



# Legislative Update

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## EPA Releases Decision on Part 301/303 Revisions

On December 13, 2016, the Environmental Protection Agency (EPA) issued a review of Public Act 98 of 2013 (PA 98) to ensure that the administration of Section 404 of the Clean Water Act (CWA) by the Michigan Department of Environmental Quality (MDEQ) is consistent with the requirements of the CWA.

Section 404 deals with permitting discharges of dredge or fill materials into waters of the United States. Michigan is one of only two states that self-administers the CWA Section 404 permitting program.

The EPA completed a comprehensive review of Michigan’s administration of the Section 404 program in April 2008. In 2013, PA 98 was enacted to address inadequacies based on the review.

PA 98 amended Part 301 (Inland Lakes and Streams) and Part 303 (Wetlands Protection) of the Michigan Natural Resources and Environmental Protection Act (NREPA). Following PA 98’s enactment, the EPA began its review for compliance with the CWA.

In its review of PA 98, the EPA found the majority of the revisions to Part 301 and Part 303 consistent with the CWA. However, some of the sections revised under PA 98 were found to be inconsistent and requiring further revisions.

Drain commissioners may be impacted by the EPA’s disapproval or suggested revisions of certain sections of PA 98.

Under Part 301, the EPA disapproved the exemption for culvert replacement, specifically relating to culvert extensions of up to 24 feet. The EPA found that any extension of an existing culvert is beyond the scope of maintenance and cannot be exempt from the permitting requirements of the CWA.

Several sections under Part 303 were also affected by the review. The EPA clarified that



spoils cannot be placed into a wetland abutting the drain, even if that was a location where spoils have previously been placed. The EPA also found the exemption of wetlands inci-

dentally created by construction of water treatment ponds, lagoons, or storm water facilities inconsistent with the CWA because wetlands of this type may meet the definition of a “water of the U.S.” Additionally, the EPA also found the exemption of drainage structures such as culverts, ditches, or channels was too broad and thus inconsistent with the CWA.

As a result of the EPA’s review and their findings, stakeholders, including MACDC, will begin to work on the necessary revisions to Part 301 and Part 303.

The list of reviewed sections can be found in the Federal Register at [www.gpo.gov/fdsys/pkg/FR-2016-12-13/pdf/2016-29888.pdf](http://www.gpo.gov/fdsys/pkg/FR-2016-12-13/pdf/2016-29888.pdf). An explanation of each section can be found at <https://www.regulations.gov/document?D=EPA-HQ-OW-2013-0710-0121>.

## Michigan House of Representatives (2017-2018)



Tom Leonard  
R-DeWitt  
House Speaker



Dan Lauwers  
R-Brockway Township  
House Majority Floor  
Leader



Lee Chatfield  
R-Levering  
Speaker Pro-  
Tempore



Rob VerHeulen  
R-Walker  
Majority Whip



Sam Singh  
D-East Lansing  
House Minority  
Leader



Christine Greig  
D-Farmington Hills  
House Minority Floor  
Leader

## Drain Code Amendment to Chapter 20 Passes

Public Act 521 of 2016 amends Chapter 20 of the Drain Code to prescribe the membership of a drainage board for a charter county (under Public Act 293 of 1966) in certain instances.

Section 464 of the Drain Code governs the membership of drainage boards for petitioned projects that will be financed solely by public corporations in a single county. Generally, a drainage board consists of:

1. the drain commissioner;
2. the chairperson of the county board of commissioners; and
3. the chairperson of the finance committee of the county board of commissioners

For a charter county under Public Act 293 of 1966 with a population of more than 2.0 million, however, Section 464 provides a different drainage board:

1. a person appointed by the county executive;
2. the person designated by the county charter to

carry out the duties of the drain commissioner; and

3. the county commissioner whose district will be assessed the greatest portion of the cost.

Previously, this different make up only applied to Chapter 20 drainage boards in Wayne County. With the removal of the population requirement, this section now also applies to Chapter 20 drainage boards in Macomb County.

"This new construct allows for a more open and transparent management process for these drain districts," said Macomb County Public Works Commissioner Candice S. Miller. "This ensures those communities that will be most impacted by decisions related to county drains have a say in those decisions. Put simply, it adds a new level of accountability to the management of our drain districts."

This law takes effect on April 9, 2017.

## 21st Century Infrastructure Commission Releases Report

The 21st Century Infrastructure Commission released its report on November 30. The report outlines goals for meeting Michigan's infrastructure needs over the next 50 years.

According to the report, Michigan is facing a \$4 billion per year gap in investment in infrastructure compared to our neighboring states. The report gives recommendations on how to close this gap and improve infrastructure statewide. The follow-

ing are highlights of the report pertinent to drainage infrastructure:

- Create a statewide asset database system
- Develop sustainable approaches to manage quantity and quality of stormwater
- Amend Chapter 22 of the Drain Code to create collaborative watershed management plans
- Reduce inconsistencies between the Drain Code and MS4 program

Evan Pratt, Washtenaw County Water Resources Commissioner and member of the 21st Century Infrastructure Commission stated, "MACDC supports this infrastructure investment, enabling legislation to allow local units of government a better toolkit to make locally appropriate choices for addressing local or regional drainage issues." The full report can be found at: [miinfrastructurecommission.com/21st-century-infrastructure-commission-report](http://miinfrastructurecommission.com/21st-century-infrastructure-commission-report).

# New Legislation of Interest to MACDC

The following bills of interest to Drain Commissioners and Associate Members are currently pending before, or recently passed by, the Legislature. Full text and up-to-date action for each bill can be found online on the Legislature’s website at [www.legislature.mi.gov](http://www.legislature.mi.gov).

## LOCAL GOV’T PUBLIC NOTICE ACT

House Bill 4002, introduced by Representative VerHeulen (R-Walker), would create a new Local Government Public Notice Act, prescribing the legal notice requirements that local units of government must comply with. Currently, there are over 250 statutes that provide different legal notice requirements that local units of government must abide by. This legislation is designed to streamline and make uniform the various notice requirements by phasing in new legal notice protocols, including electronic dissemination and archival practices, until 2025. Under the bill, legal notices are divided into tiers A, B and C, depend-

ing on the substance of the notice. Each tier has different notice protocols that would be in place until 2025, when all legal notices would be posted on a website. Printed copies of a notice would be made available for inspection during the notice period.



*HB 4002 was introduced on January 11 and referred to the House Committee on Local Government.*

## NO REASON ABSENTEE VOTING

House Bills 4033-4035, introduced by Representative Wittenberg (D-Oak Park), Representative Ellison (D-Royal Oak), and Representative Hammoud (D-Dearborn) amend the Michigan Election Law to allow an absent voter ballot be issued upon a voter’s request without requiring justification.

*HBs 4033-4035 were introduced on January 12 and referred to the House*

*Committee on Elections and Ethics.*

## MI INFRASTRUCTURE COUNCIL ACT

Senate Bill 51, introduced by Senator Bieda (D-Warren), would create a new law called the Michigan Infrastructure Council Act. The law would create a council of 9 members from various stakeholders. The Council would be tasked with:

1. Establishing a regional infrastructure pilot program to identify existing data and appropriate system to house and analyze information;
2. Deploying a statewide asset management database;
3. Developing a long-term, integrated infrastructure strategy; and
4. Designing, overseeing and coordinating incentives, funding and financing opportunities for the various asset types.

*SB 51 was introduced on January 18 and referred to the Senate Committee on Government Operations.*

# EPA Issues Final Rule on MS4 Permits

The Environmental Protection Agency (EPA) issued a final rule on November 17, 2016, revising the regulations governing how small municipal separate storm sewer systems (MS4s) obtain coverage under National Pollutant Discharge Elimination System (NPDES) general permits. The new rule became effective January 9, 2017.

A small MS4 is a conveyance, or a system of conveyances (storm drains, pipes and ditches), owned by state or local governments that collects, transports and discharges stormwater to the “waters of the U.S.” and serves populations below 100,000.

The rule was issued in response to *Environmental Defense Center, et al. v EPA* (U.S. Court of Appeals, September 15, 2003). In that decision, the Court determined that the regulations governing MS4 permits did not provide the public with adequate notice or an opportunity to request a hearing. Additionally, the regulations did not ensure the MS4 permittees were using the best management practices (BMPs) to reduce

the discharge of pollutants to the “maximum extent practicable” (MEP). This standard must be followed to meet requirements of the Clean Water Act (CWA).

The EPA’s final rule establishes two alternative approaches that the permit issuing authority (MDEQ) can utilize in issuing NPDES general permits:

**Comprehensive General Permit:** A traditional upfront permit that sets forth all necessary requirements for the MS4 permittee in order to reduce the discharge of pollutants in compliance with the CWA.

**Two-Step General Permit:** A base general permit is issued that applies to all small MS4s and then a second step is required to establish the necessary permit requirements for individual MS4s that are seeking to discharge under the base general permit.

Both options require adequate public notice and opportunities for hearing. This final rule has not created any new substantive requirements for MS4 permits.

# Lame Duck Abolishes Dower Rights

Legislation passed in lame duck has abolished common law dower rights in Michigan. As a result, the failure to obtain a wife’s signature for transfers of a husband’s real property interest will no longer cloud the title.

Historically, a widow of a deceased man was entitled to a dower, or the right to use 1/3 of all lands her husband acquired at any time during marriage. Dower rights, however, were rarely exercised because most widows elected to abide by their husband’s will, if one was written, or to recover their intestate share under Michigan’s Estates and Protected In-

dividuals Code, which usually offered more than dower.

The existence of dower rights had an impact on transfers of real property while both spouses were alive. In *Zaher v Miotke* (Michigan Court of Appeals, March 28, 2013), the Court explained that married women with a potential dower interest in real property owned by their husband were required to sign off on the transfer of interest in the land to satisfy the statute of frauds. Without the wife’s signature on a sale of the husband’s real property, clear marketable title was not transferred and the land was still

subject to the wife’s 1/3 use interest if her husband passed away and she elected dower rights instead of the other inheritance options.

Dower rights also had an impact on easements. If a wife did not sign an easement granted by her husband, the easement would have still be valid, but if the dower rights were elected after the husband’s death, the easement holder could be required to compensate the wife for any loss in value due to the easement.

Public Acts 378, 489 and 490 of 2016 begin to take effect in March and April 2017.

# Court of Appeals Confirms E-Mails Can Violate OMA

E-mail communication can be an effective and efficient tool for disseminating information to an entire public body. When one e-mail is followed by others, however, the possibility arises that a “meeting” of the public body has occurred in violation of the Open Meetings Act (OMA).

The Michigan Court of Appeals recently found that e-mail communications exchanged between members of a public body violated the OMA when a quorum of the members were attached to the string of e-mails and the e-mails exchanged were “deliberating toward or rendering a decision on a matter of public policy.”

In *Markel v Mackley* (Michigan Court of Appeals, November 1, 2016), the Court examined a number of e-mails

exchanged among members of a public body. One exchange of emails addressed how to handle a legal opinion from the public body’s attorney. Another exchange involved the hiring of a manager. A third exchange discussed whether to permit the construction of a parking lot on park property.

The Court found that each of these e-mail exchanges constituted a “meeting” because the e-mails involved “deliberating toward or rendering a decision on a matter of public policy” and a quorum of the public body was included on the exchanges.

As a result, the Court held that each of the above exchanges of e-mails violated the OMA, which requires such deliberations to be open to the public.

<p><b>Michigan Association of County Drain Commissioners</b>                  120 N. Washington Sq., Suite 110A                  Lansing, MI 48933</p> <p>Phone: 517-484-9761                  Fax: 517-371-1170</p>	<p><b>The Michigan Association of County Drain Commissioners is dedicated to safeguarding the health, safety and welfare of Michigan’s citizens through the protection of property, surface waters and the environment. We seek to accomplish these goals by providing storm water management, flood control, drainage, development review and water quality programs.</b></p>
<p><b>We’re on the web! <a href="http://www.macdc.us">www.macdc.us</a></b></p>	