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Water Pollution

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I. Overview §2.1

The primary mechanisms for the regulation of water pollution in Michigan are Part 31 of the Natural Resources and Environmental Protection Act (NREPA), [MCL 324.3101 et seq.](#), the federal Clean Water Act, [33 USC 1251 et seq.](#), and the rules promulgated under each act. The U.S. Environmental Protection Agency (EPA) oversees the implementation and enforcement of these acts, but the Michigan Department of Natural Resources and Environment (DNRE) has the primary responsibility and authority to administer Michigan's federally approved water program.

This chapter begins by describing the general principles of the Clean Water Act, such as the National Pollutant Discharge Elimination System, minimum national effluent standards, and enforcement. The second part of the chapter discusses Michigan's water pollution statutes, regulations, and permitting process. This chapter provides only an overview of the statutes and regulations relating to water pollution in Michigan. It is therefore important for the reader to refer to the appropriate statutes, regulations, and case law for more details.

II. The Clean Water Act

A. In General §2.2

The Clean Water Act of 1972 (CWA), [33 USC 1251 et seq.](#), was enacted in response to growing awareness and concern for controlling water pollution. It is currently the primary federal statute regulating water pollution. The CWA was created to “restore and maintain the chemical, physical, and biological integrity” of the nation's waters. [33 USC 1251\(a\)](#); see also *Ass'n of Pacific Fisheries v Environmental Protection Agency*, [615 F2d 794](#), 801 (9th Cir 1980). To achieve this objective the CWA sets forth two major goals: (1) “water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water”; and (2) the elimination of discharges of pollutants into navigable waters by 1985. [33 USC 1251\(a\) et seq.](#) The elimination of pollutants was not attained by 1985, but with federal standards becoming more restrictive and treatment technology improving, there is still advancement towards the goal of zero discharge of pollutants. To accomplish these goals, the CWA established a permit program, a system of minimum national effluent standards, and oil and hazardous waste discharge reporting requirements.

B. The National Pollutant Discharge Elimination System

1. In General §2.3

The National Pollutant Discharge Elimination System (NPDES) is the CWA's chief instrument for imposing effluent limitations. [33 USC 1342](#). The CWA prohibits the “discharge of any pollutant” into “navigable waters” of the United States unless the EPA has issued an NPDES permit. [33 USC 1311](#); see also [33 USC 1362](#).

2. Definitions §2.4

The CWA defines the term “discharge of a pollutant” to mean “any addition of any pollutant to navigable waters from a point source.” 33 USC 1362(12). The statute does not define the term “addition,” *Catskill Mountains Chapter of Trout Unlimited, Inc. v City of New York*, [273 F3d 481](#), 489 (2d Cir 2001); however, there is case law that provides guidance as to its meaning.

In *National Wildlife Federation v Consumers Power Co*, [862 F2d 580](#) (6th Cir 1988) the defendant withdrew water from Lake Michigan for hydroelectric power generation. The defendant’s withdrawal of water led to the uptake of live fish, which were pureed after passing through hydroelectric generators. *Id.* The Sixth Circuit found that “returning the fish to the lake albeit in a different form, was not an ‘addition’ because the fish had already been there.” *Catskill*, 273 F3d 481, 492 (2d Cir 2001) (citing to *National Wildlife Federation* for the principle that to constitute “addition” of a pollutant, something new has to be added to the water).

Pollutant is defined as “dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water,” [33 USC 1362](#)(6). Courts generally have interpreted the definition of “pollutant” broadly. *Rapanos v United States*, [547 US 715](#), 723 (2006) (noting, “‘pollutant’ is defined broadly to include not only traditional contaminants but also solids”).

“Navigable waters” is defined as “waters of the United States, including territorial seas.” [33 USC 1362](#)(7). The Supreme Court in *United States v Riverside Bayview Homes, Inc.*, [474 US 121](#) (1985), held that non-navigable wetlands, if adjacent to navigable water, are within the jurisdiction of the CWA. The court noted that Congress chose to define waters covered by the CWA broadly. *Id.* at 131. In 2001, the Supreme Court in *Solid Waste Agency of Northern Cook County v Army Corps of Engineers*, [531 US 159](#) (2001), however, limited the CWA’s jurisdiction by concluding that isolated wetlands, i.e., those with no connection to navigable waters, should not be regulated by the CWA merely because migratory birds used that wetland. In *Rapanos v. United States*, [547 US 715](#), 742 (2006) the Supreme Court held that a determination of whether isolated wetlands fall under the purview of the CWA relies on a two prong showing that, (1) “the adjacent channel contains a ‘wate[r] of the United States,’ (i.e., a relatively permanent body of water connected to traditional interstate navigable waters); and (2), the wetland has a continuous surface connection with that water, making it difficult to determine where the ‘water’ ends and the ‘wetland’ begins.”. Essentially, the court held that where a “boundary drawing problem” exists in determining where water ends and abutting/ adjacent wetlands begin, a nexus will be assumed in favor of regulating the abutting wetland under the jurisdictional purview of the CWA. *Id.*

“Point source” is defined as “any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged.” [33 USC 1362](#)(14).

In 2004, the Supreme Court in *South Florida Water Management Dist v Miccosukee Tribe of Indians*, 541 US 95 (2004), held that the definition of a point source as a “conveyance” makes it clear that a point source need not be the original source of the pollutant, but merely a source that conveys the pollutant to a new body of water. The CWA, however, exempts agricultural storm water discharges and return flows from irrigated agriculture from the definition of “point sources.” [33 USC 1362](#)(14).

3. Permit Conditions §2.5

On October 17, 1973, the EPA approved Michigan’s NPDES program and in 1997 approved Michigan’s proposed modification to its program. [62 FR 14844](#). Although the state is the primary issuer of NPDES permits, the EPA retains some authority. For example, a state permit cannot be issued if the EPA objects within 90 days of receiving notice of the proposed permit. [33 USC 1342](#)(d)(2). NPDES permits ensure that a state’s mandatory standards for clean water and federal minimum standards are met by specifying acceptable levels of pollutants in a discharge. The CWA limits the length of NPDES permits to five years, after which permits can be renewed. *U.S. v. Louisville and Jefferson County Metropolitan Sewer Dist.*, [983 F.2d 1070](#) (6th Cir. 1993) (citing to [33 USC 1342](#)(b)(1)(B)); see *United States v City of Menominee*, [727 F Supp 1110](#), 1115 (WD Mich 1989).

Permits usually contain five conditions: standard conditions, technology-based limitations, water quality-based limitations, monitoring and reporting requirements, and special conditions. The standard conditions are “boilerplate” in that they must be included in all NPDES permits. Examples of some standard conditions are: allowing the permitting authority to inspect the premises, duty to reduce or prevent permit violations that would adversely affect human health, and duty to properly maintain the facility. [40 CFR 122.41](#)-.42. Special conditions are site-specific conditions that also may be included in a NPDES permit in addition to the standard conditions.

Some permit conditions may be changed or negotiated to relax effluent limitation standards on a case-by-case basis. *Citizens Coal Council v Environmental Protection Agency*, [447 F3d 879](#), 891 (6th Cir 2006). A permit applicant may receive a permit that modifies the effluent limitations for a pollutant, other than a toxic pollutant, provided that “there is no reasonable relationship between the economic and social costs and the benefits to be obtained . . . from achieving such limitation.” [33 USC 1312](#)(b)(2)(A). An applicant may obtain a permit that modifies the effluent limitations for toxic pollutants if the applicant can “represent [that] the maximum degree of control within the economic capability of the owner and operator of the source” will be attained and will result in “reasonable further progress” toward water quality goals. [33 USC 1312](#)(b)(2)(B). This type of permit may be granted for a single period that may not exceed 5 years. *Id.*

The CWA grants the EPA the authority to protect the interests of downstream states. The EPA may establish a general requirement that an NPDES permit be conditioned to ensure compliance with downstream water quality standards. *Arkansas v Oklahoma*, [503 US 91](#) (1992).

4. Stormwater Discharges §2.6

Stormwater is defined to include stormwater runoff, snowmelt runoff, and surface runoff and drainage. [40 CFR 122.26\(b\)\(13\)](#). In 1987, Congress adopted added the “municipal and industrial stormwater discharges” section to the CWA. 33 USC 1342(p). This established a phased approach to controlling pollutants discharged via various forms of stormwater discharge.

a. Phase I §2.7

Phase 1 of the NPDES “municipal and industrial stormwater discharges” program regulates:

1. A discharge with respect to which a permit has been issued under this section before February 4, 1987;
2. A discharge associated with industrial activity;
3. A discharge from a municipal separate storm sewer system serving a population of 250,000 or more;
4. A discharge from a municipal separate storm sewer system serving a population of 100,000 or more but less than 250,000; and
5. A discharge for which the Administrator or the State, as the case may be, determines that the stormwater discharge contributes to a violation of a water quality standard or is a significant contributor of pollutants to waters of the United States.

[33 USC 1342\(p\)](#).

Under the EPA’s regulation of the CWA’s “municipal and industrial stormwater discharges” program, there are eleven categories of industrial activity in the definition of “discharges associated with industrial activity” that must obtain an NPDES stormwater permit. See [40 CFR 122.26\(b\)\(14\)\(i\)-\(xi\)](#); [40 CFR 122.26\(g\)](#). Stormwater discharges to a sanitary sewer system or publicly owned treatment works (POTW) are excluded. [40 CFR 122.3\(c\)](#). Permits for discharges of stormwater associated with industrial activity are subject to the best-available technology/best conventional technology (BAT/BCT) requirements. [33 USC 1314\(b\)\(1\)\(B\)-\(b\)\(4\)\(B\)](#). There are three permit application options for stormwater discharges associated with industrial activity: individual permits, group permits, and general permits. Michigan currently issues only a generic baseline general permit, a generic general permit with monitoring requirements, and a site-specific individual permit.

The “industrial activity” category includes large construction activities, i.e., any construction activity disturbing five acres of land or greater. [40 CFR 122.26\(b\)\(14\)\(x\)](#). Although construction activity is included in the definition of “stormwater discharges associated with industrial activity,” construction activities require construction stormwater permits, not industrial stormwater permits, under the NPDES stormwater program. 57 Fed Reg 41,237 (1992).

Phase I requirements include Notice of Intent (NOI), development and implementation of a Storm Water Pollution Prevention Plan (SWPPP) with appropriate BMPs to minimize the discharge of pollutants on site, and Notice of Termination (NOT). [40 CFR 122](#). An NOI should include general information such as the legal name and the address of the owner or operator, the

facility name and address, the type of discharge, and the receiving stream. [40 CFR 122.21\(a\)](#). The NOT should be submitted when disturbed soils at the construction site have been stabilized, or when stormwater discharges have been eliminated, or when another operator has assumed control of the site.

Phase I regulates large and medium municipal separate stormwater systems (MS4s). Systems serving a population of 250,000 or more are “large” MS4s, while systems serving populations between 100,000 and 250,000 are “medium” MS4s. [40 CFR 122.26\(b\)\(4\)](#), [\(b\)\(7\)](#). Municipal discharge standards need not meet technology-based requirements, but instead are required to reduce the discharge to “the maximum extent practicable” (MEP). [33 USC 1342\(p\)\(3\)\(B\)\(iii\)](#). All Phase I discharges are required to comply with the conditions of the permit as expeditiously as practicable, but in no event later than three years after the date of issuance of the permit. [40 CFR 122.42\(d\)](#).

b. Phase II §2.8

In response to *Natural Resources Defense Council, Inc v Environmental Protection Agency*, [966 F2d 1292](#) (9th Cir 1992), the EPA implemented a Phase II stormwater program in 1999. The Phase II program extended NPDES stormwater permit requirements to include small construction sites and small municipal separate storm sewer systems (MS4s). Under Phase II rules, any category of industrial activity (except construction) may be exempt from permit requirements for discharges composed entirely of storm water if the operator can certify that no industrial materials and activities will be exposed to rain, snow, snowmelt or runoff. [40 CFR 122.26\(g\)](#).

Small construction sites are defined as sites that cover between one and five acres of land, but can also be part of a larger common plan that covers more than one acre, e.g., the operator is building on two half-acre lots in a four-acre development. [40 CFR 122.26\(b\)\(15\)](#). Unlike large construction sites regulated under Phase I, NPDES permitting authorities may provide a waiver from the requirements to operators of small construction sites who certify one of two conditions: (1) low predicted rainfall potential, i.e., construction activity occurs during a negligible rainfall period, where the rainfall erosivity factor (“R” in the Revised Universal Soil Loss Equation (RUSLE)) is less than five during the period of construction activity; or (2) a determination that stormwater controls are not necessary based on either (a) Total Maximum Daily Load (TMDL) that addresses the pollutant(s) of concern for construction activities, or (b) an equivalent analysis that determines allocations are not needed to protect water quality based on consideration of in-stream concentrations, expected growth in pollutant concentrations from all sources, and a margin of safety. [40 CFR 122.26\(15\)\(b\)\(i\)](#).

The Phase II program also regulates small MS4s, that is, all MS4s not already covered by the Phase I program that are located within a census-determined “urbanized area.” All MS4s located within an urbanized area are required to obtain an NPDES permit. These permits will require the small MS4 to implement and enforce a stormwater management program that must include control measures addressing: (1) public education and outreach, (2) public participation or involvement, (3) illicit discharge detection and elimination, (4) construction site runoff control, (5) post-construction runoff control, and (6) pollution prevention and good housekeeping.

[40 CFR 122.34\(b\)](#). The permit deadline for most MS4s was March 10, 2003. [40 CFR 122.26\(e\)\(9\)\(i\)](#). However, MS4s with populations less than 10,000 must have obtained a permit by March 8, 2007 under the permitting authority's discretion. [40 CFR 123.35\(d\)\(3\)](#).

C. Minimum National Effluent Standards

1. In General §2.9

The CWA requires the EPA to establish effluent limitations for specific pollutants that may be discharged by municipal sewage plants and industrial facilities. A list of these specific pollutants is found at [40 CFR 410.15](#). The approach in setting such limitations includes: (1) creating a nationwide, base-level treatment through an assessment of what is technologically and economically achievable for a particular industry; and (2) requiring more stringent levels of treatment for specific facilities to achieve water quality objectives. The EPA has employed technology-based effluent limitations, water quality-based standards and, in a small number of cases, health-based effluent standards.

2. Technology-Based Effluent Limitations §2.10

Direct dischargers must use Best Available Technology (BAT) for toxic pollutants and for nontoxic-nonconventional pollutants, e.g., iron, chlorine, color, phenols. Direct dischargers must use Best Conventional Technology (BCT) for conventional pollutants, e.g., pH, total suspended solids, fecal coliform, oil, and grease. [33 USC 1311\(b\)\(2\)](#).

a. New sources §2.11

New sources are subject to more stringent effluent limitations. [33 USC 1316\(a\)\(2\)](#). A “new source” is defined as any building, structure, facility or installation, from which there is or may be a discharge of pollutants, that is constructed: (1) after promulgation of standards of performance applicable to such source, or (2) after proposal of such standards, but only if the proposed standards are actually promulgated within 120 days of their proposal. [40 CFR 122.2 – 40 CFR 122.29\(b\)](#); *Natural Resources Defense Council, Inc v Environmental Protection Agency*, [822 F2d 104](#) (DC Cir 1987). A new discharger and a new source, for NPDES purposes, are treated the same since a new discharger is defined as “any building structure, facility, or installation (1) from which there is or may be a discharge of pollutants; (2) that did not commence the discharge of pollutants at a particular site prior to August 13, 1979; (3) which is not a “new source;” and (4) has never received a finally effective NPDES permit for discharges at that site.” [40 CFR 122.2](#). New sources are to meet New Source Performance Standards (NSPS), which may apply to any pollutant (conventional, nonconventional, or toxic). NSPS not only consider pollution control standards under [33 USC 1311](#), but also reflect a great degree of effluent reduction through alternative production processes and operating methods. [33 USC 1316\(a\)\(1\)](#). NSPS are at least as stringent as BAT, with the possibility of being even more stringent. *American Iron & Steel Institute v Environmental Protection Agency*, [526 F2d 1027](#) (3d Cir 1975).

b. Pretreatment Standards §2.12

The EPA has implemented pretreatment standards for those who introduce any pollutant into a Publically Owned Treatment Work (POTW). [33 USC 1317\(b\)](#). These standards are designed to prevent pass-through or interference with the treatment processes of the POTW by such indirect dischargers. Definitions of “pass-through” and “interference” can be found in [40 CFR 403.3\(p\)](#) and [40 CFR 403.3\(k\)](#) respectively. There “pass through” is defined as “[d]ischarge which exits the POTW into waters of the United States in quantities or concentrations which, alone or in conjunction with a discharge or discharges from other sources, is a cause of a violation of any requirement of the POTW's NPDES permit (including an increase in the magnitude or duration of a violation).”[40 CFR 403.3\(p\)](#); whereas “interference “ is defined as [d]ischarge which, alone or in conjunction with a discharge or discharges from other sources... [i]nhibits or disrupts the POTW, its treatment processes... and [t]herefore is a cause of a violation of any requirement of the POTW's NPDES permit” [40 CFR 403.3\(k\)](#).

Pretreatment programs give the POTWs legal authority to control and enforce requirements over indirect dischargers. [40 CFR 403.8\(f\)](#). The processes for POTWs to receive pretreatment program approval are explained under [40 CFR 403.8](#) – [40 CFR 403.11](#). For an industrial user to discharge to a POTW, it must first show that it fits under a specific category of industry. [40 CFR 403.6](#). The industrial user must additionally present baseline monitoring reports, compliance reports, and periodic reports containing the nature and concentration of the pollutant being discharged. [40 CFR 403.12](#).

3. Water Quality Standards §2.13

The purpose of implementing water quality standards is to obtain the CWA’s goal of swimmable and fishable waters. [33 USC 1251\(a\)](#). To achieve this goal the water quality based treatments and strategies go beyond the technology-based levels of treatment required by Sections 301(b) and 306 of the CWA. [40 CFR 131.2](#). Water quality standards submitted by states to the EPA for review must include designated use of a water body, water quality criteria sufficient to protect the waters, and an anti-degradation policy. [40 CFR 131.6](#). Although the EPA has procedures and criteria for reviewing state-proposed water quality standards, states are principally responsible for developing water quality standards pertinent to state waters. See [40 CFR 131](#).

a. Total Maximum Daily Loads §2.14

States must develop Total Maximum Daily Loads (TMDLs) for all waters in which technology based effluent limits are not stringent enough to achieve the water quality standards set for those waters. [33 USC 1313\(d\)\(1\)](#). A TMDL is a numerical quantity determining the present and near future maximum load of pollutants from all sources to receiving bodies of water that will still meet water quality standards with an adequate margin for safety. A TMDL has two basic parts: a Waste Load Allocation (WLA) from point sources and Load Allocations (LA) from nonpoint sources and natural background conditions.

Each state must identify “impaired” waters, which are waters that fail to meet water quality standards despite compliance by NPDES permitted dischargers. [40 CFR 130.7\(b\)\(1\)](#). The state

must then prioritize its impaired waters, taking into account the severity of the pollutant and the uses of the water body. The priority-ranking list should specifically include the identification of the waters targeted and the identity of the pollutant causing the impairment. [40 CFR 130.7\(b\)\(4\)](#). In Michigan, there are a total of seventy-six water bodies with developed and approved TMDLs. The list can be found on the DNRE Website under Water Quality Monitoring | Assessment of Michigan Waters | [TMDLs](#).

After making the priority-ranking list, a state must establish TMDLs for the water quality limited segments and submit them to the EPA for approval. TMDLs may be established using a pollutant-by-pollutant approach, bio monitoring approach, or in some cases both. [40 CFR 130.7\(c\)\(1\)\(i\)](#). The EPA will then either approve or disapprove the listings and the loadings within 30 days of the state's submission. If the EPA approves the plans, the state can incorporate them into its water quality management program. If the EPA disapproves the plan, however, it will establish its own list or TMDLs for such waters within the same 30 days. [40 CFR 130.7\(d\)](#). Failure of the state or the EPA to meet the deadlines for the submission and approval of the lists of impaired waters and TMDLs have led to successful citizen led lawsuits. *Friends of the Wild Swan v Environmental Protection Agency*, [74 F Appx 718](#) (9th Cir 2003).

b. 1997 TMDL guidance §2.15

In 1997, the EPA released a guide for the TMDL program in response to issues raised throughout the program's development. Regarding achievement of a nationally consistent scheme for developing and implementing TMDLs, the guide recommended: (1) states develop schedules for establishing TMDLs promptly, generally within 8-13 years of a particular water body being listed as impaired; (2) EPA regions have documented written agreements with other individual states about the schedules; and (3) factors to be considered in developing the schedule, which include, but are not limited to: the number of impaired segments, number and complexity of the TMDLs, proximity of listed waters to each other, availability of monitoring data, and significance of the environmental harm. In addition, states have the discretionary authority to implement load allocations (LAs) for waters impaired by nonpoint sources. See *Pronsolino v Nastri*, [291 F3d 1123](#) (9th Cir 2002).

4. Health-Based Effluent Standards – Toxic Pollutant List §2.16

The EPA has the authority to issue toxic pollutant effluent standards where the BAT standard is not sufficient to achieve an "ample margin of safety" in protecting the environment and public health from certain toxic pollutants. [33 USC 1317](#). Toxic pollutant effluent standards have been set for six chemicals: aldrin, DDT and related compounds, endrin, toxaphene, benidine, and polychlorinated biphenyls. [40 CFR 129](#).

D. Requirement for Reporting Discharges of Oil and Hazardous Waste §2.17

In response to major oil spills like the *Exxon Valdez*, Congress enacted the Oil Pollution Act of 1990 (OPA), which amended [33 USC 2701 et seq](#). The OPA expanded the EPA's planning and spill prevention activities and improved response capabilities. Similar to the liability under CERCLA (see Chapter 5), OPA liability is interpreted as both strict and joint and several.

Regulations for the prevention of oil spills into navigable waters and adjoining shorelines of the United States are found at [40 CFR 112](#).

Oil pollution regulations contain two major types of requirements: prevention requirements (Spill Prevention, Control and Countermeasures (SPCC plans)) and Facility Response Plans (FRP). Each SPCC plan is unique to the facility, but all contain standard elements which include, among other things, a description of the physical layout of the facility, contact list and phone numbers of people or agencies who must be contacted in case of a discharge, a prediction of direction, flow rate, total quantity of oil that could be discharged, and a description of containment equipment that prevents discharged oil from reaching navigable waters. [40 CFR 112.7](#). A FRP demonstrates a facility's ability to respond to a worst case oil discharge. A facility that could reasonably be expected to cause "substantial harm" to the environment by discharging oil into or on navigable waters are required to prepare and submit an FRP. [40 CFR 112.20](#).

In July 2002, the EPA revised 40 CFR 112 effective on August 11, 2004. Important highlights of the new SPCC rule include: (1) exemptions from the technical requirements of the UST regulations for completely buried storage tanks, [40 CFR 112.1\(d\)\(2\)\(i\)](#); (2) exemptions for portions of certain facilities or any facility that is used exclusively for wastewater treatment, [40 CFR 112.1\(d\)\(6\)](#); (3) establishment of an aboveground storage capacity threshold of greater than 1,320 gallons and removal of the 660 gallon threshold, [40 CFR 112.1\(d\)\(2\)](#); and (4) requirements for facilities to submit information after having two discharges over 42 gallons in any 12-month period or a after a single discharge of more than 1,000 gallons, [40 CFR 112.4\(a\)](#).

Discharges made in compliance with an NPDES permit are excluded from regulation under the OPA. [33 USC 2702\(c\)\(1\)](#). Those who do not have a permit or fail to comply with SPCC regulations, however, can face civil and criminal penalties. [33 USC 2716\(a\)](#).

E. Dredge or Fill Material Discharged into Navigable Waters §2.18

Section 404 of the CWA authorizes the U.S. Army Corps of Engineers (COE) to oversee the permit program for the discharge of dredge or fill material into waters of the United States. [33 USC 1344](#). Waters regulated under this section are defined as navigable waters, which include wetlands. See [33 CFR Part 328](#); *United States v Riverside Bayview Homes, Inc*, [474 US 121](#) (1985), *United States v Rapanos*, [547 US 715](#), 723 (2006). In Michigan waters, the discharge of dredge or fill material is regulated by the DNRE. [MCL 324.30101](#). In federal "navigable" waters, the COE and the DNRE regulate such discharges. See generally Chapter 10.

F. Penalties and Abatement Actions §2.19

The CWA provides administrative, civil, and criminal enforcement devices for violations, such as discharges without a permit, discharges in violation of technology or water quality-based effluent limitations, violations of new source performance standards or pretreatment standards, and discharges in violation of NPDES permits. [33 USC 1319](#). Administrative penalties are composed of two classes of penalties. [33 USC 1319\(g\)\(2\)](#). Class I penalties may not exceed \$10,000 per violation or \$25,000 total, and class II penalties may not exceed \$10,000 per day in

which the violation continues or a total of \$125,000. *Id.* The EPA also may initiate criminal prosecution in order to enforce the CWA. Criminal penalties may include significant fines, imprisonment, or both. [33 USC 1319\(c\)](#); see *United States v Panyard*, [No. 07-20037-2](#), 2009 US Dist LEXIS 34978 (ED Mich, Apr. 23, 2009), sentencing defendant to 15 months imprisonment and but not imposing fines for bypassing CWA pretreatment requirements in violation of [33 USC 1319\(c\)\(2\)\(A\)](#).

States that have NPDES permitting authority, such as Michigan, enforce permits issued under state law. Although the EPA has delegated authority to the state, the EPA retains authority to enforce the mandates of the CWA. [33 USC 1342](#). The EPA, however, must first notify the state of a violation and give the state 30 days to bring an enforcement action before it may commence a civil action of its own. [33 USC 1319\(a\)](#). Alternatively, the EPA's enforcement decisions are discretionary in that the EPA may take no formal action or seek another type of enforcement procedure. See *Sierra Club v Whitman*, [268 F3d 898](#) (9th Cir 2001); *Sierra Club v Train*, [557 F2d 485](#) (5th Cir 1977).

G. Citizens' Suits §2.20

The CWA grants citizens the ability to file suit in federal court to enforce provisions of the act. Pursuant to [33 USC 1365\(a\)](#), any citizen may commence a civil action on his or her own behalf against anyone who is "alleged to be in violation of an effluent standard or limitation" under the CWA. Claims may also be brought against the Administrator where there is "alleged failure of the Administrator to perform any act or duty" under the CWA that is not subject to the Administrator's discretion. The alleged violator, the state, and the EPA must receive a sixty-day notice from the plaintiff before filing suit. [33 USC 1365\(b\)\(1\)\(A\)](#). This notice allows parties time to resolve conflicts in a non-adversarial time period.

Citizens are barred from bringing suit when the federal or state government is "diligently prosecuting" a civil or criminal action concerning the same alleged violations. [33 USC 1365\(b\)\(1\)\(B\)](#); *N & S Rivers Watershed Ass'n, Inc v Town of Scituate*, [949 F2d 552](#) (1st Cir 1991). To keep violators from evading liability, courts have traditionally interpreted "diligent prosecution" narrowly. See *Washington Public Interest Research Group v Pendleton Woolen Mills, Inc*, [11 F3d 883](#) (9th Cir 1993); *Altamaha Riverkeepers v City of Cochran*, [162 F Supp 2d 1368](#) (MD Ga 2001). Citizens are barred from filing suit over wholly past violations. For a violation to be actionable the defendant's violations must continue after the date the plaintiff files suit or when there is a reasonable likelihood of future violations. *Gwaltney, Ltd v Chesapeake Bay Foundation, Inc*, [484 US 49](#) (1987).

In *Friends of the Earth v Laidlaw*, [528 US 167](#) (2000), the Supreme Court held that a citizen showing a reasonable concern about discharges that have harmed his or her economic, aesthetic, and recreational interests in a water body demonstrated an injury in fact required to bring a citizen suit under the CWA. To have standing, plaintiffs need to demonstrate a considerable likelihood that the defendant caused the injury and the injury is likely to be redressed by a favorable decision. *Lujan v Defenders of Wildlife*, [504 US 555](#) (1992).

Citizen plaintiffs may be awarded civil penalties including attorneys' fees and costs in addition to other available remedies such as penalties and injunctive relief. If a court determines that a defendant violated the CWA, it must impose civil penalties. These civil penalties are authorized up to \$25,000 per day per violation. [33 USC 1319\(d\)](#). Under 33 USC 1365(d), citizens may be awarded "costs of litigation (including reasonable attorney and expert witness fees) to any prevailing party or substantially prevailing party, whenever the court determines such award appropriate." Attorney fees may be awarded using the "catalyst" approach, but typically fees are determined using the "lodestar" amount (a reasonable number of hours worked on the case times a reasonable hourly rate). See *Buckhannon Board & Care Home, Inc v West Virginia Dep't of Health and Human Resources*, [532 US 598](#) (2001); *Hensley v Eckerhart*, [461 US 424](#) (1983); *City of Burlington v Dague*, [505 US 557](#) (1992).

III. The Natural Resources and Environmental Protection Act (NREPA)

A. Water Resources Protection (Part 31)

1. In General §2.21

Part 31 of NREPA, [MCL 324.3101 et seq.](#), is Michigan's primary pollution control statute. Part 31 has the dual purpose of protecting water quality and regulating waste-water disposal. Under [MCL 324.3103\(1\)](#), the DNRE has the duty and authority to "protect and conserve the water resources of the state." Waters of the state" include both surface and underground waters. *LA Darling Co v Water Resources Comm'n*, [341 Mich 654](#); 67 NW2d 890 (1955). Part 31 of NREPA gives the DNRE broad powers regarding water pollution. *City of Brighton v Hamburg Twp*, [260 Mich App 345](#); 677 NW2d 349 (2004). To achieve uniformity and to serve the public policy interest of protecting the waters of the state, Part 31 authorizes the DNRE to:

1. Issue discharge permits that will assure compliance with state standards to regulate municipal, industrial, and commercial discharges and storage of any substance that may affect the quality of the waters of the state, [MCL 324.3106](#);
2. Establish water quality standards for lakes, rivers streams, and other waters, [MCL 324.3106](#);
3. Regulate the pretreatment program for indirect discharge to publicly owned treatment work; [R 323.2301 et seq.](#);
4. Regulate spillage of oils and other polluting materials; see [R 324.2001 et seq.](#);
5. Issue permits for floodplain alteration, [MCL 324.3104](#); and
6. Enforce criminal and civil liability against discharge violators, [MCL 324.3115](#).

Part 31 applies to municipalities, which are defined as "[the] state, a county, city, village, or township, or an agency or instrumentality of any of these entities." [MCL 324.3101\(m\)](#).

2. Unlawful Discharges §2.22

Part 31 prohibits direct and indirect discharges into state waters of a substance that is or may be injurious to: (1) the public health, safety, or welfare; (2) domestic, commercial, industrial,

agricultural, or recreational, or other uses that are being made or may be made of such waters; (3) the value or utility of riparian lands; (4) livestock, wild animals, or plants; or (5) the value of fish and game. [MCL 324.3109](#). Industrial or commercial entities that discharge liquid waste into surface or groundwater must have waste treatment or control facilities that are supervised by a certified person. [MCL 324.3110](#)(1).

The discharge of any medical waste (defined in Part 138 of the public health code, [MCL 333.13805](#)(8) *et seq.*) into any of the waters of the state without authorization by a permit, order, or rule is considered prima facie evidence of a violation of Part 31 and subjects the person responsible to the penalties provided under [MCL 324.3115](#). [MCL 324.3109](#)(2). The indirect or direct discharge of any raw sewage of human origin into state waters not permitted by an order, rule, or permit is considered prima facie evidence of a violation of Part 31 by the municipality from which it originated. *Id.* If the municipal discharge is not the subject of a valid permit, or is subject to a valid permit but is in violation of that permit, then the municipality is subject to the penalties under [MCL 324.3115](#). *Id.*

When untreated or partially treated sewage is discharged from a sewer system into state waters, the municipality at fault must, within 24 hours of the discharge, notify the DNRE, local health departments, and newspapers that the discharge is occurring. [MCL 324.3112a](#)(1). At the conclusion of the discharge, the responsible municipality must state: the volume and quality of the discharge, reason for the discharge, time the discharge began and ended, and verification that it is in full compliance with the NPDES permit requirements. *Id.* If the municipality's discharge of untreated or partially treated sewage may affect other municipalities, it must notify those municipalities of the discharge. [MCL 324.3112a](#)(4).

In addition to the penalties under [MCL 324.3115](#), the unauthorized discharge of any kind is prima facie evidence of the existence of a public nuisance and the attorney general may bring an abatement action. [MCL 324.3109](#)(6); *Attorney General v John A. Biewer Co*, [140 Mich App 1](#); 363 NW2d 712 (1985). Part 31, however, does not provide an exclusive remedy against a municipality that discharges inadequately treated sewage into state waters. *White Lake Improvement Ass'n v City of Whitehall*, [22 Mich App 262](#); 177 NW2d 473 (1970).

3. Waste Discharge Permits

a. In General §2.23

Waste discharge or discharge of waste effluent into groundwater or surface water is prohibited unless the discharger has obtained a permit issued by the DNRE. [MCL 324.3112](#). Michigan has received authorization from the EPA to issue waste discharge permits pursuant to the NPDES program.

b. Obtaining a Permit §2.24

Michigan treats surface water and groundwater as two separate resources, thus different permits are required. A person discharging waste into surface waters of the state must submit an

application for a NPDES permit to the DNRE. [R 323.2106](#). A person discharging waste into the groundwater must submit a state permit application to the DNRE. [R 323.2206\(3\)](#).

Anyone proposing a new or increased wastewater discharge into surface or ground waters must to apply for a permit at least 180 days before commencement of the discharge. [R 323.2106\(2\)](#). DNRE requires applicants for permits to include the nature of the enterprise or development, the amount of water required to be used, its source, the proposed point of discharge, the amount to be discharged, and expected composition of the waste, i.e., bacterial, physical, and chemical characteristics. [MCL 324.3113\(1\)](#).

Michigan's NPDES permit application is divided into 3 sections. Section 1 is the general facility information that every applicant must complete. Section 2 is for sanitary wastewater facilities. This section is to be completed by POTWs and all privately owned treatment facilities discharging treated or untreated sanitary or industrial wastewater to surface waters. Privately owned facilities generally include mobile home parks, campgrounds, condominiums, hotels, and nursing homes. Section 3 is to be completed by all facilities classified as industrial or commercial facilities. Industrial and commercial facilities include, but are not limited to, facilities that discharge or propose to discharge wastewater generated by a production process, a service provided, or through a remediation project. Municipal and public facilities are not required to complete Section 3 unless they request authorization for discharges other than sanitary wastewater. Michigan's NPDES permit application form is available on the DNRE's website. <http://www.michigan.gov/deq>.

If a person discharges waste or wastewater from more than one location, that person must file a separate application for each discharge location. For multiple outfalls discharging from one location, the person need only file a single application so long as each outfall is described separately in the application. [R 323.2108\(2\)](#). In such case, there may be different permit conditions for each outfall.

State and NPDES permits have a fixed term that is not to exceed five years. [R 323.2150](#). A person wishing to continue to discharge wastewater needs to reapply for a permit at least 180 days before the permit expiration date. Before reissuing the permit, the DNRE will ensure that (1) the applicant has substantially complied with the terms, conditions, requirements, and schedules of compliance of the existing permit; (2) the DNRE has up-to-date information on the applicant's production levels, waste treatment practices, and the nature, contents, and frequency of the applicant's discharge; and (3) the discharge is consistent with applicable effluent standards and limitations, water quality standards, and other legally applicable requirements. [R 323.2151](#). If negotiations with the DNRE regarding reissuance of the new permit extend beyond the expiration date of the existing permit, the permittee continues to operate under the existing permit. *Id.*

A permit will not be issued for discharges containing a radiological, chemical, or biological warfare agent or a high-level radioactive waste; a discharge that would substantially impair anchorage or navigation; or a point source discharge in conflict with an area-wide waste treatment management plan. [R 323.2136\(1\)](#).

c. Industrial and General Permits §2.25

Depending on the nature of the proposed discharge, the DNRE may issue either an individual permit or Certificate of Coverage (COC) under a valid general permit. A general permit may be issued for stormwater point source discharges or a category of point source discharges other than stormwater if the sources: (1) involve the same or substantially similar types of operations; (2) discharge the same types of wastes; (3) require the same effluent limitations or operating conditions; and (4) require the same or similar monitoring. [R 323.2191](#)(1).

Applications for coverage under existing general permits are submitted to the DNRE. If the DNRE determines that the discharge meets the criteria for coverage under the general permit, then the DNRE will issue a notice of coverage that initiates the permit. Persons aggrieved by the coverage may file a sworn petition for a contested case hearing within 60 days of the issuing of notice. [R 323.2192](#)(c). See Chapter 15 for a discussion of contested cases.

Individual permit holders also may apply for coverage under the general permit. [R 323.2192](#)(d). The DNRE may also require a person authorized to discharge under a general permit to apply and obtain an individual permit under certain circumstances including but not limited to situations where “the discharge is a significant contributor to pollution as determined by the department of a case-by-case basis” or “the discharger is not complying, or has not complied, with the conditions of the general permit.” [R 323.2191](#)(3). For persons with both an individual and general permit, however, the DNRE may terminate one of the permits if it determines that the other permit is more appropriate. [R 323.2191](#)(5).

4. Obtaining a Stormwater Discharge Permit

a. Industrial Activity §2.26

As a result of the federal regulations governing stormwater discharges, the state of Michigan began issuing permits in 1994 and regulates such discharges under [R 323.2101](#) *et seq.* See [40 CFR 122](#) for industrial activities that need to obtain a permit, discussed in [§ 2.7](#). To obtain coverage under the general permit, stormwater applicants should submit a notice of intent (NOI) to the DNRE. If coverage under the general permit is appropriate, the DNRE will issue the applicant a Certificate of Coverage (COC). It should be noted that the DNRE has the discretion to grant a contested case hearing on the certificate of coverage issued to an individual facility under a general permit in accordance with [R 323.2192](#). A stormwater permit is not required if stormwater does not discharge from the facility site or is discharged into a sewer system that leads to a wastewater treatment plant.

b. Construction Activity §2.27

The DNRE currently utilizes a “permit by rule” for stormwater discharges associated with construction sites. Construction activities on five acres or more that contain a point source discharge to state waters are required to submit a notice of coverage to obtain coverage under “permit by rule.” The notice of coverage should include:

1. Certification that an individual soil erosion and sedimentation control permit for that site has been issued;
2. Acknowledgement by the construction permittee that any discharge is in compliance with state and federal regulations;
3. A location map and description of the nature of the construction activity;
4. The location of the proposed discharge and identification of the receiving water;
5. The total area of the site and the area of the site that is expected to undergo construction during the existence of the project;
6. Site-specific soil erosion control measures that will be used to control waste in stormwater during construction activity;

[R 323.2190](#)(1)(a). In accordance with Part 31, a notice of coverage is not required for construction activities that disturb 1 to 5 acres because these sites have automatic coverage under “permit by rule” if they have obtained coverage under the Soil Erosion and Sedimentation Control Program (SESC). *Id.*

Once a notice of coverage has been submitted, the permittee must have the construction site inspected by a certified stormwater operator once a week and within 24 hours after every precipitation event that results in a discharge. The permittee must also keep a log of these inspections and corrective actions, if any are taken. [R 323.2190](#)(2)(e).

5. Issuance or Denial of a Permit

a. When a Permit is Approved §2.28

The DNRE will develop a draft permit when it considers the application complete. The draft permit will be mailed to the applicant and, in the case of a NPDES permit; the draft permit will be mailed to the regional administrator of EPA Region 5 in Chicago before public notice of application. The draft permit will contain proposed effluent limitations, a proposed schedule of compliance for meeting the proposed effluent limitations, and any other conditions or restrictions deemed necessary by the DNRE that will significantly affect the discharge described in the application. [R 323.2115](#).

Once the DNRE issues the draft permit, a 30-day public notice of the permit is circulated within the geographical area of the proposed or existing discharge. [R 323.2117](#). Any interested person may submit comments on the application to the DNRE within the 30-day public notice. The duration of the time for public comment may be extended past the suggested 30 days when the DNRE determines it necessary to facilitate additional public comment. [R 323.2119](#). Within the 30-day comment period, any interested person or agency may file a petition with the DNRE for a public hearing. The DNRE will schedule a hearing if it determines that the petition constitutes sufficient cause or there is sufficient public interest to warrant a hearing. [R 323.2119](#)(1).

The DNRE will consider the comments submitted during the public notice and may revise or modify the draft permit while formulating its final determination. Following the public notice, modifications, and applicable recommendations, the DNRE will make the final determination on the permit application and issue or deny the permit. [R 323.2133](#). The DNRE may deny an application for a permit pursuant to [MCL 324.3106](#). [R 323.2133](#)

b. Challenging the Denial or the Conditions of a Permit §2.29

Any person to whom a permit is not acceptable may file a sworn petition with the Office of Administrative Hearings of the DNRE, setting forth the conditions of the permit that are being challenged and specifying the grounds for the challenge. This petition needs to be filed within 60 days of the issuance, modification, suspension, or revocation of a permit. [MCL 324.3112\(5\)](#). The DNRE may reject petitions submitted after the 60 days for being untimely. *Id.*

6. Violations

a. Permit Conditions §2.30

The DNRE sets permit conditions such as effluent limitations, monitoring requirements, record-keeping requirements, and facility maintenance requirements, with which the permittee must comply. Dischargers not in compliance with applicable effluent standards and limitations or other requirements at the time of inspection or discovery of noncompliance are required to achieve compliance within a period established by the DNRE. The DNRE will require compliance with terms and conditions of the permit “in the shortest reasonable time period” or within a time schedule for compliance that is specified in the permit. [R 323.2145](#). Within 14 days after the interim date of compliance or the final date of compliance specified in the permit, the discharger must submit a written notice of compliance or noncompliance to the DNRE. Failure to submit the written notice is cause for the DNRE to pursue enforcement action against the discharger. [R 323.2146](#).

b. Civil and Criminal Sanctions §2.31

The DNRE may request the attorney general to commence a civil action for appropriate relief against a person who violates Part 31 or a provision of a permit, order, or rule. [MCL 324.3115](#) (1). Appropriate relief may include temporary or permanent injunctions, civil penalties, or criminal penalties. Actions should be brought in the circuit court for Ingham County or the county in which the defendant is located, resides, or is doing business. *Id.* The court can impose a minimum civil fine of \$2,500 and may additionally grant attorney fees and costs to the prevailing party. The maximum civil fine the court can grant is \$25,000 per day of violation. *Id.*

In criminal prosecutions under Part 31, a person may be fined not less than \$2,500 or more than \$25,000 for each violation and be guilty of a felony if at the time of the violation the discharger:

1. Knew or should have known that the discharge was unlawful;
2. Knew or should have known that the discharge was contrary to a permit, order, rule, or stipulation of the DNRE;
3. Intentionally makes a false statement, representation, or certification pertaining to a permit, notice, or report required by permit terms and conditions; or
4. Intentionally renders inaccurate a monitoring device or record to be maintained by the DNRE.

[MCL 324.3115](#)(2). For second time offenders, the court shall impose a fine of not less than \$25,000 per day and not more than \$50,000 per day of violation and may additionally sentence the defendant to two years in prison, or impose probation.

In addition to a fine, the attorney general may file a civil suit to “recover the full value of the injuries done to the natural resources of the state and the costs of surveillance and enforcement by the state resulting from the violation.” *Id.* Civil penalties for violations under Part 31 may be awarded for violations that occur before the offender was notified of the violations as well as any violations occurring after the offender receives notice. *Attorney General v John A Biewer Co*, [140 Mich App 1](#); 363 NW2d 712 (1985). A person, however, is not subject to penalties if the discharge of the effluent is in conformance with and obedient to a rule, order, or permit of the DNRE. [MCL 324.3115](#)(2).

For civil defendants whose actions pose or posed substantial endangerment to the public health, safety, or welfare, the court “shall” impose an additional fine of not less than \$500,000 and not more than \$5,000,000. [MCL 324.3115](#)(3). For criminal defendants whose actions pose or posed substantial endangerment to the public health, safety, or welfare, the court “shall” impose a fine of not less than \$1,000,000 and a five-year prison sentence. [MCL 324.3115](#)(4). Pursuant to [MCL 324.3115](#)(5), a civil or criminal defendant is liable for “substantial endangerment” if the court determines that the defendant knowingly or recklessly acted in a way that caused danger of death or serious bodily injury *and*

1. the defendant had an actual awareness, belief, or understanding that his or her conduct would cause substantial danger of death or serious bodily injury, *or*
2. the defendant acted in gross disregard of the standard of care that any reasonable person should observe in similar circumstances.

All fines and awards ordered paid are made payable to the state of Michigan and will constitute a lien on any property owned by the defendant. [MCL 324.3115](#)(7). This lien has priority over all other liens and encumbrances except liens filed or recorded before the date of judgment, provided that notice of the lien was properly recorded and filed. [MCL 324.3115](#)(8). Fines and awards ordered paid may be recovered by right to setoff any debt owed to the defendant by the state of Michigan, including the right to a refund of income taxes paid. [MCL 324.3115](#)(10).

7. Water Quality Standards

a. In General §2.32

Michigan water quality standard requirements are established to “protect the public health and welfare, to enhance and maintain the quality of water, and to protect the state’s natural resources.” [R 323.1041](#). These water quality standards apply to the Great Lakes, the connecting waters, and all other surface waters of the state. *Id.* The water quality standards are used to improve water quality of water bodies that have been degraded due to past human activities and are the minimum water quality requirements by which the waters of the state are to be managed. *Id.* Permits specify limitations on wastewater constituents, which at a minimum ensure compliance with federal standards. Township ordinances that impose more rigorous standards

for wastewater discharge than those imposed by the DNRE are preempted by NREPA because a patchwork of inconsistent local regulations undermines the state's ability to control water pollution. *City of Brighton v Hamburg Twp*, [260 Mich App 345](#); 677 NW2d 349 (2004). This regulatory scheme gives the DNRE sole responsibility for regulating point source discharges into state waters in order to achieve uniformity. *Id.*

b. Surface Waters §2.33

Michigan surface-water quality standard requirements are found at [R 323.1050](#)-.1117. The DNRE uses these standards to develop effluent limitations for each NPDES permit. Water characteristics most often regulated in permits include dissolved solids, pH, taste- and odor-producing substances, toxic substances, radioactive substances, plant nutrients, microorganisms, dissolved oxygen, and temperature. [R 323.1051](#) to .1075. To determine compliance with water quality standards, state waters are analyzed pursuant to procedures outlined in 40 CFR 136 or methods approved by the DNRE and the EPA. [R 323.1096](#).

State surface waters are designated and protected for uses that include, but are not limited to, agriculture, navigation, industrial water supply, public water supply at the point of water intake, warm-water fisheries, other indigenous aquatic life and wildlife, and partial body contact. [R 323.1100](#)(1). When a portion of a water body is designated for more than one use, then the designated use with the most restrictive water quality standards will apply to the water-body. [R 323.1105](#). To restore designated uses that are interrupted due to uncontrollable circumstances during or following flood conditions, accidental spillages, or other emergencies, the discharger must take prompt corrective action and notify affected entities. [R 323.1100](#)(3).

c. Water Quality Standard Variances §2.34

Under certain circumstances, a variance may be granted from a water quality standard that is the basis of a water quality-based effluent limitation in an NPDES permit. The variance applies only to the permittee(s) requesting the variance and only to the pollutant(s) specified in the variance. [R 323.1103](#)(1). The duration of the variance cannot exceed the term of the NPDES permit. *Id.* The variance may be granted if the permittee demonstrates that attaining the water quality standard is not feasible for any of the following reasons:

1. Naturally occurring pollutant concentrations prevent the attainment of the water quality standard;
2. Natural, ephemeral, intermittent, or low flow conditions or water levels prevent the attainment of the water quality standard;
3. Human-caused conditions or sources of pollution prevent the attainment of the water quality standard and cannot be remedied or more environmental damage would occur in correcting the conditions or sources of pollution than would occur by leaving the conditions or sources in place;
4. Dams, diversions, or other types of hydrologic modifications preclude the attainment of the water quality standard, and it is not feasible to restore the water body to its original condition or to operate the modification in a way that would result in the attainment of the water quality standard;

5. Physical conditions related to the natural features of the water body preclude attainment of the water quality standard; or
6. Controls more stringent than the treatment technology requirements in the Clean Water Act would result in unreasonable economic effects on the discharger and affected communities.

[R 323.1103](#)(2). The DNRE additionally requires the permittee to characterize the extent of any increased risk to human health and the environment associated with granting the variance, and to show that the variance requested conforms to the anti-degradation demonstration requirements of [R 323.1098](#); [R 323.1103](#)(3). The DNRE will deny an NPDES permit variance request if the permittee fails to complete the required demonstrations. [R 323.1103](#)(7).

New dischargers may not apply for a variance unless the proposed discharge is “necessary to alleviate an imminent and substantial danger to the public health or welfare.” [R 323.1103](#)(1)(b). Water quality variances will not be granted if (1) the variance would likely jeopardize the continued existence of endangered or threatened species or destroy or adversely modify their habitat, or (2) the water quality standard in the receiving water will be attained by implementing the CWA’s treatment technology requirements and cost-effective and reasonable best management practices for nonpoint sources over which the discharger has control within the vicinity of the facility. [R 323.1103](#)(1)(c), (d).

8. Pretreatment Requirements §2.35

Pretreatment rules, which are found in [R 323.2301](#)- [R 323.2317](#), apply to nondomestic users that discharge pollutants to POTWs either directly or indirectly, including by truck, rail, or any other means, and apply to POTWs that receive pollutants from nondomestic users that are subject to pretreatment standards. [R 323.2301](#).

A nondomestic user may not discharge any pollutant into a POTW that would cause pass-through or interference. [R 323.2303](#). A “pass-through” is a discharge that exits a POTW into state waters in quantities or concentrations that alone or in conjunction with a discharge or discharges from other sources, causes a violation of any requirement of the act. [R 323.2302](#)(t). An “interference” is a discharge, alone or in conjunction with a discharge or discharges from other sources, that (1) inhibits or disrupts the POTW, its treatment processes or operations, or its sludge processes, use, or disposal; and (2) is a cause of violation of any requirement of the POTW’s permit, including an increase in the magnitude or duration of a violation, or the prevention of sewage sludge use or disposal in compliance with applicable laws, regulations, and permits. [R 323.2302](#)(o).

Nondomestic users are prohibited from introducing certain substances into POTWs, which include, among other things, pollutants that create a fire or explosion hazard; pollutants that will cause corrosive structural damage to the POTW, including all discharges with a pH lower than 5.0 unless under the POTW’s approval; heat that will inhibit biological activity in the POTW resulting in interference; petroleum oil, non-biodegradable cutting oil, or other products of mineral oil origin in amounts that will cause interference or pass-through; or pollutants that result

in the presence of toxic gases, vapors, or fumes within the POTW in a quantity that may cause acute worker health or safety problems. [R 323.2303\(2\)](#).

State and national permits require POTWs to develop and implement a pretreatment program to control the introduction of pollutants. [R 323.2305](#). The POTW pretreatment program must be approved by DNRE. [R 323.2307](#). POTWs subject to industrial pretreatment program requirements in accordance with [R 323.2305\(2\)](#) have the authority to require compliance with applicable pretreatment standards by nondomestic users. [R 323.2306](#). To ensure compliance the POTW may carry out all necessary inspections, surveillance, and monitoring procedures on nondomestic users. *Id.* The POTW also has the authority to control, through a permit, the contribution to the POTW by each significant industrial user. See [R 323.2306](#) for a complete list of industrial pretreatment program requirements and legal authority.

Among the permit requirements stipulated by [R 323.2306](#) are the requirements that the permit contain: (1) a statement of the duration of the permit, which shall not be more than five years; (2) a statement of permit nontransferability without prior notification to the POTW and provision of a copy of the existing permit to the new owner or operator; (3) effluent limits based on applicable general pretreatment standards, categorical pretreatment standards, local limits, and state and local law; (4) self-monitoring, sampling, reporting, notification, and recordkeeping requirements, including identification of the pollutants to be monitored, sampling location, sampling frequency, and sample type, based on the applicable general pretreatment standards, categorical pretreatment standards, local limits and state and local law; and (5) a statement of applicable civil and criminal penalties for violation of pretreatment standards and requirements and any applicable compliance schedule. The schedule may not extend the compliance date beyond applicable federal deadlines.

9. Spillage of Oil and Polluting Materials §2.36

Current rules for spillage of oil and polluting materials became effective August 31, 2001. [R 324.2001](#)- [R 324.2009](#). These rules rescinded R 323.1151-.1159, .1162-.1164, and -.1169. The new rules clarify the definition of oils and expand the definition of salt. Polluting materials include salt, oil, and any other chemical included in R 324.2009, and any compound that contains 1% or more, by weight, of these materials (based on the material safety data sheet formulation information). [R 324.2002\(a\)](#). “Salt” includes sodium chloride, potassium chloride, calcium chloride, and magnesium chloride, and solutions or mixtures of these compounds in solid or liquid form. [R 324.2002\(c\)](#).

The new rules clarify the definition of on-land and oil storage facilities. An “oil storage facility” is defined as any temporary or permanent facility that receives, manufactures, uses, stores, or ships oil, and at which there is present an amount of oil equal to or more than the threshold management quantity and which is so situated that oil could directly or indirectly reach state surface or groundwaters, including any facility that discharges through a public sewer system. [R 324.2001\(f\)](#). For oil, the threshold management quantity is 1320 gallons in aboveground tanks or containers if no single tank or container has a capacity of more than of 660 gallons. [R 324.2002\(f\)\(iii\)](#). An “on-land facility” is defined like oil storage facility, but broadens the definition by substituting “polluting materials” in place of “oil.” [R 324.2001\(g\)](#). These

definitions expressly exclude oil field petroleum or brine storage facilities, recreational marinas, installations of oil-containing electrical equipment, or transportation-related facilities as defined in [40 CFR Part 122](#). [R 324.2001](#)(f)-(g). See [R 324.2003](#) for other facilities that are exempt from these rules.

Oil storage and on-land facilities are required to maintain adequate surveillance of the facility area so that discharges of polluting material can be detected in a timely manner and procedures can be implemented to prevent the polluting materials from reaching state waters. [R 324.2004](#). The owner or operator of any on-land facility needs to also develop, maintain, and operate a pollution incident prevention plan (PIPP). [R 324.2006](#). A PIPP should include general facility information, procedures for emergency notification for necessary entities, spill control and cleanup procedures, a polluting material inventory, a site plan depicting relevant site structures and all storage and use areas where polluting materials are managed on-site in quantities exceeding the threshold management quantity, information on outdoor secondary containment structures, and provisions for general facility security. *Id.* Within 30 days of completing the PIPP, the owner or operator is required to notify the DNRE so that the DNRE may inspect and certify that the facility is in full compliance. *Id.* The owner or operator of the facility needs to evaluate the PIPP every 3 years or after any release that requires implementations of the plan, whichever is more frequent. *Id.*

If a facility releases any polluting material in excess of a threshold reporting quantity within a 24-hour period, the owner, operator, or manager of an oil or on-land facility must notify the DNRE by calling 1-800-292-4706. [R 324.2007](#)(1). A “threshold reporting quantity” includes the following:

1. For releases of oil to the surface of the ground, 50 pounds.
2. For releases of oil to the waters of the state, any quantity that causes unnatural turbidity, color, visible sheens, oil films, foams, solids, or deposits in the receiving waterbody.
3. For release of salt to the surface of the ground, or waters of the state, 50 pounds in solid form, unless the use is authorized by the department for deicing purposes, or 50 gallons in liquid form, unless authorized by the department as a dust suppressant or deicing agent or permitted under part 31 of the act.
4. For releases of all other polluting materials, the quantity specified in table 1 in [R 324.2009](#), or any quantity that causes unnatural turbidity, color, visible sheens, oil films, foams, solids, or deposits in the receiving waterbody.

Within 10 days of the release exceeding threshold reporting quantity, the owner or operator of the facility must submit a written report to the DNRE outlining the cause of the release, discovery of the release, and the response measures taken and/or a schedule for completion of measures to be taken. [R 324.2007](#)(2).

Any person who violates any provisions of these rules is subject to the procedures and penalties outlined in Sections 3112, 3115, and 3115a of Part 31 (see [§ 2.31](#)).

B. Sewage Disposal and Waterworks Systems

1. Sewerage Systems (Part 41) §2.37

The DNRE has regulatory authority over all sewerage systems and those who are engaged in sewage treatment service. [MCL 324.4102](#). Treatment facilities are classified into four class designations of A, B, C and D, based on population served, type of treatment facility, the character and volume of wastes to be treated, and the use and nature of state waters receiving the effluent. [R 299.2911\(1\)](#). The class designations identified by [R 299.2911\(1\)](#) are as follows:

1. Class A, treatment facilities serving or designed to serve a population of 50,000 or more persons.
2. Class B, treatment facilities serving or designed to serve a population of 10,000 or more, but less than 50,000, persons.
3. Class C, treatment facilities serving or designed to serve a population of 2,000 or more, but less than 10,000, persons.
4. Class D, treatment facilities serving or designed to serve a population of less than 2,000 persons.

Individuals desiring to be certified and classified for operation of a treatment facility must submit an application to the DNRE and take a written examination. See [R 299.2918-.2927](#).

Before constructing or altering of a sewerage system, applicants must first submit plans and specifications of the proposed project, which include an engineering report, to the DNRE for review and issuance of a construction permit. [R 299.2933-.2936](#). In evaluating the application, the DNRE considers design criteria as set forth in recommended standards for sewage works and assures that the sewerage system is designed to protect the public health and prevent unlawful pollution. See [R 299.2938-.2942](#). The DNRE will then approve or deny the issuance of a permit.

Sewage system developers no longer need to obtain a resolution from the municipality, pursuant to [R 299.2933\(4\)](#), before the DNRE will consider their application. The court in *Lake Isabella Dev, Inc v Village of Lake Isabella*, [259 Mich App 393](#); 675 NW2d 40 (2003), held that Rule 299.2933(4) was (1) contrary to the legislative intent underlying the DNRE's enabling statute because it gave municipalities indirect veto power and created a new burden and new remedy instead of an enforcement mechanism, and was (2) arbitrary and capricious because it constituted an unlawful delegation of discretionary power to municipalities, sought to impose operational mandates upon municipalities ill-adapted to comply with those mandates, and was unnecessary to the DNRE for enforcement. DNRE Water Bureau has since published its Policy and Procedures to "ensure that sewage systems governed under Part 41 are continually operated and maintained to avoid the unauthorized discharge of raw or untreated sewage into the waters of the state; and to ensure that sewage is not potentially prejudicial to the public health". [WB-010](#), Privately Owned, Publicly Used, Sewage Systems Permit Approval effective date July 26, 2007, Revision Date October 30, 2007.

Sewerage systems are required to provide adequate operating staff to carry out the proper operation, maintenance, and laboratory testing functions to ensure the facility is functioning in a manner that will minimize upsets and discharges of excessive pollutants. [R 299.2955](#). The owner of the treatment facility is required to prepare an operation and maintenance manual that describes the function, start-up, shutdown, and periodic maintenance procedures for each unit process and each item of mechanical and electrical equipment. [R 299.2957](#). A copy of the manual must be submitted to the DNRE for review at least 60 days before the date of operation. *Id.*

When operating a sewerage system during construction or alteration, the bypassing of untreated wastewater or reduction in treatment effectiveness should be avoided. A program for completing the work in a way that will minimize pollution effects on receiving waters must be submitted to the DNRE for review and approval. [R 299.2943](#).

If a breakdown of a sewerage system or emergency situation results in a discharge of pollutants in excess of those authorized by a discharge permit, the owner is required to take all necessary measures to correct the breakdown or emergency and eliminate or reduce the discharge of excessive pollutants. [R 299.2959\(1\)](#). The owner must promptly notify the DNRE about the discharge and within 72 hours submit a written report stating the cause, the discovery, and the corrective actions taken to restore the facility and minimize the adverse impact on state waters. [R 299.2959\(2\)](#).

A person who violates Part 41 is guilty of a misdemeanor punishable by imprisonment for not more than 90 days or a fine of not more than \$500, or both, and payment of the costs of prosecution. [MCL 324.4110\(3\)](#). Each day for which a violation occurs is a separate and additional violation. *Id.*

2. Waterworks Systems, Sewers, and Disposal Plants (Part 43) §2.38

Pursuant to [MCL 324.4301](#), a local unit of government, either individually or jointly by agreement with another local unit of government, may own, acquire, construct, equip, operate, and maintain, either within or outside of the statutory or corporate limits of the local unit or units of government, intercepting sewers, plants for treatment and disposal of waste, and waterworks systems approved by the DNRE for the purpose of obtaining, treating, and delivering quality water in adequate quantity to the local unit or units of government. When the DNRE, or a court has ordered, or when the DNRE has issued a permit, the legislative body of the local unit of government may issue and sell all necessary bonds for construction, installation, alteration, operation, or improvement of the proposed system or facilities set forth in the order or permit. [MCL 324.4307](#). The legislative body determines the denominations of the bonds and the date, time, and manner of payment. *Id.*

3. Sewage Disposal and Water Supply Districts (Part 47) §2.39

The DNRE has the power and the duty to foster and encourage the organization of sewage disposal and water supply districts; to cooperate, negotiate, and enter into contracts with other governments, governmental units and agencies in matters concerning water supply systems and

sewage disposal systems; and to act as a fiscal agent for the state for the purpose of making money available to local units of government for the construction and operation of sewage disposal systems. [MCL 324.4702](#). Two or more municipalities may file a petition with the DNRE requesting that a sewage disposal district or a water supply district or combination of both, be organized to function in the area. [MCL 324.4703](#). Within 30 days, or under certain circumstances, within 90 days, the DNRE will hold a hearing on the desirability and necessity of the creation of a district, the appropriate district boundaries, and all questions related to the matter. [MCL 324.4704](#). After the hearing, the DNRE will approve the petition if it finds creating a district will serve the public health and welfare. [MCL 324.4705](#). Alternatively, the DNRE will deny the petition if the district within the defined boundaries is not feasible from the standpoint of engineering, administration, and financing. *Id.*

Once a water supply district is created under this part, it serves as a governmental subdivision of the state and a corporate body, exercising public powers, with the power to sue and be sued in any court of the state. [MCL 324.4708](#). The district also may enter into contracts with any municipality located within its territorial limits providing for the acquisition, construction, improvement, enlargement, extension, operation, and financing of a sewage disposal system or water supply system. [MCL 324.4709](#).

4. Construction of Collecting Sewers (Part 49) §2.40

The legislature established the state sewer construction fund to provide state grants to local agencies to finance construction of collecting sewers. [MCL 324.4903](#). Grants are made only for collecting sewers on which contracts for construction were awarded prior to the exhaustion of the fund. *Id.* Under MCL 324.4905, grants are subject to the following limitations:

1. A grant shall not be made for collecting sewers required under the subdivision control act of 1967 (now land division act), 1967 PA 288, [MCL 560.101](#)-.293, .
2. A grant shall not be made for collecting sewers for which a federal grant has been made if the amount of the federal grant equals or exceeds the amount of the state grant that the collecting sewers would have received if there had been no federal grant. If the amount of the federal grant made for the collecting sewers is less than the amount of the state grant that the collecting sewers would have received if there had not been a federal grant, the amount of the state grant made for the collecting sewers shall not exceed the difference between the state grant that the collecting sewers would have received if there had not been a federal grant, and the federal grant.
3. A grant shall not be made for collecting sewers, the construction of which would result in the discharge of untreated or inadequately treated sewage to the waters of the state.
4. A grant shall not be made unless the local agency has received approval by the department of an official pollution control plan as required by sections 7 and 8 of 1966 PA 329, [MCL 323.117](#), -.118, and the collecting sewers are in conformity with the official plan.
5. A grant shall not be made for collecting sewers that the department determines would not meet an existing or imminent need or would constitute a noneconomic or speculative project.
6. A local agency shall not be allotted more than 2% of the fund.

The director of the department of management and budget and the state treasurer makes disbursements from the state sewer construction fund. [MCL 324.4904](#), .4912(4). Disbursements from the fund to a local agency are made for projects on the priority list established under [MCL 324.4904](#), .4912. See [MCL 324.4909](#)-.4912 for all priority project certification procedures.

5. Clean Water Assistance (Part 53) §2.41

Part 53 provides for a state water pollution control revolving fund. [MCL 324.5301](#) *et seq.* The state revolving fund (SRF) allows municipalities to receive low interest loans for constructing wastewater treatment facilities. Through the 2007 fiscal year, the SRF program has provided loans for 305 projects, totaling \$2.846 billion. [Michigan.gov, DNRE: [Clean Water Revolving Funds](#), (last visited July 23, 2008).]

To receive assistance, a municipality must first submit to the DNRE a project plan for a tier I or tier II project. DNRE uses the project plans to develop a project priority list. Project plans should demonstrate the need of the project to assure maintenance, or progress toward, compliance with the CWA or Part 31, and to meet the minimum requirements of the National Environmental Policy Act of 1969. [MCL 324.5303](#)(3). According to [R 323.952](#) to .953 in order to ensure that tier II projects are completed in an environmentally sound manner, project plans should demonstrate “sufficient detail” on (a) the background, (b) analysis of alternatives, (c) basis of design, (d) environmental impacts, and (e) public participation.

After notice and opportunity for public comment, the DNRE develops three separate priority lists: one for sewage treatment works projects and stormwater treatment projects, one for nonpoint source projects, and one for projects funded under the strategic water quality initiatives fund. [MCL 324.5303](#)(5); [R 323.957](#). Under [MCL 324.5202](#) loans will be disbursed through the strategic water quality initiatives program meant to provide assistance to projects seeking to improve a sewage water system for one or more of the following:

1. Improvements to reduce or eliminate the amount of groundwater or storm water entering a sanitary sewer lead or a combined sewer lead.
2. Upgrades or replacements of failing on-site septic systems that are adversely affecting public health or the environment, or both.

The project priority list ranks the municipal projects based on (1) the severity of the water pollution problem, (2) whether the project is necessary to comply with an order, permit, or legal requirement, and (3) the residential population to be served by the project. [R 323.958](#)-.960.

Using the priority list, the DNRE annually prepares and submits to the EPA an intended use plan to identify proposed intended uses of the fund. Intended use plans include a copy of the state’s priority list, description of long and short term goals of the fund, description of projects on the priority list, necessary proposals indicating how the state intends to meet applicable federal requirements, criteria and methods used for distribution of the fund, description of the public participation process, and any other appropriate information. [MCL 324.5306](#).

The DNRE reviews the project plans for projects and approves or disapproves the plans typically within 120 days of notifying the municipalities of their inclusion in the intended use plan. [MCL 324.5307](#). If the project is disapproved, the DNRE will notify the municipality of the deficiencies that need to be corrected. *Id.*

The DNRE may terminate assistance if it determines that there is (1) a substantial failure to comply with the terms and conditions of the agreement providing assistance, (2) a legal finding or determination that the assistance was obtained by fraud, (3) a practice in the administration of the project that is illegal or impair the successful completion or organization of the project, or (4) misappropriation of assistance for uses other than those set forth in the agreement providing assistance. [MCL 324.5312](#). The DNRE will give written notice to the municipality of its intent to terminate assistance within 30 days before it moves forward with the appropriate action to terminate assistance. *Id.*

C. Watercraft Pollution Control (Part 95) §2.42

Persons are prohibited from “placing, throwing, depositing, discharging, or causing to be discharged into or onto state waters, any litter, sewage, oil, or other liquid or solid materials that render the water unsightly, noxious, or otherwise unwholesome so as to be detrimental to the public health or welfare or to the enjoyment of the water for recreational purposes.” [MCL 324.9502](#). Part 95 of the NREPA prohibits the discharge of all sewage, whether treated or untreated, from watercraft in Michigan waters. *Lake Carriers’ Ass’n v Director of Dep’t of Natural Resources*, [407 Mich 424](#); 286 NW2d 416 (1979).

Persons are prohibited from discharging oil from a watercraft or a docking facility into or onto state waters. [MCL 324.9505](#)(1). The owner or operator of a watercraft that discharges or contributes to the discharge of oil into or onto state waters is required to immediately remove the oil from the waters, shorelines, or beaches. [MCL 324.9505](#)(2). If the state removes the oil that was discharged from the watercraft, the owner or operator, or both, are liable to the state for the full amount of the cost of removing the oil. *Id.*

Part 95 regulates marine sanitation devices, which are defined as equipment installed on board watercraft to receive, retain, treat, or discharge sewage. [MCL 324.9501](#)(e). Marine sanitation devices are required to be equipped with pollution control devices with (1) an approved holding tank that will retain all sewage produced on the watercraft *or* (2) an incinerating device that will reduce to ash all sewage produced on the watercraft. [MCL 324.9503](#). Watercraft with a marine sanitation device equipped with any type of bypass connection, pump, or other means of directly or indirectly discharging sewage into state waters are prohibited unless the bypass connection, pump, or other device has been rendered incapable of discharging sewage. [MCL 324.9503](#)(2). Under [MCL 324.9503](#)(2)(a), (b) a bypass connection, pump, or other device is rendered incapable of directly or indirectly discharging sewage into the waters of the state of Michigan by:

1. Removing a section of the pipe or tubing that allows discharge of sewage into the waters of this state, placing a cap over the pipe or tubing that remains attached to the marine sanitation device, and placing a seal approved by the department over the cap in a manner that precludes reattaching the pipe or tubing without breaking the seal. To comply with

the requirements of this subsection, the seal must be unbroken at the time an inspection occurs.

2. Closing a valve that will prevent all discharge of sewage into the waters of the state, and placing a seal approved by the department over the valve handle in a manner that precludes reopening the valve without breaking the seal. To comply with the requirements of this subsection, the seal must be unbroken at the time an inspection occurs.

All docking facilities, which include public, private, or commercial marinas, yacht clubs, docks, and wharves used for mooring, serving, or otherwise handling watercraft, are required to provide DNRE approved pump-out facilities for marine sanitation device holding tanks on the watercraft. [MCL 324.9504](#). Docking facilities that service only small watercraft of a type not equipped with marine sanitation devices or having a capacity of 15 watercraft or less are exempt from providing pump-out facilities. *Id.* Docking facilities that contract and use a pump-out facility of a nearby docking facility are exempt provided that the docking facility was constructed before May 1, 1990 and capacity has not expanded by a cumulative amount exceeding 25% or more than 15 slips, whichever is less. *Id.*

All watercraft, marinas, or other waterside facilities used by watercraft may be inspected by the DNRE, peace officers, conservation officers, or police officers to ensure compliance with Part 95. [MCL 324.9506](#). Persons in violation of Part 95 under this part are guilty of a misdemeanor punishable by imprisonment up to 92 days and/or a fine of not more than \$500. [MCL 324.9510](#). Part 95, however, bars the enforcement of any of its provisions that would cause a violation of federal law, but does not prevent the enforcement of standards for Michigan waters which exceed federal requirements. *Lake Carriers' Ass'n v Director of Dep't of Natural Resources*, [407 Mich App 424](#); 286 NW2d 416 (1979).

IV. Other Federal and Michigan Water Pollution Statutes

A. The Great Lakes Water Quality Agreement of 1978 §2.43

The [Great Lakes Water Quality Agreement](#) was first signed in 1972 and renewed in 1978 to express the commitment of the United States and Canada to restore and maintain the chemical, physical, and biological integrity of the waters of the Great Lakes Basin Ecosystem. The agreement was amended by the 1987 Protocol that introduced provisions to develop and implement Remedial Action Plans (RAPs) for Areas of Concern and Lakewide Management Plans (LaMPs) to control critical pollutants. An Area of Concern is a polluted location on the Great Lakes. Currently there are [14 Areas of Concern](#) within Michigan's Jurisdiction, 10 of which are completely within Michigan's borders.

LaMPs were developed to reduce the loadings of critical pollutants in the open waters of the Great Lakes, and to restore the beneficial uses in areas where they are impaired. The United States and Canada share the responsibility for developing and implementing LaMPs for Lake Superior, Huron, Erie, and Ontario, while Lake Michigan is solely under United States responsibility.

The most recent Annexes to the agreement address atmospheric deposition of toxic pollutants, contaminated sediments, groundwater, and nonpoint source pollution.

B. The Safe Drinking Water Act §2.44

In 1976, the legislature enacted the Safe Drinking Water Act, [MCL 325.1001 et seq.](#), to ensure that public water supply systems meet minimum national standards for the protection of the public health. The DNRE has control over Michigan's public water supplies and suppliers of water, is therefore allowed to enter the waterworks system of a water supplier for inspecting the system and making sure it is in compliance with the act. [MCL 325.1003](#). The act incorporates maximum contaminant levels for inorganic and organic chemicals, microbiological contaminants and turbidity set forth under the federal drinking water regulations. [MCL 325.1006](#).

Before commencing the construction, alteration, addition, or improvement of a waterworks system, the water supplier must first submit its plans and specifications for the construction to the DNRE to obtain a permit. [MCL 325.1004\(6\)](#). A professional engineer licensed under article 20 of the occupational code, [MCL 339.2001-2014](#), must prepare the plans and specifications. *Id.* The DNRE will deny a permit when the most recent capacity assessment shows that the waterworks system does not have adequate technical, financial, or managerial capacity to meet the requirements of this act. [MCL 325.1004\(7\)](#).

The director of the DNRE appoints an [advisory board of examiners](#) to assist the DNRE in examining individuals' competency in operating water treatment systems and water distribution systems. [MCL 325.1009\(2\)](#). The DNRE issues certificates to individuals meeting the requirements, recognizing their ability to operate a specified class of waterworks system. [MCL 325.1009\(4\)](#).

Violations under the Safe Drinking Water Act are misdemeanors subject to maximum imprisonment of one year, fines, civil penalties (up to \$5,000 for each day of violation), and injunctions. [MCL 325.1021-1022](#).

C. Water Pollution Prevention and Monitoring (Part 88)

1. Clean Michigan Initiative Nonpoint Source Pollution Control Grants §2.45

The director of the DNRE may award grants and enter into contracts with developers who implement the physical improvement portion of an approved watershed management plan or to those who reduce nonpoint source pollution from identified sources. [MCL 324.8802\(2\)](#); [R 324.8803](#). Only counties, cities, villages, townships, and non-profit entities are eligible to apply for these grants. See [R 324.8805](#). Applications must be submitted to the DNRE and should include a detailed description of the project, an explanation of how the project is consistent with an approved watershed plan (if applicable), and a description of the total cost of the project and the source of the local government's contribution to the project. [MCL 324.8804](#). See [R 324.8804](#) for a complete list of all application requirements.

In selecting projects for a grant award, the DNRE considers many factors which include: the expectation for long term water quality improvement and protection of high-quality waters,

anticipated water quality benefits of the project in relations to the cost, the length of time the applicant has committed to maintain the physical improvements, and whether the project provides benefits to sources of drinking water. [MCL 324.8803](#); [R 324.8806](#).

Following project selection, the DNRE and the grantee enter into a contract that establishes the work to be conducted and the commitment of the funds. [R 324.8808](#)(2). The grantee must submit quarterly status reports to the DNRE and allow the DNRE on the site for inspections to ensure the project's environmental benefits and consistency with approved site plans. [R 324.8807](#)(1), (3). The DNRE may revoke a grant or withhold payment to a grantee who fails to comply with the terms and conditions of the grant. [R 324.8807](#)(7).

2. Clean Water Fund §2.46

Created within the state treasury, the Clean Water Fund was designed to financially help those involved in water pollution control activities, wellhead protection activities, and stormwater treatment projects and activities. [MCL 324.8807](#). Under Part 88, the DNRE may award grants and enter into contracts with individuals involved in activities such as implementing recommendations in LaMPs and RAPs that will directly protect or improve water quality, implementing portions of the surface water monitoring strategy, or implementing programs to identify and correct illicit connections to separate stormwater sewer systems. [R 324.8907](#)(1). Only local governmental units and non-profit entities are eligible for a grant under the Clean Water Fund. [R 324.8908](#)(2). In addition to being a local unit of government or a non-profit entity, [R 324.8908](#) eligibility is attained through the satisfaction of the following requirements:

1. The applicant shall demonstrate the capability to carry out the proposed project.
2. The applicant shall demonstrate that there is an identifiable source of funds for future maintenance and operation of the proposed project, if appropriate.
3. The applicant shall have undergone a successful financial audit within the 24-month period immediately preceding the application for a grant.
4. Within the 24 months immediately preceding the application for a grant, the applicant shall not have demonstrated an inability to either manage a grant or meet the obligations in a contract with the department.
5. Within the 24-month period immediately preceding the application for the grant, the applicant shall not have had a grant from any program within the department revoked or terminated due to the applicant's inability to meet the terms or condition of a grant.

The applicant must also satisfy the requirements stipulated in [R 324.8909](#). The application requirements and project selection criteria are similar to those in the Clean Michigan Initiative Nonpoint Source Pollution Control Grants. See [R 324.8909](#) for a listing of application requirements. [R 324.8910](#) defines the criteria for project selection as requiring a showing that the applicant has considered future/ long-term goals for improved water quality and is financially capable of committing themselves to the project in order to ensure successful completion.

After a grant is awarded, the grantee must submit a final project report to ensure the final project is consistent with the format provided by the DNRE. [R 324.8911](#)(3). The final project report should include a brief narrative description of the project, the number and types of best

management practices implemented, pollutant reduction information, and before and after pictures. *Id.* The grantee must also contribute match funds. [R 324 8912](#). Depending on the type of activity receiving the grant, matching funds are a minimum of 25% of the project's total cost, but can be as high as 66% of the project's total cost. See *id.*

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