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Wetlands

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I. Introduction §10.1

In 1979 the legislature enacted the Goemaere-Anderson Wetland Protection Act, former MCL 281.701 *et seq.*, finding that wetland conservation is, among other things, a matter of state interest since a wetland in one county can be affected by the acts on a river, lake, stream, drain, or wetland of another county. See former MCL 281.702, now [MCL 324.30302\(1\)\(a\)](#). Wetlands protection is now codified in Part 303 of NREPA, [MCL 324.30301 et seq.](#) The purpose of enacting Part 303 was to prevent loss of wetlands, which are important for storm control, wildlife habitat, groundwater recharge, pollution treatment, and erosion control. [MCL 324.30302\(1\)\(b\)](#).

II. Part 303: Wetlands Protection

A. Delegation of Federal Authority to Administer Wetland Protection Program §10.2

Under § 404 of the Clean Water Act (CWA), Congress authorized the Army Corps of Engineers (the COE) to issue permits for dredge and fill activities in wetlands. [33 USC 1344](#). Section 309 of the CWA grants the Environmental Protection Agency (EPA) authority to enforce the permits issued by the COE under §404. [33 USC 1319](#), and authorizes the EPA to delegate administration of §404 programs to states. [33 USC 1344\(g\)](#). Both the EPA and the COE have entered into separate Memoranda of Agreement (MOA) with the Michigan Department of Natural Resources (DNR) (subsequently the Department of Environmental Quality and currently the Department of Natural Resources and Environment (DNRE)). In 1984, the COE delegated Michigan the authority to administer §404 in the state, but reserved primary jurisdiction over all navigable waters used in the transport of interstate or foreign commerce. See MOA between the COA and the DNR, October 24, 1984 at X(A)(2), [40 CFR 233.50](#).

Similarly, the EPA delegated its 404 authority to Michigan in 1983, but reserved the right to review major discharges of dredged or fill material (as defined in the MOA), discharges authorized by general permit, discharges into critical areas established under state or federal law, and discharges that may affect waters of a state other than Michigan. See MOA between the EPA and DNR ¶3. A major discharge includes, among other things, wetland fills involving more than 10,000 cubic yards of material. *Id.* ¶5. The COE and the U.S. Fish and Wildlife Service (FWS) also maintain authority to review all permit applications received by DNRE that fall within these categories.

Michigan is the only state to which the wetland enforcement authority of the EPA and the COE under section 404 of the CWA has been delegated. General guidance on Michigan's administration of Section 404 may be found on the DNRE [website](#).

B. The Administrative Process

1. When is a Permit Required? §10.3

Before beginning the permitting process under Part 303, the prospective applicant must first determine: (1) whether there is a “wetland” present on the subject property; (2) if so, whether it is a regulated wetland; and (3) whether the proposed activity requires a wetland permit.

a. Determine the Existence of a Wetland §10.4

Part 303 defines a wetland as “land characterized by the presence of water at a frequency and duration sufficient to support, and that under normal circumstances does support, wetland vegetation or aquatic life, and is commonly referred to as a bog, swamp, or marsh” [MCL 324.30301](#)(p). In determining whether an area of land is a wetland, the DNRE, and local governments that have enacted wetland ordinances, are required to apply the technical standards contained in the COE’s 1987 wetland delineation manual. [MCL 324.30301\(2\)](#) .

The DNRE has compiled wetland inventory maps by county. These maps are not comprehensive and are not regularly updated, and should be used only as a preliminary planning tool for determining whether wetlands are present on a particular property. You can access these maps at the DNRE’s [Wetlands Map Viewer](#) site. If wetlands are known or believed to be present, the prospective applicant should hire a qualified wetland consultant (QWC) to characterize and delineate potential wetlands. The ideal time to complete the delineation is between April and October when vegetation is present and visible.

The prospective applicant may request that the DNRE conduct wetland delineation through the agency’s wetland identification program. [R 281.924\(5\)](#). This program offers three levels of services, each with varying fees. Under Level 1, the DNRE only provides the appropriate wetland inventory map for the county. [R 281.924\(6\)\(c\)\(i\)](#). Under Level 2, agency personnel perform an on-site delineation of an identified area up to five acres in size. DNRE staff generates a letter report and site map identifying non-regulated wetlands and regulated wetlands on the property, if any. If there are areas of non-wetland and non-regulated wetlands identified on the property, the DNRE will issue a determination that it lacks jurisdiction. This determination remains valid for three years from the date of inspection. [R 281.924\(6\)\(c\)\(ii\)](#). Under Level 3, DNRE staff verifies a wetland delineation completed by a QWC and prepares a letter report and site map confirming or disagreeing with the QWC’s delineation. [R 281.924\(6\)\(c\)\(iii\)](#). DNRE issues the same jurisdictional determination for Level 2 and Level 3 services.

Fees for Level 2 and Level 3 services vary based on the size of the property to be delineated. The DNRE has developed a [calculator to determine fees](#) for inventory reviews. It is available on their website.

Unpublished decision: *People v Kozak*, unpublished opinion per curiam of the Court of Appeals, issued June 19, 2008 ([Docket No. 272945](#)) (descriptors “bog, swamp, or marsh” in [MCL 324.30301](#)(p) are only illustrative of typical areas that may be considered a wetland and do not limit the statutory definition of wetland).

b. Determine Whether the Wetland is Regulated §10.5

Not every wetland is a regulated wetland. The second consideration in the administrative process, therefore, is to determine if a wetland that is present on a subject property is regulated. Under [MCL 324.30301](#)(p), wetlands are regulated if they are (1) contiguous to the Great Lakes

or Lake St. Clair, an inland lake or pond, or a river or stream, or (2) greater than five acres in size with sufficient water to support wetland vegetation or wildlife.

A wetland may be considered “contiguous” to a regulated water body if (a) there is a permanent surface water connection or other direct physical contact to a Great Lake, Lake St. Clair, a river, stream, or an inland lake or pond; (b) there is a seasonal or intermittent direct surface water connection; (c) the wetland is partially located within 500 feet of the ordinary high water mark of an inland lake or stream or within 1,000 feet of the ordinary high water mark of one of the Great Lakes, or Lake St. Clair unless no surface or groundwater connection exists; or (d) two or more areas of wetland that are separated only by physical barriers such as a road or berm. [R 281.921\(b\)](#). A wetland is presumptively considered contiguous if it is within 500 feet of an inland lake or stream or within 1,000 feet of a Great Lake or Lake St. Clair. [R 281.921\(b\)](#).

The DNRE may assert jurisdiction over non-contiguous wetlands less than five acres in size if it notifies the property owner in advance and in writing that it has determined the wetlands are essential to the preservation of the state's natural resources from pollution, impairment, or destruction. [MCL 324.30301\(p\)\(iii\)](#).

Regulated wetlands are not limited to those created under natural conditions. Wetlands that were artificially created, such as through the removal of a drainage conduit or as the by-product of construction, are subject to regulation. *Citizens Disposal, Inc v Department of Natural Resources*, [172 Mich App 541](#), 549; 432 NW2d 315 (1988) (analyzing a provision under the former Geomaere-Anderson Wetlands Protection Act, MCL 281.702, now [MCL 324.30302](#)).

c. Determine Whether the Activity Requires a Permit or is Exempt §10.6

A permit is generally required if the applicant intends to perform any of the following activities:

- Deposit or permit the placing of fill material in a wetland
- Dredge, remove, or permit the removal of soil or minerals from a wetland
- Construct, operate, or maintain any use or development in a wetland
- Drain surface water from a wetland

[MCL 324.30304](#). Part 303 exempts from permit requirements several pedestrian activities, such as fishing, hunting, swimming, boating, and hiking and several industrial activities, such as oil and gas pipeline repair. [MCL 324.30305](#).

Farming and silvicultural activities are exempt from regulation under Part 303. [MCL 324.30305\(2\)\(e\)](#). The Michigan Supreme Court has held that not all activities necessary to farming are exempted, but only those specifically listed in the exemption, or activities of the same kind, class, character, or nature as the listed activities. *Huggett v Dep’t of Natural Resources*, [464 Mich 711](#), 719; 629 NW2d 915 (2001). The exemption is not limited to “land in established use for agriculture.” *Id.* at 721. The Court concluded, however, that this provision does not authorize full-scale construction of a new farm since many of the activities required to construct a new farm would not fall within the exemption. *Id.* at 722.

Following the Court's decision in *Huggett*, the DNRE issued guidance on the farming and silvicultural permit exemptions, adopting the court's same kind, class, character, or nature test, but continuing to consider the exemption applicable only for activities associated with ongoing farming operations. Land & Water Management Division Guidance Document [No. 303-05-03](#), February 2, 2005.

Part 303 exempts from regulation the construction or maintenance of farm or stock ponds. [MCL 324.30305\(2\)\(g\)](#). Although Michigan courts have not interpreted this exemption, the Court of Appeals for the Second Circuit has interpreted a parallel provision in the CWA, [33 USC 1344\(f\)\(1\)\(C\)](#), and the statute's exception to the exemption, known as the recapture provision, [33 USC 1344\(f\)\(2\)](#). *Coon v Willet Dairy*, [536 F3d 171](#) (2d Cir 2008). The CWA's recapture provision requires a permit if the diversion of navigable waters to construct a farm or stock pond is for the purpose of bringing an area "into a use which it was not previously subject." [33 USC 1344\(f\)\(2\)](#). In *Coon*, the defendant was an established dairy farm that diverted a stream to create a stock pond for its operations. *Id.* at 174. The plaintiffs contended that because defendant was constructing a new pond, it was using the area for a new use and required a permit, which it had not sought. *Id.* The court held that the recapture provision did not apply to the construction of a new pond in connection with a previously established farming operation simply because the pond itself is "new", and that any other interpretation of the recapture provision would render the exemption meaningless. *Id.* at 175. The DNRE guidance generally follows *Coon*, but narrows the scope of the exemption by imposing size and use conditions. See Guidance [Document No. 303-05-03](#).

2. Applying for a Permit §10.7

Section 30304 prohibits depositing or permitting the placement of fill in a wetland; dredging, removing or permitting the removal of soil or minerals from a wetland; constructing, operating or maintaining any development in a wetland; and draining surface water from a wetland. [MCL 324.30304](#). To conduct any of these activities, a permit application must be completed and submitted to DNRE Land and Water Management Division (LWMD) along with the required application fee. [R 281.922](#). Permit application requirements differ depending on the type of activity planned to be conducted and the location of the project.

There are two types of permits: individual and general. Review of all individual permit applications includes a notice and comment period. [MCL 324.30307\(1\)-\(7\)](#). Individual permits may be granted without a public hearing unless the applicant makes a request in writing for a hearing. [MCL 324.30307\(1\)](#). General permits are discussed in [§10.8](#). All permits issued by the DNRE are valid for five years. [MCL 324.30311b\(1\)](#).

Applicants in Michigan submit only one [wetland permit](#) application to the DNRE, available on the DNRE's website. The application is a joint application for either (or both) the state and federal agencies. The application is submitted to the DNRE whether a federal or state permit is needed. The DNRE forwards the application to the EPA to request federal comment or determination of the need for a separate federal permit. The DNRE may not issue a permit to which the EPA objects. If EPA objects, permit issuing authority reverts to the COE if, after 90 days from the date the EPA submits its objection, the DNRE has not requested a hearing on the objection. [33 USC 1344\(j\)](#) and 40 CFR 233.50 (j). Once jurisdiction over the permitting process

is transferred to the COE, EPA may not return permitting authority to the DNRE even if EPA's objections are withdrawn. *Friends of Crystal River v Environmental Protection Agency*, [35 F3d 1073](#), 1080 (6th Cir 1994).

The DNRE issues operational memoranda, guidance documents, and interpretive statements that provide the agency's interpretation of the policies underlying the Act and procedures for the application of the Act. These documents are not legally binding and may not be cited by the DNRE for compliance or enforcement purposes. [MCL 324.30311a\(1\)](#). While not binding on applicants, a review of these internal documents may provide insight to permit applicants. Documents are available on the DNRE's website, [WRD Policy Guidance Documents](#) and upon request to the LWMD.

General information concerning the permitting process and submittal requirements can be found on the MDRE website under [Wetlands Permits](#).

3. General Permits §10.8

Part 303 grants the DNRE authority to issue general permits for "minor" activities in regulated wetlands. [MCL 324.30312\(1\)](#) and [R 281.923\(1\)](#). The DNRE has authority to review applications for general permits without issuing a public notice or holding the comment period required for all other permits. *Id.* The DNRE has defined projects that it will consider for accelerated processing under a general permit. See "[General Permit Categories for Minor Activities in Wetlands in the State of Michigan](#)," issued June 13, 2007.

Over 20 categories of activities are defined by the DNRE as minor activities. Typical activities that may be processed under a general permit include: (1) construction of a pond impacting less than one-third of an acre of wetland and not connected to an inland lake or stream; (2) construction of boardwalks less than 6 feet wide and 500 feet long, and platforms less than 120 square feet; (3) construction of fences, subject to height and length restrictions; (4) driveway construction or widening; (5) the placement of utilities; (6) construction of storm water outfalls, culverts, and other drain maintenance; (7) oil, gas, and mineral well access roads; (8) septic system replacement; and (9) minor residential construction for parcels owned since 1980 with total construction not impacting more than one-quarter acre including driveway construction. *Id.* Each of these activities is subject to various limitations as outlined in the DEQ guidance and the general permit application.

General permits are not available for projects if: (1) the proposed project would constitute a "major discharge" subject to federal review; (2) the wetland is associated with a sensitive natural resource; (3) the LWMD determines the decision making process would benefit from a public review; (4) the LWMD determines that the project is minor, but it could have an adverse cumulative impact due to the characteristics of the wetland or its proximity to other projects; or (5) the project would require a permit under another part of NREPA. *Id.*

4. Criteria for Approval of a Permit §10.9

In order to approve a permit for any activity listed in [MCL 324.30304](#), the DNRE must review an application to determine whether the issuance of a permit is in the public interest, is necessary

to realize the benefits of the proposed activity, and that the activity is lawful. [MCL 324.30311](#)(1). In making the determinations, the DNRE also considers other criteria set forth in Section 30311 and the applicable rules. See [R 281.922a](#) and [MCL 324.30311\(2\)](#). The criteria generally focus on the applicant's burden to submit information demonstrating that there are "no feasible and prudent alternatives" to the proposed wetland alteration. [R 281.922a\(2\)\(b\)](#). The agency may also consider factors such as the nature and scope of the project. [R 281.922a\(3\)](#).

An alternative that entails higher costs is not considered feasible and prudent if those higher costs are "unreasonable." [MCL 324.30311](#)(6). In determining whether costs are unreasonable, the DNRE must consider the relation of the increased cost to the overall cost of the project, and whether the increased cost is substantially greater than costs normally associated with such projects. *Id.* Part 303 was amended in 2009 to require that the DNRE develop a guidance document for the evaluation of feasible and prudent alternatives. [MCL 324.30311a](#)(2). The statutory deadline for the DNRE's adoption of the guidance document is November 2010.

C. Local Government Regulation §10.10

A local unit of government may adopt an ordinance to regulate wetlands within its jurisdiction. [MCL 324.30307](#)(4). If a local government adopts such an ordinance, a permit must also be obtained from the local government for any proposed activity in a wetland under its jurisdiction. Local governments have the authority to modify, approve, or deny an application. [MCL 324.30307](#)(6). Local governments may regulate wetlands less than two acres in size, but such regulation must comply with the provisions of [MCL 324.30309](#). A local government unit must approve a permit for use of such a wetland unless the local government determines that the wetland is "essential" to preserve the natural resources of the local government. *Id.*

Unpublished decision: Forsberg Family, LLC v Meridian Twp, unpublished opinion per curiam of the Court of Appeals, issued Feb. 24, 2004 ([Docket No. 245413](#)) (local governments have the right to preserve and protect natural resources by use of a water features setback ordinance); *Divergilio v West Bloomfield Twp*, unpublished opinion per curiam of the Court of Appeals, issued Nov. 2, 2006 ([Docket No. 261766](#)) (local governments authorized to impose conditions for approval of permit, including requirement of buffer consistent with zoning; if local government unit finds that a wetland essential, but permit restrictions agreed to by applicant, local government need not find wetland to be "essential"); *Hall v West Bloomfield Twp*, unpublished opinion per curiam of the Court of Appeals, issued Dec. 23, 2008 ([Docket No. 279793](#)) (local government unit not bound by findings of fact and issuance of a permit by the DNRE when considering an application for a permit under its own wetland ordinance).

D. Mitigation

1. In General §10.11

The DNRE is authorized to impose, as a condition to the issuance of a permit, the requirement for compensatory mitigation. [MCL 324.30311d](#)(1). Mitigation involves the creation of a new wetland, restoration of a wetland in an area where it once existed, or preservation of an existing wetland.

2. DNRE Mitigation Rule §10.12

If mitigation is required, DNRE prefers that mitigation be implemented within the watershed and preferably as close to the site as possible if not on the site. [R 281.925](#)(7)(c). The DNRE can impose wetland mitigation requirements only after all of the following conditions have been met: (1) the wetland impacts are otherwise permissible under sections 30302 and 30311; (2) no feasible and prudent alternatives exist to avoid wetland impacts; and (3) an applicant has used all practical means to minimize impacts to wetlands. [R 281.925](#)(2). The requirement that an applicant use “all practical means” to minimize wetland impacts may include the permanent protection of wetlands on the site not directly impacted by the proposed activity under a conservation easement. Conservation easements are discussed in [§10.15](#).

DNRE may require mitigation as a condition of issuing a wetland permit after all relevant permit criteria have been evaluated. [R 281.925](#)(2). The DNRE may waive the wetland mitigation condition if the permitted wetland impact is less than one-third of an acre and no reasonable opportunity for mitigation exists. [R 281.925](#)(3). Activities authorized under a general permit do not require mitigation. [MCL 324.30311d](#)(1) and [R 281.925](#)(3)(b).

When mitigation is required, the type of wetland affected determines the required acreage to be committed to mitigation. The DNRE has established mitigation ratios (the amount of mitigation needed based on the amount and type of wetland impacted) based on the type of wetland affected by permitted activities. [R 281.925](#)(7)(e). For example, if mitigation is in the form of preservation of an existing wetland, for each acre impacted from permitted activities the applicant must preserve ten acres under easement granted to the DNRE. Unless a schedule is agreed on between the DNRE and the applicant, all mitigation activities must be completed before initiating permitted activities. [R 281.925](#)(9).

The DNRE can request a mitigation plan from an applicant, which should be prepared by a QWC or engineer, if required. The required contents of the plan are provided in [Rule 281.925](#)(6). General requirements include the submission of a development plan, a description of baseline conditions, performance standards, a construction schedule, and monitoring plans.

E. Challenging Conditional Permit Requirements or Permit Denial

1. Contested Case Hearings and Judicial Review §10.13

If DNRE denies a permit, the applicant may contest the denial through an administrative contested case hearing pursuant to the Michigan Administrative Procedures Act (MAPA), [MCL](#)

[24.201](#) *et seq.* [MCL 324.30319](#). A contested case petition must be filed within 60 days of the mailing of a written denial. [MCL 24.304](#). After filing the contested case petition, an informal “Rogers” hearing may be requested to facilitate negotiations. A Rogers hearing, following *Rogers v State Bd of Cosmetology*, [68 Mich App 751](#); 244 NW2d 20 (1976), is essentially a meeting with the DNRE project manager and field personnel in the presence of an agency facilitator for the purpose of working towards resolving issues surrounding the denial of the permit. In many situations a settlement may be reached whereby the DNRE conditions the issuance of a permit on completion of engineering concessions or mitigation alternatives. Absent settlement, the propriety of the denial will be resolved at the formal contested case hearing. The result of a contested case hearing is subject to judicial review as provided in MAPA. See Chapter 15 concerning MAPA.

2. Regulatory Takings §10.14

Part 303 authorizes a property owner who has been denied a permit to file an action alleging a taking of property without just compensation. [MCL 324.30323](#). See generally Chapter 12 concerning takings. The Michigan Court of Appeals has adopted a three-factor test to determine whether a regulatory taking has occurred when a landowner is denied a permit to fill wetlands. These factors are (1) the economic impact of the regulation on the claimant, (2) the extent to which the regulation has interfered with distinct investment-backed expectations, and (3) the character of the government action. *K&K Constr, Inc v Dep’t of Environmental Quality*, [267 Mich App 523](#), 552; 705 NW2d 365 (2005).

In *K&K Construction*, the DNRE denied commercial developers’ application for a permit to fill areas of wetlands dispersed across four parcels consisting of 82 acres of land. The court held that the denial did not cause a compensable regulatory taking of the developers’ property, finding that, although the permit denial causes the property owners to suffer a diminution of value, the relevant tract retained substantial value and development potential. *Id.* at 554. Although there is no bright line threshold for a compensation decrease in property value, the court cited cases from other jurisdictions where claimants suffered a 75% diminution in value from regulatory action and implied that such a diminution would not necessarily give rise to a compensable taking, particularly if the remaining factors weighed against the claimant. *Id.*

Regarding the second factor, the court stated that reasonable investment-backed expectations of property owner are not rendered unreasonable simply due to knowledge of the wetland regulations, but where the owner is “experienced” in commercial development and the navigation of wetland laws, the owner should take into account the existence of the wetland regulations in establishing its investment-backed expectations. *Id.* at 557.

Under the third factor, a court will characterize the government action along a spectrum ranging from actual physical taking on the one hand “to a far-reaching, ubiquitous governmental regulation that provides all property owners with an ‘average reciprocity of advantage’ on the other.” *Id.* at 558. After a lengthy analysis on the character of wetland protection regulations, the court ultimately held that government action taken under Part 303 equates to “a wide-reaching, regulatory action that seeks to protect the rights of the public . . .”, a conclusion that weighs heavily against establishing a regulatory taking has occurred. *Id.* at 563.

3. Conservation Easement Requirements §10.15

The DNRE will often stipulate to issue a permit upon the grant by the owner of a conservation easement over undeveloped portions of the property. Part 303 authorizes the DNRE to “impose conditions on a permit for a use or development if the conditions are designed to remove an impairment to the wetland benefits, to mitigate the impact of a discharge of fill material, or to otherwise improve the water quality.” The holding in *K&K Construction* suggests that any challenge to the imposition of conditions will generally fail in an inverse condemnation action. [267 Mich App 523](#), 552; 705 NW2d 365 (2005).

Unpublished decision: Schultz v Dep’t of Environmental Quality, unpublished opinion per curiam of the Court of Appeals, issued May 6, 2008 ([Docket No. 272995](#)) (determination that an easement is necessary to mitigate potential environmental impacts on the property is to be given deference by the courts).

F. Enforcement

1. Administrative Enforcement §10.16

The DNRE generally uses administrative enforcement to attempt to resolve violations of Part 303 before referring the case to the attorney general for judicial enforcement. When DNRE believes a person has violated Part 303, the DNRE may informally advise the person that there are compliance issues or permit violations that require resolution. If DNRE fails to obtain voluntary compliance or if the violations are significant or numerous, the DNRE may issue a formal violation notice, which specifies the actions the recipient must take to return to compliance and the deadline for a response. [MCL 324.30315](#)(2). Failure to timely respond to the first violation notice may result in the issuance of a second violation notice or the initiation of judicial enforcement proceedings. [MCL 324.30315](#)(1) and [MCL 324.30316](#). In addition to requiring correction of the violation, the DNRE may assess fines or penalties. *Id.*

2. Judicial Enforcement §10.17

The DNRE has discretion to refer a violation to the Attorney General to file a civil action in state court. [MCL 324.30316](#). The DNRE is authorized to pursue simultaneous or successive civil and criminal enforcement actions for the same violation by the same person. *Id.* If local authorities believe there are grounds for criminal prosecution, the matter is referred to the DNRE’s Office of Criminal Investigations. If the Office of Criminal Investigation finds a basis for criminal prosecution, the matter is referred to the local prosecutor’s office.

a. Statute of Limitations §10.18

Part 303 contains no statute of limitations applicable to civil actions. The Court of Appeals, however, has held that the general six-year limitation provisions of [MCL 600.5813](#) apply to actions brought under Part 303. *Attorney General v Harkins*, [257 Mich App 564](#), 570; 669 NW2d 296 (2003). The statute of limitations begins to run when the “wrong upon which the

claim is based is done.” *Id.*, citing [MCL 600.5827](#). Hence, where the violation is discrete and completed on a particular and certain date, a claim under Part 303 begins to accrue. *Id.*

b. Continuing Violations §10.19

If the DNRE bases an action on a continuing violation, the agency must establish that the defendant was engaged in continuing acts that violated Part 303. An action based on a continuing violation may not be established by alleging continual harmful effects. *Attorney General v Harkins*, [257 Mich App 564](#), 572; 669 NW2d 296 (2003), citing *Horvath v Delida*, [213 Mich App 620](#), 626; 540 NW2d 760 (1995). Where a potential defendant has committed a particular violation, such as constructing in a wetland, once the particular act is completed, the statute of limitations begins to run. Accordingly, if a defendant undertakes additional construction or commits a separate violation, the statute is not tolled as to the previous violation. *Id.* at 573.

c. Penalties §10.20

Violations of Part 303 carry significant penalties that can be civil or criminal in nature. Civil penalties include revocation of the violator’s permit and monetary penalties of up to \$10,000 per day per violation depending on the magnitude and duration of the violation. [MCL 324.30313](#) and [MCL 324.30316](#). Under Part 303, the local prosecutor or the Attorney General may seek criminal penalties where a person willfully or recklessly violates a permit condition. Corporate officers who have knowledge of or are responsible for a violation may also be subject to criminal penalties, which include fines of up to \$25,000 per day of violation or imprisoned for a maximum of 1 year. *Id.*

3. Settlement Issues

a. Judicial and Administrative Consent Orders §10.21

A settlement agreement usually contains provisions requiring the person to correct the violation, take steps to ensure that the violation is not repeated, repair environmental damage and pay monetary penalties. The agreement may be in the form of an administrative consent order (ACO) or a judicial order. Due to the nature of a judicial order and requirement that the attorney general become involved, most consent orders are administrative unless they involve unusual or complex settlement issues, involve a high degree of public concern, or the alleged violator requests a judicial order.

b. Supplemental Environmental Projects §10.22

The DNRE may consider the use of a supplemental environmental project (SEP) as part of a settlement agreement in lieu of payment of a portion of a monetary penalty. SEPs may not be actions that the violator is otherwise obligated to perform, such as wetland mitigation or restoration required as part of the issuance of a permit.

4. Permit After-the-Fact §10.23

Under [MCL 324.30306\(5\)](#), the DNRE has discretion to accept an application for a permit after work has been done in violation of Part 303, provided that the department has not issued an order to restore the wetland to its original state before receiving the application. Once an order to restore has been issued, the DNRE lacks authority to process an after-the-fact (ATF) permit. *Maxwell v Dep't of Environmental Quality*, [264 Mich App 567](#); 692 NW2d 68 (2005). An applicant for an ATF permit does not have standing to request a contested case hearing under the Michigan Administrative Procedures Act (MAPA) if his or her permit application is denied. *Id.* at 573.

A challenge to an order to restore could possibly be made under the theory of estoppel if a potential plaintiff can show that the DNRE or its agents were on the property during the progression of the work that violated Part 303 and did not give any notice of the violation until the work was complete. *Id.* at 575. The court, however, declined to address the merits of this argument in *Maxwell*, since the plaintiff showed no support for the argument in the record. *Id.*

III. Federal Jurisdiction

A. In general §10.24

Under Section 10 of the Rivers and Harbors Act of 1899, [33 USC 401 et seq.](#), the United States Army Corps of Engineers (COE) is authorized to regulate the discharge of dredge or fill material into the navigable waters of the United States. Additionally, under Section 404(g) of the Clean Water Act, the COE retains federal jurisdiction over traditionally navigable waters including the Great Lakes, connecting channels, other waters connected to the Great Lakes where navigational conditions are maintained, and wetlands directly adjacent to these waters. [33 CFR 328.3](#). If an applicant seeks a permit to dredge or fill within these waters, both a federal permit and a state wetland permit must be obtained. [33 USC 403](#); [40 CFR 233.70](#).

At the request of a permit applicant, landowner, or affected party, the COE will issue either an approved or a preliminary jurisdictional determination (JD) identifying and delineating waters of the United States on a particular property. [33 CFR 329.15](#) and [331.2](#). An approved JD is an official determination by the COE and may be relied upon by a landowner or other affected party for five years. See [33 CFR 331.2](#) and U.S. Army Corps of Engineers Regulatory Guidance [Document No. 05-02](#), June 24, 2005. A preliminary JD is a non-binding, advisory determination that there “may be” waters of the United States on a particular property. [33 CFR 331.2](#). A definitive, official determination that there are, or that there are not, jurisdictional “waters of the United States” on a site can be made only by an approved JD. See U.S. Army Corps of Engineers Regulatory Guidance [Document No. 08-02](#), June 26, 2008. *Id.*

Guidance letters issued by the COE may be found on its website at [Regulatory Guidance Letters](#).

B. Judicial Evolution of Federal Jurisdiction Over Wetlands §10.25

As noted in [§10.24](#), the COE maintains jurisdiction over the Great Lakes, connecting channels, and other waters connected to the Great Lakes where navigational conditions are maintained.

The federal regulations extend the COE's jurisdiction over waters of the United States to include "wetlands" that are adjacent to other waters of the United States. See [33 CFR Part 328](#). Similar to Part 303, federal regulations define the term "wetlands" as "areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. . . ." [33 CFR 328.3\(b\)](#). The regulation defines "adjacent" wetlands as those "bordering, contiguous [to], or neighboring" waters of the United States. [40 CFR 328.3\(c\)](#). Wetlands separated from other waters of the United States by manmade or natural barriers are also considered adjacent wetlands. This jurisdictional definition of waters of the United States has evolved over several decades in light of various Supreme Court cases, the most recent being *Rapanos v United States*, [547 US 715](#) (2006). The following sections discuss the evolution of the COE's jurisdiction over wetlands under the CWA.

1. Cases preceding *Rapanos v United States* §10.26

In *United States v Riverside Bayview Homes, Inc.*, Riverside Bayview Homes challenged the COE's regulation ([33 CFR Part 328.3](#)) that included adjacent wetlands within its jurisdiction of waters of the United States. [474 US 121](#), 123 (1985). The Court upheld the COE's interpretation of its jurisdiction under the CWA and found the regulation to be valid. *Id.* at 139.

In *Solid Waste Agency of Northern Cook Cty v Army Corps of Engineers*, [531 US 159](#) (2001) (*SWANCC*), the COE attempted to exert jurisdiction over a gravel pit on the sole contention that it was a habitat for migratory birds. The court noted that its decision in *Riverside Bayview Homes* was based on the significant nexus between the wetlands and the navigable waters. *Id.* at 167. The court held that in order to find that the COE appropriately exercised its jurisdiction under the migratory bird rule alone, the COE would have to extend jurisdiction to waters not "adjacent" to navigable waters, which would essentially eliminate the "navigable" qualification. The significant nexus qualifier mentioned in *SWANCC* was resurrected in *Rapanos v United States* (see [§10.27](#)) by Justice Kennedy in his plurality opinion and has been adopted by several of circuit courts of appeal as discussed in [§10.28](#).

2. *Rapanos v United States* §10.27

In *Rapanos v United States*, [547 US 715](#) (2006), the United States Supreme Court attempted to resolve the question of whether federal jurisdiction existed over four separate wetlands, each of which was located near ditches or manmade drains that eventually emptied into traditional navigable waters. The court split 4-1-4 on the appropriate jurisdictional test. The majority, however, ultimately remanded the case to the lower court to determine whether three of the four wetlands fell within the COE's jurisdiction. *Id.* at 758.

The plurality set forth two criteria that must be satisfied to confer jurisdiction over wetlands to the COE: (1) relatively continuous flow, and (2) a continuous surface connection to traditional waters of the United States. *Id.* at 733, 742. The dissent argued that deference should be given to the COE in determining the existence of a hydrological connection between a particular wetland and the navigable water. *Id.* at 788.

Justice Kennedy's concurrence adopted the "significant nexus test" previously referenced by the court in *SWANCC* (see [§10.26](#)) as the applicable standard for determining whether a water or wetland is a water of the United States. *Id.* at 778-783. Justice Kennedy stated that a wetland meets the significant nexus test if "either alone or in combination with similarly situated lands in the region, [it] significantly affects the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'" *Id.* at 780. When a wetland's effect on water quality is "speculative or insubstantial, [it] fall[s] outside the zone fairly encompassed by the statutory term 'navigable waters.'" *Id.*

3. Judicial Application of the "Significant Nexus" Test §10.28

The Seventh, Ninth, and Eleventh Circuits have adopted Justice Kennedy's significant nexus test as the narrowest holding in *Rapanos v United States*, [547 US 715](#) (2006), to apply to jurisdictional determinations made by the COE. See *United States v Gerke Excavating, Inc.*, [464 F3d 723](#), 724-725 (7th Cir 2006); *Northern California River Watch v City of Healdsburg*, [496 F3d 993](#), 999-1000 (9th Cir 2007); *United States v Robison*, [505 F3d 1208](#), 1219 (11th Cir 2007). The First Circuit has held that jurisdiction would be appropriate under either the plurality test or the significant nexus test because, in certain circumstances, the plurality test may be the narrowest holding applicable. *United States v Johnson*, [467 F3d 56](#), 64 (1st Cir 2006). The Sixth Circuit has not considered the issue.

C. Federal Compensatory Mitigation Rule §10.29

On April 10, 2008, the COE and the EPA promulgated the Compensatory Mitigation for Losses of Aquatic Resources Final Rule pursuant to 2004 National Defense Authorization Act (PL 108-136). [73 Fed Reg 19594](#) (April 10, 2008). The COE regulations are found at [33 CFR Parts 325](#) and [332](#); the EPA regulations are found at [40 CFR Part 230](#). The purpose of the regulations is to systematize performance standards and criteria for the use of compensatory mitigation and mitigation banks. The regulations also account for regional variations in aquatic resource types and apply equivalent standards to each type of compensatory mitigation. The COE and EPA regulations are generally identical; therefore the EPA regulations are cited throughout this section. The new rule establishes a preference hierarchy of compensatory mitigation methods and standards for implementation. The rule prefers mitigation bank credits foremost, in-lieu fee mitigation second, and permittee-responsible mitigation as the least preferred option.

Mitigation banks consist of a particular wetland that is restored or preserved and set aside to compensate for future impacts to resources from permitted activities. The value of the bank is set in terms of "credits," which applicants may obtain to meet requirements for compensatory mitigation. In-lieu fee mitigation is a payment to an established program that conducts wetland or other aquatic resource restoration, creation, or enhancement. Mitigation banks are preferred over in-lieu fee payments because the credits generated by the banks are tied to completed restoration or conservation projects, whereas in-lieu payments fund project studies that have not yet been implemented. Under these two compensatory mitigation mechanisms, the permittee's obligations are relieved after payment to the particular bank or program.

The least-preferred mechanism, permittee-responsible mitigation, requires implementation by the permittee of a mitigation project on-site, at an area adjacent to the impacted location, or at a

location within the same watershed as the permitted impact. This is the only option available to permittees if a mitigation bank or an in-lieu fee program has not been established within the “service area” of the permitted impacts or the particular program does not have the resources available. The “service area” of the particular bank or in-lieu fee program is usually established in the same watershed.

All three compensation mechanisms require preparation of a mitigation plan. [40 CFR 230.94\(c\)\(1\)](#). In general, these plans requires a description of the baseline conditions, the proposed mitigation project, schedules and monitoring plans. See [40 CFR 230.94\(c\)](#).

Currently, Michigan regulations provide for mitigation banking and permittee-responsible mitigation only. [R 281.925\(12\)](#). See [§10.12](#). To date, however, few wetland banks have been established in Michigan. Consequently, most mitigation projects required under state law are completed by the permittees.

D. Enforcement §10.30

The EPA may exercise its enforcement authority under the CWA for a violation of the terms and conditions of a permit issued under Section 404, or an unpermitted dredging or discharge of fill into waters of the United States. Civil and criminal penalties may be assessed where a person commits such a violation. [13 USC 1344\(s\)](#). Civil enforcement mechanisms may be either administrative or judicial. The EPA is authorized to issue administrative compliance orders requiring a violator to stop any ongoing illegal discharge and, where appropriate, clean up orders to remove the illegal discharge and otherwise restore the site. [13 USC 1344\(s\)\(1\)](#). The EPA and the COE are authorized to assess administrative civil penalties of up to \$25,000 per day per action. [13 USC 1344\(s\)\(4\)](#).

If a court orders a judicial civil penalty, the court, in determining the amount of the penalty, must consider the seriousness of the violation, the economic benefit resulting from the violation, any history of violations, good-faith efforts to comply, the economic impact of the penalty, “and such other matters as justice may require.” [33 USC 1319\(d\)](#). In *United States v Pauley*, [321 F3d 578, 579](#) (6th Cir 2003), the defendants were found to have trenched, graded and filled wetlands without a permit. The court found that although “the scope of the violation was not huge” and only affected a small piece of land, the defendants’ history of refusing to comply with the law warranted a fine of \$25,000. *Id.*

The CWA allows the EPA to bring a criminal judicial action if a violation of Section 404 is determined to have been committed negligently, knowingly or willful. [33 USC 1319\(c\)](#). A negligent offense is punishable by fines of \$2,500 to \$25,000 per day. [33 USC 1319\(c\)\(1\)](#). Criminal penalties may consist of fines or prison. [33 USC 1319\(c\)\(2\)](#).

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