

ATTORNEY WRITES

by: Clifford H. Bloom
Law, Weathers & Richardson, P.C.
Bridgewater Place
333 Bridge Street, N.W., Suite 800
Grand Rapids, Michigan 49504-5360

PERMIT ME

There are a number of activities and modifications that occur in Michigan inland lakes, as well as the bottomlands and shorelines thereof, which require prior approval and permits from government agencies. Depending upon the type of project involved, the property owner may have to get approvals from the local municipality (city, village or township), county and/or the state of Michigan. This column will discuss applicable permits from the state of Michigan.

While beyond the scope of this article, property owners should not forget that local and county approvals and permits may also be applicable—just because one or more state agencies have approved a particular project and issued the necessary permit or permits, that does not negate the need to comply with all applicable local and county approval and permitting requirements. For example, there may be soil erosion and sedimentation issues and permits which must be obtained from the county (although in some counties, such permits are handled by the local municipality). Additionally, local governments often have ordinances which govern required lake setbacks, docks, shoreline disruption and other lake uses and alterations.

If a property owner desires to alter, dredge, sand or modify a lake shoreline or bottomlands, install a permanent dock, create a marina or similar activities, the activities are regulated by the Michigan Natural Resources and Environmental Protection Act (MCLA 324.101 *et. seq.*) (the “Act”). The Act is a recodification of Michigan’s various environmental laws, which was undertaken in 1994 and places all such laws in one supposedly easy to find statutory location. Michigan statutes which are most often applicable to shoreline and bottomland activities (the Inland Lakes & Streams Act, the Inland Lake Level Act and the Wetlands Protection Act) are now found within the Act. Most of the time, a property owner who desires to alter a riparian shoreline or bottomlands will have to deal with the Michigan Department of Environmental Quality (“DEQ”), rather than the Michigan Department of Natural Resources (“DNR”).

Sanding

As we all know, it is very common for riparian property owners to place sand on the beach and along shoreline areas on inland lakes. Some have attempted to do so on the bottomlands of the lake, which is generally illegal without a prior DEQ permit. Apart from the legal issues involved, placing sand along the shoreline or on the bottomlands of a lake is a losing proposition—inevitably, it will be washed away and the property owner will have to replace it later.

The key to whether or not prior approval and a permit must be obtained from the DEQ for sanding is the “existing water’s edge,” and whether the sanding is “reasonable.” The Act does not define the existing water’s edge. To be safe, a property owner should be conservative and use the ordinary high water mark as the limit. In most cases, if sand is placed upland of the normal high water mark, a permit is not needed while a prior permit is required if sand is placed below the ordinary high water mark.

There are exceptions to this general rule, however, and the property owner should check with the local DEQ official in a given case to make sure whether or not a permit is required. For example, if a wetland is involved, sanding cannot occur without a permit under the Wetland Protections Act, even if it is upland from a lake. Similarly, if a property owner attempts to place sand in a pile, on a slope or other fashion so that it is reasonably foreseeable that the sand will end up in the water, a permit may be required.

Dredging, Filling, Creating a Canal, etc.

Any activity such as dredging, filling, removal of bottomlands, significant alteration of bottomlands, creating a canal, etc., which occurs on a lake or the lakeside of the high-water mark of a lake or enlarges, diminishes or ties into a lake requires prior approval and a permit from the DEQ under the Inland Lakes & Streams Act.

Seawalls and Lake Retaining Walls

Installing a seawall, retaining wall or similar structure at or lakeside of the high-water mark of a lake, as well as any backfill or fill related thereto, requires prior approval and a permit from the DEQ under the Inland Lakes & Streams Act. A permit may also be required to replace, extend or modify an existing seawall, retaining wall or similar structure.

Permanent Docks or Piers

Seasonal docks or piers (*i.e.*, mooring structures which are taken out during the off season and do not involve pilings significantly attached to the bottomlands of a lake and for use by one family) normally do not require a state permit. However, the following types of docks, piers or mooring devices normally require DEQ approval and a permit prior to installation and usage:

- . Permanent structures
- . Structures used by more than one family
- . Structures used for commercial, business or industrial use

Altering Wetlands

A property owner generally cannot alter, fill or destroy a wetland or any portion of it without obtaining a prior approval and permit from the DEQ under the Wetland Protection Act. This statute only applies, however, if a portion of the property involved constitutes a wetland under the statute. Determining whether or not a given area is a wetland is not always easy and the definitions of wetland contained in the statute are complex and confusing. Nevertheless, if a wet area is located along the shoreline of the lake or is near or tied into the lake, it is highly likely that it will turn out to be a regulated wetlands.

It should be kept in mind that the activities mentioned above are not totally prohibited—that is, if the DEQ issues a permit for the project requested by the applicant (or something less than that which was requested by the applicant), the project as approved by the DEQ can proceed, unless otherwise regulated or prohibited by county or local regulations. The permit approval rate by the DEQ is quite high in some of these areas, particularly with regards to the filling or alternation of wetlands.

The Permit Process

If you, your neighbors or your lake association are opposed to an area property owner engaging in one of the above-mentioned activities, what can be done? First, one must ascertain whether a permit application has been filed. Contrary to popular belief, the DEQ does not always have to notify adjoining residents of the pending permit application or hold a public hearing. For certain minor projects, the DEQ can issue a permit with virtually no notice to area property owners or the local governmental unit. For more significant projects, the DEQ will normally give notice prior to a permit being issued to neighboring riparian owners and the local governmental unit. Therefore, you may desire to ask the local government to notify you immediately if it receives such a notice. Members of the public and the local government do have a right to petition the DEQ to hold a public hearing before a particular permit is issued. Whether or not to hold such hearing is, however, generally within the discretion of the DEQ. If you desire to have a public hearing, you should submit a written request for one to the DEQ shortly after the DEQ sends out notice of a pending permit. If you do not act quickly, the deadline could pass regarding the holding of a public hearing.

Is there any right of appeal regarding the denial or granting of a permit? Yes. The aggrieved property owner [if a permit is turned down (or alternately, aggrieved neighbors if a permit

which they oppose is granted)] can appeal to an Administrative Law Judge within the DEQ. If the aggrieved property owner or aggrieved neighbors do not prevail with the Administrative Law Judge, they can appeal the matter to the Director of the DEQ. Beyond the Director of the DEQ, the appeal process proceeds to the local county circuit court.

What can be done if someone commences one of the above activities without first obtaining a permit or exceeds the scope of a permit? First, the local DEQ office should be contacted. It is also often helpful to have the local municipality also contact the DEQ. Given the DEQ's limited budget and staff, the old adage "the squeaky wheel gets the grease" is often applicable. If the DEQ does not act vigorously, you, your neighbors or your lake association may have to commence court action to stop the violation. It is important to act quickly when violations occur. Those who "sit on their hands" where a known violation occurs could potentially lose their remedies in court. Also, many violators believe the old adage that "it is easier to seek forgiveness afterwards than to obtain permission beforehand," and proceed even without required permits or approvals.