

# Brownfield Redevelopment: A Great Opportunity

*Beth S. Gotthelf  
Butzel Long  
Bloomfield Hills*

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Finding contamination on a property was once considered a death knell. No longer. Contaminated property can be redeveloped and there are a variety of tools, both financial and regulatory, to build a successful development on contaminated property. Below is a brief discussion of some of those tools.

## **I. Development of Environmentally-Sensitive Properties**

Michigan's program for redeveloping contaminated "Brownfield" properties has three primary components. First, Part 201 of the Natural Resources and Environmental Protection Act ("NREPA"), MCL 324.10101 *et seq.*, (the state Superfund act) greatly limits the circumstances under which purchasers of contaminated properties may be held liable for funding or performing a cleanup of historic contamination. This provision has greatly reduced the actual and perceived environmental risk traditionally associated with owning contaminated property. Second, MDEQ has established cleanup standards for contaminated properties that generally are less restrictive than the criteria that previously was in effect. Cleanup strategies for contaminated property now must be appropriate for the particular health and environmental risks associated with the contamination given the particular property use. The third component of Michigan's redevelopment program consists of various financial incentives that have been developed by the state to generate funds for the redevelopment and reuse of contaminated property. These three components of Michigan's Brownfield program are discussed below.

### **A. Limitations on Liability Under Part 201**

The previous state Superfund statute was known as the Michigan Environmental Response Act, also known as Act 307. Act 307 basically mirrored the Federal Superfund

Act known as the Comprehensive Environmental Response, Compensation and Liability Act, 42 USC 9601 *et seq.* (“CERCLA”). Part 201 of NREPA heavily amended Act 307 and became effective on June 5, 1995. In essence, Act 307, imposed strict liability on persons who were in the chain of title of contaminated property at the time the contamination occurred or anytime thereafter, regardless of whether they were responsible in any way for causing the contamination. Act 307 also was the source of target cleanup criteria for soil and groundwater that were perceived as overly stringent and unrealistic for many industrial and commercial properties. These provisions inhibited the sale and redevelopment of Michigan’s contaminated industrial sites. The Michigan legislature enacted Part 201 to promote the redevelopment and reuse of contaminated properties by imposing liability only on persons who cause or contribute to environmental contamination on the property, and by removing excess conservatism from the cleanup standards.

Liability under Part 201 is imposed on persons who are responsible for causing or contributing to a release or threatened release of hazardous substances on property. MCL 324.20126(10)(a). Persons who do not cause or contribute to contamination on the property are exempt from liability. To establish this exemption, a purchaser must comply with two requirements. First, the purchaser must perform a baseline environmental assessment (“BEA”) of the property and submit the results of the BEA to the Michigan Department of Environmental Quality (“MDEQ”). The purchaser also must exercise due care at all times with respect to contamination on the property.

### **1. Baseline Environmental Assessments**

One of the primary mechanisms available for controlling environmental liability is the baseline environmental assessment, or BEA. A BEA is an environmental report that supplies a “snapshot” of site conditions at a particular point in time so that any contamination that occurs after that time may be distinguished from contamination that occurred before. MCL 324.20101(d). A new owner who completes a BEA that meets the state’s requirements is exempt from liability for contamination that occurred on the property during its historic use.

- a. The exemption extends both to liability under state environmental statutes and to liability for common law claims (*e.g.*, trespass or nuisance).
- b. The exemption extends to claims brought by third parties (such as adjacent property owners) that arise out of contamination that may have migrated off the property to a neighbor’s property.
- c. The exemption extends to all contamination that is identified in the BEA and any “unknown” contamination that exists as of the date of purchase.

The exemption does not extend explicitly to liability under CERCLA. However, on July 19, 1996, the United States Environmental Protection Agency (“USEPA”) and MDEQ entered into a Superfund Memorandum of Agreement that provides assurances that USEPA will not take action against property owners who are exempt from liability under Part 201 except in extraordinary circumstances. The agreement provides that USEPA will not take action against a property owner or operator exempt from liability under Part 201 so long as

- i. The property is not proposed or listed on the National Priorities List, is not subject to an order or other enforcement action under CERCLA; and does

- not pose an imminent and substantial endangerment to the public health or welfare or the environment; and
- ii. The property owner or operator discloses the results of the BEA to MDEQ, is not liable for the contamination at the site, and either conducts its activities at the property consistent with a closure plan approved by MDEQ or a settlement agreement entered into with MDEQ, or acquired the property after a regulatory closure had been achieved.

This agreement provides most property owners significant assurance that an exemption pursuant to Part 201 will protect them from liability under CERCLA.

Importantly, the BEA mechanism is available only if property is a “facility.” A “facility” is a place where contamination exists in excess of the cleanup criteria established by Michigan regulations for property intended for residential use. MCL 324.20101(1)(o), .20120a(1) and (17). The definition of “hazardous substance” in Part 201 is very broad and includes all substances designated as “hazardous” under CERCLA as well as petroleum products. MCL 324.20101(t). To make the BEA process as simple and inexpensive as possible, MDEQ has stated that the amount of environmental and technical information necessary to complete a BEA varies with the nature and extent of the purchaser’s proposed use of hazardous substances on the property. MDEQ has developed three types of BEAs: (1) a standard BEA where the new owner will not use significant quantities of hazardous substances; (2) a more comprehensive BEA where the hazardous substances that historically were used on the property are different than the hazardous substances that the new owner intends to introduce on the property; and (3) a very detailed BEA where the new owner intends to use the same hazardous substances as those used historically on the property. MDEQ regulations and guidance documents outline specific requirements for completing each type of BEA.

Part 201 describes fairly detailed procedures for completing and submitting the BEA. The exemption from liability provided by a BEA is available to a new owner when the BEA is completed and submitted to MDEQ. MCL 324.20126(1)(c). Generally, the new owner must complete the BEA within 45 days of the new owner’s purchase or occupancy of the property, and must submit the BEA to MDEQ within six months of its completion. MCL 324.20126(1)(c)(I). For additional certainty, a new owner may petition MDEQ for a written determination that the BEA is adequate and that the owner is entitled to liability protection. MCL 324.20129a. A request for such a determination must be accompanied by a \$750 fee and must be made within six months of purchase or occupancy of the property. *Id.* MDEQ must respond to such requests within 15 days of receipt.

Property owners who do not complete a BEA are not exempt from liability but may still be entitled to establish the traditional “innocent purchaser defense” to liability. Michigan’s version of the innocent purchaser defense parallels the federal defense: defendants must establish that at the time of acquisition, “all appropriate inquiry into the previous ownership and uses of the property” were conducted, consistent with good commercial or customary practice, and the new owner neither knew nor had reason to know that the property was contaminated. MCL 324.20126(3)(h). In addition, Part 201 establishes numerous exemptions from liability for certain categories of owners and operators. These categories include the owner or operator of property onto which contamination has migrated, unless the person is responsible for an activity causing a release that is the source of the contami-

nation; as well as many easement holders, lenders, persons who inherit contaminated property; residential property owners, and lessees using property for retail office or commercial purposes. MCL 324.20126.

Finally, although new property owners who do not submit a completed BEA may be liable for any contamination that may exist on the property, Part 201 allocates to MDEQ the burden of proving that a property owner or operator is liable. MCL 324.20126(6). Moreover, even if a property owner is found liable, as a practical matter, liability usually is apportioned among liable parties in accordance with their relative degree of responsibility for the contamination. MCL 324.20129.

## **2. Covenants Not to Sue**

Part 201 provides a second mechanism for protecting new owners of contaminated property from liability for the contamination that exists on the property at the time of the purchase. Sections 20132 and 20133 of Part 201 generally authorize MDEQ to grant a covenant not to sue (“CNTS”) to non-labile parties who voluntarily undertake to cleanup contaminated property. MCL 324.20132, .20133. The CNTS generally take effect after the cleanup has been completed, and extends to liability for any contamination that existed at the time of the purchase and, in some circumstances, to liability for contamination that may occur in the future. *Id.* The protection of a CNTS even may be transferred to a subsequent owner in some circumstances. To obtain a CNTS, a buyer generally must enter into an agreement with the state.

Unlike a BEA, a CNTS protects a buyer from liability even though the buyer cleans up the existing contamination and conducts site preparation activities on the property. In essence, the State provides a CNTS to a buyer in exchange for an agreement to cleanup and redevelop the contaminated property. The CNTS therefore specifically contemplates on-site work, and protects the buyer from liability arising out of the condition of the property after the site activities and cleanup have been completed (as long as MDEQ approves the construction plans and has an opportunity to oversee the activities).

As part of the agreement, the buyer often has to obtain regulatory “closure” of the property from MDEQ. To obtain closure of a contaminated facility, a cleanup strategy must be developed that addresses contamination on the property that presents an unacceptable risk to human health or the environment. MCL 324.20114(3). Specific cleanup activities must be developed and incorporated into a remedial action plan (“RAP”), and may be undertaken only with MDEQ approval. *Id.* MDEQ approves of specific cleanup strategies on the basis of cost effectiveness, and prefers cleanup strategies that permanent remove or control contamination at the site. MCL 324.20118(3), (4). Obtaining regulatory approval of a cleanup strategy can be a lengthy and time-consuming process, and often requires “hand in hand” cooperation with MDEQ.

## **3. The “Due Care” Requirements**

Although Part 201 created an exemption to liability for purchases of contaminated property who perform a BEA, the Part 201 amendments do not release such purchasers from all responsibility for the contamination. Part 201 requires all property owners to exercise “due care” with respect to contamination that is known to exist on the property. “Due care” consists of three elements. Owners of contaminated property must:

- a. Take actions necessary to prevent “exacerbation” of the existing contamination;

- b. Mitigate any unacceptable risks on the property to assure that the use of the property protects the public health and safety; and
- c. Take reasonable precautions against the acts or omissions of third parties.

MCL 324.20107a. New owners or operators who fail to comply with the “due care” requirements can be held liable for the costs and damages that result from their failure. *Id.*

Complying with “due care” obligations under Part 201 is critical for property owners who intend to disturb contaminated property in any way, including by excavating soils to install new utility lines or to construct new buildings. Part 201 defines “exacerbation” to include activities undertaken by the owner or operator of a facility that either (1) alter the condition of the facility in a way that increases cleanup costs associated with the property; or (2) cause contamination to migrate beyond the property boundaries at unacceptable concentrations. MCL 324.20101(n). Thus, for example, excavating soils to construct a new building could “exacerbate” existing soil contamination if contaminated soil is moved from one part of the property to another. Similarly, contamination that currently exists in soil could create “unacceptable exposure” to people on the property if left unremediated. As such, a new owner may be required to implement a RAP as part of its due care. Finally, contractors who perform work on contaminated property are “third parties” whose foreseeable acts or omissions foreseeably could exacerbate contamination.

Administrative rules promulgated pursuant to Part 201 define and expand on the concept of “due care.” Under the rules, activities that provide environmental or public health benefits and which only increase response activity costs a small amount in relation to the total cost of the response activity would not be considered exacerbation. For example, paving or landscaping to provide a barrier to prevent direct contact with contamination would not be considered exacerbation under the proposed rules. It is important to note, however, that due care obligations continue as long as the contamination remains on the property.

A new owner or operator who fails to comply with the due care provisions can be held liable for the costs and damages that result from his or her failure to comply. To ensure compliance with the due care requirements, a buyer could develop a “use plan” for the property. A use plan would incorporate specific elements to ensure that the due care requirements were being met. The plan would set forth all of the foreseeable uses a buyer would make of the property (residential home sites, golf course, common areas, etc.) The plan should also include engineering diagrams, expansion plans, rehabilitation plans, and arrangements for site security while the cleanup proceeded. The use plan would identify areas on the property that are significantly contaminated and should be addressed by the use plan to control unacceptable exposure. Response activities (such as activities designed to obtain a “closure” of known and suspected areas of contamination) may be an essential element.

To obtain certainty with respect to meeting its due care obligations, a buyer could petition MDEQ within six months of purchasing the property for a written determination that its proposed use of the property meets the “due care” requirements of Part 201. MCL 324.20129A. However, such a petition, like a BEA, could invite MDEQ involvement in the property.

## **B. Cleanup Criteria**

The numeric cleanup standards that MDEQ has promulgated pursuant to amended Part 201 reflect the Michigan's legislature's interest in matching the extent of a necessary cleanup to the proposed future use of the property. Part 201 provides four main land use categories: residential, commercial, recreational, and industrial. MCL 324.20120a. These land use categories are based on local zoning and the use of the property. MDEQ has promulgated default cleanup criteria for these categories that reflect the varying degree of unacceptable environmental risk that is associated with contamination on these properties. These numeric criteria have been promulgated for soil, groundwater, and (in certain circumstances) surface water contamination on properties in the residential and industrial/commercial land use categories.

Part 201 also provides two risk categories for obtaining a regulatory closure of contaminated property: "limited" and "unlimited." A closure is "limited" if contaminated soil or other media that remains on property after a cleanup creates residual environmental risk that must be addressed through restrictions on the use of the property. Methods of restricting the use of the property include deed restrictions, use of pavement as a barrier to limit exposure to contaminated soil, and/or signs or markers warning of the contamination. An "unlimited" closure is one that does not require post-closure limitations on the use of the property. Persons proposing a remedial action have the option of determining which cleanup category to implement, subject to the approval of MDEQ. MCL 324.20120a.

## **C. See Financial Incentives Paper**

## **D. Open Space Planning**

Over the past forty years, all fifty states have enacted legislation aimed at preserving land for agricultural or open space use. Some states have very active programs.

One example is Maryland's Smart Growth Program. Adopted in 1997, this program's initiatives aim to direct state resources to revitalizing older developed areas and discouraging the continuation of sprawling development into rural areas. To promote these incentives, Maryland limits most of the state's infrastructure funding and economic development and housing money to Smart Growth Areas, which local governments have designated for growth. Md State Finance and Procurement Code 5-7B-01. Maryland also has implemented a "Live Near Your Work" program that provides cash contributions to workers buying homes in certain older neighborhoods, and a Rural Legacy Program which redirects state funds into land preservation program to limit the adverse effect of urban sprawl by purchasing conservation easements for large contiguous areas of undeveloped land. Md Natural Resources Code 5-9A-01.

Another active open space preservation program is Oregon's Land Use Planning Act of 1973. Or Rev Stat 197.005-197.860. Under this act, local governments in Oregon must establish an Urban Growth Boundary ("UGB") that separates an urban area from rural land, and requires that all land outside the UGB be zoned exclusively for farm use if the land is classified as "prime farmland" by the Soil Conservation Service. Additionally, Oregon's act requires local governments to arrange public facilities to serve both urban and rural development and to plan for adequate housing within the urban areas.

By comparison to the open space preservation initiatives in Maryland and Oregon, Michigan's open space program is moving very slowly. In 1974, Michigan passed the Farmland and Open Space Preservation Act, MCL 324.36101 *et seq.* Under this act, farmers are granted tax relief to preserve farm land and open space, provided that they enter into a written agreement to limit the development of their land for non-agricultural purposes for not less than 10 years. MCL 324.36103-324.36104. Owners of non-agricultural open space also receive tax relief under this act. Landowners in the program must apply to local governments for permission to convey open space development rights easements to the state of Michigan. The conveyance must be approved by the state legislature. MCL 324.36105. Because of the procedural hurdles involved with receiving this tax relief, few landowners, especially near urban areas (*i.e.*, land most likely affected by urban sprawl), have taken advantage of this program.

Some local governments in Michigan also have implemented open space planning policies. For example, Washtenaw County recently prepared a [Task Force Report on Agricultural Lands and Open Space Planning](#). In this report, Washtenaw County stated its interest in implementing a program to maintain a minimum of 120,000 acres of agricultural land in the County through the year 2020, and to maintain the present ratio of publicly accessible open space to the population.

## **II. Specific Environmental Programs Affecting Property Development**

### **A. Wetland Areas**

One of the most prominent environmental programs that impact property development are the statutes and regulations that govern activities in wetlands. This topic was discussed earlier in the program and its materials are in this booklet.

### **B. Endangered Species Act**

One of the regulatory programs that may impact the development of property that provides habitat for plant and animal life is the Endangered Species Act ("ESA"), 16 USC 1531 *et seq.* Under the Endangered Species Act, a property owner's activities cannot "take" a listed endangered or threatened species without an incidental take permit. 16 USC 1538-1539. "Take" is defined as harass, harm (including the significant modification of a species' habitat), pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to engage in any such conduct. 16 USC 1532(19). According to a 1993 study, half of the species listed as an endangered or threatened species under the Endangered Species Act ("ESA"), have at least 80 percent of their habitat on private land.

Private landowners that wish to develop any land which may result in the "incident take" of a listed animal species must first receive a permit. If a permit is required, then the landowner must also submit a habitat conservation plan ("HCP"). 16 USC 1539(a)(2)(A). A HCP ensures that there is adequate minimizing and mitigating of the effects of an "incidental take" of a listed species. The requirements of an HCP include:

- a. An assessment of impacts likely to result from the proposed taking of one or more federally listed species;
- b. Measures the permit applicant will undertake to monitor, minimize and mitigate (*i.e.*, conservation easement over existing habitat, enhancement or restoration of former habitat, creation of new habitat or buffer zones) such impacts;

- c. The funding that will be made available to implement such measures;
- d. Procedures to deal with unforeseen or extraordinary circumstances;
- e. Alternative actions to the taking that the applicant analyzed and the reasons why the applicant did not adopt such alternatives; and
- f. Additional measures that the U.S. Fish and Wildlife Service may require as necessary or appropriate.

*Id.*

The U.S. Fish and Wildlife Service can help a landowner determine whether an “incidental take” permit will be required for a proposed development or if the development can be designed to avoid the permit. Often a development project can be designed to avoid an incidental take permit (*i.e.* implementing a seasonal restriction to minimize disturbance during nesting). However, if an “incidental take” permit is required, then the U.S. Fish and Wildlife Service can help the property owner apply for the permit and develop the HCP for the property.

The processing time for a permit varies from three to ten months depending on the project’s complexity. Additionally, once a permit has been issued, the U.S. Fish & Wildlife Service has recently implemented its “No Surprises Policy” which assures that landowners will not incur any additional mitigation requirements beyond those agreed to in the HCP, even if circumstances change.

Michigan also has enacted an Endangered Species Act, MCL 324.36501 *et seq.* Michigan’s Endangered Species Act prohibits a person from taking, possessing, transporting, importing, exporting, processing, selling, buying, or offering to buy, and a common or contract carrier from transporting or receiving for shipment, any species of plant or animals that are on the state’s endangered species list or on the United States list of threatened or endangered species. MCL 324.36505. DNR will only permit a taking of a listed plant on a showing of good cause and where necessary to alleviate damage to property, or to protect human health or the endangered or threatened species. *Id.*

### **C. Storm Water Management**

In addition to program designed to protect wetlands and habitat, federal, state, and local laws and regulations require property owners to collect and treat storm water runoff from developed property. These programs are designed to reduce surface water pollution that can result from contaminated storm water runoff, and may have a significant impact on property development. Again, storm water was discussed previously in the program and its material is contained in this booklet.

### **D. Development of Waterfront Property**

Macomb County has a considerable amount of waterfront property. Special regulatory programs are applicable to the development of lakefront or riverfront properties. For example, Part 301 (Inland Lakes and Streams) of NREPA (“Part 301”), MCL 324.30101 *et seq.*, grants MDEQ extensive authority to regulate activities in Michigan’s inland lakes and streams. This was also discussed earlier in the program and the material is in this booklet.

## **E. Tree Preservation Ordinances**

Wetland regulations do not regulate the cutting down of trees. In fact, there is no state or federal statutes specifically addressing tree preservation. However, many municipalities are passing such ordinances, sometimes called woodland protection ordinances, in response to rapid development. The intent of the ordinances is to maintain some of the natural resources in the community. Woodlands provide several benefits including, for example, control of erosion and flooding, absorption of air contaminants, buffering noise, buffering wind, and visual screening. These ordinances often require tree surveys before development takes place on the property. Most ordinances require a permit before trees of a certain size (e.g. 36 inches in diameter) may be removed, damaged or destroyed. The ordinance may prohibit the removal of these larger trees except in certain circumstances, e.g. no feasible and prudent alternative for the proposed structure, or the tree is dead or diseased. If the permit allows for the removal of a tree, then it usually requires the relocation or replacement of that tree. The size and or number of replacement trees usually depends on the size of the tree being removed. The ordinances usually also dictate the type of tree (e.g. red oak, walnut) that must be planted. For trees that are to remain, the ordinances often require that protective barriers be erected around remaining trees. Tree preservation ordinance vary depending on the municipality. The developer is well advised to check with the local municipality before destroying trees.

## **F. Underground Storage Tanks**

Properties prime for redevelopment in Michigan often include properties where contamination has occurred due to leaking from abandoned underground storage tanks (“USTs”). These sites are prime locations for convenience stores, drug stores, and fast-food chains because they provide the ideal-size parcel, complete with an existing infrastructure and an existing customer base. Part 213 (Leaking Underground Storage Tanks) of NREPA, MCL 324.21301 *et seq.*, regulates leaking underground storage tank cleanups in Michigan. Generally, the liability protections added to Part 201 of NREPA in 1995, such as the baseline environmental assessment, are available to new owners of abandoned UST sites so that redevelopment may occur. In addition, liability for conducting UST cleanups under Part 213, like liability under Part 201, is causation-based, which means that a person must have caused a release from the UST through an act or failure to act. Finally, the cleanup criteria under Part 213 are purely risk-based, which means that the type of cleanup that is allowed at a UST site depends on the risk that contamination at the site poses to human health and the environment. The UST cleanup process therefore creates flexibility and provides for a more cost-effective solution.

Like Part 201 remedial activities, the cleanup activities mandated by Part 213 are basically under the control of the owner or operator of the USTs, with MDEQ only having an audit role. Under Part 213, however, responsible UST owners/operators are required to hire Qualified Underground Storage Tank Consultants (“QC”) to perform corrective actions. The QC must use risk-based corrective action (“RBCA”) and must submit required reports in time frames mandated by Part 213. Thus, Part 213 generally presents a more formalized cleanup process than Part 201.

MDEQ’s participation in UST cleanups is fairly limited. MDEQ field staff selectively audits reports and conduct field audits primarily based on the risk posed by the site. Staff also review baseline environmental assessments (“BEAs”) that have been prepared for

UST sites to protect the purchasers of properties contaminated by leaking USTs from liability for the contamination.

### **G. Solid Waste Management**

The development and construction of solid waste landfills generate even stricter regulatory controls than other types of development. Part 115 (Solid Waste Management) of NREPA, MCL 324.11501 *et seq.*, regulates the disposal of solid waste. Part 115 regulates all disposal areas including solid waste transfer facilities, incinerators, sanitary landfills, processing plants, and any other solid waste handling and disposal facilities used to dispose of solid waste. MCL 324.11503. In particular, Part 115 prohibits the disposal of solid waste on land without a current license issued by the MDEQ unless the disposal fits within a statutory exemptions. Such statutory exemptions may include, for example, the disposal of solid waste from in individual's own household on its own land (provided the disposal does not create a nuisance or health hazard). MCL 324.11520(2). Part 115 is beyond the scope of this program, but we will be happy to provide you with additional information if you desire.

### **H. Hazardous Waste Treatment, Storage, and Disposal**

Part 111 (Hazardous Waste Management) of NREPA ("Part 111"), MCL 324.11101 *et seq.*, and the Resource Conservation and Recovery Act ("RCRA"), 42 USC 6901, *et seq.*, regulate hazardous waste facilities. Under RCRA and Part 111, owners and operators of treatment, storage, or disposal facilities ("TSDFs") must obtain construction and operating permits from the MDEQ. Generators are not required to obtain hazardous waste permits unless they treat or dispose of hazardous wastes at their own facility, store hazardous wastes at their own facility, or store hazardous waste for more than 90 days. Generally, property owners who wish to construct, expand or enlarge a TSDF, or alter the method of treatment or disposal at a TSDF, must apply for and obtain a Part 111 construction permit. MCL 324.11118. Part 111 is beyond the scope of this program, but we will be happy to provide you with additional information if you desire.

### **I. Asbestos**

Developers must also be aware of federal asbestos regulations if property development involves renovation or demolition of older building structures. Asbestos was widely used in buildings for fireproofing, thermal and acoustical insulation, condensation control, and decoration. It was sprayed on beams and ceilings, used to cover piping and boilers, and sprayed into ducts. Asbestos was used extensively until the 1970s when USEPA banned certain applications.

Asbestos regulations arose from the federal Clean Air Act ("CAA"), 42 USC 7401 *et seq.* The CAA requires USEPA to develop and enforce regulations to protect the general public from exposure to airborne contaminants that are known to be hazardous to human health. USEPA established the National Emission Standards for Hazardous Air Pollutants ("NESHAP") program under the authority of Section 112 of the CAA, and asbestos was one of the first hazardous air pollutants regulated. The asbestos NESHAP was promulgated on April 6, 1973 and was revised in 1990.

The asbestos NESHAP protects the public by minimizing the release of asbestos fibers during renovation and demolition activities. "Demolition" is defined as the wrecking or taking out of any load-supporting structural member of a facility, together with any

related handling operations or intentional burning activities. “Renovation” is altering a facility or one or more facility components in any way, including the stripping or removal of asbestos-containing building materials from a facility component. Undertaking these activities with respect to certain amounts of asbestos containing materials, trigger work practice and notification requirements. Privately-owned residential houses or apartments that have four or fewer dwelling units are excluded from the regulations. However, if the structures are owned by commercial, industrial, or governmental entities, they may be subject to the NESHAP requirements.

The federal asbestos regulations specify work practices to be followed for demolitions and renovations of all structures, installations, and buildings. Work practices include adequate wetting of materials to ensure that asbestos fibers do not become airborne; managing asbestos-containing materials carefully to ensure that the fibers are not unnecessarily disturbed; and transporting the materials through chutes or tubes if removed more than 50 feet above ground level. The asbestos NESHAP contains notification requirements for the owner of the building and/or the contractor. Both the owner and the contractor are liable for compliance with the asbestos regulations.

## **J. Lead-Based Paint in Residential Housing**

Lead-based paint has gotten a considerable amount of press recently. Regulations issued jointly by USEPA and the Department of Housing and Urban Development (“HUD”) require property sellers, landlords, and agents to disclose lead-based paint hazards in certain types of housing to prospective purchasers and tenants. The regulations apply generally to “target housing,” which includes virtually all housing that was constructed prior to 1978 except for efficiencies and studio apartments, dormitories, military barracks, and housing for the elderly or persons with disabilities. These regulations are effective on September 6, 1996 for sellers and lessors who own more than four residential dwellings, and on December 6, 1996 for sellers and lessors who own fewer than four residential dwellings.

Under the regulations, sellers and landlords generally must disclose all available information about lead-based paint hazards in the property. The seller or landlord must (1) disclose the presence of any known lead-based paint and/or lead-based paint hazards in the housing; (2) provide copies of any records and reports in seller’s/landlord’s possession or reasonably obtainable regarding lead-based paint in the housing (including common areas); and (3) provide the purchaser or tenant with a copy of an USEPA/HUD-approved pamphlet entitled “Protect Your Family From Lead in Your Home.” These requirements must be met before the purchaser or tenant becomes obligated under any contract. In sales transactions, the regulations also require the seller to provide to the purchaser a 10-day period in which to conduct its own risk assessment or inspection for lead-based paint. The 10-day risk assessment period is not required for lease or rental transactions. Moreover, in lease transactions, the landlord need not make the required disclosures if the housing has been determined to be free of lead-based paint by a certified inspector. However, landlords are not required to test for lead-based paint.

The disclosure required by the regulations must be made in writing, and must include specific language set forth in the regulations. Purchase agreements must include the specific regulatory language and an acknowledgment that the purchaser has received the information and is aware of the opportunity to conduct a risk assessment. Leases need only include the disclosure and the tenant’s acknowledgment that the information was pro-

vided. Importantly, real estate or rental agents who assist in purchase or lease transactions are responsible for ensuring that the requirements of the new regulations are met.

Penalties for failing to comply with the regulations may be significant. Persons who knowingly fail to comply with the disclosure requirements not only are subject to civil penalties of up to \$10,000 per violation, but also may be liable to an injured purchaser or lessee for *three times* the damages incurred by these individuals, plus attorneys' fees, expert fees and court costs. Criminal penalties also may be assessed if a violation is both knowing and willful.

The regulations were designed to provide a regulatory framework to ensure an adequate flow of information regarding the presence of lead-based paint risks in housing.

### **III. Conclusion**

Redevelopment of old contaminated sites can be a successful and profitable endeavor. Federal and state funding is available, and state regulations provide sufficient protection to take advantage of existing infrastructure and those properties back on the tax rolls.

**Exhibit A**  
**Advance Notice of Proposed Rulemaking on the Clean Water Act**  
**Regulatory Definition of "Waters of the United States"**

Federal Register / Vol. 68, No. 10 / Wednesday, January 15, 2003 / Proposed Rules

1991

State resource agencies on the implications of the SWANCC decision for jurisdictional decisions under the CWA. The goal of the agencies is to develop proposed regulations that will further the public interest by clarifying what waters are subject to CWA jurisdiction and affording full protection to these waters through an appropriate focus of Federal and State resources consistent with the CWA. The input received from the public in response to today's ANPRM will be used by the agencies to determine the issues to be addressed and the substantive approach for a future proposed rulemaking addressing the scope of CWA jurisdiction.

Pending this rulemaking, should questions arise, the regulated community should seek assistance from the Corps and EPA, in accordance with the joint memorandum attached as Appendix A.

**DATES:** In order to be considered, comments or information in response to this ANPRM must be postmarked or e-mailed on or before March 3, 2003.

**ADDRESSES:** Comments may be submitted electronically, by mail, or through hand delivery/courier. Mail comments to: Water Docket, Environmental Protection Agency, Mailcode 4101T, 1200 Pennsylvania Ave., NW., Washington, DC 20460, Attention Docket ID No. OW-2002-0050.

**FOR FURTHER INFORMATION CONTACT:** For information on this ANPRM, contact either Donna Downing, U.S. Environmental Protection Agency, Office of Wetlands, Oceans and Watersheds (4502T), 1200 Pennsylvania Avenue N.W., Washington, DC 20460, phone: (202) 566-1366, e-mail: [CWAwaters@epa.gov](mailto:CWAwaters@epa.gov), or Ted Rugiel, U.S. Army Corps of Engineers, ATTN CECW-OR, 441 G Street NW., Washington, DC 20314-1000, phone: (202) 761-4595, e-mail: [Thaddeus.J.Rugiel@HQ02.USACE.ARMY.MIL](mailto:Thaddeus.J.Rugiel@HQ02.USACE.ARMY.MIL).

**SUPPLEMENTARY INFORMATION:**

**I. General Information**

**A. Potentially Regulated Entities**

Persons or entities that discharge pollutants (including dredged or fill material) to "waters of the U.S." could be regulated by a rulemaking based on this ANPRM. The CWA generally prohibits the discharge of pollutants into "waters of the U.S." without a permit issued by EPA or a State or Tribe approved by EPA under section 402 of the Act, or, in the case of dredged or fill material, by the Corps or an approved

**DEPARTMENT OF DEFENSE**

**Department of the Army, Corps of Engineers**

**33 CFR Part 328**

**ENVIRONMENTAL PROTECTION AGENCY**

**40 CFR Parts 110, 112, 116, 117, 122, 230, 232, 300, and 401**

**[FRL-7439-8]**

**RIN 2040-AB74**

**Advance Notice of Proposed Rulemaking on the Clean Water Act Regulatory Definition of "Waters of the United States"**

**AGENCIES:** U.S. Army Corps of Engineers, Department of the Army, DOD; and Environmental Protection Agency.

**ACTION:** Advance notice of proposed rulemaking.

**SUMMARY:** The U.S. Army Corps of Engineers (Corps) and the Environmental Protection Agency (EPA) are today issuing an advance notice of proposed rulemaking (ANPRM) in order to obtain early comment on issues associated with the scope of waters that are subject to the Clean Water Act (CWA), in light of the U.S. Supreme Court decision in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001) (*SWANCC*).

Today's ANPRM requests public input on issues associated with the definition of "waters of the United States" and also solicits information or data from the general public, the scientific community, and Federal and

State or Tribe under section 404 of the Act. In addition, under the CWA, States or approved Tribes establish water quality standards for "waters of the U.S.", and also may assume responsibility for issuance of CWA permits for discharges into waters and wetlands subject to the Act. Today's ANPRM seeks public input on what, if any, revisions in light of SWANCC might be appropriate to the regulations that define "waters of the U.S.", and today's ANPRM thus would be of interest to all entities discharging to, or regulating, such waters. In addition, because the Oil Pollution Act (OPA) is applicable to waters and wetlands subject to the CWA, today's ANPRM may have implications for persons or entities subject to the OPA. Examples of entities potentially regulated include:

Category	Examples of potentially regulated entities
State/Tribal governments or instrumentalities.	State/Tribal agencies or instrumentalities that discharge or spill pollutants into waters of the U.S.
Local governments or instrumentalities.	Local governments or instrumentalities that discharge or spill pollutants into waters of the U.S.
Federal government agencies or instrumentalities.	Federal government agencies or instrumentalities that discharge or spill pollutants into waters of the U.S.
Industrial, commercial, or agricultural entities.	Industrial, commercial, or agricultural entities that discharge or spill pollutants into waters of the U.S.
Land developers and landowners.	Land developers and landowners that discharge or spill pollutants into waters of the U.S.

This table is not intended to be exhaustive, but rather provides a guide for readers regarding entities that are likely to be regulated by a rulemaking based on this ANPRM. This table lists the types of entities that we are now aware of that could potentially be regulated. Other types of entities not listed in the table could also be regulated. To determine whether your organization or its activities could be regulated, you should carefully examine the discussion in this ANPRM. If you have questions regarding the applicability of this action to a particular entity, consult one of the persons listed in the preceding **FOR FURTHER INFORMATION CONTACT** section.

*B. How Can I Get Copies of This Document and Other Related Information?*

1. *Docket.* The agencies have established an official public docket for this action under Docket ID No. OW-2002-0050. The official public docket consists of the documents specifically referenced in this ANPRM, any public comments received, and other information related to this ANPRM. Although a part of the official docket, the public docket does not include Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. The official public docket is the collection of materials that is available for public viewing at the Water Docket in the EPA Docket Center, (EPA/DC) EPA West, Room B102, 1301 Constitution Ave., NW., Washington, DC. The EPA Docket Center Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566-1744, and the telephone number for the Water Docket is (202) 566-2426. You may have to pay a reasonable fee for copying.

2. *Electronic Access.* You may access this Federal Register document electronically through the EPA Internet under the Federal Register listings at <http://www.epa.gov/fedrgstr/>.

An electronic version of the public docket is available through EPA's electronic public docket and comment system, EPA Dockets. You may use EPA Dockets at <http://www.epa.gov/edocket> to submit or view public comments, access the index listing of the contents of the official public docket, and to access those documents in the public docket that are available electronically. Once in the system, select search, then key in the appropriate docket identification number.

Certain types of information will not be placed in the EPA Dockets. Information claimed as CBI and other information whose disclosure is restricted by statute, which is not included in the official public docket, will not be available for public viewing in EPA's electronic public docket. EPA's policy is that copyrighted material will not be placed in EPA's electronic public docket but will be available only in printed, paper form in the official public docket. Although not all docket materials may be available electronically, you may still access any of the publicly available docket materials through the docket facility identified in I.B.1.

For those who submit public comments, it is important to note that

EPA's policy is that public comments, whether submitted electronically or in paper, will be made available for public viewing in EPA's electronic public docket as EPA receives them and without change, unless the comment contains copyrighted material, CBI, or other information whose disclosure is restricted by statute. When EPA identifies a comment containing copyrighted material, EPA will provide a reference to that material in the version of the comment that is placed in EPA's electronic public docket. The entire printed comment, including the copyrighted material, will be available in the public docket.

Public comments submitted on computer disks that are mailed or delivered to the docket will be transferred to EPA's electronic public docket. Public comments that are mailed or delivered to the Docket will be scanned and placed in EPA's electronic public docket. Where practical, physical objects will be photographed, and the photograph will be placed in EPA's electronic public docket along with a brief description written by the docket staff.

*C. How and To Whom Do I Submit Comments?*

You may submit comments electronically, by mail, or through hand delivery/courier. To ensure proper receipt by EPA, identify the appropriate docket identification number (OW-2002-0050) in the subject line on the first page of your comment. Please ensure that your comments are submitted within the specified comment period. Comments received after the close of the comment period will be marked late. The agencies are not required to consider these late comments.

1. *Electronically.* If you submit an electronic comment as prescribed below, EPA recommends that you include your name, mailing address, and an e-mail address or other contact information in the body of your comment. Also include this contact information on the outside of any disk or CD ROM you submit, and in any cover letter accompanying the disk or CD ROM. This ensures that you can be identified as the submitter of the comment and allows EPA to contact you in case EPA cannot read your comment due to technical difficulties or needs further information on the substance of your comment. EPA's policy is that EPA will not edit your comment, and any identifying or contact information provided in the body of a comment will be included as part of the comment that is placed in the official public docket,

and made available in EPA's electronic public docket. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, the agencies may not be able to consider your comment.

i. *EPA Dockets.* Your use of EPA's electronic public docket to submit comments to EPA electronically is EPA's preferred method for receiving comments. Go directly to EPA Dockets at <http://www.epa.gov/edocket>, and follow the online instructions for submitting comments. Once in the system, select search, and then key in Docket ID No. OW-2002-0050. The system is an anonymous access system, which means EPA will not know your identity, e-mail address, or other contact information unless you provide it in the body of your comment.

ii. *E-mail.* Comments may be sent by electronic mail (e-mail) to [CWAwaters@epa.gov](mailto:CWAwaters@epa.gov), Attention Docket ID No. OW-2002-0050. In contrast to EPA's electronic public docket, EPA's e-mail system is not an anonymous access system. If you send an e-mail comment directly to the Docket without going through EPA's electronic public docket, EPA's e-mail system automatically captures your e-mail address. E-mail addresses that are automatically captured by EPA's e-mail system are included as part of the comment that is placed in the official public docket, and made available in EPA's electronic public docket.

iii. *Disk or CD ROM.* You may submit comments on a disk or CD ROM that you mail to the mailing address identified in I.C.2. These electronic submissions will be accepted in WordPerfect or ASCII file format. Avoid the use of special characters and any form of encryption.

2. *By Mail.* Send four copies of your comments to: Water Docket, Environmental Protection Agency, Mailcode 4101T, 1200 Pennsylvania Ave., NW, Washington, DC 20460, Attention Docket ID No. OW-2002-0050.

3. *By Hand Delivery or Courier.* Deliver your comments to: Water Docket, EPA Docket Center, EPA West, Room B102, 1301 Constitution Avenue, NW, Washington, DC, Attention Docket ID No. OW-2002-0050. Such deliveries are only accepted during the Docket's normal hours of operation as identified in I.B.1.

#### *D. What Should I Consider as I Prepare My Comments?*

You may find the following suggestions helpful for preparing your comments:

- a. Explain your views as clearly as possible.
- b. Describe any assumptions that you used.
- c. Provide any technical information and/or data on which you based your views.
- d. If you estimate potential burden or costs, explain how you arrived at your estimate.
- e. Provide specific examples to illustrate your concerns.
- f. Offer alternatives.
- g. Make sure to submit your comments by the comment period deadline identified.
- h. To ensure proper receipt by EPA, identify the appropriate docket identification number in the subject line on the first page of your response. It would also be helpful if you provided the name, date, and **Federal Register** citation related to your comments.

#### **II. The Importance of Updating the Regulations**

The agencies have not engaged in a review of the regulations with the public concerning CWA jurisdiction for some time. This ANPRM will help ensure that the regulations are consistent with the CWA and the public understands what waters are subject to CWA jurisdiction. The goal of the agencies is to develop proposed regulations that will further the public interest by clarifying what waters are subject to CWA jurisdiction and affording full protection to these waters through an appropriate focus of Federal and State resources consistent with the CWA. It is appropriate to review the regulations to ensure that they are consistent with the *SWANCC* decision. *SWANCC* eliminates CWA jurisdiction over isolated waters that are intrastate and non-navigable, where the sole basis for asserting CWA jurisdiction is the actual or potential use of the waters as habitat for migratory birds that cross State lines in their migrations. *SWANCC* also calls into question whether CWA jurisdiction over isolated, intrastate, non-navigable waters could now be predicated on the other factors listed in the "Migratory Bird Rule" or the other rationales of 33 CFR 328.3(a)(3)(i)-(iii).

Although the *SWANCC* case itself specifically involves section 404 of the CWA, the Court's decision may also affect the scope of regulatory jurisdiction under other provisions of the CWA, including programs under sections 303, 311, 401, and 402. Under each of these sections, the relevant agencies have jurisdiction over "waters of the United States." The agencies will consider the potential implications of the rulemaking for these other sections.

- *Section 404 dredged and fill material permit program.* This program establishes a permitting system to regulate discharges of dredged or fill material into waters of the United States.

- *Section 303 water quality standards program.* Under this program, States and authorized Indian Tribes establish water quality standards for navigable waters to "protect the public health or welfare" and "enhance the quality of water", "taking into consideration their use and value for public water supplies, propagation of fish and wildlife, recreational purposes, and agriculture, industrial, and other purposes, and also taking into consideration their use and value for navigation."

- *Section 311 spill program and the Oil Pollution Act (OPA).* Section 311 of the CWA addresses pollution from both oil and hazardous substance releases. Together with the Oil Pollution Act, it provides EPA and the U.S. Coast Guard with the authority to establish a program for preventing, preparing for, and responding to spills that occur in navigable waters of the United States.

- *Section 401 State water-quality certification program.* Section 401 provides that no Federal permit or license for activities that might result in a discharge to navigable waters may be issued unless a section 401 water-quality certification is obtained from or waived by States or authorized Tribes.

- *Section 402 National Pollutant Discharge Elimination System (NPDES) permitting program.* This program establishes a permitting system to regulate point source discharges of pollutants (other than dredged or fill material) into waters of the United States.

#### **III. Legislative and Regulatory Context**

The Federal Water Pollution Control Act Amendments, now known as the Clean Water Act (CWA), was enacted in 1972. In the years since its enactment, the scope of waters regulated under the CWA has been discussed in regulations, legislation, and judicial decisions.

The CWA was intended to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. 1251(a). Its specific provisions were designed to improve upon the protection of the Nation's waters provided under earlier statutory schemes such as the Rivers and Harbors Act of 1899 ("RHA") (33 U.S.C. 403, 407, 411) and the Federal Water Pollution Control Act of 1948 (62 Stat. 1155) and its subsequent amendments through 1970. In doing so, Congress recognized "the primary responsibilities and rights of States to prevent, reduce,

and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources \* \* \* 33 U.S.C. 1251(b).

The jurisdictional scope of the CWA is "navigable waters," defined in the statute as "waters of the United States, including the territorial seas." CWA section 502(7), 33 U.S.C. 1362(7). The existing CWA section 404 regulations define "waters of the United States" as follows:

(1) All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to ebb and flow of the tide;

(2) All interstate waters including interstate wetlands;

(3) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters:

(i) which are or could be used by interstate or foreign travelers for recreational or other purposes; or

(ii) from which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or

(iii) which are used or could be used for industrial purposes by industries in interstate commerce.

(4) All impoundments of waters otherwise defined as waters of the United States under the definition;

(5) Tributaries of waters identified in paragraphs (a)(1)-(4) of this section;

(6) The territorial seas;

(7) Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a)(1)-(6) of this section.

(8) Waters of the United States do not include prior converted cropland ... Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of CWA (other than cooling ponds ...) are not waters of the United States. 40 CFR.230.3(s); 33 CFR 328.3(a).

Counterpart and substantively similar regulatory definitions appear at 40 CFR 110.1, 112.2, 116.3, 117.1, 122.2, 232.2, 300.5, part 300 App. E, 302.3 and 401.11 (hereafter referred to as "the counterpart definitions").

In regulatory preambles, both the Corps and EPA provided examples of additional types of links to interstate commerce which might serve as a basis under 40 CFR 230.3(a)(3) and 33 CFR 328.3(a)(3) for establishing CWA

jurisdiction over intrastate waters which were not part of the tributary system or their adjacent wetlands. These included use of waters (1) as habitat by birds protected by Migratory Bird Treaties or which cross State lines, (2) as habitat for endangered species, or (3) to irrigate crops sold in commerce. 51 FR 41217 (November 13, 1986), 53 FR 20765 (June 6, 1988). These examples became known as the "Migratory Bird Rule," even though the examples were neither a rule nor entirely about birds. The Migratory Bird Rule later became the focus of the SWANCC case.

#### IV. Potential Natural Resource Implications

To date, some quantitative studies and anecdotal data provide early estimates of potential resource implications of the SWANCC decision. One of the purposes of the ANPRM is to solicit additional information, data, or studies addressing the extent of resource impacts to isolated, intrastate, non-navigable waters.

Non-navigable intrastate isolated waters occur throughout the country. Their extent depends on a variety of factors including topography, climate, and hydrologic forces. Preliminary assessments of potential resource impacts vary widely depending on the scenarios considered. See, e.g., Ducks Unlimited, "The SWANCC Decision: Implications for Wetlands and Waterfowl" (September 2001) (available at [http://www.ducks.org/conservation/404\\_report.asp](http://www.ducks.org/conservation/404_report.asp)); ASWM, "SWANCC Decision and the State Regulation of Wetlands," (June 2001) (available at <http://www.aswm.org>).

There is an extensive body of knowledge about the functions and values of wetlands, which include flood risk reduction, water quality improvement, fish and wildlife habitat, and maintenance of the hydrologic integrity of aquatic ecosystems. The ANPRM seeks information regarding the functions and values of wetlands and other waters that may be affected by the issues discussed in this ANPRM.

#### V. Solicitation of Comments

The agencies are seeking comment on issues related to the jurisdictional status of isolated waters under the CWA which the public wishes to call to our attention. To assist the public in considering these issues, the following discussion and specific questions are presented. The agencies will carefully consider the responses received to this ANPRM in determining what regulatory changes may be appropriate and the issues to be addressed in a proposed rulemaking to clarify CWA jurisdiction.

The SWANCC holding eliminates CWA jurisdiction over isolated, intrastate, non-navigable waters where the sole basis for asserting CWA jurisdiction is the actual or potential use of the waters as habitat for migratory birds that cross State lines in their migrations. 531 U.S. at 174 ("We hold that 33 CFR 328.3(a)(3) (1999), as clarified and applied to petitioner's balefill site pursuant to the "Migratory Bird Rule," 51 FR 41217 (1986), exceeds the authority granted to respondents under section 404(a) of the CWA."). The agencies seek comment on the use of the factors in 33 CFR 328.3(a)(3)(i)-(iii) or the counterpart regulations in determining CWA jurisdiction over isolated, intrastate, non-navigable waters.

The agencies solicit comment from the public on the following issues:

(1) Whether, and, if so, under what circumstances, the factors listed in 33 CFR 328.3(a)(3)(i)-(iii) (i.e., use of the water by interstate or foreign travelers for recreational or other purposes, the presence of fish or shellfish that could be taken and sold in interstate commerce, the use of the water for industrial purposes by industries in interstate commerce) or any other factors provide a basis for determining CWA jurisdiction over isolated, intrastate, non-navigable waters?

(2) Whether the regulations should define "isolated waters," and if so, what factors should be considered in determining whether a water is or is not isolated for jurisdictional purposes?

#### Solicitation of Information

In answering the questions set forth above, please provide, as appropriate, any information (e.g., scientific and technical studies and data, analysis of environmental impacts, effects on interstate commerce, other impacts, etc.) supporting your views, and specific recommendations on how to implement such views. Additionally, we invite your views as to whether any other revisions are needed to the existing regulations on which waters are jurisdictional under the CWA. As noted elsewhere in this document, the agencies are also soliciting data and information on the availability and effectiveness of other Federal or State programs for the protection of aquatic resources, and on the functions and values of wetlands and other waters that may be affected by the issues discussed in this ANPRM.

#### VI. Related Federal and State Authorities

The SWANCC decision addresses CWA jurisdiction, and other Federal or

State laws and programs may still protect a water and related ecosystem even if that water is no longer jurisdictional under the CWA following SWANCC. The Federal government remains committed to wetlands protection through the Food Security Act's Swampbuster requirements and Federal agricultural program benefits and restoration through such Federal programs as the Wetlands Reserve Program (administered by the U.S. Department of Agriculture), grant making programs such as Partners in Wildlife (administered by the Fish and Wildlife Service), the Coastal Wetlands Restoration Program (administered by the National Marine Fisheries Service), the State Grant, Five Star Restoration, and National Estuary Programs (administered by EPA), and the Migratory Bird Conservation Commission (composed of the Secretaries of Interior and Agriculture, the Administrator of EPA and Members of Congress).

The SWANCC decision also highlights the role of States in protecting waters not addressed by Federal law. Prior to SWANCC, fifteen States had programs that addressed isolated wetlands. Since SWANCC, additional States have considered, and two have adopted, legislation to protect isolated waters. The Federal agencies have a number of initiatives to assist States in these efforts to protect wetlands. For example, EPA's Wetland Program Development Grants are available to assist States, Tribes, and local governments for building their wetland program capacities. In addition, the U.S. Department of Justice and other Federal agencies co-sponsored a national wetlands conference with the National Governors Association Center for Best Practices, National Conference of State Legislatures, the Association of State Wetlands Managers, and the National Association of Attorneys General. This conference and the dialogue that has ensued will promote close collaboration between Federal agencies and States in developing, implementing, and enforcing wetlands protection programs. EPA also is providing funding to the National Governors Association Center for Best Practices to assist States in developing appropriate policies and actions to protect intrastate isolated waters.

In light of this, the agencies solicit information and data from the general public, the scientific community, and Federal and State resource agencies on the availability and effectiveness of other Federal or State programs for the protection of aquatic resources and practical experience with their implementation. The agencies are also

interested in data and comments from State and local agencies on the effect of no longer asserting jurisdiction over some of the waters (and discharges to those waters) in a watershed on the implementation of Total Maximum Daily Loads (TMDLs) and attainment of water quality standards.

#### VII. Statutory and Executive Order Reviews

##### A. Executive Order 12866

Under Executive Order 12866 (58 FR 51735, October 4, 1993), EPA and the Corps must determine whether the regulatory action is "significant" and therefore subject to review by the Office of Management and Budget (OMB) and the requirements of the Executive Order. The Order defines "significant regulatory action" as one that is likely to result in a rule that may:

- (1) Have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or Tribal governments or communities;
- (2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;
- (3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or
- (4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

Pursuant to the terms of Executive Order 12866, it has been determined that this Advanced Notice of Proposed Rulemaking is a "significant regulatory action" in light of the provisions of paragraph (4) above as it raises novel legal or policy issues. As such, this action was submitted to OMB for review. Changes made in response to OMB suggestions or recommendations will be documented in the public record.

##### B. National Environmental Policy Act

As required by the National Environmental Policy Act (NEPA), the Corps prepares appropriate environmental documentation for its activities affecting the quality of the human environment. The Corps has determined that today's Advance Notice of Proposed Rulemaking merely solicits early comment on issues associated with the scope of waters that are properly subject to the CWA, and information or data from the general public, the scientific community, and

Federal and State resource agencies on the implications of the SWANCC decision for the protection of aquatic resources. In light of this, the Corps has determined that today's ANPRM does not constitute a major Federal action significantly affecting the quality of the human environment, and thus does not require the preparation of an Environmental Impact Statement (EIS).

Dated: January 10, 2003.

**Christine Todd Whitman,**  
Administrator, Environmental Protection Agency.

Dated: January 10, 2003.

**R.L. Brownlee,**  
Acting Assistant Secretary of the Army, (Civil Works), Department of the Army.

**Note:** The following guidance document will not appear in the Code of Federal Regulations.

#### Appendix A

##### Joint Memorandum

###### Introduction

This document provides clarifying guidance regarding the Supreme Court's decision in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159 (2001) ("SWANCC") and addresses several legal issues concerning Clean Water Act ("CWA") jurisdiction that have arisen since SWANCC in various factual scenarios involving federal regulation of "navigable waters." Because the case law interpreting SWANCC has developed over the last two years, the Agencies are issuing this updated guidance, which supersedes prior guidance on this issue. The Corps and EPA are also initiating a rulemaking process to collect information and to consider jurisdictional issues as set forth in the attached ANPRM. Jurisdictional decisions will be based on Supreme Court cases including *United States v. Riverside Bayview Homes*, 474 U.S. 121 (1985) and SWANCC, regulations, and applicable case law in each jurisdiction.

###### Background

In SWANCC, the Supreme Court held that the Army Corps of Engineers had exceeded its authority in asserting CWA jurisdiction pursuant to section 404(a) over isolated, intrastate, non-navigable waters under 33 C.F.R. 328.3(a)(3), based on their use as habitat for migratory birds pursuant to preamble language commonly referred to as the "Migratory Bird Rule," 51 FR 41217 (1986). "Navigable waters" are defined in section 502 of the CWA to mean "waters of the United States, including the territorial seas." In SWANCC, the Court determined that the term "navigable" had significance in indicating the authority Congress intended to exercise in asserting CWA jurisdiction. 531 U.S. at 172. After reviewing the jurisdictional scope of the statutory definition of "navigable waters" in section 502, the Court concluded that neither the text of the statute nor its legislative history supported the

Corps' assertion of jurisdiction over the waters involved in *SWANCC*. *Id.* at 170-171.

In *SWANCC*, the Supreme Court recognized that "Congress passed the CWA for the stated purpose of 'restoring and maintaining the chemical, physical, and biological integrity of the Nation's waters'" and also noted that "Congress chose to 'recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources.'" *Id.* at 166-67 (citing 33 U.S.C. 1251(a) and (b)). However, expressing "serious constitutional and federalism questions" raised by the Corps' interpretation of the CWA, the Court stated that "where an administrative interpretation of a statute invokes the outer limits of Congress' power, we expect a clear indication that Congress intended that result." *Id.* at 174, 172. Finding "nothing approaching a clear statement from Congress that it intended section 404(a) to reach an abandoned sand and gravel pit" (*id.* at 174), the Court held that the Migratory Bird Rule, as applied to petitioners' property, exceeded the agencies' authority under section 404(a). *Id.* at 174.

#### The Scope of CWA Jurisdiction After SWANCC

Because *SWANCC* limited use of 33 CFR § 328.3(a)(3) as a basis of jurisdiction over certain isolated waters, it has focused greater attention on CWA jurisdiction generally, and specifically over tributaries to jurisdictional waters and over wetlands that are "adjacent wetlands" for CWA purposes.

As indicated, section 502 of the CWA defines the term navigable waters to mean "waters of the United States, including the territorial seas." The Supreme Court has recognized that this definition clearly includes those waters that are considered traditional navigable waters. In *SWANCC*, the Court noted that while "the word 'navigable' in the statute was of 'limited import'" (quoting *Riverside*, 474 U.S. 121 (1985)), "the term 'navigable' has at least the import of showing us what Congress had in mind as its authority for enacting the CWA: traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made." 531 U.S. at 172. In addition, the Court reiterated in *SWANCC* that Congress evidenced its intent to regulate "at least some waters that would not be deemed 'navigable' under the classical understanding of that term." *SWANCC* at 171 (quoting *Riverside*, 474 U.S. at 133). Relying on that intent, for many years, EPA and the Corps have interpreted their regulations to assert CWA jurisdiction over non-navigable tributaries of navigable waters and their adjacent wetlands. Courts have upheld the view that traditional navigable waters and, generally speaking, their tributary systems (and their adjacent wetlands) remain subject to CWA jurisdiction.

Several federal district and appellate courts have addressed the effect of *SWANCC* on CWA jurisdiction, and the case law on the precise scope of federal CWA jurisdiction in light of *SWANCC* is still developing. While

a majority of cases hold that *SWANCC* applies only to waters that are isolated, intrastate and non-navigable, several courts have interpreted *SWANCC*'s reasoning to apply to waters other than the isolated waters at issue in that case. This memorandum attempts to add greater clarity concerning federal CWA jurisdiction following *SWANCC* by identifying specific categories of waters, explaining which categories of waters are jurisdictional or non-jurisdictional, and pointing out where more refined factual and legal analysis will be required to make a jurisdictional determination.

Although the *SWANCC* case itself specifically involved Section 404 of the CWA, the Court's decision may affect the scope of regulatory jurisdiction under other provisions of the CWA as well, including the Section 402 NPDES program, the Section 311 oil spill program, water quality standards under Section 303, and Section 401 water quality certification. Under each of these sections, the relevant agencies have jurisdiction over "waters of the United States." CWA section 502(7).

This memorandum does not discuss the exact factual predicates that are necessary to establish jurisdiction in individual cases. We recognize that the field staff and the public could benefit from additional guidance on how to apply the applicable legal principles to individual cases.<sup>1</sup> Should questions arise concerning CWA jurisdiction, the regulated community should seek assistance from the Corps and EPA.

#### A. Isolated, Intrastate Waters That are Non-Navigable

*SWANCC* squarely eliminates CWA jurisdiction over isolated waters that are intrastate and non-navigable, where the sole basis for asserting CWA jurisdiction is the actual or potential use of the waters as habitat for migratory birds that cross state lines in their migrations. 531 U.S. at 174 ("We hold that 33 CFR § 328.3(a)(3) (1999), as clarified and applied to petitioner's bafflefill site pursuant to the 'Migratory Bird Rule,' 51 FR 41217 (1986), exceeds the authority granted to respondents under § 404(a) of the CWA."). The EPA and the Corps are now precluded from asserting CWA jurisdiction in such situations, including over waters such as isolated, non-navigable, intrastate vernal pools, playa lakes and pocosins. *SWANCC* also calls into question whether CWA jurisdiction over isolated, intrastate, non-navigable waters could now be predicated on the other factors listed in the Migratory Bird

Rule, 51 FR 41217 (*i.e.*, use of the water as habitat for birds protected by Migratory Bird Treaties; use of the water as habitat for Federally protected endangered or threatened species; or use of the water to irrigate crops sold in interstate commerce).

By the same token, in light of *SWANCC*, it is uncertain whether there remains any basis for jurisdiction under the other rationales of § 328.3(a)(3)(i)-(iii) over isolated, non-navigable, intrastate waters (*i.e.*, use of the water by interstate or foreign travelers for recreational or other purposes; the presence of fish or shellfish that could be taken and sold in interstate commerce; use of the water for industrial purposes by industries in interstate commerce). Furthermore, within the states comprising the Fourth Circuit, CWA jurisdiction under 33 CFR § 328.3(a)(3) in its entirety has been precluded since 1997 by the Fourth Circuit's ruling in *United States v. Wilson*, 133 F. 3d 251, 257 (4th Cir. 1997) (invalidating 33 CFR § 328.3(a)(3)).

In view of *SWANCC*, neither agency will assert CWA jurisdiction over isolated waters that are both intrastate and non-navigable, where the sole basis available for asserting CWA jurisdiction rests on any of the factors listed in the "Migratory Bird Rule." In addition, in view of the uncertainties after *SWANCC* concerning jurisdiction over isolated waters that are both intrastate and non-navigable based on other grounds listed in 33 CFR § 328.3(a)(3)(i)-(iii), field staff should seek formal project-specific Headquarters approval prior to asserting jurisdiction over such waters, including permitting and enforcement actions.

#### B. Traditional Navigable Waters

As noted, traditional navigable waters are jurisdictional. Traditional navigable waters are waters that are subject to the ebb and flow of the tide, or waters that are presently used, or have been used in the past, or may be susceptible for use to transport interstate or foreign commerce. 33 CFR § 328.3(a)(1); *United States v. Appalachian Elec. Power Co.*, 311 U.S. 377, 407-408 (1940) (water considered navigable, although not navigable at present but could be made navigable with reasonable improvements); *Economy Light & Power Co. v. United States*, 256 U.S. 113 (1911) (dams and other structures do not eliminate navigability); *SWANCC*, 531 U.S. at 172 (referring to traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made).<sup>2</sup>

In accord with the analysis in *SWANCC*, waters that fall within the definition of traditional navigable waters remain jurisdictional under the CWA. Thus, isolated, intrastate waters that are capable of supporting navigation by watercraft remain subject to CWA jurisdiction after *SWANCC* if they are traditional navigable waters, *i.e.*, if they meet any of the tests for being navigable-in-fact. *See, e.g., Colvin v. United States* 181 F. Supp. 2d 1050 (C.D. Cal. 2001) (isolated

<sup>1</sup> The CWA provisions and regulations described in this document contain legally binding requirements. This document does not substitute for those provisions or regulations, nor is it a regulation itself. It does not impose legally binding requirements on EPA, the Corps, or the regulated community, and may not apply to a particular situation depending on the circumstances. Any decisions regarding a particular water will be based on the applicable statutes, regulations, and case law. Therefore, interested person are free to raise questions and objections about the appropriateness of the application of this guidance to a particular situation, and EPA and/or the Corps will consider whether or not the recommendations or interpretations of this guidance are appropriate in that situation based on the law and regulations.

<sup>2</sup> These traditional navigable waters are not limited to those regulated under Section 10 of the Rivers and Harbors Act of 1899; traditional navigable waters include waters which, although used, susceptible to use, or historically used, to transport goods or people in commerce, do not form part of a continuous waterborne highway.

man-made water body capable of boating found to be "water of the United States").

#### C. Adjacent Wetlands

##### (1) Wetlands Adjacent to Traditional Navigable Waters

CWA jurisdiction also extends to wetlands that are adjacent to traditional navigable waters. The Supreme Court did not disturb its earlier holding in *Riverside* when it rendered its decision in *SWANCC*. *Riverside* dealt with a wetland adjacent to Black Creek, a traditional navigable water. 474 U.S. 121 (1985); see also *SWANCC*, 531 U.S. at 167 ("[i]n *Riverside*, we held that the Corps had section 404(a) jurisdiction over wetlands that actually abutted on a navigable waterway"). The Court in *Riverside* found that "Congress' concern for the protection of water quality and aquatic ecosystems indicated its intent to regulate wetlands 'inseparably bound up with' jurisdictional waters. 474 U.S. at 134. Thus, wetlands adjacent to traditional navigable waters clearly remain jurisdictional after *SWANCC*. The Corps and EPA currently define 'adjacent' as 'bordering, contiguous, or neighboring. Wetlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes, and the like are 'adjacent wetlands.'" 33 CFR § 328.3(b); 40 CFR § 230.3(b). The Supreme Court has not itself defined the term "adjacent," nor stated whether the basis for adjacency is geographic proximity or hydrology.

##### (2) Wetlands Adjacent to Non-Navigable Waters

The reasoning in *Riverside*, as followed by a number of post-*SWANCC* courts, supports jurisdiction over wetlands adjacent to non-navigable waters that are tributaries to navigable waters. Since *SWANCC*, some courts have expressed the view that *SWANCC* raised questions about adjacency jurisdiction, so that wetlands are jurisdictional only if they are adjacent to navigable waters. See, e.g., *Rice v. Harken*, discussed *infra*.

#### D. Tributaries

A number of court decisions have held that *SWANCC* does not change the principle that CWA jurisdiction extends to tributaries of navigable waters. See, e.g., *Headwaters v. Talent Irrigation Dist.*, 243 F.3d 526, 534 (9th Cir. 2001) ("Even tributaries that flow intermittently are 'waters of the United States'"); *United States v. Interstate Gen. Co.*, No. 01-4513, slip op. at 7, 2002 WL 1421411 (4th Cir. July 2, 2002), *affing* 152 F. Supp. 2d 843 (D. Md. 2001) (refusing to grant writ of coram nobis; rejecting argument that *SWANCC* eliminated jurisdiction over wetlands adjacent to non-navigable tributaries); *United States v. Krilich*, 393F.3d 784 (7th Cir. 2002) (rejecting motion to vacate consent decree, finding that *SWANCC* did not alter regulations interpreting "waters of the U.S." other than 33 C.F.R. § 328.3(a)(3)); *Community Ass. for Restoration of the Env't v. Henry Bosma Dairy*, 305 F.3d 953 (9th Cir. 2002) (drain that flowed into a canal that flows into a river is jurisdictional); *Idaho Rural Council v. Bosma*, 143 F. Supp. 2d 1169, 1178 (D. Idaho 2001) ("waters of the

United States include waters that are tributary to navigable waters"); *Aiello v. Town of Brookhaven*, 136 F. Supp. 2d 81, 118 (E.D. N.Y. 2001) (non-navigable pond and creek determined to be tributaries of navigable waters, and therefore "waters of the United States under the CWA"). Jurisdiction has been recognized even when the tributaries in question flow for a significant distance before reaching a navigable water or are several times removed from the navigable waters (*i.e.*, "tributaries of tributaries"). See, e.g., *United States v. Lamplight Equestrian Ctr.*, No. 00 C 6486, 2002 WL 360652, at \*8 (ND. Ill. Mar. 8, 2002) ("Even where the distance from the tributary to the navigable water is significant, the quality of the tributary is still vital to the quality of navigable waters"); *United States v. Buday*, 138 F. Supp. 2d 1282, 1291-92 (D. Mont. 2001) ("water quality of tributaries \* \* \* distant though the tributaries may be from navigable streams, is vital to the quality of navigable waters"); *United States v. Rueth Dev. Co.*, No. 2:96CV540, 2001 WL 17580078 (N.D. Ind. Sept. 26, 2001) (refusing to reopen a consent decree in a CWA case and determining that jurisdiction remained over wetlands adjacent to a non-navigable (man-made) waterway that flows into a navigable water).

Some courts have interpreted the reasoning in *SWANCC* to potentially circumscribe CWA jurisdiction over tributaries by finding CWA jurisdiction attaches only where navigable waters and waters immediately adjacent to navigable waters are involved. *Rice v. Harken* is the leading case taking the narrowest view of CWA jurisdiction after *SWANCC*. 250 F.3d 264 (5th Cir. 2001) (rehearing denied). *Harken* interpreted the scope of "navigable waters" under the Oil Pollution Act (OPA). The Fifth Circuit relied on *SWANCC* to conclude "it appears that a body of water is subject to regulation under the CWA if the body of water is actually navigable or is adjacent to an open body of navigable water." 250 F.3d at 269. The analysis in *Harken* implies that the Fifth Circuit might limit CWA jurisdiction to only those tributaries that are traditionally navigable or immediately adjacent to a navigable water.

A few post-*SWANCC* district court opinions have relied on *Harken* or reasoning similar to that employed by the *Harken* court to limit jurisdiction. See, e.g., *United States v. Rapanos*, 190 F. Supp. 2d 1011 (E.D. Mich. 2002) (government appeal pending) ("the Court finds as a matter of law that the wetlands on Defendant's property were not directly adjacent to navigable waters, and therefore, the government cannot regulate Defendant's property."); *United States v. Needham*, No. 6:01-CV-01897, 2002 WL 1162790 (W.D. La. Jan. 23, 2002) (government appeal pending) (district court affirmed finding of no liability by bankruptcy court for debtors under OPA for discharge of oil since drainage ditch into which oil was discharged was found to be neither a navigable water nor adjacent to an open body of navigable water). See also *United States v. Newdunn*, 195 F. Supp. 2d 751 (E.D. Va. 2002) (government appeal pending) (wetlands and tributaries not contiguous or adjacent to navigable waters

are outside CWA jurisdiction); *United States v. RGM Corp.*, 222 F. Supp. 2d 780 (E.D. Va. 2002) (government appeal pending) (wetlands on property not contiguous to navigable river and, thus, jurisdiction not established based upon adjacency to navigable water).

Another question that has arisen is whether CWA jurisdiction is affected when a surface tributary to jurisdictional waters flows for some of its length through ditches, culverts, pipes, storm sewers, or similar manmade conveyances. A number of courts have held that waters with manmade features are jurisdictional. For example, in *Headwaters Inc. v. Talent Irrigation District*, the Ninth Circuit held that manmade irrigation canals that diverted water from one set of natural streams and lakes to other streams and creeks were connected as tributaries to waters of the United States, and consequently fell within the purview of CWA jurisdiction. 243 F.3d at 533-34. However, some courts have taken a different view of the circumstances under which man-made conveyances satisfy the requirements for CWA jurisdiction. See, e.g., *Newdunn*, 195 F. Supp. 2d at 765 (government appeal pending) (court determined that Corps had failed to carry its burden of establishing CWA jurisdiction over wetlands from which surface water had to pass through a spur ditch, a series of man-made ditches and culverts as well as non-navigable portions of a creek before finally reaching navigable waters).

A number of courts have held that waters connected to traditional navigable waters only intermittently or ephemeral are subject to CWA jurisdiction. The language and reasoning in the Ninth Circuit's decision in *Headwaters Inc. v. Talent Irrigation District* indicates that the intermittent flow of waters does not affect CWA jurisdiction. 243 F.3d at 534 ("Even tributaries that flow intermittently are 'waters of the United States.'"). Other cases, however, have suggested that *SWANCC* eliminated from CWA jurisdiction some waters that flow only intermittently. See, e.g., *Newdunn*, 195 F. Supp. 2d at 764, 767-68 (government appeal pending) (ditches and culverts with intermittent flow not jurisdictional).

A factor in determining jurisdiction over waters with intermittent flows is the presence or absence of an ordinary high water mark (OHWM). Corps regulations provide that, in the absence of adjacent wetlands, the lateral limits of non-tidal waters extend to the OHWM (33 CFR 328.4(c)(1)). One court has interpreted this regulation to require the presence of a continuous OHWM. *United States v. RGM*, 222 F. Supp. 2d 780 (E.D. Va. 2002) (government appeal pending).

#### Conclusion

In light of *SWANCC*, field staff should not assert CWA jurisdiction over isolated waters that are both intrastate and non-navigable, where the sole basis available for asserting CWA jurisdiction rests on any of the factors listed in the "Migratory Bird Rule." In addition, field staff should seek formal project-specific HQ approval prior to asserting jurisdiction over waters based on

other factors listed in 33 CFR 328.3(a)(3)(i)-(iii).

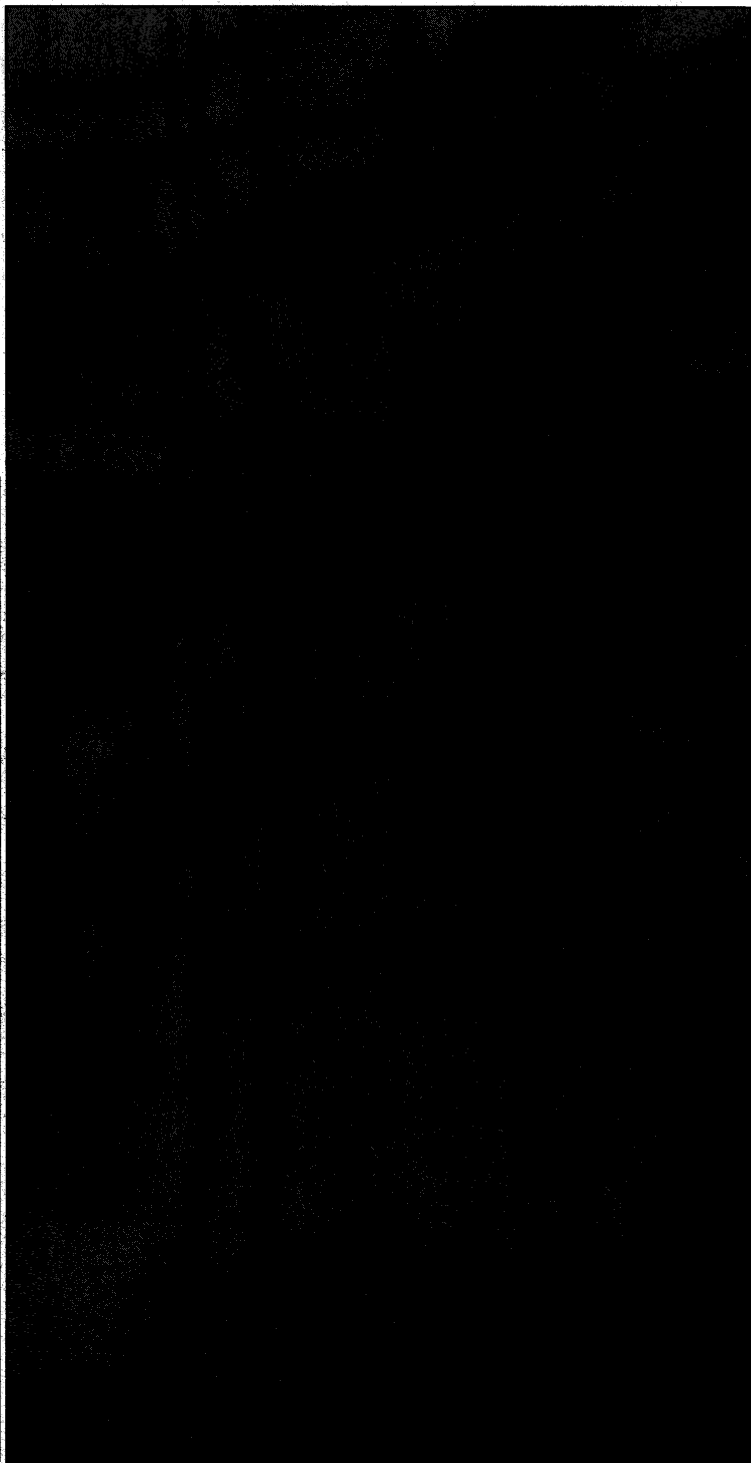
Field staff should continue to assert jurisdiction over traditional navigable waters (and adjacent wetlands) and, generally speaking, their tributary systems (and adjacent wetlands). Field staff should make jurisdictional and permitting decisions on a case-by-case basis considering this guidance, applicable regulations, and any additional relevant court decisions. Where questions remain, the regulated community should seek assistance from the agencies on questions of jurisdiction.

**Robert E. Fabricant,**  
*General Counsel, Environmental Protection Agency.*

**Steven J. Morello,**  
*General Counsel, Department of the Army.*

[FR Doc. 03-960 Filed 1-14-03; 8:45 am]

BILLING CODE 6560-50-P



**Exhibit B**  
**Administration's Commitment to No Net Loss of Wetlands and Protection of Isolated Waters**

# NEWS RELEASE

For Immediate Release – January 10, 2003

**CONTACTS:**

U. S. Environmental Protection Agency, (202) 564-9828  
David Hewitt, US Army Corps of Engineers, (202) 761-0289,

**ADMINISTRATION TO REAFFIRM COMMITMENT TO NO NET LOSS OF WETLANDS AND ADDRESS APPROACH FOR PROTECTING ISOLATED WATERS IN LIGHT OF SUPREME COURT RULING ON JURISDICTIONAL ISSUES**

The U.S. Environmental Protection Agency and the U.S. Army today announced a pair of actions that will help Americans comply with the Clean Water Act's requirements for protection of the nation's wetlands. These actions, which reaffirm federal authority over the vast majority of America's wetlands, are in response to the Supreme Court's 2001 decision in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers* (*SWANCC*), which limited federal authority under the Clean Water Act to regulate certain isolated wetlands.

Today's action builds upon the Administration's commitment to protecting America's wetlands, including its "no net loss" of wetlands policy. The two agencies jointly issued clarifying guidance for the federal government's rules used to protect wetlands that are regulated under the Clean Water Act (CWA). Simultaneously, the Administration announced its intention to publish an Advance Notice of Proposed Rule Making (ANPRM) to solicit from the public data and information to clarify the extent of Clean Water Act coverage in light of *SWANCC*.

"We are committed to protecting America's wetlands and watersheds to the full extent under the Clean Water Act and the recent Supreme Court ruling. We are also committed to full public involvement in this process, and we will seek additional information and scientific data for possible rulemaking," said EPA Administrator Christie Whitman. "It is more important than ever that we work closely with tribes, states and local agencies to ensure strong protection of wetlands and other aquatic resources."

"Today's announcement is important because the Corps of Engineers regulatory officers and the regulated community now have guidance which more clearly describes the scope of jurisdiction for which permits are required," said Les Brownlee, Undersecretary for the Army and Acting Assistant Secretary of the Army for Civil Works. "As regards the ANPRM, the agencies have not engaged in a review of the regulations with the public concerning Clean Water Act jurisdiction for some time. The ANPRM will help ensure that the regulations are consistent with the CWA and that the public understands what waters are subject to CWA jurisdiction."

These two steps complement the actions announced December 26, 2002, when the Corps and EPA issued a regulatory guidance letter to improve wetland protections through compensatory mitigation, and the Administration unveiled a National Wetlands Mitigation Action Plan listing 17 action items that federal agencies will undertake to improve the effectiveness of wetlands restoration. Through those actions, the agencies affirmed their commitment to achieving the goal of no net loss of wetlands under their regulatory programs and to increase the overall function and value of the nation's wetlands through public and private, regulatory and non-regulatory initiatives and partnerships. Representatives of EPA and the Corps testified before Congress on September 19, 2002, pledging the actions announced today.

In addition to the Regulatory Guidance Letter/ National Wetlands Mitigation Action Plan (RGL/MAP), the Administration's commitment to protecting and restoring America's wetlands is reflected in the conservation title of the 2002 Farm Bill, which provides an unprecedented \$47 billion over the next decade—that includes funding for conservation programs that will double the number of wetlands protected to a total of 2.275 million acres of wetlands and other aquatic resources. And in December 2002, President Bush signed a bill reauthorizing the North American Wetlands Conservation Act, which extends for five years a program under which the federal government

matches donations from sportsmen, state wildlife agencies, conservationists and landowners who pledge to protect millions of acres of wetlands.

The SWANCC decision also highlights the important role of states in protecting waters not addressed by federal law. EPA's Wetland Program Development Grants, currently funded at \$15 million annually, would be boosted to \$20 million under the FY'04 budget that President Bush will soon submit to Congress. The grants will help states, tribes, and local governments improve the capability of their wetland programs.

The new guidance clarifies the following:

- Field staff should continue to assert jurisdiction over traditional navigable waters (and adjacent wetlands) and, generally speaking, their tributary systems (and adjacent wetlands).
- In light of *SWANCC*, field staff should not assert CWA jurisdiction over isolated waters that are both intrastate and non-navigable, where the sole basis available for asserting CWA jurisdiction rests on any of the factors listed in the "Migratory Bird Rule".
- In light of *SWANCC*, field staff should seek formal project-specific HQ approval prior to asserting jurisdiction over isolated non-navigable intrastate waters based on other types of interstate commerce links listed in current regulatory definitions of "waters of the U.S."

The CWA protects wetlands, streams, and other waters from discharges of pollutants by requiring permits with appropriate environmental safeguards before a discharge may be authorized. In *SWANCC*, the Supreme Court held that the Corps had exceeded its CWA regulatory authority in asserting jurisdiction over isolated intrastate non-navigable ponds based on the Migratory Bird Rule.

Although the *SWANCC* decision limits federal CWA jurisdiction over isolated, intrastate, non-navigable waters and wetlands, other federal or state laws and programs still cover these waters and wetlands. The Food Security Act's "Swampbuster" requirements and the Wetlands Reserve Program under the U.S. Department of Agriculture are unaffected. In addition, other federal programs supporting wetlands protection and restoration continue, including the following: the Fish and Wildlife Service's Partners in Wildlife, the National Marine Fisheries Service's Coastal Wetlands Restoration Program, the EPA's Five-Star Restoration program, the National Estuary Program, and the Migratory Bird Conservation Commission, which is composed of the Secretaries of Interior and Agriculture, the Administrator of EPA, and Members of Congress.

The Federal Register document and additional information are available either on EPA's Office of Water home page at:  
or the Corps Regulatory Branch home page at <http://www.usace.army.mil/inet/functions/cw/cecw0/reg/citizen.htm>

Interested persons may also contact EPA's Wetlands Helpline at 800/832-7828 to obtain copies.

## Exhibit C

### Preliminary Findings of Informal Review of State of Michigan's Approved Clean Water Act Section 404 Permit Program

772

Federal Register / Vol. 68, No. 4 / Tuesday, January 7, 2003 / Notices

[Docket Nos. ER03-341-000 and ER03-342-000]

Take notice that on December 26, 2002, Calpine PowerAmerica—CA, LLC tendered for filing, under section 205 of the Federal Power Act (FPA), a request for authorization to make wholesale sales of electric energy, capacity, replacement reserves, and ancillary services at market-based rates, to reassign transmission capacity, and to resell firm transmission rights.

*Comment Date:* January 16, 2003.

#### 13. Aquila, Inc.

[Docket No. ER03-344-000]

Take notice that on December 27, 2002, Aquila, Inc. (Aquila), filed with the Federal Energy Regulatory Commission (Commission), pursuant to Section 205 of the Federal Power Act, 16 U.S.C. 824d, and part 35 of the Commission Regulations, 18 CFR part 35, an Interconnection Agreement between Aquila, Inc. d/b/a WestPlains Energy-Kansas and Russell Municipal Power and Light dated as of December 9, 2002. The Interconnection Agreement is filed as Service Agreement No. 104 to Aquila FERC Electric Tariff, Third Revised Volume No. 26.

*Comment Date:* January 17, 2003.

#### 14. New England Power Pool

[Docket No. ER03-345-000] Take notice that on December 27, 2002, the New England Power Pool (NEPOOL) Participants Committee submitted changes to Appendix E to Market Rule 1 (Appendix E), entitled "Load Response Program." Appendix E has been revised to change the basis for allocating to Participants the costs of the NEPOOL Load Response Program from Load Obligation to Network Load. NEPOOL has requested that the proposed changes become effective February 25, 2003 for transactions on and after the applicable effective dates set forth in Market Rule 1 and Appendix E (the SMD Effective Date and the effective date for the Day-Ahead Demand Response Program).

The NEPOOL Participants Committee states that copies of these materials were sent to the NEPOOL Participants and the New England state governors and regulatory commissions.

*Comment Date:* January 17, 2003.

#### Standard Paragraph

Any person desiring to intervene or to protest this filing should file with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding.

Any person wishing to become a party must file a motion to intervene. All such motions or protests should be filed on or before the comment date, and, to the extent applicable, must be served on the applicant and on any other person designated on the official service list. This filing is available for review at the Commission or may be viewed on the Commission's Web site at <http://www.ferc.gov>, using the "FERRIS" link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, contact FERC Online Support at [FERCOnlineSupport@ferc.gov](mailto:FERCOnlineSupport@ferc.gov) or toll-free at (866)208-3676, or for TTY, contact (202)502-8659. Protests and interventions may be filed electronically via the Internet in lieu of paper; see 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under the "e-Filing" link. The Commission strongly encourages electronic filings.

Linwood A. Watson, Jr.,

Deputy Secretary.

[FR Doc. 03-296 Filed 1-3-03; 8:45 am]

BILLING CODE 6717-01-P

#### ENVIRONMENTAL PROTECTION AGENCY

[FRL-7435-9]

#### Availability of FY 01 Grant Performance Reports for State of North Carolina and Memphis-Shelby County, Tennessee

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Notice of availability of grantee performance evaluation reports.

**SUMMARY:** EPA's grant regulations (40 CFR 35.150) require the Agency to evaluate the performance of agencies which receive grants. EPA's regulations for regional consistency (40 CFR 56.7) require that the Agency notify the public of the availability of the reports of such evaluations. EPA performed end-of-year evaluations of the state air pollution control program at North Carolina Department of Environment and Natural Resources, and the local program at Memphis-Shelby County Health Department, Tennessee. These evaluations were conducted to assess the agencies' performance under the grants awarded by EPA under authority of section 105 of the Clean Air Act. EPA Region 4 has prepared reports for each agency identified above and these reports are now available for public inspection. Evaluations for the other

seven states and 15 local governments which have air pollution control programs were published November 18, 2002.

**ADDRESSES:** The reports may be examined at the EPA's Region 4 office, 61 Forsyth Street, SW, Atlanta, Georgia 30303, in the Air, Pesticides, and Toxics Management Division.

**FOR FURTHER INFORMATION CONTACT:** Rayna Brown (404) 562-9093. She may be contacted at the above Region 4 address.

Dated: December 23, 2002.

Russell L. Wright, Jr.,

Assistant Regional Administrator, Office of Policy and Management, Region 4.

[FR Doc. 03-284 Filed 1-6-03; 8:45 am]

BILLING CODE 6560-50-P

#### ENVIRONMENTAL PROTECTION AGENCY

[FRL-7436-4]

#### Preliminary Findings of Informal Review of State of Michigan's Approved Clean Water Act Section 404 Permit Program

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Notice and request for comments.

**SUMMARY:** This document announces EPA's preliminary finding that, at this time, formal program withdrawal proceedings should not be initiated for Michigan's approved Clean Water Act section 404 permit program.

**DATES:** Comments on this document must be received in writing by March 10, 2003.

**ADDRESSES:** Written comments on today's notice may be submitted to Jo Lynn Traub, Director, Water Division, Attn: Michigan Section 404 Program Review, U.S. Environmental Protection Agency, 77 West Jackson Boulevard, Chicago, Illinois 60604. As an alternative, EPA will accept comments electronically. Comments should be sent to the following Internet Email Address: [elston.sue@epa.gov](mailto:elston.sue@epa.gov).

**FOR FURTHER INFORMATION CONTACT:** Sue Elston, Watersheds and Wetlands Branch, at the EPA address noted above or by telephone at (312) 886-6115. The Report containing EPA's preliminary findings is available via the Internet at the following location: [http://www.epa.gov/region5/water/wshednps/pdf/mi\\_404\\_program\\_review.pdf](http://www.epa.gov/region5/water/wshednps/pdf/mi_404_program_review.pdf). In addition, a hard copy of the information supporting today's notice is available for review at EPA Region 5, 77 West

Jackson Boulevard, 16th Floor, Chicago, Illinois; Library of Michigan, 702 Kalamazoo Street, Lansing, Michigan; Olson Library, Northern Michigan University, 1401 Presque Isle Avenue, Marquette, Michigan; Otsego County Library, 700 S. Otsego Avenue, Gaylord, Michigan; and at Brandner Library, Schoolcraft College, 18600 Haggerty Road, Livonia, Michigan. To arrange for access to the docket materials in Chicago, call (312) 886-6115, in Lansing call (517) 373-9489, in Marquette call (906) 227-2117, in Gaylord call (989) 732-5841, and in Livonia call (734) 462-4440.

**SUPPLEMENTARY INFORMATION:** On October 16, 1984, EPA approved the regulatory permitting program that the State of Michigan had submitted pursuant to the requirements and guidelines contained in subsections 404(g) and 404(h) of the Clean Water Act, 33 U.S.C. 1344(g) and (h). (See 49 FR 38947, October 2, 1984.) In that notice of approval, EPA noted that the Administrator was required to approve a program submitted by a state pursuant to subsection 404(g) of the CWA unless that program does not meet the requirements of subsection 404(h) of the CWA, and EPA then stated that it had determined that the program submitted by the State of Michigan met those statutory requirements. The components of the approved program are stated at 40 CFR 233.70. When EPA initially approved the program, Michigan did not have authority to carry out the program in Indian lands. EPA now concludes, as set forth more fully in the Report, that Michigan remains without authorization to carry out the program in Indian lands, which EPA defines to be the same as Indian Country as defined by statute (18 U.S.C. 1151).

The Michigan state agency authorized in 1984 to administer the approved section 404 program was the Department of Natural Resources. Later, the State of Michigan reorganized its agencies and transferred authority to administer the approved section 404 program to the Department of Environmental Quality (MDEQ). EPA approved this transfer on November 14, 1997 (62 FR 61173, November 14, 1997). The State of Michigan was the first state in the nation, and currently is one of only two states, to be authorized to administer a CWA section 404 permit program within its borders.

Recently EPA decided to perform an informal review of Michigan's approved section 404 program and the program's administration by MDEQ. EPA so decided, among other reasons, because since 1984 there have been a number of

changes to the relevant federal and state statutes and regulations, and because a body of State of Michigan judicial and administrative opinions relevant to permitting under the section 404 program had developed. In addition, in recent years EPA has received a number of comments and complaints about Michigan's administration of the approved section 404 program. Among these was the February 1997 submission by the Michigan Environmental Council and the Lone Tree Council which requested that EPA either ensure reform of Michigan's section 404 program or withdraw approval of the section 404 program. EPA responded that it was treating the February 1997 request as a petition to withdraw, and committed to performing an informal review of that petition's allegations, as provided for by 40 CFR 233.53(c)(1). See documents published at 62 FR 14846, March 28, 1997, and 62 FR 61173, 61174, November 14, 1997. The federal regulations allow EPA to conduct an informal review of allegations made in a petition to withdraw a section 404 program approval, 40 CFR 233.53(c).

In deciding to informally review Michigan's section 404 program, however, EPA decided to comprehensively review all aspects of Michigan's administration of the section 404 program—both with respect to permit processing and permit decision making and with respect to enforcement of the provisions of CWA section 404 and section 404 permits issued by MDEQ—and to comprehensively review the adequacy of Michigan's current legal authorities which establish and embody Michigan's section 404 program. Thus, EPA did not limit itself to reviewing the few matters of concern mentioned in the petition submitted by the Michigan Environmental Council and the Lone Tree Council.

The Regional Administrator of Region 5, EPA, informed the Director of MDEQ of the commencement of the section 404 program review in a letter of January 22, 1998.

To perform its program review, EPA requested that the State of Michigan provide an updated program description (40 CFR 233.11); a new Attorney General's Statement confirming that state laws and regulations provide adequate authority to administer the section 404 program and addressing the other subjects mentioned at 40 CFR 233.12; and a compilation of all current, relevant Michigan laws and regulations. The State of Michigan submitted these materials to EPA in June 1999, and submitted new and updated information to EPA between June 1999 and the date of this Notice.

As well as reviewing and analyzing the documents submitted by the State of Michigan, during its program review EPA reviewed hundreds of permitting files, enforcement files, and citizen complaint files that MDEQ generated between 1995 and 1999, visiting all thirteen MDEQ district offices and the central MDEQ office in Lansing, Michigan. EPA also conducted numerous interviews of MDEQ personnel in the field and central offices. Additionally, EPA reviewed most of MDEQ's written decisions issued in contested permitting cases between January 1994 and early 1999. The contested case decisions represent final agency action by MDEQ in matters involving individual permits processed under the approved state program. Also as part of its program review, EPA consulted with offices of the U.S. Fish and Wildlife Service and the U.S. Army Corps of Engineers which interact with MDEQ during its administration of the program. Finally, during January and May of 1999 EPA held four availability sessions to receive comments from interested persons.

EPA now has completed its review and analysis of all materials. EPA has preliminarily concluded that the review findings do not warrant a recommendation to the Administrator to initiate formal program withdrawal proceedings, but do warrant corrective action on the State's part. In arriving at this conclusion, EPA analyzed whether the circumstances for program withdrawal which are set forth at 40 CFR 233.53(b) exist and, with respect to those areas of concern to EPA, whether the State of Michigan has indicated its willingness to take timely corrective actions to address EPA's concerns. In performing the program review, EPA also reviewed the criteria for initial section 404 program approval which are set forth in subsection 404(h) of the CWA.

EPA has found both deficiencies and strengths in Michigan's legal authorities establishing the approved section 404 program and in the program's administration by MDEQ. These strengths, deficiencies, and proposed corrective actions are identified in the document titled *Results of the U.S. Environmental Protection Agency Region 5 Review of Michigan Department of Environmental Quality's Section 404 Program*, and other documents that are contained in the public docket that supports this Notice. To address the deficiencies, EPA will be requesting that the State of Michigan perform certain corrective actions; EPA already has consulted with the State of Michigan about the nature of those

corrective actions. The corrective actions that EPA has identified to date are described in general terms elsewhere in this Notice and supporting documents, although those corrective actions may be modified based on future experience and the specifics of the corrective actions must still be defined and finalized. EPA expects that certain corrective actions may be implemented through regulatory action by MDEQ, but that other corrective actions will require action by the Michigan legislature. EPA and the State of Michigan also have agreed on a tentative schedule for implementing the identified corrective actions, although we expect that modifications to this schedule likely will occur in the future. If adequate corrective actions are not taken by the State of Michigan in a timely manner, EPA will reconsider whether formal withdrawal proceedings, as outlined in subsection 404(j) of the CWA and 40 CFR 233.53(c), should be commenced. A summary of the most significant findings of the program review follows.

Through its review of the State of Michigan's legal authorities, EPA has determined that the State's laws and regulations are, for the most part, consistent with section 404 of the Clean Water Act, but has identified deficiencies in a few specific areas, resulting in a preliminary conclusion by EPA that the State does not have legal authority fully consistent with section 404 of the Clean Water Act and the State's implementation of the section 404 program is not entirely consistent with the requirements of 40 CFR part 233.

The scope of regulatory jurisdiction granted to MDEQ by Michigan law is one area of concern for EPA. In many Michigan counties MDEQ has no jurisdiction over a non-contiguous wetland even if that wetland is ecologically significant or large (unless MDEQ has individually determined that the wetland has essential natural resource value). EPA acknowledges that the extent of federal CWA jurisdiction over isolated wetlands recently was limited by the United States Supreme Court decision in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 121 S.Ct. 675 (2001) (*SWANCC*), but the precise CWA jurisdictional limitation resulting from *SWANCC* remains unclear. For that reason EPA remains concerned that Michigan's jurisdiction over non-contiguous wetlands is narrower than is federal CWA jurisdiction over isolated wetlands, even post-*SWANCC*. The State is proposing completion of a statewide wetland inventory, which upon completion in each county, will

authorize MDEQ to assert jurisdiction over all non-contiguous wetlands in that county which are larger than five acres.

Another area of concern is that Michigan law appears to exempt a wider range of activities than does the CWA under subsection 404(f) of the CWA, including exemptions for discharges occurring as part of certain agricultural activities, discharges related to drain creation and improvement, and discharges associated with iron and copper mining tailings basins. The State has agreed to seek statutory amendments and the promulgation of administrative rules to address these issues.

EPA's examination of Michigan law included review of MDEQ's authorities and procedures for issuing permits. MDEQ issues section 404 and State permits for activities in waters of the United States under two different state statutes: Part 301 and Part 303 of the Natural Resources and Environmental Protection Act. EPA has several concerns with regard to MDEQ's permitting authority. The first concern is that MDEQ may not have clear authority to require all permit conditions required under federal law, and may not have clear authority to revoke and modify issued permits in all situations provided for by federal law. The State has agreed to promulgation of administrative rules to resolve these concerns. EPA also considered the Michigan statutory provision which directs that a permit under Part 303 shall issue within 90 days of a triggering event, and found this provision does not pose an impediment to MDEQ's proper implementation of the section 404 program.

Michigan law also fails to require that MDEQ incorporate the section 404(b)(1) guidelines (or state environmental criteria which are equivalent to the section 404(b)(1) guidelines) into its permit decision making processes. The criteria in the section 404(b)(1) guidelines as to which MDEQ-issued permits are not explicitly required to meet include application of a proper feasible and prudent alternatives analysis, application of the correct water dependency test, a bar on issuing permits which will jeopardize federally threatened or endangered species or their critical habitats, and a bar on issuing permits which will result in significant degradation of waters of the United States. The State has already promulgated administrative rules that address many of these concerns, and has agreed to promulgate rules to address the remaining issues.

EPA's review of contested case decisions issued over the years by

MDEQ's Office of Administrative Hearings found that final agency decisions frequently have failed to interpret and apply Michigan law in a manner that is consistent with the federal requirements for administering a section 404 program; the result has been the issuance of permits—which constitute section 404 permits—for activities which have not been subjected to proper analyses for water dependency, satisfaction of the section 404(b)(1) guidelines, and other federal criteria, thereby undermining the State's ability to administer a program which meets the terms of section 404(h) of the CWA. For these reasons, EPA has found that certain changes must be made to some Michigan statutory provisions and administrative rules in order to make them more clearly consistent with federal law. MDEQ has acknowledged EPA's concerns and has proposed what appear to be effective corrective actions to resolve these concerns. Some of these corrective actions already have been taken by MDEQ, while others are proposed for the future.

With regard to MDEQ's administration of the section 404 program, the program review found that, in general, MDEQ is doing a good job. MDEQ is operating its regulatory program in a manner consistent with the State Program Regulations found at 40 CFR part 233. The majority of permit files which EPA reviewed were found to contain the necessary documentation supporting the permit decision. The State's general permit program was found to be consistent with the federal requirements for general permits. MDEQ's permit application process was found to be consistent with the requirements in the federal regulations. MDEQ is including appropriate conditions in its permits to ensure compliance with the section 404(b)(1) guidelines and applicable water quality standards, and the duration of permits issued is consistent with federal requirements.

This program review did, however, identify several problems with MDEQ's administration of its section 404 permit program. The program review identified a need for MDEQ, USFWS and EPA to develop a procedure regarding how the agencies will coordinate when a potential project may have some effect on a federally threatened or endangered species or critical habitat.

The EPA has identified the need for MDEQ to modify its public notice procedures to make them consistent with 40 CFR 233.32. EPA found that MDEQ public notice procedures do not ensure that interested members of the public always have sufficient

opportunity to submit comments in response to public notices nor do the state's public notice procedures include providing public notices by mail to all interested parties, as required by the regulations. In order to partially address this concern, the state has implemented an internet based public notice system that makes all public notices available on the MDEQ website. EPA and MDEQ will be discussing additional corrective actions that need to be taken to ensure that all interested persons receive timely public notices of projects requiring CWA section 404 permits.

As part of our review of MDEQ's enforcement efforts, citizen complaint files were reviewed in all of the MDEQ district offices. Based on the annual reports prepared by MDEQ, an average of 800 citizen complaints are investigated each year. The program review found that district offices make a concerted effort to address complaints. Generally, the review found complaints were routinely followed with site inspections, which usually were made within two weeks of receipt of the complaint.

An opportunity for public participation in the State's enforcement process is required by federal law, and MDEQ has agreed to implement procedures to comply with the requirements of 40 CFR 233.41(e)(2).

This review concludes that MDEQ has maintained a satisfactory enforcement program. MDEQ has designed the enforcement program to identify unpermitted activities and initiates enforcement responses in a timely manner. Overall, Michigan's enforcement program achieves appropriate injunctive relief through wetlands restoration and wetland mitigation and obtains adequate penalties. The review of MDEQ's use of administrative consent agreements found that the agreements effectively resolved the violations at issue and resulted in additional environmental restoration and conservation of wetland.

Although there is no legal requirement that EPA receive public comment regarding the preliminary determinations of its informal review of Michigan's section 404 program, EPA has decided to accept such public comments for a period of sixty (60) days from the publication date of this notice. EPA seeks public comment on its preliminary determination that formal withdrawal proceedings not be commenced, as well as EPA's detailed findings regarding MDEQ's administration of the permitting and enforcement program and the adequacy of Michigan's legal authorities. If public comments received by EPA indicate

significant public interest in the holding of a public hearing, EPA may decide to hold such a hearing.

Dated: December 18, 2002.

**Bharat Mathur,**

*Acting Regional Administrator, Region 5.*

[FR Doc. 03-285 Filed 1-6-03; 8:45 am]

BILLING CODE 6560-50-P

## ENVIRONMENTAL PROTECTION AGENCY

[FRL-7436-5]

### Issuance of a General Permit to the National Science Foundation for the Ocean Disposal of Man-Made Ice Piers From its Base at McMurdo Sound on Antarctica

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Proposed permit.

**SUMMARY:** EPA is today proposing to issue a general permit under sections 102(a) and 104(c) of the Marine Protection, Research, and Sanctuaries Act (MPRSA) to the National Science Foundation (NSF) for the disposal at sea of man-made ice piers from its base at McMurdo Sound on Antarctica. The NSF is the agency of the United States Government responsible for oversight of the United States Antarctic Program. The NSF currently operates three major bases in Antarctica: McMurdo Station on Ross Island, adjacent to McMurdo Sound; Palmer Station, near the western terminus of the Antarctic Peninsula; and Amundsen-Scott South Pole Station, at the geographic South Pole. McMurdo Station is the largest of the three stations, and serves as the primary logistics base for Antarctica. In order to unload supplies at McMurdo Station, ships dock at an ice pier at McMurdo Station; this man-made pier has a normal life span of three to five years. At the end of its useful life, all transportable equipment, materials, and debris are removed, the pier is cast loose from its moorings at the base and towed out to McMurdo Sound for disposal, where it melts naturally. Issuance of this general permit is necessary because the pier must be towed out to sea for disposal at the end of its useful life. This proposed general permit is intended to protect the marine environment by setting forth specific permit terms and conditions, including operating conditions during use of the pier and clean-up, with which the NSF must comply before the disposal of such ice piers would take place.

**DATES:** Written comments on this proposed general permit will be

accepted until February 6, 2003. All comments must be received or postmarked by midnight of February 6, 2003, or must be delivered by hand by the close of business of that date to the address specified below.

**ADDRESSES:** This proposed permit is identified as Docket No. OW-2002-0048. Please send an original and three copies of your comments and enclosures (including references) to the "OW-2002-0048, Comment Clerk", Water Docket (MC 4101T), U.S. Environmental Protection Agency, 1200 Pennsylvania Avenue, NW., Washington, DC 20460. Hand deliveries should be delivered to: EPA Water Docket, 1301 Constitution Avenue, NW., Room B-135, Washington, DC 20004. Electronic mail comments will be accepted at the e-mail address, [ow-docket@epamail.epa.gov](mailto:ow-docket@epamail.epa.gov), and must be received by close of business of the date specified above. Electronic comments must be submitted as an ASCII, WP 5.1, WP 6.1, or WP 8 file, avoiding the use of special characters and any form of encryption. Electronic comments must be identified by Docket Number OW-2002-0048. Comments and data will also be accepted on discs in ASCII, WP 5.1, WP 6.1, or WP 8 file format. Electronic comments on this notice may be filed online at many Federal Depository Libraries. To ensure that the Agency can read, understand, and therefore properly respond to comments, commenters should cite the paragraph(s) or sections in the proposed permit to which each comment refers. Commenters should use a separate paragraph for each issue discussed. Commenters should submit any references cited in their comments. Commenters who want the Agency to acknowledge receipt of their comments should include a self-addressed, stamped envelope. No comments submitted by facsimile transmission (fax) will be accepted. The record for this proposed permit has been established, as noted above, as Docket No. OW-2002-0048, and includes printed, paper versions of electronic comments. The record is available for inspection from 9 a.m. to 4 p.m., Monday through Friday, excluding legal holidays, at the Water Docket, 1301 Constitution Avenue, NW., Room B-135, Washington, DC 20004. For access to docket materials, call (202) 566-2426, to schedule an appointment.

**FOR FURTHER INFORMATION CONTACT:** David Redford, Chief, Marine Pollution Control Branch, Oceans and Coastal Protection Division (4504T), U.S. Environmental Protection Agency, 1200 Pennsylvania Avenue, N.W.,

**Exhibit D**  
**Phase 2 MS4 Communities in Michigan**

**Phase 2 MS4 Communities in Michigan**  
**Based on 2000 Census Urbanized Areas**  
**August 14, 2002**

**DRAFT**

<b>Ann Arbor Urbanized Area (U A)</b>	Beverly Hills	Lathrup Village
Ann Arbor	Bingham Farms	Lenox Twp
Ann Arbor Twp	Birmingham	Lincoln Park
Barton Hills	Bloomfield Hills	Livonia
Belleville	Bloomfield Twp	Macomb Twp
Dexter	Brandon Twp	Madison Heights
Lodi Twp	Brownstown Twp	Melvindale
Pittsfield Twp	Bruce Twp	Milford
Saline	Canton Twp	Milford Twp
Saline Twp	Casco Twp	Mt Clemens
Scio Twp	Center Line	New Baltimore
Sumpter Twp	Chesterfield Twp	New Haven
York Twp	Clarkston	Northville
Ypsilanti	Clawson	Northville Twp
Ypsilanti Twp	Clinton Twp	Novi
<b>Battle Creek U A</b>	Commerce Twp	Novi Twp
Battle Creek	Dearborn	Oak Park
Bedford Twp	Dearborn Heights	Oakland Twp
Emmett Twp	Detroit	Orchard Lake
Leroy Twp	Eastpointe	Orion Twp
Newton Twp	Ecorse	Oxford
Pennfield Twp	Farmington	Oxford Twp
Ross Twp	Farmington Hills	Pleasant Ridge
Springfield	Ferndale	Plymouth
<b>Bay City U A</b>	Flat Rock	Plymouth Twp
Bangor Twp	Franklin	Pontiac
Bay City	Fraser	Redford Twp
Essexville	Garden City	River Rouge
Frankenlust Twp	Gibraltar	Riverview
Fraser Twp	Grosse Ile Twp	Rochester
Hampton Twp	Grosse Pointe	Rochester Hills
Kawkawlin Twp	Grosse Pointe Farms	Rockwood
Monitor Twp	Grosse Pointe Park	Romeo
Portsmouth Twp	Grosse Pointe Shores	Romulus
<b>Benton Harbor/St Joseph U A</b>	Grosse Pointe Twp	Roseville
Benton Harbor	Grosse Pointe Woods	Royal Oak
Benton Twp	Groveland Twp	Royal Oak Twp
Bridgman	Hamtramck	Shelby Twp
Lake Twp	Harper Woods	So Rockwood
Lincoln Twp	Harrison Twp	Southfield
Royalton Twp	Hazel Park	Southfield Twp
Shoreham	Highland Park	Southgate
Sodus Twp	Highland Twp	Springfield Twp
St Joseph	Huntington Woods	St Clair Shores
St Joseph Twp	Huron Twp	Sterling Heights
Stevensville	Independence Twp	Superior Twp
<b>Detroit U A</b>	Inkster	Sylvan Lake
Addison Twp	Ira Twp	Taylor
Algonac	Keego Harbor	Trenton
Allen Park	Lake Angelus	Troy
Auburn Hills	Lake Orion	Utica
Berkley	Lake Twp	Van Buren Twp

Walled Lake	Georgetown Twp	Dewitt Twp
Warren	Grand Rapids	Dimondale
Washington Twp	Grand Rapids Twp	East Lansing
Waterford Twp	Grandville	Grand Ledge
Wayne	Hudsonville	Lansing
West Bloomfield Twp	Jamestown Twp	Lansing Twp
Westland	Kentwood	Mason
White Lake Twp	Plainfield Twp	Meridian Twp
Wixom	Rockford	Olive Twp
Wolverine Lake	Sparta	Oneida Twp
Woodhaven	Sparta Twp	Vevay Twp
Wyandotte	Tallmadge Twp	Watertown Twp
<b>Elkhart, IN – MI U A</b>	Walker	Williamstown Twp
Mason Twp	Wright Twp	Windsor Twp
<b>Flint U A</b>	Wyoming	Woodhull Twp
Atlas Twp	<b>Holland U A</b>	<b>Michigan City, IN – MI U A</b>
Birch Run Twp	Fillmore Twp	Grand Beach
Burton	Holland	Michiana
Clayton Twp	Holland Twp	New Buffalo Twp
Clio	Laketown Twp	<b>Monroe U A</b>
Davison	Olive Twp	Berlin Twp
Davison Twp	Park Twp	Frenchtown Twp
Fenton	Port Sheldon Twp	Lasalle Twp
Fenton Twp	Zeeland	Monroe
Flint	Zeeland Twp	Monroe Twp
Flint Twp	<b>Jackson U A</b>	Raisinville Twp
Flushing	Blackman Twp	<b>Muskegon U A</b>
Flushing Twp	Jackson	Crockery Twp
Gaines Twp	Leoni Twp	Dalton Twp
Genesee Twp	Napoleon Twp	Egelston Twp
Grand Blanc	Rives Twp	Ferrysburg
Grand Blanc Twp	Spring Arbor Twp	Fruitport
Holly Twp	Summit Twp	Fruitport Twp
Linden	<b>Kalamazoo U A</b>	Grand Haven
Mt Morris	Brady Twp	Grand Haven Twp
Mt Morris Twp	Charleston Twp	Laketon Twp
Mundy Twp	Comstock Twp	Muskegon
Richfield Twp	Cooper Twp	Muskegon Heights
Swartz Creek	Galesburg	Muskegon Twp
Thetford Twp	Kalamazoo	North Muskegon
Tyrone Twp	Kalamazoo Twp	Norton Shores
Venice Twp	Oshtemo Twp	Robinson Twp
Vienna Twp	Parchment	Roosevelt Park
<b>Grand Rapids U A</b>	Pavilion Twp	Spring Lake
Ada Twp	Portage	Spring Lake Twp
Algoma Twp	Richland Twp	Sullivan Twp
Allendale Twp	Schoolcraft	<b>Port Huron U A</b>
Alpine Twp	Schoolcraft Twp	Burtchville Twp
Blendon Twp	Texas Twp	China Twp
Byron Twp	Vicksburg	Clay Twp
Caledonia Twp	<b>Lansing U A</b>	Clyde Twp
Cannon Twp	Alaiedon Twp	Cottrellville Twp
Cascade Twp	Bath Twp	East China Twp
Courtland Twp	Delhi Twp	Fort Gratiot Twp
East Grand Rapids	Delta Twp	Kimball Twp
Gaines Twp	Dewitt	Lexington

*Brownfield Redevelopment: A Great Opportunity*

Lexington Twp  
Marine City  
Marysville  
Port Huron  
Port Huron Twp  
St Clair  
St Clair Twp  
Worth Twp

**Saginaw U A**

Bridgeport Twp  
Buena Vista Twp  
Carrollton Twp  
James Twp  
Kochville Twp  
Saginaw  
Saginaw Twp  
Spaulding Twp  
Thomas Twp  
Tittabawassee Twp  
Zilwaukee

**South Bend, IN – MI U A**

Bertrand Twp  
Buchanan  
Buchanan Twp  
Edwardsburg  
Howard Twp  
Milton Twp  
Niles  
Niles Twp  
Ontwa Twp

**S. Lyon-Howell-Brighton U A**

Brighton  
Brighton Twp  
Dexter Twp  
Genoa Twp  
Green Oak Twp  
Hamburg Twp  
Hartland Twp  
Howell  
Howell Twp  
Lyon Twp  
Marion Twp  
Northfield Twp  
Oceola Twp  
Pinckney  
Putnam Twp  
Salem Twp  
South Lyon  
Webster Twp

**Toledo, OH – MI U A**

Bedford Twp  
Erie Twp  
Whiteford Twp