STATE OF MICHIGAN
DEPARTMENT OF ENVIRONMENTAL QUALITY
LANSING

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GENERAL PERMIT CATEGORIES IN THE STATE OF MICHIGAN

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Issued Under Part 301, Inland Lakes and Streams; Part 303, Wetlands Protection; and Part 325, Great Lakes Submerged Lands, of the Natural Resources and Environmental Protection Act, 1994 PA 451, as Amended (NREPA)

BACKGROUND INFORMATION

PURPOSE

Part 301, Part 303, and Part 325 of the NREPA authorize the Department of Environmental Quality (DEQ), Water Resources Division (WRD), to define types of regulated activities that would be expected to cause no more than minimal impacts and that can, therefore, be reviewed through an expedited permit application process. This General Permit (GP) defines categories of activities that the WRD has determined to have minimal impacts and also defines the legal authority and limitations for use of this process. These categories do not alter or replace current exemptions, but provide a mechanism for expedited processing of certain activities that are not exempt.

The purpose of this GP is to allow the WRD to evaluate permit applications for many minor activities without the delay of public noticing or site inspecting specific projects. The objective of this GP is to reduce the time and cost of the permit process for applicants proposing minor activities and to reduce the costs of administering the program while protecting aquatic resources.

Please note that this GP does not define projects that will be authorized, but only those that may be considered for accelerated processing. Applications under this GP may be issued, modified, or denied. Authorization will be issued only if it is determined that the proposed activity is in accordance with the criteria and requirements of the NREPA.

GENERAL PERMIT PROCEDURES

A person seeking an authorization under this GP must submit a permit application on a form supplied by the WRD at www.michigan.gov/jointpermit. A preliminary determination of whether an application may be processed under this GP is made by WRD staff when the application is received. Applications processed under GP procedures are typically reviewed without issuance of a public notice. However, before authorizing a specific project to proceed under a general permit, the WRD may provide public notice but will not hold a public hearing and will not typically require a site inspection. The DEQ will provide written authorization for an approved project, or will otherwise notify the applicant in writing of the decision on the application.

If at any time in the review process, it is determined that an activity in a proposed project, although within a GP category, is likely to cause more than minimal adverse effects on the environment or aquatic resources, including high value aquatic habitats, the WRD may require the application be processed as an individual permit application. The processing as an individual permit application may require the applicant to provide additional information and an additional application fee.

REGULATORY AUTHORITY

Part 301 (Section 30105), Part 303 (Section 30312), and Part 325 (Section 32512) provide that the WRD, after notice and opportunity for a public hearing, may issue general permits on a statewide basis for a category of activities that are similar in nature, will cause only minimal adverse environmental effects when performed separately, and will have only minimal cumulative adverse effects on the environment. A general permit cannot be valid for more than 5 years.

GENERAL CRITERIA FOR REVIEW

Part 301, Part 303, and Part 325 specify the criteria that must be met before an authorization may be issued. These general criteria, as well as the specific criteria detailed later in this GP, must be met before the WRD can issue an authorization under this GP.

Under Part 303, the WRD will issue an authorization under a GP if the requirements of the GP and the NREPA are met. However, in determining whether to issue an authorization under a general permit, the WRD shall not consider off-site alternatives to be feasible and prudent alternatives under Part 303. Compensatory wetland mitigation cannot be required as part of an authorization under this GP. Under Part 301 and Part 325, off-site alternatives can be considered. Compensatory mitigation can be provided under Part 301.

EXCLUSIONS

The types of activities described in this document can typically be processed under GP procedures. However, some activities will not qualify for this type of processing even if the listed criteria are met. Applications will not qualify for consideration under these categories if:

A) It is determined that the proposed project would constitute a "major discharge of dredged or fill materials" subject to federal review as defined in the Memorandum of Agreement between the DEQ and the U.S. Environmental Protection Agency.

B) The activity is associated with sensitive natural resources including:

1. A federally designated wild and scenic river.
2. A state or federally designated wilderness or environmental area.
3. A federally designated marine sanctuary.
4. A state or federally listed or proposed threatened or endangered species (unless alternative procedures developed by the WRD are followed to coordinate with federal agencies, or the landowner has obtained a letter of no impact from the Department of Natural Resources [DNR]).
5. An identified historic or archeological area.
6. An identified recharge area for drinking water aquifers.
7. An identified rare or unique ecological type.

C) The activity will disturb sediments in an area known or suspected to contain toxic pollutants (unless testing in accordance with WRD procedures provided by the applicant shows that the material does not contain toxic pollutants).

D) The WRD determines that a specific activity that would generally qualify under a GP category would, due to the proximity of other projects and the characteristics of the aquatic resources, cause more than minimal adverse environmental effects.

E) The project also requires a permit under Part 31, Water Resources Protection; Part 301; Part 303; Part 315, Dam Safety; or Part 325 of the NREPA but does not meet one of the GP or minor project (MP) categories under those parts.

F) The project also requires a permit under Part 323, Shorelands Protection and Management; or Part 353, Sand Dunes Protection and Management, of the NREPA.

NEED FOR OTHER PERMITS

An authorization under this GP does not remove the need for other applicable local, state, or federal permits.

EXPIRATION DATE

The categories in this GP modify and replace all existing GP categories under Part 301, Part 303, and Part 325, except for the GP category for Limited Great Lakes Shoreline Management Activities, and shall expire on August 11, 2016, unless revoked or modified before that date.

Issued by: William Creal

William Creal, Chief
Water Resources Division
Department of Environmental Quality

Date: 10/31/2011

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GENERAL PERMIT CATEGORIES

The following activities are incorporated into this list of GP categories. The proposed activity must meet the specific criteria of a category in addition to the General Criteria, Exclusions, and General Conditions. Each category lists the statute(s) to which it applies.

A. Aids to Navigation

Category applies to: ☒ *Part 301, Inland Lakes and Streams*
☐ *Part 303, Wetlands Protection*
☒ *Part 325, Great Lakes Submerged Lands*

The placement of aids to navigation and regulatory markers that meets all of the following:

- The aids are approved by the United States Coast Guard, if applicable.
- The aids are approved under Part 801, Marine Safety, of the NREPA.
- Aids for navigation shall not be used for mooring.

B. Amateur Recreational Gold Prospecting

Category applies to: ☒ *Part 301, Inland Lakes and Streams*
☐ *Part 303, Wetlands Protection*
☐ *Part 325, Great Lakes Submerged Lands*

Amateur recreational gold prospecting with a hand-operated sluice box that is either:

1. Along select portions of streams on state-owned mineral and surface lands and meets all of the following:

    - This category does not include the following sensitive natural resource areas: state designated natural rivers, state designated natural areas, or state designated trout streams. Note: Applicants may apply for authorization under this category for stream segments highlighted in yellow on the Amateur Recreational Gold Prospecting layer on the Wetland Map Viewer found at www.mcgi.state.mi.us/wetlands/. The stream segments highlighted in yellow have been determined to avoid, to the extent practicable, adverse impact on state or federally listed threatened or endangered species. The applicant may request authorization under this category for up to 1 mile of identified stream segments.
    - Dredging or excavation shall only be done with a shovel in the stream bed and shall not disturb the banks of the stream.
    - The hand-operated sluice box used shall not be larger than 52 inches long, 12 inches wide, and 6.5 inches deep.
    - The use of a powered sluice box or any power operated dredge or equipment of any kind is not included in this category.
    - This category is not applicable in any area of a stream if native mussels are encountered while using a sluice box. The applicant must prospect in another authorized stream segment if native mussels are encountered.
    - Individual prospecting areas shall be 300 square feet or less per site with up to 4 sites per 1 mile of stream segments. No more than 1 sluice box per identified stream segments can be authorized.
    - Sluicing is only allowed between July 1 and August 31 from dawn until dusk.
    - Processing extractive chemicals shall not be used.
    - The removed material may not be temporarily or permanently placed in a wetland or floodplain. Only material removed from the stream may be placed back into the stream. Materials originating outside of the stream cannot be sluiced. Any increase in turbidity caused by the activity must settle or dissipate within 40 feet downstream.
    - This category shall not be used to destroy or alter areas of existing wetland or aquatic vegetation.

- Authorizations under this category are limited to the recovery of 1/2 Troy ounce or 15.55 grams of gold per year.
- The applicant must ensure that they remain on the riparian interest area of a streambed in state ownership. (The ownership interest in the stream bed is divided between the owners of opposing stream banks at the thread of the stream.)

2. Along streams where written authorization is obtained from the riparian property owners and meets all of the following:

   - This category applies only where the stream bottom is predominately gravel.
   - Dredging or excavation shall only be done with a shovel in the stream bed and shall not disturb the banks of the stream.
   - The hand-operated sluice box used shall not be larger than 52 inches long, 12 inches wide, and 6.5 inches deep.
   - The use of a powered sluice box or any power operated dredge or equipment of any kind is not included in this category.
   - This category is not applicable in any area of a stream if native mussels are encountered while using a sluice box.
   - No more than 1 sluice box per riparian interest area can be authorized.
   - Sluicing is only allowed between July 1 and August 31.
   - Individual prospecting areas shall be 300 square feet or less per location.
   - Processing extractive chemicals shall not be used.
   - The removed material may not be temporarily or permanently placed in a wetland or floodplain. Only material removed from the stream may be placed back into the stream. Materials originating outside of the stream cannot be sluiced. Any increase in turbidity caused by the activity must settle or dissipate within 40 feet downstream.
   - This category shall not be used to destroy or alter areas of existing wetland or aquatic vegetation.

C. Clear Span Bridge

Category applies to: ☒ *Part 301, Inland Lakes and Streams*
☐ *Part 303, Wetlands Protection*
☐ *Part 325, Great Lakes Submerged Lands*

New or replacement clear span bridges that meet all of the following:

- Any abutments or foundations must be placed a minimum of 1.2 times the bankfull width.
- The lowest bottom beam elevation is at or above the natural ground elevations on either bank and spans the entire bankfull width.
- No filling or dredging in the bankfull channel is included in this category, unless approved by the DEQ based on site conditions.
- The structure will allow passage of watercraft that could be expected to navigate the water involved.
- The bridge shall be anchored to prevent floatation during periods of high water.

Bankfull is the width of the stream that corresponds to the depth where water fills a main channel to the point of overflowing. In instances where the applicant is unsure of the bankfull width, it is recommended that the applicant contact DEQ staff and request a preapplication site review. In legally established drains (except those constituting mainstream portions of certain natural watercourses identified in rule), if bankfull indicators are not present, the structure span may be determined by calculating the 1.5-year stream width at the 1.5-year flow that is based on a stable stream width and depth.

For stream crossing locations where the drainage area is 2 square miles or greater, the crossing must meet one of the following:

1. The applicant must submit, and receive DEQ approval of, a certification by a licensed engineer with supporting hydraulic computations stating that either the replacement structure, including any weir flow, is designed with equal or greater hydraulic capacity that does not cause a harmful interference OR a new structure, including weir flow, is designed to pass the 100-year flood without causing a harmful interference.
2. For replacement bridges:
   - The proposed structure must have an equal or greater hydraulic capacity when compared to the existing bridge.
   - The proposed road grade shall not exceed that of the existing road grade by more than 4 inches, unless the road grade has been shown to be above the 100-year floodplain elevation.
3. For new bridges, the approach fill slopes to natural ground elevations within 10 feet of either side of the structure, unless the fill has been shown to be above the 100-year floodplain elevation.

D. Culvert Cleanout

Category applies to:
☒ *Part 301, Inland Lakes and Streams*
☐ *Part 303, Wetlands Protection*
☐ *Part 325, Great Lakes Submerged Lands*

Cleanout activities for existing culverts conducted by county drain commissioners, public transportation agencies, their agents, or other governmental agencies that meet all of the following:

- Accumulated sediment and small debris may be removed from within a maximum of 25 feet on either side of the culvert ends to restore a stable stream width and slope.
- Sediments shall be captured to prevent downstream loss of suspended material. When feasible, sufficient materials shall be left to maintain natural bottom materials within the culvert.
- All dredged or excavated materials shall be removed to an identified upland site exclusive of floodplain or wetland areas.
- The culvert cleanout will occur during periods of low flow.
- The culvert cleanout will not occur during any critical fish spawning windows.
- The culvert cleanout will not cause bank or channel failure.

E. Culverts - Small

Category applies to:
☒ *Part 301, Inland Lakes and Streams*
☐ *Part 303, Wetlands Protection*
☐ *Part 325, Great Lakes Submerged Lands*

New or replacement culverts that are 6 feet or less in span and 30 feet or less in length that meet all of the following:

- The culvert must be bottomless (3-sided), or if the structure has a bottom then the invert elevation must be buried below the stream bottom 1/6 of the bankfull width up to a maximum buried depth of 1-foot.
- The culvert spans a minimum of bankfull width.
- The culvert is aligned with the centerline of the stream at both the inlet and outlet ends. Meanders upstream or downstream of the culvert shall not be eliminated.
- For replacements, the existing culvert cannot be perched (i.e., a culvert with an outlet invert elevated above the downstream water surface, allowing a freefall condition).
- The culvert must be placed at a flat slope, unless a steeper slope is approved by the DEQ, or for legally established drains, at an approved design slope. For stream crossings with an approximate slope of 3% or greater, as determined by the DEQ, the structure must be bottomless (or a clear span bridge) to be included in this GP category.

- The placement of riprap shall be limited to the minimum necessary to ensure proper stabilization of the side slopes and fill in the immediate vicinity of the culvert. Riprap shall not extend upstream or downstream of the culvert more than 25 feet on each end. Riprap shall be properly sized based on velocity and consist of natural field stone or rock (broken concrete is not allowed). Natural field stone or rock includes crushed quarry rock. Broken concrete, free of protruding metal, contaminants, and other foreign material, may be allowed in legally established drains, except those constituting mainstream portions of certain natural watercourses identified in rule.

Bankfull is the width of the stream that corresponds to the depth where water fills a main channel to the point of overflowing. In instances were the applicant is unsure of the bankfull width, it is recommended that the applicant contact DEQ staff and request a preapplication site review. In legally established drains (except those constituting mainstream portions of certain natural watercourses identified in rule), if bankfull indicators are not present, the structure span may be determined by calculating the 1.5-year stream width at the 1.5-year flow that is based on a stable stream width and depth.

For stream crossing locations where the drainage area is 2 square miles or greater, the crossing must meet one of the following:

1. The applicant must submit, and receive DEQ approval of, a certification by a licensed engineer with supporting hydraulic computations stating that either the replacement structure, including any weir flow, is designed with equal or greater hydraulic capacity that does not cause a harmful interference OR a new structure, including weir flow, is designed to pass the 100-year flood without causing a harmful interference.
2. For replacement culverts:
   - The proposed structure must have an equal or greater hydraulic capacity when compared to the existing culvert.
   - The proposed road grade shall not exceed that of the existing road grade by more than 4 inches, unless the road grade has been shown to be above the 100-year floodplain elevation.
3. For new culverts:
   - The fill over the culvert is not more than 1.5 feet.
   - The approach fill slopes to natural ground elevations within 10 feet of either side of the structure, unless the fill has been shown to be above the 100-year floodplain elevation.

F. Dry Fire Hydrant

Category applies to: ☒ *Part 301, Inland Lakes and Streams*
☒ *Part 303, Wetlands Protection*
☒ *Part 325, Great Lakes Submerged Lands*

Installation of a dry fire hydrant that meets all of the following:

- The intake line will not constitute a navigational or safety hazard. The face of the intake structure shall conform to the bottom contour and not extend into the receiving water to impair navigation or create shoreline pockets capable of trapping debris.
- Dredging in wetlands shall be minimized to the most practicable extent possible. All impacted areas shall be immediately restored to grade. No additional fill materials (other than the line itself) shall be placed in the wetland.

G. Maintenance Dredging on the Great Lakes and Section 10 Waters

Category applies to: ☒ *Part 301, Inland Lakes and Streams*
☐ *Part 303, Wetlands Protection*
☒ *Part 325, Great Lakes Submerged Lands*

Excavation and removal of accumulated sediment for maintenance of previously dredged areas that meet all the following:

- For Part 301 of the NREPA, this GP includes only Section 10 waters under the federal Rivers and Harbors Act of 1899.
- Dredging shall be limited to a maximum of 100 cubic yards per 5-year period.
- Dredging shall be limited to previously authorized depths or controlling depths for ingress/egress, whichever is less.
- Only 1 permit under this GP category may be authorized on the same parcel of property within any 5-year period.
- The activity will not disturb sediments in an area known or suspected to contain toxic pollutants (unless testing accordance with WRD procedures provided by the applicant shows that the material does not contain toxic pollutants).
- All dredged or excavated materials shall be disposed of in an identified upland (nonfloodplain, nonwetland) site.
- This GP category does not include dredging in wetlands.

H. Maintenance of Storm Water Management Facilities: Wetlands

Category applies to:
☐ *Part 301, Inland Lakes and Streams*
☒ *Part 303, Wetlands Protection*
☐ *Part 325, Great Lakes Submerged Lands*

Dredging or filling in wetlands for the maintenance of storm water management facilities that were designed for the primary purpose of storm water detention, retention, and/or treatment, including the maintenance dredging of existing storm water ponds/facilities, detention basins, and retention basins and maintenance of water control structures, outfall structures, and emergency spillways.

To be included in this category, the maintenance activity must meet all of the following:

- The dredging and filling must not cause the loss of greater than 1/2 acre of wetlands.
- Any contaminated materials shall be appropriately handled and disposed.

I. Maintenance: Wetlands

Category applies to:
☐ *Part 301, Inland Lakes and Streams*
☒ *Part 303, Wetlands Protection*
☐ *Part 325, Great Lakes Submerged Lands*

The repair, rehabilitation, or replacement of any previously authorized, currently serviceable structure or fill under Part 303, or of any currently serviceable structure or fill in existence on October 1, 1980, provided that:

- The structure or fill is not to be put to uses differing from those uses specified or contemplated for it in the original permit or the most recently authorized modification. Minor deviations in the structure's configuration or filled area, including those due to changes in materials, construction techniques, or current construction codes or safety standards that are necessary to make the repair, rehabilitation, or replacement are allowed.
- This GP allows the repair, rehabilitation, or replacement of those structures or fills destroyed or damaged by storms, floods, fire, or other discrete events provided the repair, rehabilitation, or replacement is commenced, or is under contract to commence, within 12 months of the date of their destruction or damage. In cases of catastrophic events, such as tornadoes, this 12-month limit may be waived by the DEQ, provided the permittee can demonstrate funding, contract, or other similar delays.
- This GP also allows temporary structures, fills, and work necessary to conduct the maintenance activity. Appropriate measures must be taken to maintain normal flows and minimize flooding to the maximum extent practicable, when temporary structures, work, and discharges, including cofferdams, are necessary for construction activities, access fills, or dewatering of construction sites. Temporary fills must consist of materials, and be placed in a manner, that will not be eroded by expected high flows. Temporary fills must be removed in their entirety and the affected

areas returned to preconstruction elevations. The areas affected by temporary fills must be revegetated, as appropriate, with plant species that are considered native to Michigan.

J. Minor Permit Revisions and Transfers

Category applies to:
- ☒ *Part 301, Inland Lakes and Streams*
- ☐ *Part 303, Wetlands Protection*
- ☒ *Part 325, Great Lakes Submerged Lands*

Minor revisions, including transfers, of a permit that meet all of the following:

- The project is in compliance with the permit and NREPA.
- If the request is for a transfer of the permit, the request is accompanied by a written agreement between the current and new owners or operators containing a specific date for transfer of responsibility, coverage, and liability under the permit.
- No extension of time is allowed under this category.

For the purposes of this category, a minor revision means a transfer of a permit or a revision that does not increase the overall impact of a project and that is within the scope of the project as described in the original permit. Minor permit revisions for wetlands may be requested under Section 30313b of Part 303.

K. Moist Soil Management for Wildlife

Category applies to:
- ☐ *Part 301, Inland Lakes and Streams*
- ☒ *Part 303, Wetlands Protection*
- ☐ *Part 325, Great Lakes Submerged Lands*

Dredging or filling activities in wetlands and maintenance activities that are associated with moist soil management for wildlife for the purpose of continuing ongoing, site-specific, wildlife management activities where soil manipulation is used to manage habitat and feeding areas for wildlife, that meet all of the following:

- Such activities include, but are not limited to, plowing or discing to impede succession, preparing seed beds, or establishing fire breaks.
- Sufficient riparian areas must be maintained adjacent to all open waterbodies, including streams, to preclude water quality degradation due to erosion and sedimentation.
- This GP category does not allow the construction of new dikes, roads, water control structures, or similar features associated with the management areas.
- The activity must not result in a net loss of aquatic resource functions and services.
- This GP category does not allow the conversion of wetlands to uplands, impoundments, or other open waterbodies.

L. Pipeline Safety Program Designated Time Sensitive Inspections and Repairs

Category applies to:
- ☒ *Part 301, Inland Lakes and Streams*
- ☒ *Part 303, Wetlands Protection*
- ☐ *Part 325, Great Lakes Submerged Lands*

Maintenance and repair of oil and gas pipelines that cross inland lakes, streams, and wetlands, in particular, as required by the provisions of the Pipeline Safety Improvement Act of 2002, that meet all of the following:

- The repair and replacement using the best available construction technologies that are necessary to avoid and minimize impact when considering the wetlands and waters involved. Additional precautions and construction techniques may be necessary in areas of high quality resources.
- Stream crossing shall use dry ditch open trenching, and shall be limited to 50 feet per crossing (bank to bank) and a cumulative total of 200 feet per application.

- Wetland crossings using open trenching shall be limited to total cumulative crossing length of 500 feet per application.
- All pipeline repair and maintenance projects shall follow the relevant and appropriate procedures and best management practices (BMPs) outlined in the Federal Energy Regulatory Commission's "Wetland and Waterbody Construction and Mitigation Procedures," dated January 17, 2003, or an equivalent manual of procedures and BMPs approved in advance by the WRD. Site access and preparation, pipeline repair or installation, and site restoration must be sequenced and carried out in accordance with these procedures and BMPs in order to minimize soil erosion and siltation, the introduction of nonnative and invasive species, drainage of wetlands via the pipeline conduit, and other adverse impacts to aquatic resources. The specific repair procedure that will be used once a pipeline is exposed at a given crossing does not have to be identified in advance of authorization under this GP category as long as such procedures are included in the approved BMP manual. This GP category does not mandate the presence of environmental inspectors at all times, but an inspector must be available to ensure compliance with BMPs.
- Damaged pipeline must be replaced in the same location where it is feasible and prudent to do so, unless it can be demonstrated that relocation of the pipeline will result in an overall reduction of adverse impacts to aquatic resources. Where damaged pipeline must be replaced in a new location, that location must be selected to minimize overall environmental impact of the project.
- Where drilling mud is being used, 2 properly installed rows of silt fencing must be installed around entry/exit points of the bore. Any unintended release of drilling mud shall be immediately reported to WRD staff, and additional drilling shall be discontinued while the material that was released is controlled. Cleanup of drilling mud that impacts water resources, including wetlands, shall be initiated and completed in an expeditious manner.
- When a plowing-in method is used in wetlands, the area must be immediately restored to grade after installation.
- All revegetation of wetland sites must be with plant species that are native to Michigan according to the Floristic Quality Assessment for the State of Michigan.
- The construction of new permanent access roads is not included under this GP category. Where needed, timber construction mats may be authorized under this category.

This GP category does not alter or replace current exemptions, but provides a mechanism for authorization of repairs for pipelines that do not meet the criteria for exempt activities and, in particular, coordinates authorization of pipeline repairs that impact both wetlands and other waterbodies.

M. Public Transportation Projects

Category applies to: ☒ *Part 301, Inland Lakes and Streams*
☐ *Part 303, Wetlands Protection*
☐ *Part 325, Great Lakes Submerged Lands*

1. Culvert and Bridge Extensions. The extension of existing bridges or culverts by public transportation agencies that meet all of the following:

   - The total length of the extension does not exceed 24 feet.
   - The end area of the extension must be equal to or greater than the existing structure's end area.
   - Dredging and/or filling are limited to the extent necessary for the bridge/culvert extension.
   - The proposed inverts shall be at or below the existing stream bottom.
   - The structure will be designed and placed to ensure that any increase in stream erosion or downcutting is prevented.
   - The placement of riprap shall be limited to the minimum necessary to ensure proper stabilization of the side slopes and fill in the immediate vicinity of the culvert. Riprap shall not extend upstream or downstream of the culvert more than 25 feet on each end. Riprap shall be properly sized based on velocity and consist of natural field stone or rock unless it is determined by the DEQ that broken concrete can be allowed based on site conditions. Broken concrete, free of protruding metal, contaminants, and other foreign material, may be allowed in legally established drains except those constituting mainstream portions of certain natural watercourses identified in rule.

- The existing culvert is not perched (i.e., a culvert with an outlet invert elevated above the downstream water surface, allowing a freefall condition).

2. Culvert End Sections, Headwalls and Wingwalls. Installation or replacement of culvert end sections, headwalls, and wingwalls by public transportation agencies that meet all the following:

   - The end area of the end section must be equal to or greater than the existing structure's end area and the length of the end section is a maximum of 12 feet.
   - Dredging and/or filling are limited to the minimum necessary.
   - The proposed inverts shall be at or below the existing stream bottom.
   - The structure will be designed and placed to ensure that any increase in stream erosion or downcutting is prevented.
   - The placement of riprap shall be limited to the minimum necessary to ensure proper stabilization of the side slopes and fill in the immediate vicinity of the culvert. Riprap shall not extend upstream or downstream of the culvert more than 20 feet on each end. Riprap shall be properly sized based on velocity and consist of natural field stone or rock unless it is determined by the DEQ that broken concrete can be allowed based on site conditions. Broken concrete, free of protruding metal, contaminants, and other foreign material, may be allowed in legally established drains except those constituting mainstream portions of certain natural watercourses identified in rule.
   - The existing culvert is not perched (i.e., a culvert with an outlet invert elevated above the downstream water surface, allowing a freefall condition).

N. Recreational Facilities: Boardwalks, Platforms, and Walkways

Category applies to:
- ☐ *Part 301, Inland Lakes and Streams*
- ☒ *Part 303, Wetlands Protection*
- ☐ *Part 325, Great Lakes Submerged Lands*

The following recreational facilities are included in this GP category:

1. Simple elevated or floating structures that are either:

   a. Open pile or floating boardwalks constructed to access wetlands or open water provided that they do not exceed 6 feet in width, except for widening to allow passage of wheel chairs, etc., at 150-foot intervals, and have a maximum cumulative length through wetlands of 500 feet.
   b. Open pile or floating platforms constructed of appropriate nonpolluting materials not to exceed 120 square feet of surface area.

   Roofs or walls are not included in this GP category. Railings may be authorized if proper justification is provided by the applicant, if blockage of animal migration is minimized to the greatest extent possible, and if the railings are determined by the DEQ to be necessary during the review process.

2. Walkways or footpaths that are on public lands or on lands that are owned or managed by nonprofit conservation organizations that meet all of the following:

   - The walkway does not exceed 6 feet in base width and 200 feet in cumulative length through wetlands.
   - A boardwalk or elevated walkway is not feasible or practical.
   - Culverts are required where necessary to provide for the free flow of surface water.
   - If in a floodway, the grade elevation change shall not exceed 4 inches.
   - The area does not have standing water for any significant period of time.

O. Scientific Measuring Devices

Category applies to: ☒ *Part 301, Inland Lakes and Streams*
☒ *Part 303, Wetlands Protection*
☒ *Part 325, Great Lakes Submerged Lands*

Devices whose purpose is to measure and record scientific data, such as staff gages, water recording devices, water quality testing and improvement devices, and similar structures. Installation of devices shall avoid and minimize impacts and the site shall be restored upon completion of the project.

P. Soil Borings

Category applies to: ☒ *Part 301, Inland Lakes and Streams*
☐ *Part 303, Wetlands Protection*
☒ *Part 325, Great Lakes Submerged Lands*

Soil sample borings that meet all of the following:

- The outside diameter of the bore hole does not exceed 8 inches.
- Drilling is carried out either from a bridge or other existing structure, or from a barge anchored on a temporary basis, and is completed within a 48-hour period for each bore hole.
- After completion of drilling, the auger hole is backfilled, as appropriate, and any material remaining on the auger is disposed of in an upland location.
- Written authorization is obtained from any riparian property owners prior to drilling, other than soil borings carried out by or for a public agency within a public right-of-way or under appropriate authority.

Q. Survey Activities

Category applies to: ☐ *Part 301, Inland Lakes and Streams*
☒ *Part 303, Wetlands Protection*
☐ *Part 325, Great Lakes Submerged Lands*

Survey activities, such as core sampling, seismic exploratory operations, plugging of seismic shot holes and other exploratory-type bore holes, exploratory trenching, soil surveys, sampling, and historic resources surveys that meet all of the following:

- The area in which the exploratory trench is dug must be restored to its preconstruction grade upon completion of the work. For the purposes of this GP, the term exploratory trenching means mechanical land clearing of the upper soil profile to expose bedrock or substrate for the purpose of mapping or sampling the exposed material.
- The top 6 to 12 inches of the trench should normally be backfilled with topsoil from the trench.
- This GP allows the construction of temporary pads, provided the fill does not exceed 25 cubic yards, or the placement of temporary structures and construction mats.
- Dredging, filling, and structures associated with the recovery of historic resources are not included in this GP category.
- Drilling and the discharge of excavated material from test wells for oil and gas exploration are not included in this GP category.
- Fill placed for roads and other similar activities is not included in this GP category.
- This GP category does not include any permanent structures.
- The discharge of drilling mud and cuttings may require a separate National Pollutant Discharge Elimination System permit.

R. Utility Line Activities

Category applies to: ☒ *Part 301, Inland Lakes and Streams*
☒ *Part 303, Wetlands Protection*
☐ *Part 325, Great Lakes Submerged Lands*

Activities required for the construction, maintenance, repair, and removal of utility lines by directional drilling/jack and bore crossings of wetlands, inland lakes, and streams.

A "utility line" is any pipe or pipeline for the transportation of any gaseous, liquid, liquescent, or slurry substance, for any purpose, and any cable, line, or wire for the transmission for any purpose of electrical energy, telephone, and telegraph messages, and radio and television communication. The term "utility line" does not include activities that drain a water of the State, such as drainage tile or french drains, but it does apply to pipes conveying drainage from another area.

This category includes the installation, maintenance, repair, and removal of utility lines by directional drilling/jack and bore provided there is no change in the preconstruction grade, that meet all the following:

- Crossing locations shall be selected to minimize the impact to the wetlands, inland lakes and streams.
- The outside diameter of the pipe, cable, encasement, etc. shall not exceed 20 inches.
- A minimum of 36 inches of cover will be maintained between the top of the cable or pipe and the soil surface.
- All re-vegetation of wetland sites must be with plant species that are native to Michigan according to the Floristic Quality Assessment for the State of Michigan.
- The construction of new permanent access roads is not included under this GP category.
- There are no limits on the distance of the crossing of wetlands, inland lakes or streams using directional boring or jack and bore methods.
- The entrance and exit locations of the bore shall be located outside of any wetland (unless it is not feasible based on boring distance or method), inland lake and streams, and isolated using double rows of properly installed silt fencing. Any temporary fill for access must meet the Temporary Construction, Access and Dewatering Minor Project Category.
- A plan for preventing and controlling the loss of drilling mud into any waters of the state must be submitted. The plan should include steps that will be taken to minimize any impacts to any waters of the state caused by an accidental release of drilling mud. Any unintended release of drilling mud shall be immediately reported to WRD staff, and additional drilling shall be discontinued while the material that was released is controlled. Cleanup of drilling mud that impacts water resources, including wetlands, shall be initiated and completed in an expeditious manner
- Use of directional drilling/jack and bore should be given particular emphasis in any area that is prone to erosion, on slopes upgradient from coldwater streams, in forested wetland habitat, in high quality wetlands or wetland types that are locally or regionally uncommon.

S. Wetland Habitat Restoration and Enhancement

Category applies to: ☒ *Part 301, Inland Lakes and Streams*
☒ *Part 303, Wetlands Protection*
☐ *Part 325, Great Lakes Submerged Lands*

For the purposes of this category:

Restoration is the manipulation of the physical, chemical, or biological characteristics of a site with the goal of returning natural/historic functions to a former or altered wetland. Restoration is either one of the following:

a. Reestablishment is the manipulation of the physical, chemical, or biological characteristics of a site with the goal of returning natural/historic functions to former wetland. Reestablishment results in rebuilding a former wetland and results in a gain in wetland acres.

b. Rehabilitation is the manipulation of the physical, chemical, or biological characteristics of a site with the goal of repairing natural/historic functions of altered wetlands.

Enhancement is the manipulation of the physical, chemical, or biological characteristics of a wetland site to heighten, intensify, or improve specific function(s) or to change the growth stage or composition of the vegetation present. Enhancement is undertaken for a purpose such as a water quality improvement, flood water retention, or wildlife habitat improvement. Enhancement results in a change in wetland function(s), but does not result in a gain in wetland acres.

Altered wetlands include areas that have been partially or fully drained by ditching, tiling, and/or pumping; or partially or fully filled by direct placement of material or significant sedimentation; or where other land use conversions have resulted in significant alteration of the original character of the site.

Former wetland is an area that once was a wetland but has been modified to the point it no longer has the hydrologic characteristics of a wetland. Former wetlands are not regulated under Part 303.

Dredged or excavated spoils or fill material shall not be located in a floodway or harmfully interfere with flood flows in any streams regulated under Part 31. Spoils must be removed from and fill shall not be placed in any floodplain regulated under Part 31 unless it meets the criteria for a minor project under that part to be included in this category. Construction of a dike, berm, or embankment that is 6 feet or more in height and that impounds an area of 5 acres or more during a design flood; such activity requires authorization under Part 315 may not be authorized under this category.

Dredging and filling activities below the Ordinary High Water Mark of lakes or streams are not included under this category.

This category includes projects that restore or enhance wetland functions, provided that a project results in net increase of wetland acreage or functions and services and is conducted by or in cooperation with local, state, or federal conservation agencies or nonprofit conservation organizations, and are any of the following:

1. Rehabilitation or enhancement activities in wetlands that have been farmed within the past 5 years that meets the following:

   - Use of soil cultivation equipment (e.g., harrows, discs, or plows) or other earth moving equipment, to reestablish microtopography. Microtopography establishment shall be a maximum of 12 inches above the normal design water elevation, and the area must continue to meet the definition of a wetland under Part 303.
   - Existing drainage structures may be removed or altered (e.g., tile breaks or pump removal) to reduce or eliminate effects of drainage.
   - Wetland fill for dikes, berms, embankments, water control structures, and other structures shall not exceed 2 acres. The purpose of such fill shall be to restore or enhance the hydrological function of the farmed wetland. The 2-acre size limit refers only to the wetland area on which fill is placed and not to the broader disturbance area or restored basin size.

2. Rehabilitation in wetlands documented to be dominated by invasive species (e.g., reed canary grass or Phragmites) for the purpose of invasive species management that meets all of the following:

   - Existing drainage structures may be removed or altered (e.g., tile breaks, pump removal) to restore (to the extent possible) the original or natural wetland hydrology, vegetation, and/or functions of the wetland.
   - Plugs in drains or ditches not meeting the definition of a stream under Part 301 may be authorized under this subcategory if photographs of the plug location are provided and if all impacted parties acknowledge and provide their written authorizations. Wetland fill for dikes, berms, or embankments associated with the plug shall not exceed 1/3 acre. The purpose of such fill shall be to restore the hydrological function of the wetland.

3. Excavation of shallow water areas for wildlife:

   a. Excavation of shallow water areas for wildlife less than 5 acres in size in a former wetland or upland site and within 500 feet of an inland lake or stream, or

   b. Excavation of shallow water areas for wildlife in wetlands that have been regularly farmed within the past 5 years or in wetlands documented to be dominated by invasive species (e.g., reed canary grass or Phragmites). Each individual excavated area shall not exceed 1.5 acres and the cumulative impact of excavation associated with a project shall not exceed 3 acres.

   For both subcategory a. and b., the excavation must meet the following:

   - At least 50% of the surface area of the excavated area shall have a water depth of no more than 18 inches, and no more than 15% can be deeper than 48 inches.
   - The excavated area shall not be constructed within or physically touching an inland lake or stream.
   - All excavated spoils including organic and inorganic soils, vegetation, and debris shall be placed at an upland site in such a manner as not to erode into any waterbody or wetland, unless this material is used to reestablish microtopography. The establishment of microtopography is allowed within the excavated areas, but any microtopography areas shall be a maximum of 12 inches above the normal design water elevation, and the area must continue to meet the definition of a wetland under Part 303. Excavated topsoil may be placed back into the excavated area to aid in plant establishment.
   - For excavated areas within 500 feet of cold or cold-transitional streams, the applicant must provide written documentation of concurrence on the project from DNR, Fisheries Division.

4. Plugs in drains or ditches not meeting the definition of a stream may be authorized under this subcategory to restore wetland hydrology if photographs of the plug location are provided and if all impacted parties acknowledge and provide their written authorizations.

5. Water level control in wetlands or impoundments for habitat management within areas managed for wildlife that meets all of the following:

   - The drawdown rate shall not exceed 6 inches per day.
   - The drawdown shall not negatively impact downstream habitat or structures.
   - For drawdowns with water discharge to streams, the applicant must provide written documentation of concurrence on the project from DNR, Fisheries Division and Wildlife Division.

For all activities within this GP category, stumps, trunks and limbs may be placed in wetlands for establishing wildlife habitat structure. This category does not include the conversion of a stream or wetland to another aquatic habitat type (e.g., stream to wetland or vice versa) or uplands. No plugs in streams are included in this category.

GENERAL CONDITIONS

The following general conditions must be complied with for any authorization under a GP to be issued:

1. Navigation and Riparian Rights: No activity may cause more than a minimal adverse effect on navigation. The activity shall not interfere with the riparian rights or use of the waters by others.
2. Aquatic Life Movements: No activity may substantially disrupt the necessary life cycle movements of those species of aquatic life indigenous to the waterbody, including those species that normally migrate through the area, unless the activity's primary purpose is to impound water.
3. Spawning Areas: Activities in spawning areas during spawning seasons must be avoided to the maximum extent practicable. Activities that result in the physical destruction (e.g., through excavation, fill, or downstream smothering by substantial turbidity) of an important spawning area are not authorized.
4. Migratory Bird Breeding Areas: Activities in waters of the state that serve as breeding areas for migratory birds must be avoided to the maximum extent practicable.

5. Shellfish Beds: No activity may occur in areas of concentrated native shellfish populations (mussels).
6. Suitable Material: No activity may use unsuitable material (e.g., trash, debris, car bodies, asphalt, etc.). Material used for construction or fill must be free from toxic pollutants in toxic amounts.
7. Water Supply Intakes: No activity may occur in the proximity of a public water supply intake, except where the activity is for the repair or improvement of public water supply intake structures or adjacent bank stabilization.
8. Adverse Effects from Impoundments: If the activity creates an impoundment of water, adverse effects to the aquatic system due to accelerating the passage of water, and/or restricting its flow, must be minimized to the maximum extent practicable.
9. Management of Water Flows: To the maximum extent practicable, the preconstruction course, condition, capacity, and location of open waters must be maintained for each activity, including stream channelization and storm water management activities, except as provided below. The activity must be constructed to withstand expected high flows. The activity must not restrict or impede the passage off normal or high flows, unless the primary purpose of the activity is to impound water or manage high flows. The activity may alter the preconstruction course, condition, capacity, and location of open waters if it benefits the aquatic environment (e.g., stream restoration or relocation activities).
10. Removal of Temporary Fills: Temporary fills must be removed in their entirety and the affected areas returned to preconstruction elevations within 90 days of initiation of the authorized activity unless otherwise approved by the DEQ. The affected areas must be revegetated and reseeded with species native to Michigan appropriate to the site.
11. Proper Maintenance: Any authorized structure or fill shall be properly maintained, including maintenance to ensure public safety.
12. Tribal Rights: No activity or its operation may impair reserved tribal rights, including, but not limited to, reserved water rights and treaty fishing and hunting rights.
13. Mitigation: The DEQ will consider the following factors when determining appropriate and practicable mitigation necessary to ensure that adverse effects on the aquatic environment are minimal: (a) the activity must be designed and constructed to avoid and minimize adverse effects, both temporary and permanent, to waters of the state to the maximum extent practicable; and (b) mitigation in all its forms (avoiding, minimizing, reducing, or compensating) will be required to the extent necessary to ensure that the adverse effects to the aquatic environment are minimal.
14. Water Quality: The project must comply with state water quality standards.
15. Coastal Zone Management: The project must comply with the enforceable statutes in Michigan's coastal zone management plan.
16. Case-By-Case Conditions: The activity must comply with conditions that may have been added by the DEQ and with any case-specific conditions added for Section 401 Water Quality Certification or Coastal Zone Management Act consistency determination. Under Part 303, case-by-case conditions may only be imposed after consultation with the applicant or applicant's agent.
17. Use of Multiple GP Categories: The use of more than 1 GP category for a single and complete project is allowed unless it is prohibited within a specific GP category. When using multiple categories, fill can not exceed 0.1 acre or the highest acreage limit.
18. Compliance Certification: Each permittee who receives an authorization under a GP must submit a signed certification regarding the completed work and any required mitigation within 1 week after the completion of the authorized activity. The certification must be mailed to the DEQ with the authorization (permit) number and shall include: (a) a statement that the authorized work was done in accordance with the authorization under the GP, including any general or specific conditions; (b) a statement that any required mitigation was completed in accordance with the permit conditions; and (c) the signature of the permittee certifying the completion of the work and mitigation.
19. Single and Complete Project: The activity must be a single and complete project. The same GP category can not be used more than once for the same single and complete project.

AUTHORIZATION CONDITIONS

The following additional conditions will also apply to all authorizations issued under all GP categories:

A. Initiation of any work on the permitted project confirms the permittee's acceptance and agreement to comply with all terms and conditions of an authorization under this permit.

B. The permittee in exercising the authority granted by an authorization under this permit shall not cause unlawful pollution as defined by Part 31.
C. An authorization under this permit shall be kept at the site of the work and available for inspection at all times during the duration of the project or until its date of expiration.
D. All work shall be completed in accordance with the plans and the specifications submitted with the application and/or plans and specifications attached to the authorization.
E. No attempt shall be made by the permittee to forbid the full and free use by the public of public waters at or adjacent to the structure or work approved.
F. It is made a requirement of an authorization under this permit that the permittee give notice to public utilities in accordance with Act 53 of the Public Acts of 1974 and comply with each of the requirements of that act.
G. An authorization under this permit does not convey property rights in either real estate or material; nor does it authorize any injury to private property or invasion of public or private rights; nor does it waive the necessity of seeking federal assent, all local permits, or complying with other state statutes.
H. An authorization under this permit does not prejudice or limit the right of a riparian owner or other person to institute proceedings in any circuit court of this state when necessary to protect his or her rights.
I. The permittee shall notify the DEQ within 1 week after the completion of the authorized activity.
J. An authorization under this permit shall not be assigned or transferred without the written approval of the DEQ.
K. Failure to comply with conditions of an authorization under this permit may subject the permittee to revocation of the authorization and criminal and/or civil action as cited by the specific state act, federal act, and/or rule under which this permit is granted.
L. All dredged or excavated materials shall be disposed of in an upland site (outside of floodplains, unless exempt under Part 31, and wetland).
M. In issuing an authorization under this permit, the DEQ has relied on the information and data that the permittee has provided in connection with the permit application. If, subsequent to the issuance of an authorization, such information and data prove to be false, incomplete, or inaccurate, the DEQ may modify, revoke, or suspend the permit, in whole or in part, in accordance with the new information.
N. The permittee shall indemnify and hold harmless the State of Michigan and its departments, agencies, officials, employees, agents, and representatives for any and all claims or causes of action arising from acts or omissions of the permittee, or employees, agents, or representatives of the permittee, undertaken in connection with this permit. This permit shall not be construed as an indemnity by the State of Michigan for the benefit of the permittee or any other person.
O. Noncompliance with these terms and conditions, and/or the initiation of other regulated activities not specifically authorized shall be cause for the modification, suspension, or revocation of this permit, in whole or in part. Further, the DEQ may initiate criminal and/or civil proceedings as may be deemed necessary to correct project deficiencies, protect natural resource values, and secure compliance with statutes.
P. If any change or deviation from the permitted activity becomes necessary, the permittee shall request, in writing, a revision of the permitted activity from the DEQ. Such revision requests shall include complete documentation supporting the modification and revised plans detailing the proposed modification. Proposed modifications must be approved, in writing, by the DEQ prior to being implemented.
Q. An authorization under this permit may be transferred to another person upon written approval of the DEQ. The permittee must submit a written request to the DEQ to transfer the permit to the new owner. The new owner must also submit a written request to accept transfer. The new owner must agree, in writing, to accept all conditions of the authorization. A single letter signed by both parties that includes all of the above information may be provided to the DEQ. The DEQ will review the request and if approved, will provide written notification to the new owner.
R. Prior to initiating construction authorized, the permittee is required to provide a copy of the authorization to the contractor(s) for review. The property owner, contractor(s), and any agent involved in exercising the authorization are held responsible to ensure the project is constructed in accordance with all drawings and specifications. The contractor is required to provide a copy of the authorization to all subcontractors doing work authorized by the authorization.
S. Construction must be undertaken and completed during the dry period of the wetland. If the area does not dry out, construction shall be done on equipment mats to prevent compaction of the soil.

T. Authority granted by an authorization does not waive permit requirements under Part 91, Soil Erosion and Sedimentation Control, of the NREPA, or the need to acquire applicable permits from the County Enforcing Agent.

U. Authority granted by this permit does not waive permit requirements under the authority of Part 305, Natural Rivers, of the NREPA. A Natural Rivers Zoning Permit may be required for construction, land alteration, streambank stabilization, or vegetation removal along or near a natural river.

V. The permittee is cautioned that grade changes resulting in increased runoff onto adjacent property is subject to civil damage litigation.

W. Unless specifically stated in an authorization under this permit, construction pads, haul roads, temporary structures, or other structural appurtenances to be placed in a wetland or on bottomland of the waterbody are not authorized and shall not be constructed unless authorized by a separate permit or permit revision granted in accordance with the applicable law.

X. For projects with potential impacts to fish spawning or migration, no work shall occur within fish spawning or migration timelines (i.e., windows) unless otherwise approved in writing by the DNR, Fisheries Division.

DEQ

WATER RESOURCES DIVISION
POLICY AND PROCEDURES

NUMBER:	WRD-003
TITLE:	EVALUATION OF FEASIBLE AND PRUDENT ALTERNATIVES UNDER PART 303, WETLANDS PROTECTION, OF THE NREPA
PAGE:	1 OF 14

ISSUE:

The purpose of this document is to provide instruction to Water Resources Division (WRD) staff regarding the evaluation of feasible and prudent alternatives to projects proposed under Part 303, Wetlands Protection, of the Natural Resources and Environmental Protection Act, 1994 PA 451, as amended (NREPA), including amendments that took effect on October 15, 2009. Section 30311a(2) required the Department of Environmental Quality (DEQ) to "adopt a new guidance document for the evaluation of feasible and prudent alternatives."[1] In addition, this guidance responds to a directive to the DEQ made in the Final Determination and Order in the Petition of Martin and Deborah Ocedek (2004, DEQ File No. 00-05-0040).

This procedure is intended to clarify certain provisions of Part 303 and to provide information and encourage consistent administration of Part 303 by WRD staff. It is not intended to modify the provisions of Part 303, and should there be any apparent inconsistency between this operating procedure and statutory or administrative rule requirements, the language in the statute and rules should guide staff decisions.

AUTHORITY: Part 303 of the NREPA. Part 303 requires consideration of feasible and prudent alternatives in determining whether or not a proposal is in the public interest:

> **"Section 30311. (2) In determining whether the activity is in the public interest, the benefit which reasonably may be expected to accrue from the proposal shall be balanced against the reasonably foreseeable detriments of the activity . . . The following general criteria shall be considered:**
> **. . .**
> **(b) The availability of feasible and prudent alternative locations and methods to accomplish the expected benefits from the activity."**

In addition, a prohibition is placed on issuance of a permit unless the applicant demonstrates either wetland dependency, or that there is no feasible and prudent alternative:

> **"Section 30311. (4) . . . A permit shall not be issued unless the applicant also shows either of the following:**

[1] Section 30311a(2) further provides: "The guidance document shall be consistent with findings and recommendations of the United States environmental protection agency's region 5 review of the program under this part. The department shall develop the guidance document in consultation with interested parties, including the [wetland advisory] council [established under Section 30329]."

(a) The proposed activity is primarily dependent upon being located in the wetland.

(b) A feasible and prudent alternative does not exist."

In 2009, Part 303 was amended to include the following provisions:

"Section 30311. (5) If it is otherwise a feasible and prudent alternative, an area not presently owned by the applicant which could reasonably be obtained, utilized, expanded, or managed in order to fulfill the basic purpose of the proposed activity may be considered.

(6) An alternative that entails higher costs, as described in R 281.922a(11) of the Michigan administrative code, is not feasible and prudent if those higher costs are unreasonable. In determining whether such costs are unreasonable, the department shall consider both of the following:

(a) The relation of the increased cost to the overall scope and cost of the project.

(b) Whether the projected cost is substantially greater than the costs normally associated with the particular type of project."

R 281.922a (promulgated in 2000) of the Wetlands Protection Rules (Wetlands Rules), promulgated under Part 303 of the NREPA, provides guidance to DEQ staff on the evaluation of feasible and prudent alternatives and wetland dependency. However, in the Final Determination and Order in the Petition of Martin and Deborah Ocedek (2004, DEQ File No. 00-05-0040), the director noted that there has been some confusion generated by the DEQ application of these rules in a manner that is inconsistent with the plain language of the rules. In order to reduce confusion, and to facilitate the processing of applications by the DEQ, the DEQ was directed to develop additional guidance regarding the evaluation of feasible and prudent alternatives. This order included the following specific directions:

"In general, the geographical extent of the feasible and prudent alternatives analysis is related to the basic project purpose. Consistent with the statutory criteria and purpose, the most logical standard is to establish the geographic area consistent with the project purpose and facts of the case. Once the basic project purpose is properly defined, it becomes easier for an applicant to identify potential alternatives, including the geographical area where there are potential alternative locations, and then to evaluate whether those alternatives are feasible and prudent. I am directing MDEQ staff to develop further interpretive guidance in this area as well."

PROCEDURE:

PROJECT PURPOSE

Appropriate definition of the basic project purpose is important because it defines the scope of the alternatives analysis; that is, only those alternatives that will achieve the project purpose need be considered by the applicant and assessed by the DEQ. The basic project purpose should clearly and specifically define why the applicant is proposing to alter wetland resources, but should not be so narrowly defined as to preclude any alternative but the applicant's preferred one. The applicant's definition of the project purpose should include the scope of the proposed project; e.g., a driveway to a single-family home, a single-family home development, or an industrial park. It may also include the associated general location. For the examples given, these might be a proposed upland home site (accessed by the wetland crossing), in the vicinity of a particular community, and a site near a major interstate system and other industrial area, respectively.

To give another example, the project purpose may be to "construct an elementary school to serve approximately 350 students in the southern portion of a particular community." In this instance, the benefits of the school can only be realized within a given geographic location, and some sites may be precluded due to size or because of the presence of adjacent development or other conditions not compatible with a school. The scope of the alternatives analysis is thus readily apparent.

In another instance, the basic project purpose may be construction of a residential development. In this case, it is appropriate to specify, as part of the project purpose, the general location and type of housing planned; e.g., "a single family home development to help meet the housing demand in the vicinity of a particular community." It is not acceptable to define the project purpose in a manner that limits the project to the applicant's preferred location; e.g., a "152-lot subdivision on the shore of a certain lake between certain roads."

It is understandable that a proposed project may have been designed to take advantage of the features of a given site, such as its proximity to a waterfront, or provision of a particular scenic view. However, from the perspective of Part 303 and the Wetlands Rules, these features may not be necessary to meet the basic project purpose, whether that is to provide housing, or to develop a commercial venture. Alternative sites that do not include such secondary features could thus be feasible and prudent alternatives.

The statement of project purpose must focus on the basic, or primary, purpose of the project. Where a mall, for example, has a particular configuration following models such as an anchor mall with outlots or a lifestyle center with leisure amenities, there may be variations from the standard model. As another example, a four-lane road needed to meet traffic loads may not need to be a boulevard.

R 291.922a(10) of the Wetlands Rules indicates that:

> **"An alternative may be considered feasible and prudent even if it does not accommodate components of a proposed activity that are incidental to or severable from the basic purpose of the proposed activity."**

GENERAL REQUIREMENTS IN EVALUATION OF FEASIBLE AND PRUDENT ALTERNATIVES

Under Part 303, the purpose of seeking an alternative is to determine whether it is feasible and prudent to avoid adverse environmental impacts of the proposed activity. It is not the purpose of the Part 303 alternatives analysis to select the best or most desirable alternative from the perspective of the applicant (which will presumably be the project as proposed).

In general, R 281.922a(6) of the Wetlands Rules directs the applicant to consider other locations, project size and configurations, and methods that may be used to accomplish the project purpose. A feasible and prudent alternative must be one that has less adverse impact on aquatic resources. If the use of an alternative would have a greater adverse impact on aquatic resources than the applicant's preferred option, that alternative is not feasible and prudent given the resulting resource impact.

This general description of a feasible and prudent alternative applies to <u>both</u> Section 30311(2)(b) and Section 30311(4)(b) of Part 303. The Final Determination and Order in Ocedek includes the following clarifying language:

> *"Section 30311(4)(b) unambiguously requires that any alternative, whether it is on-site or off-site, be utilized if it is "feasible and prudent." . . . [In] the future, the Department of Environmental Quality will consider off-site alternatives under § 30311(4)(b)."*

<u>"Economic Development" as a Component of Project Purpose</u>

Definition of the project purpose must be specific enough to meaningfully evaluate the impacts of the proposed activity and the availability of feasible and prudent alternatives. Consequently, relying only on a vague description of purpose of the project as "economic development," or alteration of a site "for future development," would not be sufficient to enable DEQ staff to apply the Part 303 criteria.

If the applicant adequately defines the project purpose but indicates that the primary driver of the project is a desire to attract local or regional economic development, the alternatives analysis should reflect that fact. Examples include new road construction where the specific goal is stimulating economic growth – rather than responding to existing traffic needs; or the purpose is development of an industrial park by a local community to attract new business rather than to serve the needs of a specific company.[2] The range of alternatives available

[2] The discussion in this paragraph does not apply to all projects that provide economic benefits, but only to those that are driven primarily by a desire to *attract* unspecific economic development to a region.

could be very broad if the goal is jobs for the region since the desire for economic development is not tied to a specific site. In general terms, a project whose goal is attraction of economic development could be located anywhere in the region and could incorporate a full range of methods, sizes, and configurations (e.g., alternative forms of transportation, a variety of commercial ventures, etc.). Therefore, a relatively large number of options should be available and considered during the alternatives analysis. If the economic development goal is tied to the expansion of the tax base, location may be part of the purpose.

The language of Part 303 prohibits the DEQ from issuing a permit unless the applicant demonstrates that a feasible and prudent alternative does not exist. The permit decision also rests on other statutory criteria; among these is the public interest test that also requires consideration of the availability of feasible and prudent alternatives. (Provisions for wetland dependent activities are addressed below.) R 281.922a of the Wetlands Rules clarifies how the alternatives analysis impacts the regulatory decision. While the DEQ must independently evaluate and agree with the applicant's demonstration before a permit can be issued, Part 303 does not require or authorize the DEQ to locate or design an alternative. If the DEQ finds that the applicant has failed to demonstrate that a feasible and prudent alternative does not exist, then it must deny the permit.

GEOGRAPHIC SCOPE OF THE ALTERNATIVES ANALYSIS: APPLYING THE PROJECT PURPOSE

The geographic scope of the alternatives analysis is dictated by the project purpose and by the facts associated with the specific proposal. The project purpose is often associated with a specific market area, geographic region, or local unit of government. Sites outside of the area defined in the project purpose need not be considered. Note, however, that the project purpose should reasonably define the location; a specific location that arbitrarily limits consideration of alternatives to the applicant's preferred site is not consistent with analysis mandated by Part 303 and the Wetlands Rules, especially R 281.922a(4). It may be necessary to locate residential or commercial development within a particular community in order to provide the benefits associated with the project purpose. In other instances, the needs of a community may be met if development is in proximity to the community; e.g., development of a nearby industrial site that will provide employment opportunities to the community. It is unusual, but possible, that a project purpose is statewide in nature.

> *Example: The alternatives analysis for a gypsum mine expansion project considered the availability of ore reserves on a statewide basis. However, in each specific location where mining was possible, the configuration of the ore body would limit on-site alternatives.*

Current ownership of the property is not generally a consideration in the alternatives analysis. Sites not currently owned by the applicant must be considered if they are "available." See Section 30311(5) of Part 303 as cited in the Authority section of this procedure.

The scope of a search for available sites is related to the specific project. For a typical project, it may be sufficient to identify appropriate parcels currently listed for sale. However, for a large project with potentially major impacts, the applicant should make a reasonable effort to

determine whether other appropriate parcels of land are potentially available. If the permit applicant has the authority to condemn property for a proposed public works project, such as a highway, a greater range of feasible and prudent alternative locations will be available. Other factors that may be taken into consideration when determining whether a particular parcel represents a feasible and prudent alternative include site zoning, availability (or potential availability) of utilities and other infrastructure, and similar site limitations.

Where the proposed activity is associated with an existing structure or facility, it is possible that the only alternatives that can accomplish the project purpose are on-site. Potential examples include the expansion of an existing home or business, the construction of a driveway, the addition of parking spaces, or the widening of a road. However, piecemeal development of a site in an effort to limit alternatives to an on-site location is not consistent with the requirements of Part 303 and the Wetlands Rules with regard to minimizing adverse impact to wetlands, consideration of feasible and prudent alternatives, and consideration of cumulative effects on aquatic resources.

If the potential adverse impact of a proposed expansion of an existing facility is significant or if the expansion essentially represents a different use of the site, it is reasonable to consider the alternative of relocating the facility at another location. Note that even if the only alternative is on-site, the permit may be denied if the proposed activity will result in an unacceptable disruption to the resource as prohibited by Part 303.

Retail Developments

Proposals involving retail developments often define a market area, which can be an acceptable component of the project purpose. However, retailers may also propose a series of specific marketing goals or preestablished criteria that may have been used in selecting the applicant's preferred site, but that may not be appropriate in determining whether there is a feasible and prudent alternative under Part 303. Detailed marketing goals that include factors such as the precise distance from intersections, location on specific roadways, distance from multiple communities, adjacent traffic volume, setbacks and visibility from various locations, and signage requirements, may sometimes be so narrowly defined as to preclude all but the preferred location and place arbitrary limits on the alternatives analysis. That is, such restrictive marketing related site criteria do not define the basic project purpose. Marketing goals may well have been designed to maximize the profit from the proposed project. However, as described in Section 30311(6) of Part 303, the most profitable location may not be the only feasible and prudent alternative – although the cost of an alternative must be reasonable, taking into account the normal cost of the type of development in question.

The primary purpose of a retail project may, consistent with Part 303 and the Wetlands Rules, be defined as development of a particular type of retail development (e.g., grocery, big box retail, small convenience store, sporting goods, etc.) within a general market area. The availability of alternative sites within that market area may then be appropriately considered.

All-Wetland Residential Lots

The argument is sometimes made that there is no alternative to use an all-wetland lot in a highly desirable location, such as a lakefront. Note that the primary purpose of a residential development project is typically housing, which may in some circumstances be further defined as vacation housing or housing in proximity to water resources. However, there may be alternatives that also provide the applicant access to water-related recreational opportunities. Lake access may be available at other locations that may use otherwise buildable, upland area but reduce the wetland impacts.

Also relevant to the determination of feasible and prudent alternatives is the ownership and history of the lot. Whether and when a lot was created as a result of the division of land severing upland areas from the wetland area is a relevant and appropriate consideration. For example, in reviewing an application to fill wetland on an all-wetland or predominantly wetland lot that has recently been divided from a larger parcel containing buildable uplands, the DEQ may consider that history as evidence of feasible and prudent alternatives.

If a permit is denied based on the availability of feasible and prudent alternatives, the unacceptable impact to the resource associated with the proposed activity should be documented as well, applying the decisional criteria of Section 30311. In identifying the least damaging alternative, the fact that riparian wetlands provide water quality and fish habitat benefits to the public that cannot be replaced easily, if at all, should be considered. Riparian areas are essential to the biological productivity of the lake as a whole. Development of waterfront property frequently results in cumulative impacts as the shoreline is developed, and the availability of feasible and prudent alternatives that result in less impact must be considered.

While it is presumed that there is a feasible and prudent alternative to the use of an all-wetland lot for housing, under certain circumstances the applicant may be able to make the opposite demonstration (see R 281. 922a[7]).

- Ownership of the lot by the same person since prior to October 1, 1980 (the effective date of the former Wetland Protection Act, now codified as Part 303), may, when balanced with the ecological value of the site, favor limiting the consideration of alternatives that avoid and minimize impacts to on-site alternatives. The rationale is that the applicant made a reasonable site selection given the regulations in place at the time the property was purchased, and does not now have the same options available (this may not be the case if there has been little or no development in the vicinity). Note that even if the site has been held by the same owner for an extended period, the permit must still be denied under Section 30311 of Part 303 if the wetland provides public benefits which, on balance, outweigh the private interest in development of the property, or if cumulative impacts to the resource are of a magnitude that make additional impact unacceptable.

- If a particular wetland parcel is severely degraded or has become so detached from other resources due to surrounding development that it no longer provides public benefits, the applicant may be able to demonstrate that there is no feasible and prudent alternative that is less damaging to the aquatic resource.

Caution should be exercised in making such a finding, and the functions provided by the wetland should be considered on a landscape scale. For example, isolated wetland pockets in the watershed of a high quality lake can trap and retain runoff that would otherwise contribute to eutrophication of the lake. Pockets of wetlands in the vicinity of a headwater stream may help to maintain base flow during dry weather conditions. The alteration of small and isolated wetlands may result in a cumulative loss of significant public benefits.

- In a large geographic region where wetlands make up a significant portion of the landscape, it may be more difficult to avoid wetland impacts. However, the presence of abundant wetland resources alone should not be used as justification for wetland alteration if there are clearly upland alternatives available. Use of all-wetland lots would not be consistent with Part 303 unless the applicant provides an analysis demonstrating that feasible and prudent alternatives are not available. Advance wetland planning by a community may be useful in evaluating where impacts to wetlands are unavoidable, and where the protection of remaining wetlands is important to the public, even if alternatives are limited.

Whenever the DEQ finds that the applicant has demonstrated that there is no feasible and prudent alternative to the use of an all-wetland lot, and that the project will not result in an unacceptable disruption of aquatic resources, the impact must still be minimized through the design of the structure and its placement on the lot; i.e., through the use of alternative size, configurations, and methods (see R 281.922a[6]). For example, the fill should be as close to the road as possible, two-story structures should be given preference over a one-story building with a larger footprint, fill for appurtenant structures such as lawns or decks should be minimized, and a vegetated wetland buffer should always be maintained along any adjacent waterbody. Moreover, while it may be appropriate to allow some use of the lot given the factors discussed above, it is not necessarily appropriate to allow use of an entire larger parcel; e.g., for multiple home site development.

TIME FRAME: WHEN MUST ALTERNATIVES BE AVAILABLE

A question may be raised regarding when, in a temporal sense, alternatives must be available. Possibilities include: at the time the applicant first seeks a location for the proposed project,[3] at the date of the permit application, or at the time of an eventual appeal of a permit application. Federal appellate courts applying the analogous provisions of Section 404 of the Clean Water Act, 33 USC §1344, have approved decisions that considered the alternatives available at the time the property at issue was purchased, at the time of the application, or at the time of decision, depending upon the circumstances, including whether the applicant knew or should have known of the alternatives.

[3] Federal courts applying analogous provisions of Section 404 of the Clean Water Act sometimes refer to this as the "market entry test."

OPTIONS THAT MUST BE CONSIDERED

As noted above, under R 281.922a(6)(b), a feasible and prudent alternative may include any or all of the following:

(i) Use of a location other than the proposed location.
(ii) A different configuration.
(iii) Size.
(iv) Method that will accomplish the basic project purpose.

This rule outlines options that must be considered as part of the analysis of feasible and prudent alternatives.

Configuration and Size

Whether the alternative is on-site or off-site, the applicant must consider alternative designs and layouts that will avoid and minimize aquatic resource impacts. For a residential development, this may include reducing the number or size of lots or reconfiguring the layout of the lots to avoid or minimize impacts to wetlands. Commercial developments may be reconfigured through innovative design and layout to reduce the size of the project footprint that impacts wetland resources, use of multiple-story buildings or parking structures, or reduction in the overall scale of the project. If the scope of the proposed project does not mesh well with the areas of the proposed site that can be utilized without significant resource impacts, use of an alternative site may be more feasible and prudent. Ultimately, if the applicant demonstrates that there are no options that avoid or minimize impacts, a decision on the permit application will be made based on other statutory criteria based on public interest and the impacts to the resource.

Again, the scope of the alternatives analysis should be consistent with the scale of the project. If the initial proposed design has effectively avoided wetland impacts, and the impact of the resulting project is small, provision of alternative designs may not be necessary. On the other hand, if a project would result in significant resource losses, the applicant should be requested to demonstrate that all options for reducing this impact have been considered. Applicants should be encouraged to clearly demonstrate efforts to avoid and minimize impacts in the application in order to expedite and facilitate the permit decision.

Methods

The applicant is required to consider alternative means of accomplishing the project purpose that will have less impact. Examples of alternative methods that may be used to accomplish the project purpose include:

- Spanning a wetland area or stream instead of placing a road bed on fill.
- Managing residential wastewater through engineered systems that require less space than septic fields, or by locating septic fields on an adjacent upland property.

- Construction of boardwalks rather than filled pathways; placing structures on pilings rather than on fill (except in situations where construction on pilings is as destructive of habitat or other resource values as fill).

- Providing shared driveways into a residential area, rather than individual drives for each lot owner.

- Constructing an engineered storm water management system, rather than discharging storm water into a natural wetland.

- Use of bioengineering or methods to control erosion along the shoreline of an inland lake, rather than a straight seawall with wetland backfill of a portion of the lake surface.

Many other alternative methods to avoid resource impacts, including advances in construction technology, have been used to meet the needs of particular projects, and applicants should be encouraged to be innovative in this regard.

CONSIDERATION OF COST

Section 30311(6) of Part 303 states that:

> **"An alternative that entails higher costs, as described in R 281.922a(11) of the Michigan administrative code, is not feasible and prudent if those higher costs are unreasonable. In determining whether such costs are unreasonable, the department shall consider both of the following:**
>
> **(a) The relation of the increased cost to the overall scope and cost of the project.**
>
> **(b) Whether the projected cost is substantially greater than the costs normally associated with the particular type of project."**

A permit applicant's preferred alternative may be less costly than other options for a number of reasons. For example, an alternative that uses a wetland site may be less expensive because the wetland property was available at a lower price than an upland site (because others considered it to be undevelopable). The applicant's preferred design or configuration of the project may have been selected to reduce construction costs, but may result in greater environmental impacts than other alternatives. For example, a "campus type" industrial park may impact a larger area than a more consolidated development. Likewise, a ground-level parking lot is generally less expensive than a parking ramp or below-ground parking.

Under Section 30311(6)(b) of Part 303, a primary consideration in determining whether the increased cost associated with a potential alternative is "reasonable" is whether that cost is within the customary range for the type of activity proposed. An alternative is feasible and prudent if it is within the range of costs normally associated with that type of project within that region. Thus, the increased cost of using an upland site is reasonable if it is typical for the type

of development in question on upland locations. Likewise, reconfiguration of a site to reduce the footprint (and thus the impact) may be considered reasonable if it is typical of the costs associated with that type of development when only a smaller area is available.

Other examples of increased costs that may be considered reasonable include the cost of bringing utilities to a site, if that cost is in line with bringing utilities into any newly developed area, or a reduction in the number of building lots available within a residential development. Note that under R 281.922a(10) of the Wetlands Rules, other properties that could reasonably be obtained, utilized, expanded, or managed are feasible and prudent alternatives.

On the other hand, an alternative may be rejected if the cost is substantially greater than the cost normally associated with the particular type of project. For example, the cost associated with construction of an entirely new factory, as opposed to expansion of an existing facility resulting in a limited wetland impact, may be found to be unreasonable.

Again, it is important to note that, even if there are no feasible and prudent alternatives, the permit must still be denied under Section 30311(4) of Part 303 if the project would result in an unacceptable disruption to the aquatic resource, or the proposed activity is not permittable under Section 30311(1)-(2) of Part 303.

Considerations Related to the Scope of the Project

An increase in cost that is reasonable (within the normal range) for a large business may not be reasonable for an individual homeowner or for a small business owner. That is, the cost should be considered within the context of the proposed project. For example, a retaining wall may be incorporated into a site design to reduce the length of a graded slope, and thus encroachment into wetlands. Depending upon the size of the wall, the associated cost may be entirely reasonable for a large commercial development, but significantly greater than costs normally associated with a single-family residential development. Likewise, the cost of spanning a sensitive wetland during highway construction may be well within the normal range of typical costs for spanning roads or other obstacles, but prohibitively expensive for obtaining access to a small business site.

Therefore, the DEQ should consider the type or category of applicant (homeowner, small business, corporation, government agency, etc.) and the overall scope of the project in evaluating reasonable costs. It is not, however, appropriate to consider the financial resources or standing of the *individual* applicant. That is, if the cost of constructing a home or small business on an alternative upland lot is typical for the scale of the structure, that alternative may be considered reasonable, even if an individual applicant asserts that he or she can only afford the project if placed on an inexpensive wetland lot.

CONSIDERATION OF OTHER WETLAND ALTERNATIVES

In most instances an alternative site will be an upland location, but the use of wetland sites that have a lesser impact may be considered. For example, the choice of a road corridor frequently involves selection of the route with the smallest wetland and aquatic resource impact, and it may be impossible to identify a no-impact alternative.

R 281.922a(8) of the Wetlands Rules further clarifies the consideration of alternatives by stating the presumption that non-wetland (upland) locations are less damaging than wetland locations. While in general it is presumed that an upland alternative will have less impact on aquatic resources than a wetland location, in certain circumstances the applicant may be able to demonstrate that use of upland is not a feasible and prudent alternative.

For example, if the only alternative site is an upland that provides critical habitat for amphibians during certain life stages, or for a threatened or endangered upland species, and the wetland alternative has no such special value, then the DEQ may find that the upland site is not a feasible and prudent alternative. Likewise, if the alteration of an upland location by the proposed activity would result in the significant degradation of an adjacent waterbody, the DEQ may find that this upland site is not a feasible or prudent alternative.

WETLAND DEPENDENT ACTIVITIES

R 281.922a(5) of the Wetlands Rules describes the type of activity that is considered wetland dependent by the DEQ:

> **"The department shall consider a proposed activity as primarily dependent upon being located in the wetland only if the activity is the type that requires a location within the wetland and wetland conditions to fulfill its basic purpose; that is, it is wetland-dependent. Any activity that can be undertaken in a non-wetland location is not primarily dependent upon being located in the wetland."**

Thus, the only activity that is wetland dependent is one that must have wetland conditions--wetland hydrology, soils, and/or plants--to fulfill its basic purpose. In general, if a category of activity could be undertaken on an upland site, then it is not wetland dependent. If a category of activity could be undertaken on either a wetland or an upland site, then it is not wetland dependent. It is expected that very few activities must be located in a wetland to achieve their basic project purpose. Under R 281.922a(2) of the Wetlands Rules, the burden of demonstrating that a project is wetland dependent is on the permit applicant.

The proposed regulated activity and the project purpose must both be considered in determining wetland dependency. For instance, if the activity is filling and excavation associated with residential development, the basic purpose is to provide shelter (housing) for people. A house does not need to be located in a wetland or have wetland conditions; therefore, residential development is not primarily dependent upon being located in the wetland.

An activity that is typically considered wetland dependent is the extraction of sphagnum peat, as this particular type of peat is found only in wetlands (bogs), and thus the basic project purpose (peat extraction) can only be achieved in a wetland area. Many wetland restoration activities could also be considered wetland dependent.

Michigan's "wetland dependent" criterion is based on the similar federal term "water dependent," and staff can look to the federal definition and case law for help in interpretation of this term. The preamble to the Section 404(b)(1) Guidelines of the federal Clean Water Act includes discussion of the term "water dependent" as it relates to the use of wetlands and other "special aquatic sites." An example is provided in the preamble of a proposed wetland fill to create a restaurant site; since a restaurant does not need to be in wetlands to fulfill its basic purpose of feeding people, it is not a water dependent activity. Refer to the "Instructions for Completion of the Project Review Report" for additional information.

Evaluation of Feasible and Prudent Alternatives for Wetland Dependent Projects

The availability of a feasible and prudent alternative is one of the considerations under the public interest test of Section 30311(2)(b) of Part 303. This test applies to all proposed projects, including those that are determined to be wetland dependent, although the scope of the alternatives analysis is much more limited than it would be for a non-wetland dependent project.

The language of the statute is specific, requiring consideration of the availability of alternative locations and methods to accomplish the expected benefits from the activity. For a wetland dependent project, the range of alternatives considered would logically be limited to other wetland locations and alternative on-site methods.

For example, even though the applicant's preferred site and an alternative site are both wetlands, use of the applicant's preferred site may be determined to be more damaging to the resource if it provides habitat for rare species (and the alternate site does not), or if impacts on downstream waters or other secondary or cumulative impacts would be greater at the applicant's preferred site. On-site alternatives may include downsizing or reconfiguring the proposed activity to minimize resource impacts while still achieving the basic project purpose.

Under Section 30311(2)(b) of Part 303, an alternative should be selected if associated overall impacts would be lower. If a proposed activity is wetland dependent and the DEQ determines that use of the applicant's preferred site or method must be denied due to the availability of a less damaging alternative, the denial is based on the fact that the preferred alternative is not in the public interest, in accordance with Section 30311(1) of Part 303.

CRANBERRY BED CONSTRUCTION: WATER DEPENDENT ACTIVITIES UNDER PART 303

Section 30301(1)(v) of Part 303 defines "water dependent" as follows:

> **"Water dependent means requiring access or proximity to or siting within an aquatic site to fulfill its basic purpose."**

Section 30305(b) of Part 303 further defines cranberry beds, including associated dikes and water control structures, as being "water dependent." Associated activities, including roads, ditches, pump houses, reservoirs, and support facilities for shipping, storage, packaging, and parking, are specifically *not* considered water dependent by the language of this section. For those aspects of cranberry operations that are water dependent, Part 303 provides that the demonstration by an applicant that there is no feasible and prudent alternative to the

construction of cranberry beds is not subject to either of the following two presumptions: (1) that there is a feasible and prudent alternative that does not involve wetland; and (2) that a non-wetland alternative will have less adverse affect on the aquatic ecosystem.[4] However, the DEQ must still determine whether a disruption to the aquatic resources is unacceptable and if a feasible and prudent alternative does not exist as provided in Section 30311.

DOCUMENTATION REQUIRED

The extent of the alternatives analysis should be commensurate with the scale and potential impact of the proposed project. If the permit applicant has clearly avoided wetland impacts in the initial design of the project, the proposed activity would have only a minimal impact and the wetland in question does not provide significant public benefits, then there may be few alternatives that are *even less* damaging. As noted in federal guidance on this subject, ". . . the [Section 404(b)(1)] Guidelines do not require an elaborate search for practicable alternatives if it is reasonably anticipated that there are only minor differences between the environmental impacts of the proposed activity and potentially practicable alternatives."[5]

On the other hand, if the impact on the applicant's preferred site is large or if wetlands on the preferred site provide significant public benefits, there are likely to be numerous less damaging options (alternative sites, configurations, sizes, or methods). If the wetland resource being impacted is rare or provides critical benefits that cannot be replaced, it could be very difficult to demonstrate that there is no less damaging alternative.

Approved: William Creal Date: 8/25/2011

William Creal, Chief
Water Resources Division

[4] Section 30329(9)(h) of Part 303 requires that the Wetland Advisory Council evaluate and make recommendations on the following prior to August 15, 2012: "Appropriate regulation of the siting, construction, and operation of cranberry production activities, in light of the benefit of cranberry production activities to the economy, the regulatory approach of other states, and other factors." This procedure may be reevaluated in light of the recommendations of the Council.

[5] August 23, 1993, Memorandum to the Field regarding the Appropriate Level of Analysis Required for Evaluating Compliance with the Section 404(b)(1) Guidelines Alternatives Requirements, issued by the U.S. Environmental Protection Agency and the U.S. Army Corps of Engineers.