



Does Giving Government Unlimited Power Really Protect the Environment?

by Joseph P. Overton

Summary

A bill passed in December by the lame-duck 90th Legislature greatly expands the power of the Michigan Department of Environmental Quality (DEQ) to levy staggering fines on property owners for alleged environmental violations. In light of past DEQ abuses, the new Legislature should reconsider giving such a blank check to the department, opening the door for more abuses of citizens' property rights.

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The Department of Environmental Quality already wields the power of \$25,000-per-day civil fines it can impose under the state's wetlands law. But with passage of SB 651 in December, that power will be extended to all property, wetlands or otherwise.

Lame-duck sessions of the Michigan Legislature can produce mischievous and sometimes dangerous new laws. While the media was focusing on dove-hunting legislation last month, the Legislature passed a bill that expands the power of state regulators far beyond all reasonable bounds.

The Michigan Department of Environmental Quality (DEQ) already wields the power to destroy with \$25,000-per-day civil fines it can impose under the state's wetlands law. But with passage of SB 651 in December, that power will be extended to all property, wetlands or otherwise.

Richard Delene is Michigan's most famous victim of DEQ civil fines. An independent Upper Peninsula contractor, Delene had a vision for the Baraga Plains where he grew up. Because the area's highly acidic and biologically sterile bogs are unsuitable for forestry or other uses, Delene acquired a large parcel of this land at bargain prices. He and his wife Nancy planned to rejuvenate the wetlands and retain the upland forests.

Over 15 years, Delene collected surface waters into a series of ponds, creating an award-winning ecosystem supporting a diverse collection of native plants and animals. The connected ponds flow into the adjacent Sturgeon River through undisturbed wetlands and a sediment basin constructed to keep silts from the river.

Delene's project enhances habitat for more than 150 bird and mammal species and created habitat for an additional 120. Lowland brush, the major item removed, is abundant elsewhere on the property and throughout the region. When Delene began work in the early 1980s, the U.S. Army Corps of Engineers issued permits. By 1990, when he decided to extend the project, authority had been transferred to the DEQ (then the Department of Natural Resources).

In May 1990, Delene applied for a permit. After he responded to DEQ requests for additional information, nothing more happened. In the fall, advised by counsel that under the law an application not denied within 90 days was awarded by default, Delene went to work. In November 1992 the state filed suit in Ingham County Circuit Court, alleging Delene had no permit and in essence demanding the property be restored to its previous condition.

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Delene was prosecuted almost 500 miles from his home. The unfamiliar attorneys he was forced to hire turned out to be more concerned with the good will of state agencies than with their client's welfare. He was found in default and faced arrest for contempt of court.

Delene's \$25,000-per-day fines, accumulating since 1990, currently may amount to more than \$90 million. Gubernatorial pardon appeals from more than 25,000 citizens were ignored, and Delene and his wife were forced to flee Michigan to avoid his arrest.

The danger of civil fines is that a defendant like Richard Delene lacks the protections available in a criminal action. His prosecutors didn't have to prove their case "beyond a reasonable doubt." They just needed "a preponderance of the evidence"—and with Delene's technical default, they didn't even need that. Delene was not tried before a jury of his peers or by a judge who is part of an independent judiciary. He effectively was found "guilty" by a DEQ employee and put in the position of having to prove his innocence when the DEQ brought the prosecution. Appeals also come under the "preponderance" standard. And there is no right against self-incrimination, so civil defendants are vulnerable to further state action.

With passage of SB 651, the Delene tragedy could be repeated many times over. Part 91 of the Natural Resources and Environmental Protection Act regulates soil erosion and sedimentation. It requires a permit for any construction that might change the topography of the land. Currently, counties issue permits for this purpose. They also can issue cease-and-desist orders and levy fines up to \$500.

Under SB 651, the DEQ will have the power to fine a person who knowingly violates Part 91: \$10,000-per-day and \$25,000-per-day after the accused receives notice. There's no limit to how long these fines can pile up. In short, this new law extends the DEQ's awesome wetlands power to every dry piece of ground, including your backyard.

Unlimited civil fines give government the power to destroy anyone, such as Richard Delene, should it decide to do so. The Legislature should reconsider carefully the dire consequences that could follow from giving the state such power.

As a result of SB 651, Richard and Nancy Delene may soon have plenty of company in their exile. From now on, any landowner who moves a dirt pile or cuts down a tree that the DEQ deems sacrosanct is subject to the same penalties that destroyed Delene.

Is this how we want to protect Michigan's environment?

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(Joseph P. Overton is senior vice president of the Mackinac Center for Public Policy, a Midland-based public policy education and research institute. More information on the environment is available at www.mackinac.org. Permission to reprint in whole or in part is hereby granted, provided the author and his affiliation are cited.)

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