples of the benefits of Michigan's program are:

- **Michigan law provides a clear and consistent definition of regulated waters and regulated activities.** Because of the ambiguity in federal law, the scope of regulated

waters has been defined by the federal courts and has changed several times in the last decade. Because Michigan law contains clear measurable criteria, the regulated community, the public, and state staff can easily determine if a water body or wetland is regulated and what activities within those water bodies are regulated.

- **Faster permit decisions.** Unlike the federal permit program, Michigan's permit processing is subject to deadlines mandated by state statute. As a result, we frequently make permitting decisions on individual permits weeks or months sooner than the United States Army Corps of Engineers (Corps).

- **Reduces the regulatory burden for permit applicants.** Michigan operates a consolidated joint permit application process; applicants submit one application and receive review and authorizations under multiple state regulations.

- **Provides the regulated property owners with better access to decision makers.** Michigan has staff located in ten offices throughout the state that are available to meet with landowners to review applications, explain decisions, and provide preapplication consultations.

- **Provides more public oversight of regulatory decisions.** Michigan law requires public noticing and an opportunity for interested persons to request public hearings on all individual permit applications.

- **Fair and impartial appeal process.** Permitting decisions can be appealed under Michigan's Administrative Procedures Act, 1969 PA 306, as amended. Appeals are adjudicated by an independent third-party administrative law judge.

Although Michigan has been able to run a successful Section 404 Program for over almost three decades, the sustainability of this program turns on the issue of funding. For the last 28 years, Michigan has administered the Section 404 Program with primarily state funds from application fees and the state General Fund. However, over the past decade, the MDEQ has seen a decline in state General Funds from $120 million to $20 million, forcing many difficult discussions and decisions regarding what programs the state should continue to operate.

As part of Michigan's budget cuts in 2009, there was a proposal to eliminate Michigan's wetland program as a means of saving state General Fund money. Elimination of the wetland program would have resulted in Michigan losing the authority to administer the CWA Section 404 Program. However, strong support from a diverse group, including regulated entities such as realtors, home builders, farmers, and manufacturers, along with environmental groups prevented this from happening. As a result of the strong support for the program, the Michigan Legislature found temporary funding for the program through 2013.

We estimate that Michigan is saving the federal government between $3 and $5 million each year by operating the Section 404 Program. Without Michigan's program, the Corps, the federal agency that administers the program, has estimated that it would need that amount of additional money annually to hire additional staff and open more offices throughout Michigan. Not only do we save the federal government's finite dollars, we are able to administer the program at a

lower cost and with a greater level of efficiency, allowing projects that provide vital economic growth to our communities to move forward more quickly.

As we mentioned above, there are many advantages to the public and the regulated community when states assume the Section 404 Program. Additionally, many states have contacted Michigan seeking advice on how to assume the program. However, we need strong diversified funding to keep this program in Michigan and to make Section 404 Program assumption possible for other interested states. One possible avenue to explore is for Congress to enact, and appropriate funds for, a grant program to make up to $2 million per year for ten years available to states that assume the Section 404 Program. If ten states assumed the program with this incentive, the annual cost to the federal government would be $20 million per year. The annual savings to the federal government would be upwards of $30 million.

On Thursday, September 20, 2012, the Subcommittee on Water Resources and Environment of the United States House of Representatives' Committee on Transportation and Infrastructure will hold a hearing entitled: *State Assumption of the Clean Water Act Section 404 Program: Enhancing Cooperative Federalism with the States.* William Creal, Chief of the MDEQ's Water Resources Division, will be testifying at the hearing and proposing the above described grant program. As Michigan's experience has shown, state administration of the Section 404 Program could benefit states, the regulated community, and the federal government through streamlining and great cost efficiencies.

As this proposal is discussed in the upcoming month, we encourage you to support it and seek full funding for this or a similar proposal to provide assistance to states that assume the Section 404 Program. Thank you for helping us to continue protecting the vital water resources of our state and helping to shape national policy as a leader in the Section 404 Program.

Should you require further information, please contact Mr. Creal at 517-335-4176, or you may contact me at 517-373-7917.

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