

	<b>WATER RESOURCES DIVISION POLICY AND PROCEDURE</b>		DEPARTMENT OF ENVIRONMENTAL QUALITY
Original Effective Date: August 25, 2011	Subject: Evaluation of Feasible and Prudent Alternatives Under Part 303, Wetlands Protection, of the NREPA		Category:
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*A Department of Environmental Quality (DEQ) Policy and Procedure cannot establish regulatory requirements for parties outside of the DEQ. This document provides direction to DEQ staff regarding the implementation of rules and laws administered by the DEQ. It is merely explanatory; does not affect the rights of, or procedures and practices available to, the public; and does not have the force and effect of law.*

**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."<sup>1</sup> 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:

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<sup>1</sup> 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]."

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

**(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*

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*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."*

**PROCEDURES:**

**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

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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 both 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)."*

#### "Economic Development" as a Component of Project Purpose

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

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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.<sup>2</sup> The range of alternatives available 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.*

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<sup>2</sup> 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.

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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.

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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,

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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 water body. 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,<sup>3</sup> 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

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<sup>3</sup> Federal courts applying analogous provisions of Section 404 of the Clean Water Act sometimes refer to this as the "market entry test."

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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.

#### 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:

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- 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

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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 permissible 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

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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

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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

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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 effects on the aquatic ecosystem.<sup>4</sup> 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."<sup>5</sup>

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<sup>4</sup> 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.

<sup>5</sup> 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.

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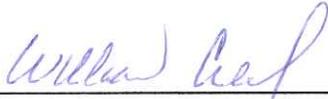
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is reasonably anticipated that there are only minor differences between the environmental impacts of the proposed activity and potentially practicable alternatives."<sup>5</sup>

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.

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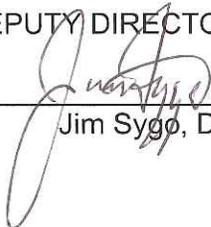


William Creal, Chief  
Water Resources Division

Date:

2/14/13

DEPUTY DIRECTOR APPROVAL: [if External/Interpretive]



Jim Sygo, Deputy Director

3/6/2013

Date

<sup>5</sup> 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.