

**ALABAMA  
SOIL AND WATER  
CONSERVATION SOCIETY  
ANNUAL MEETING**

**Current Legal Issues  
Re: Watershed Protection  
Mobile, AL  
June 11, 2003**

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**CURRENT LEGAL ISSUES  
AFFECTING WATERSHED PROTECTION**

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Presented June 11, 2003

# **CURRENT LEGAL ISSUES REGARDING WATERSHED PROTECTION**

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The continued focus on Watershed-based permitting and protection is emphasized by several regulatory programs, agencies and organizations. Water quality and cumulative effects to the ecological systems are now given more attention by regulatory agencies and courts in several jurisdictions.

## **A. Construction Stormwater Rules, Regulations and Enforcement**

### **1. ADEM Construction Site Stormwater Regulations:**

The new regulations, ADEM ADMIN CODE Reg. 335-6-12 (“ADEM Rule”) do not specifically mention “Watershed” or “Watershed protection”, but we will see and experience more attention on watersheds and NPDES coverage through BMP implementation, compliance and enforcement, TMDL considerations [335-6-12-.05(7)], and attention to receiving waters.

### **2. NPDES Permits:**

(a) **Generally:** In the event that the development will produce or need to discharge pollutants directly to navigable waters, including wetlands, from a pipe or another point source, an owner, developer, or contractor must first obtain a general or individual National Pollutant Discharge Elimination System (“NPDES”) permit as required by the Clean Water Act § 402 (33 U.S.C. § 1342). These discharges may be from commercial or industrial operations directly to surface waters, or from sewage and

waste from municipal water treatment facilities, or from stormwater runoff. ADEM administers the NPDES program in Alabama, subject to EPA rules (40 C.F.R. 122), rules and regulations found in Ala. Admin. Code R. 335-6-6, (until recently) the provisions of the Alabama General Stormwater Permit for Construction Sites, and the new ADEM Admin. Code Reg. 335-6-12 (“ADEM Rule”) (effective January 23, 2003).

NPDES permits may be individual or general. Individual permits focus on the particular operation, facility and discharges. Developers should know and anticipate the particular purpose and use of the property and explore the permit requirements for such. If water is a necessary component of the development, the water source must exist nearby or be readily available as well as the ability to discharge the used water and stormwater. If the used water and stormwater contain regulated pollutants or the temperature has been changed, an individual NPDES permit from ADEM may be necessary. The required information and application must then be filed and a public hearing held prior to issuance. If the operation is exposed to rainwater and has surface areas that contribute to runoff, or as discussed below, is a construction site where landclearing and grading are necessary, an individual, or in most cases, general stormwater NPDES permit coverage will be required.

(b) **Phase I General NPDES Permit for Construction, Land-clearing and Excavation Activities:** Alabama’s General Permit for construction activities was ALG610000 (effective until December 31, 2002, extended by administrative order until February 28, 2003). This permit was first issued by ADEM in 1992 and generally follows EPA’s Phase I permit format. The General Permit was issued

for a five-year period which automatically expired in 1997 when it was reissued by ADEM for an additional five (5) years. The most recent General Permit expired on July 31, 2002, but was extended by ADEM until December 31, 2002, and again until February 28, 2003, to allow ADEM time to propose, adopt and effect new rules to address Phase I and Phase II construction sites. Any party authorized to operate prior to July, 2002, should have received notice of expiration requiring resubmission of an intent to extend coverage under the reissued permit or now, notice of registration under the ADEM Rule. Failure to do so (and there are some sites continuing to operate under expired permits and without registration) is a violation which may result in substantial penalties. ADEM Admin. Code Reg. 335-6-6-.23 and ALG610000.

Although the ADEM Rule has been adopted by ADEM, no one can exercise authority under the ADEM Rule without fully complying with its terms, including: (a) first filing a notice of registration (“NOR”) to use and be covered by the ADEM Rule, and (b) filing all required information including a comprehensive Construction Best Management Practices (“CBMP”) plan addressing erosion and sediment control measures for stormwater discharges.

The ADEM Rule (just like the old General Permit) applies to discharges from all construction sites, regardless of the size of the project. ADEM Rule 335-6-12-.02(m). The federal regulations and the ADEM Rule in certain instances, however, refer to sites one acre or larger, unless a smaller site is part of a larger common development greater than one acre. Even though ADEM’s Rule recites its application to all sites, in practice, ADEM requires permits only for those discharges of stormwater from

construction sites that meet the one-acre threshold, unless the discharges from smaller sites adversely affect water quality of state waters and require an individual permit.

Just like the General Permit, the ADEM Rule is a legal document based on federal and state laws and regulations which imposes numerous legal duties on a defined class of persons and activities. For a clear understanding of the requirements, duties and liabilities, the ADEM Rule should be thoroughly reviewed in its entirety several times. Some of the highlights and details are described below. The ADEM Rule is comprehensive, complex, and full of confusing requirements in need of explanation and interpretation.

(i) **Notice of Registration (“NOR”)**: Unlike the federal permit, 40 C.F.R. § 122, and procedures in some states such as New York, discharges from a construction project in Alabama will not be covered by the ADEM Rule until the owner (registrant) or discharger has properly completed a NOR, the complete NOR has been submitted to ADEM, ADEM has reviewed and approved the NOR, and the discharger (registrant) has received the actual receipt of an acknowledgment from ADEM (40 C.F.R. 122.28(b)(2)(iv) and ALG610000, Part II, A.1). However, and contrary to any advice not to do so, ADEM is allowing registrants to begin work upon filing the complete NOR (at the registrant’s risk). The ADEM-approved NOR form must be completed by or on behalf of the person seeking coverage under the ADEM Rule. The NOR must specify the construction activity, the location of the site, describe and include a CBMP plan prepared and certified by a qualified credentialed professional (“QCP”), identify past

violations, describe the schedule of activity, describe and locate receiving waters, and include a certificate by the responsible person or official seeking coverage.

(ii) **The Stormwater Pollution Prevention Plan and CBMPs:**

According to the EPA, the best way to manage stormwater pollution is by use of a stormwater pollution prevention plan (“SPPP”) based on the use of CBMPs. 55 Fed. Reg. 47990, 48034 (Nov. 16, 1990); Molokai Chamber of Commerce v. Kukui (Molokai), Inc., 891 F. Supp. 1389, 1393 (D. Haw. 1995). The SPPP is required as a part of the EPA general permit applicable in states without approved NPDES programs. In Alabama, the SPPP counterpart is now called the “CBMP plan” which also focuses primarily on planning and management of stormwater onsite by using erosion and sediment control procedures.

Although the ADEM Rule contains other requirements which must be met, CBMPs are the most critical and the most visible elements necessary for protecting adjacent waters from stormwater discharge, and preventing violations of the permit conditions. CBMPs do not have to be the “best” in each instance, but they are required to be appropriate for the specific site and based on good engineering practices. The ADEM Rule now provides that CBMP’s must be effective “to the maximum extent practicable.” [ADEM Rule 335-6-125-.02 (f)]. Although the General Permit contains requirements that must be met, such as development of a comprehensive plan, implementation, maintenance, and modification of the practices where and when necessary, it is apparent that the General Permit (and ADEM Rule) require minimum standards based on

subjective engineering practices, professional judgment, and common sense “that is necessarily required in any complex project driven by the vagaries of weather, topography, topology, soil condition, and the unforeseen or unforeseeable construction contingencies.” City of New York v. Anglebrook, Ltd. Partnership, 891 F.Supp. 908, 924 (S.D.N.Y. 1995).

CBMPs are to be designed for dynamic practices which must be continually maintained and modified to address the progressive changes in the construction site and to respond to variable weather conditions. Storm events are unpredictable. Due to the nature of construction activities and the potential for the release of pollutants, ADEM relies heavily on permit requirements using CBMPs designed on a site-specific basis by a QCP hired by the registrant. The ADEM Rule requires an operator and registrant, at all times, to properly operate and maintain all erosion and sediment control procedures. Proper operation and maintenance includes effective performance, adequate funding, adequate operator staffing and training, and adequate quality assurance procedures. Requirements of the ADEM Rule in every aspect specifically focus on CBMPs.

One of the most important parts of the NOR is the CBMP plan. The CBMP plan submitted with the NOR provides the description of the conditions of the construction site and the project by identifying sources of pollution in stormwater discharges as well as the appropriate management and control procedures that will reduce or prevent pollutants in stormwater discharges (to the maximum extent possible). According to ADEM, each CBMP plan:



- (1) must be prepared by a QCP;
- (2) must be comprehensive and describe structural and non-structural practices to prevent and minimize the discharges of all types;
- (3) must be updated and modified as necessary to address any changes in deficiencies; and
- (4) must address pre-construction activities to divert up-slope water around the site, to limit the exposure of disturbed areas to precipitation to the shortest amount of time, to minimize the amount of surface area disturbed by phasing, to correct any deficiencies in CBMP implementation and maintenance, to remove sediment, nutrients, and other pollutants from stormwater before they leave the site, and to properly and promptly remediate sediment deposited offsite.

Any revisions or additions must include updated maps, a history of the location and description of the CBMPs implemented, an analysis of deficiencies, and periodic inspection reports.

At a minimum, the CBMP plan must address implementation and maintenance of effective, applicable CBMPs utilizing good engineering practices according to standards contained in approved materials, at least the specific reference materials of the Alabama Handbook for Erosion Control, Sediment Control and Stormwater Management, on Construction Sites and Urban Areas, SWCC (2002). In addition, any other appropriate CBMP manuals or documents submitted by the permittee (or qualified credentialed professional as part of the

CBMP plan) which are approved by ADEM will become part of the ADEM Rule. However, any additional material referenced in the NOR and approved by ADEM becomes part of the permit requirements and must be utilized. [Note: The proposed 335-6-12 will change the reference manual to an updated document being prepared by the Alabama Soil & Water Conservation Society.]

(c) **Other Requirements:** The ADEM Rule and the NOR contain other important requirements and duties which must be met in order to maintain compliance.

(i) **Inspection and Monitoring.** The importance of CBMPs is noted in other permit requirements such as required inspections, monitoring and reports. The applicant is required to have a QCP or QCI make periodic inspections of the site and CBMPs to prove that the CBMPs were properly designed, installed and are continually maintained. Maintenance may include repairing or replacing damaged structures, as well as modifying CBMPs to address project site conditions and changes in weather conditions. Inspections must be made regularly (as often as necessary), and within 72 hours of any rain event of 3/4 inches or more in any 24-hour period. ADEM Rule 335-6-12-.28). There are also new weekly, monthly and semi-annual requirements.

(d) **Other Duties and Responsibilities.** The ADEM Rule is riddled with affirmative duties imposed on the permittee and others, which duties include the duty to comply with all requirements of the ADEM Rule, the NOR and any supporting

documents. The QCP, and now the QCI, have a broad range of liability for and during the project until termination of coverage.

(f) **Violations, Defenses and Penalties:** Registrants and those who should, but do not, have permit coverage, must be concerned about possible statutory violations and claims based in the common law. Potential statutory violations include the violation of or omission to meet any legal term or condition, making prohibited discharges without a permit, and knowingly making any false statement, representation, or certification by a QCP, QCI or responsible official.

Pursuant to ADEM's regulations, an explicit duty to comply is imposed:

The permittee must comply with all conditions of the permit. Any permit noncompliance constitutes a violation of the AWPCA and the FWPCA and is grounds for enforcement action, for permit termination, revocation and reissuance, suspension, modification; or denial of a permit renewal application.

Ala. Admin. Code R. 335-6-6-.12(a)(1). (See also, ADEM Rule 335-6-12-.06). The regulations also provide that “[a]ny person who violates a permit condition is subject to a civil penalty as authorized by Code of Alabama (1975) § 22-22A-5(18) (1987 Cum. Supp.), and/or a criminal penalty as authorized by the AWPCA.” Ala. Admin. Code R. 335-6-6-.12(a)(3).

The permittee (operator and registrant) also has a duty to mitigate permit violations or any adverse impact from violations. Ala. Admin. Code R. 335-6-6-.12(d) and ADEM Rule 335-6-12-.35(m). Enforcement may be directed against “[a]ny person required to have a NPDES permit pursuant to this Chapter and who discharges pollutants without said permit, who violates the conditions of said permit, who discharges pollutants

in a manner not authorized by the permit, or who violates this Chapter or applicable orders of the Department or any applicable rule or standard under this Division.” Ala. Admin. Code R. 335-6-6-.18(2). Enforcement action may take the form of an administrative order “requiring abatement, compliance, mitigation, cessation of discharge, clean-up, and/or penalties;” an action for damages; an action for injunctive relief; or an action for penalties. Ala. Admin. Code R. 335-6-6-.18(2)(a)-(d).

Both the NOR form and the ADEM Rule require the signatures of the QCP and the operator as certification “under penalty of law.” The specific penalty of law is not specified, although presumably Alabama Code § 22-22-14(b) is intended, which provides as follows:

Any person who knowingly makes any false statement, representation or certification in any application, record, report, plan or other document filed, or required to be maintained, under this chapter or who falsifies, tampers with or knowingly renders inaccurate any monitoring device or method required to be maintained under this chapter shall, upon conviction, be punished by a fine of not more than \$10,000.00 or by imprisonment for not more than six months, or by both.

Primary enforcement authority for statutory violation lies within the administrative agency charged with responsibility for administering the statute – in our state, ADEM. EPA, however, will always maintain that it has reserved its own, independent, enforcement authority. Under certain circumstances, citizens too can play an enforcement role. A citizen suit may be brought pursuant to 33 U.S.C. § 1365.

While the reported court opinions and administrative decisions concerning construction and stormwater permits are somewhat limited in scope and relatively few in

number, it stands to reason that they would, for the most part, focus on manner of implementation and maintenance of CBMPs. An instructive federal case from our jurisdiction is Driscoll v. Adams, 181 F.3d 1285 (11<sup>th</sup> Cir. 1999), cert. denied, 529 U.S. 1108 (2000). Adams owned 76 acres of land, and the Driscolls owned approximately 5 adjacent acres. The Galbreaths owned two acres adjacent to the Driscolls. A stream flowed downhill from Adams' property through a pond on the Driscolls' property, and then through a pond on the Galbreaths' property, before the stream merged with the Notterly River, which united across the Georgia-Tennessee border with the Tennessee River.

Without seeking approval from any federal, state, or local government, Adams harvested timber, cut and graded roads, graveled the roads, built culverts and dams to channel stormwater runoff, and subdivided his property into residential lots. The development caused erosion, which Adams did little to prevent, and damaged the Driscolls' and Galbreaths' properties. Adams finally sought a state permit a year-and-a-half after he began to develop his property, and Adams did not procure a county development permit until two months after the Driscolls and Galbreaths sued him for violations of the Clean Water Act and for nuisance, trespass, and negligence under Georgia state law. Adams *never* obtained a NPDES permit. The issues on appeal were (1) whether the Clean Water Act's zero-discharge standard under 33 U.S.C. § 1311(a) applied to a discharger who could not obtain an NPDES permit because none was available and (2) whether Adams' discharges fell within the scope of prohibited discharges under the Act.

On the first issue, the appeals court looked to the narrow exception it had previously established in Hughey v. JMS Development Corp., 78 F.3d 1523 (11<sup>th</sup> Cir. 1996), cert. denied, 519 U.S. 993 (1996), for the general rule of liability for discharges without an NPDES permit. The exception would be deemed to apply if:

- 1) compliance with the zero discharge standard was factually impossible because there would always be some stormwater runoff from an area of development;
- 2) there was no NPDES permit available to cover such discharge;
- 3) the discharger was in good-faith compliance with local pollution control requirements, which substantially mirrored the proposed NPDES discharge standards; and
- 4) the discharges were minimal.

Driscoll, 181 F.3d at 1288-89 (citing Hughey, 78 F.3d at 1530). In other words, Hughey created a narrow exception to the CWA's zero-discharge standard for any "minimal discharge that occurs despite a developer's best efforts to reduce the amount of it and comply with applicable law." Id. at 1289 (citing Hughey, 78 F.3d at 1530).

The Driscoll court distinguished the case before it from Hughey, finding that Adams did not satisfy the third and fourth elements of the exception:

Adams did little or nothing to limit erosion or stormwater discharge before beginning construction. He sought none of the required permits until after considerable damage had been done to the [plaintiffs'] properties. . . . [T]he amount of Adams' stormwater discharge and the resulting damage were substantial. . . . 64 tons of sediment were deposited into their ponds as a result of Adams' activities.

Id.

On the second issue, Adams argued that he did not discharge a pollutant from a point source into a navigable water. The appeals court summarily rejected this argument. The definition of pollutant is broad and specifically includes sand and silt

such as that left in the plaintiffs' ponds. *Id.* at 1291 (citing 40 C.F.R. § 122.2; and Hughey, 78 F.2d at 1525, n.1). "Point source" is also broadly defined and, because Adams collected stormwater through pipes and other means prior to discharge into the stream, he was within the meaning of the CWA. *Id.* at 1291 (citing 40 C.F.R. § 122.2). Finally, the Eleventh Circuit previously spoke authoritatively on the term "navigable waters":

The CWA defines "navigable waters" as "waters of the United States, including the territorial areas." 33 U.S.C. § 1362(7). This broad definition "makes it clear that the term 'navigable' as used in the Act is of limited import" and that with the CWA Congress chose to regulate waters that would not be deemed navigable under the classical meaning of that term. . . . Consequently, courts have acknowledged that ditches and canals, as well as streams and creeks, can be "waters of the United States" under § 1362(7). Likewise, there is no reason to suspect that Congress intended to exclude from "waters of the United States" tributaries that flow only intermittently.

*Id.* (quoting United States v. Edison, 108 F.3d 1336, 1341-42 (11<sup>th</sup> Cir. 1997) (holding that a man-made drainage ditch was a navigable water under the Clean Water Act) (citations omitted)). The stream into which Adams discharged was thus a "navigable water" under the CWA. (However, this interpretation may now be challenged in light of SWANCC).

The federal district court cases of Molokai Chamber of Commerce v. Kukui (Molokai), Inc., 891 F.Supp. 1389 (D.Haw. 1995), and City of New York v. Anglebrook Ltd. Partnership, 891 F.Supp. 908 (S.D.N.Y. 1995), also offer some illustration. In Molokai, the defendants were alleged to be in violation of the CWA (and applicable state statutes) because they (1) failed "to obtain a proper and timely

stormwater permit before and during construction;” (2) failed “to comply with the state’s general stormwater permit conditions;” and (3) discharged pollutants into waters of the United States without a permit. Molokai, 891 F.Supp. at 1392. Because the defendant began construction without having its CBMP plan accepted by the State and before it received a Notice of General Permit Coverage (“NGPC”), it was held to be in violation of the CWA. The fact that the defendant stopped construction as a result of receiving a Notice of Violation (“NOV”) from the state was not a defense because there was “a total absence of erosion controls, extensive runoff, heavily stained with top soil, silt, and other debris, running from the project site into the ocean.” Id. at 1395-96.

The court observed:

[T]he defendant’s argument loses sight of the focus of the Act: the water. It fails to account for the interplay of rainwater and the construction site, and interaction that the Act and its regulatory scheme is intended to manage. It is the discharge of water without permit coverage that violates the Act, not the construction activity itself.

Id. at 1400. The defendant should not then have been surprised when it subsequently received notification that its NOR was incomplete. No CBMP plan had even been submitted; there was no grading plan, no sediment and erosion control plan, no permits approving plans from the relevant county agency; and there was no detailed description of the installation and location of silt fences being used.

In Anglebrook, New York City sued the developer of a golf course, claiming that the developer’s “Stormwater Pollution Prevention Plan” (“SWPPP”) violated section 402(a) of the CWA. 891 F.Supp. 908. Under the State of New York’s program, the General Permit required that a SWPPP “include detailed descriptions of



plans for erosion and sediment controls, monitoring, and record keeping,” which is a standard EPA permit condition. Id. at 914. The trial court found the critical issue of the litigation to be whether the General Permit’s guidelines are “hitching posts” or “sign posts” – that is, whether they are “mandatory” or “aspirational.” Id. at 915. The court appropriately looked to the language of the General Permit itself and observed:

[T]he regulations governing the contents of an SWPPP are cast in considerably more open-textured terms than the City would concede. Part III of the General Permit states that the plans should be prepared in accordance with “good engineering practices.” General Permit, Part III at 7. In its description of various sediment and erosion control and stormwater management practices, the General Permit requires that permittees prepare plans which “conform to” or are “implemented in a manner consistent with” those measures. See General Permit, Part III D.2a at 10; part III D.2c at 12. Further, the Appendices which set forth in more detail various stormwater runoff prevention approaches are self-entitled “Guidelines” – not requirements. See General Permit, Appendix D, E. and F. Moreover, each Appendix explains that its purpose is to “provide guidance” and each includes the provision that it is “not fixed and inflexible” but is to be applied in a manner which considers the “particular facts and circumstances of a particular project.” See General Permit, Appendix D; Appendix E; and Appendix F.

In review of this text and context, we find that the Guidelines are intended to be flexible rules which contemplated – and indeed require – applications to exercise good engineering practices, informed by professional judgment and common sense. This interpretation best harmonizes permit compliance with the practicalities and realities of construction and landscape architecture. The preparation of a SWPPP contemplates the interaction of many disciplines: wetland biology, biology, biochemistry, engineering, agriculture, agricultural engineering, turfgrass studies, landscape architecture, limnology, soil science, hydrology, architectural history and horticulture. The Guidelines tacitly recognize the

practical difficulties of synthesizing these areas by leaving space for professional judgment.

Id. at 915-916.

The developer's SWPPP demonstrated various erosion and sediment control measures, including diversions, earth dikes, surface roughening and grading, interior silt fences, perimeter silt fences, sediment traps, sodding, temporary seeding, and mulching. The SWPPP also included stormwater management controls, including detention ponds, vegetated swales, vegetated buffers, filter strips, oil/water separators, and biofilters ("a ditch with foliage which intercepts overland runoff and filters it"). Id. at 921. The developer's SWPPP also required a field inspection once a week and within twenty-four hours after every rainfall of ½ inch or more and monthly testing of on-site streams and ponds for various chemicals and pesticides. Finally, the developer hired a "qualified professional monitor" (at a cost of \$163,000) for the immediately neighboring town and posted a \$2.3 million erosion and sedimentation bond "to insure remediation of any damage." Id. at 922. The developer was not even required by the General Permit to take those last two steps.

Based upon all of this information, the court concluded as follows:

[T]he design requirements at issue are Guidelines. They accommodate themselves to the sound professional judgment that is necessarily required in any complex project driven by the vagaries of weather, topology, soil condition and the unforeseen or unforeseeable construction contingencies.

While the SWPPP in question may not be completely immune from criticism of the wisdom of certain of its design choices, considered as a whole, the SWPPP is a carefully conceived plan that falls well within the

boundaries of good engineering design judgment. If it is implemented in accordance with its design, the proof at trial showed no real threat of real harm to the City's water supply and certainly no danger of immediate irreparable harm.

SGA's SWPPP contains adequate erosion and sediment controls. The Plans adequately describe the erosion and sediment controls set forth in the General Permit. Defendants have established that in each instance where greater than five acres is exposed, that area will be protected by adequate erosion and sediment controls including diversions, earth dikes, surface roughening and grading, interior silt fences, sediment traps, sodding, temporary seeding and mulching. The SWPPP also provides adequate measures for maintaining stormwater quality. As indicated above, the first flush of runoff is treated adequately through detention ponds, biofilters, vegetated filter strips, swales and vegetated buffers and its Turfgrass Management System.

Id. at 924. Because the plaintiff city did not demonstrate that the defendants' plan would cause the release of pollutants into the water supply, the court rendered judgment for the defendants.

There are several Alabama decisions on this issue. In ADEM v. Wright Brothers Construction Co., Inc., 604 So.2d 429 (Ala. Civ. App. 1992), defendant, the site grading contractor for a shopping center developer, was contractually responsible for erosion and pollution control. There was some effort to mitigate erosion, but soil flowed from the construction site into two tributaries of a creek. Sampling by ADEM indicated that water from the site did not meet state water quality criteria and inspection revealed violations of departmental regulations. The grading contractor had not obtained a permit for discharge into state waters, so ADEM issued a notice of violation. The contractor was required, among other things, to do the following: develop "an engineering plan and

proposed implementation schedule for the construction and installation of all necessary pollution control structures needed to prevent a discharge of waste water” and to “monitor all discharges from the construction site.” Id. at 430.

After a number of extensions and legal deadlines without compliance by the contractor, ADEM issued an Administrative Order assessing monetary penalties and ordering the contractor to cease all unpermitted discharges from the site. The order was appealed, was determined to be reasonable by the hearing officer, and was approved by the Environmental Management Commission. The contractor appealed various issues to the circuit court, and the circuit court entered an order that did not please the contractor or ADEM, leading to cross-appeals to the Court of Civil Appeals. What the appeals court held that is immediately pertinent to the present topic is this: “Since Wright Brothers failed to obtain a permit to discharge the sediment, pollutants, and other wastes, every time [there was a] discharge[] from the construction site resulted in new or increased pollution, Wright Brothers violated [the Alabama Water Pollution Control Act].” 604 So. 2d at 433.

Brown v. ADEM, 1999 WL 956675 (Ala. Dept. Env. Mgmt. October 12, 1999), is a very short, straightforward order that denied an appeal from an ADEM order assessing a penalty against the petitioner because, even a year after the initial inspection, he was not using CBMPs, and sediment from his 40-acre construction site was running into a creek. The petitioner, the hearing officer found, had “no convincing

explanation. . . as to why he failed to obtain a permit or initiate proper remedial or preventive measures.” 1999 WL 956675 at \*2.<sup>1</sup>

Under ADEM Rule 335-6-12-.02(n), “Operator” is defined as:

“Operator” means any person, registrant, or other entity, that owns, operates, directs, conducts, controls, authorizes, approves, determines, or otherwise has responsibility for, or exerts financial control over the commencement, continuation, or daily operation of activity regulated by this Chapter. An operator includes any person who treats and discharges stormwater or in the absence of treatment, the person who generates and/or discharges stormwater, or pollutants. An operator includes but is not limited to, property owners, agents, general partners, LLP partners, LLC members, leaseholders, developers, builders, contractors, or other responsible or controlling entities. An operator does not include passive financial investors that do not have control over activities regulated by this Chapter.

Under EPA’s final Phase II rule, the NPDES permitting authority (in Alabama, ADEM) may provide waivers from Phase II coverage to operators of small construction in two situations. These waivers are intended only for sites which are not likely to have a negative effect on water quality. First, if an operator can determine that the low predicted rainfall potential, where the rainfall erosivity factor would be less than five during the period of construction activity then he qualifies for a waiver. EPA Compliance Guide at 5-5. This waiver is given when there is low predicted rainfall, and therefore, there is little chance of having stormwater discharge. “This waiver is time-sensitive and is dependent on when during the year a construction activity takes place,

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<sup>1</sup> For a further discussion, see, Neil C. Johnston and Richard E. Davis, “Permits, Best Management Practices, and Construction Sites: *Don’t Muddy the Water, or Else*,” 62 The Alabama Lawyer 330, Sept. 2000.

how long it lasts, and the expected rainfall and intensity during that time. It creates an incentive for construction site operators to build during the dry part of the year.” Id.

Second, if an operator can determine that stormwater controls are not warranted based on either a total maximum daily load (“TMDL”) assessment for an impaired waterbody, or for unimpaired waterbodies, an equivalent analysis, then he or she qualifies for a waiver. Id. With respect to TMDLs, EPA has provided as follows:

A TMDL process establishes the maximum amount of pollutants a waterbody can assimilate before water quality is impaired, then requires that this maximum level not be exceeded. A TMDL assessment determines the source or sources of a pollutant for the waterbody, then allocates to each source or category of sources a set level of the pollutant that it is allowed to discharge into the waterbody.

Id. at 5-6.

The EPA requires that for a state to meet the NPDES permitting authority requirements it must require construction site operators to (i) implement erosion and sediment control CBMPs; (ii) control waste such as discarded building materials, concrete truck washout, chemicals, litter, etc. that may have an adverse impact to water quality; (iii) submit a site plan for review that includes consideration of water quality impact; and (iv) develop and implement a SPPP similar to those required under Phase I. Id. at 5-3. Under Phase II, the EPA gave the permitting authorities the choice of whether to require a NOI under a general permit for small construction sites. However, the EPA recommended the use of NOIs “for tracking permit coverage and prioritizing inspections and enforcement.” Id. at 5-9. ADEM adopted the use of registration by submission of a Notice of Registration.

EPA required permitting authorities to create and issue Phase II permits no later than December 2, 2002, and required operators of affected sites to obtain a NPDES permit coverage by March 10, 2003.

**B. Water Quality Trading (“TMDL’s”)**

Water Quality Trading is a watershed-based scheme designed to encourage innovation and voluntary compliance with the Clean Water Act (“CWA”). A new guidance policy of the EPA was announced January 13, 2002 to address point and nonpoint sources of pollution within a watershed by encouraging states to implement programs allowing water quality trades without additional regulations. Initially, trading in sediment and nutrients (phosphorous and nitrogen) will be the focus of the program. (Alabama does not yet have ---- a program or policy, but does currently have one active pilot project).

According to EPA, Congress provided in the CWA broad national authority to develop and implement programs to address point and nonpoint pollution, including innovative and market based approaches such as water quality trading.

We have experienced the difficulty in establishing TMDL’s. The implementation of TMDL’s will be much more difficult, expensive to monitor and enforce, and subject to the next round of litigation.

The 2003 Policy aims at the TMDL implementation. TMDL’s are established on a watershed basis, and the trading in water quality credits on a watershed basis.

The 2003 Policy follows the January, 1996 Effluent Trading in Watersheds Policy and the May, 1996 Draft Framework for Watershed Based Trading.

The 2003 Policy requires a baseline such as an existing TMDL or regulatory requirement for generating pollution reduction credits (“credits”).

Applicable Statutory requirements include CWA § 402, §404, and NPDES permit requirements. Credit units should be pollutant specific to address pollutant loads, load reduction, duration, management practices, variables such as precipitation, soil consistency and slope, and receiving waters.

Initially, 11 pilot projects have been awarded including one to reduce impacts from urban and agricultural runoff and sediment in the Coosa and Tallapoosa Rivers near Montgomery. The Montgomery Water Works and Sanitary Sewer Board is involved in the pilot project.

1. **Generally:**

Water Quality Trading focuses on watershed improvement and TMDL implementation. It is therefore important to also have an understanding of TMDL’s for this discussion. Total maximum daily loads (“TMDL”) of pollutants must be established by each state for impaired waters within the state’s boundaries necessary to implement the state water quality standards. 33 U.S.C. § 1313(d). This is § 303(d) of the Clean Water Act, originally enacted as part of the 1972 Federal Water Pollution Control Act amendments.

Though dormant for many years, litigation in recent years has focused on the obligations of EPA and the states to (1) identify those waterbodies that do not meet the state’s water quality standards and water use classifications, (2) prioritize those waters, (3) determine the TMDL for pollutants that allow the state to meet



those standards, and (4) implement a program to utilize the load allocations in the permitting process. These were matters largely ignored until cases of significance including:

(a) Scott v. City of Hammond, 530 F. Supp. 288 (N.D. Ill. 1981) aff'd in part, rev'd in part, 741 F.2d 992 (7<sup>th</sup> Cir. 1984). The court held that the failure of the state to act or provide TMDLs for impaired waters (in this case, neither Indiana nor Illinois submitted anything to EPA) to EPA could be a constructive submission of no TMDLs requiring EPA to then act to determine the TMDLs.

(b) Northwest Environmental Defense Center v. Thomas, No. 86-1578BU (D. Ore., Consent Decree filed June 3, 1987). Timetable established for EPA action if Oregon did not submit its list of impaired waters.

(c) Alaska Center for the Environment v. Reilly, 762 F. Supp. 1422 (W.D. Wash. 1991), EPA required to determine TMDLs for Alaska state waters since Alaska has submitted none and had not attempted to submit any.

(d) Sierra Club v. Hankinson, 939 F. Supp. 872 (N.D. Ga. 1996). The Sierra Club filed a citizen's suit objecting to all aspects of the Georgia program including the listings of impaired waters, prioritization of the number of TMDLs proposed, and the timetables proposed. The

court ordered a shorter timetable for determination of TMDLs, within five (5) years, among other things.

(e) Edward W. Mudd, II et al. v. John Hankinson, et al., CV-97-5-0714-M and Alabama Rivers Alliance, Inc. v. John Hankinson, et al., CV 97-5-2518-M. Consent degree entered establishing a schedule for establishing TMDLs in Alabama to be prepared by EPA.

(f) Pronsolino v. Marcus, 91 F. Supp. 2d 1337 (N.D. Cal. 2000). Northern District of California held that § 303 authorized EPA to establish TMDLs for waters impaired by non-point source pollution.

Alabama, through ADEM, like other states under consent orders, has listed and identified impaired waters, proposed and will propose TMDLs for listed waters, or if unable or unwilling to do so, EPA will have one year in which to do so. ADEM has a five-year schedule from 1998 to submit the TMDLs. Currently, ADEM is working with EPA on Mobile Bay studies.

2. **Statutory Authority:**

33 U.S.C. § 1313(d) (§ 303(d) of the Clean Water Act) provides the procedures for identifying waters which remain polluted even after technological standards have been applied and to establish limits or waste loads within which water quality standards can be met.

(a) EPA Regulations: 40 C.F.R. Part 130 were first issued in 1985, revised in 1992, and again in 2000, effective October, 2001.

(b) ADEM Regulations: ADEM Admin. Code Reg. § 335-6-10, Water Quality Criteria; § 335-6-11, Water Use Clarification.

3. **40 C.F.R. § 130.2 Definitions**

(a) Total maximum daily load (TMDL). A TMDL is a written, quantitative plan and analysis for attaining and maintaining water quality standards in all seasons for a specific waterbody and pollutant. TMDLs may be established on a coordinated basis for a group of waterbodies in a watershed. TMDLs must be established for waterbodies on Part 1 of the list of impaired waterbodies and must include the following eleven elements:

- (1) The name and geographic location of the impaired waterbody;
- (2) Identification of the pollutant and the applicable water quality standard;
- (3) Quantification of the pollutant load that may be present in the waterbody and still ensure attainment and maintenance of water quality standards;
- (4) Quantification of the amount or degree by which the current pollutant load in the waterbody, including the pollutant load from upstream sources that is being accounted for as background loading, deviates from the pollutant load needed to attain and maintain water quality standards;
- (5) Identification of source categories, source subcategories or individual sources of the pollutant;
- (6) Wasteload allocation;
- (7) Load allocations;

- (8) A margin of safety;
- (9) Consideration of seasonable variations;
- (10) Allowance for reasonably foreseeable increases in pollutant loads including future growth; and
- (11) An implementation plan.

(b) Waste Load Allocation: The portion of a TMDL's pollutant load allocated to a point source of a pollutant for which an NPDES permit is required. For waterbodies impaired by both point and nonpoint sources, wasteload allocations may reflect anticipated or expected reductions of pollutants from other sources if those anticipated or expected reductions are supported by reasonable assurance that they will occur.

(c) Load Allocation: The portion of a TMDL's pollutant load allocated to a nonpoint source, stormwater source for which a National Pollutant Discharge Elimination System (NPDES) permit is not required, atmospheric deposition, groundwater, or background source of pollutants.

(d) Pollutant: Dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials (except those regulated under Atomic Energy Act of 1954, as amended (42 U.S.C. 2011 et. seq.)), heat, wrecked or discharged equipment, rock, sand, cellar dirt, and industrial, municipal, and agricultural waste discharged into water. This term does not mean: "sewage from vessels" within the meaning of Section 312 of the Clean

Water Act; or water, gas, or other material that is injected into a well to facilitate production or for disposal purposes is approved by authority of the State in which the well is located, and if the State determines that such injection or disposal will not result in the degradation of ground or surface water resources. (See Clean Water Act Section 502(6)).

(e) Impaired Waterbody: Any waterbody of the United States that does not attain and maintain water quality standards (as defined in 40 C.F.R. Part 131) throughout the waterbody due to an individual pollutant, multiple pollutants, or other causes of pollution, including any waterbody for which biological information indicates that it does not attain and maintain water quality standards. Where a waterbody receives a thermal discharge from one or more point sources, impaired means that the waterbody does not have or maintain a balanced indigenous population of shellfish, fish, and wildlife.

4. Effects on Land Use: For existing industries, the establishment of TMDLs following the identification of specific polluted waters where existing water quality standards, water use classifications and NPDES limits have not been successful means more stringent permit limits, additional costs to meet the new standards, and limits.

Monitoring is a component of the water quality standards that would be required to insure compliance with the new standards and loads.

A Montana court prohibited the state from issuing any new NPDES permits or amending existing permits for road building projects, construction projects, or permits for upgrading public drinking water systems until the state complied with § 303(d) as a water quality limited segment, the geographic description of an area to be designated as a listed water. Friends of Wild Swan v. EPA (D. Mont. CV-97-35-M-DWM, 10-13-00)

In Headwaters, Inc. v. Talent Irrigation District, 52 ERC 1001 (9<sup>th</sup> Cir. 2001), a citizen suit was filed alleging discharges to an irrigation ditch without an NPDES permit. Defendant had applied an aquatic herbicide to the irrigation canals. The court found that, although the herbicide was discharged without a permit, the canals were “waters of the United States” subject to Clean Water Act jurisdiction, which includes § 303(d).

Nonpoint source pollution and construction (NPDES) Stormwater permits could likely see more stringent limits in permits and regulations. As TMDLs for pollutants such as siltation and sediment are developed, activities affecting waters impaired by such pollutants will be restricted and control procedures more pronounced. TMDLs must address all pollution including nonpoint source pollution according to the court in Pronsolino v. Marcus, 91 F. Supp. 29 1337 (N.D. Cal. 2000). This will substantially increase construction site erosion control costs, mandate monitoring for all pollutants for which TMDLs are discussed, and have a costly effect on municipal sewage treatment and stormwater drainage systems.

**C. Wetlands and “Navigable Waters”**

**1. Watershed approach to wetland impacts:**

(a) The Clear Water Act (“CWA”) § 404 and the CWA § 404(b)(1) guidelines address cumulative impacts on a watershed basis;

(b) The Wetland mitigation guidelines contain policy statements encouraging the application and implementation of compensatory mitigation in the same watershed where the permitted activity is located. See (MOA dated 2/6/90 between EPA and Corps which encourages the use of off-site mitigation in the same “Watershed” if on-site mitigation is not practicable.) The policy statement is also contained in the Federal Guidance on the Use of In Lieu Fee Arrangements for Compensatory Mitigation, 65 Fed Register No 216, p. 66914.);

(c) Watershed codes (Hydrological Unit Codes (“HUC”) are used to describe mitigation and permitting areas;

(d) CWA § 303(d) TMDL’s are established on a watershed basis; and

(e) The Advanced Notice of RuleMaking addressing SWANCC will likely redefine “navigable waters” and address watersheds.

**2. Navigable Waters:**

The definition of *navigable waters* or *waters of the United States* is once again evolving as the ramifications of SWANCC and other judicial decisions are digested.

**3. Implications from SWANCC decision:**

The SWANCC decision has been argued by some courts to be a very narrow interpretation of the Clean Water Act Section 404 jurisdiction. Regulations apply to wetlands with hydrologic connections to non-navigable or intermittent tributaries of navigable waters. United States v. Interstate General Co., 152 F. Supp. 2d 843 (D. Md. 2001) (*aff'd* 39 Fd Appx. 870 (4<sup>th</sup> Cir. 2002)); Headwaters, Inc. v. Talent Irrigation District, 243 F.3d 526 (9<sup>th</sup> Cir. 2001). Other courts have given SWANCC a broader interpretation, stating that the Corps' Section 404 jurisdiction extends only to wetlands that are "adjacent" to navigable waters. Rice v. Harken Exploration Co., 250 F.3d 246 (5<sup>th</sup> Cir. 2001); United States v. Newdunn Assoc., 195 F. Supp. 2d 751 (E.D. Va. 2002).

In general, the evolution of the Clean Water Act jurisdiction for the last twenty years expanded to all waters of the United States (33 C.F.R. 328; 40 C.F.R. § 122), including navigable waters, tributaries, adjacent wetlands (United States v. Riverside Bayview Homes, 474 U.S. 121, 16 E.L.R. 20086 (1985)) and isolated intrastate wetlands and waters. The expansion of jurisdiction over isolated wetlands and waters was justified under the Commerce Clause of the United States Constitution (U.S. CONST. art. I cl. VIII) by the so-called "**Migratory Bird Rule.**" In other words, waters that are, should, or would be used as habitat for migratory birds which cross state lines are waters of the United States (or were pre-SWANCC) subject to the Clean Water Act Section 404 jurisdiction.



The Migratory Bird Rule found its way into the regulations in 1986 with the following language:

- “Waters of the United States...also include the following waters:
- a. waters which are or would be used as habitat for birds protected by Migratory Bird Treaties; or
  - b. which are or would be used as habitat by other migratory birds which cross state lines; or
  - c. which or would be used as habitat for endangered species; or
  - d. used to irrigate crops sold in interstate commerce.”

51 Fed. Reg. 41208, 41217 (Nov. 13, 1986)

The Rule was rejected in the Fourth Circuit in Tabb Lakes, Ltd. v. United States, 715 F. Supp. 726 (E.D. Va 1988) (aff'd 885 F.2d 866, 4<sup>th</sup> Cir. 1989), and the Seventh Circuit in Hoffman Homes, Inc. v. EPA, 975 F.2d 1554 (7<sup>th</sup> Cir. 1992), and Hoffman Homes, Inc. v. EPA, 999 F.2d 256 (7<sup>th</sup> Cir. 1993). However, the Seventh Circuit, in 1999, upheld the Rule (Solid Waste Agency of No. Cooke County v. Corps of Engineers, 191 F.3d 845 (7<sup>th</sup> Cir. 1999), as did the Ninth Circuit in 1990 and 1995. See Leslie Salt Co. v. United States, 55 F.3d 1388 (9<sup>th</sup> Cir. 1995); and Leslie Salt Co. v. United States, 896 F.2d 354 (9<sup>th</sup> Cir. 1990).

Finally, the United States Supreme Court, during the appeal from the Seventh Circuit court opinion in Solid Waste Agency of No. Cooke County v. Corps of Engineers, 531 U.S. 159 (2001), the *SWANCC* decision, held that the

Corps of Engineers overextended Section 404 jurisdiction beyond the Congressional authority. The Migratory Bird Rule was, therefore, invalidated.

A consortium of twenty-three suburban Chicago cities formed a corporation to handle their solid waste disposal. The group purchased 533 acres of an old gravel pit to develop a landfill. The pits held water seasonably and were visited from time to time by migratory birds. The site was also in close proximity to another wetland area, which was in close proximity to a navigable water. The Corps of Engineers denied, after several years, the Section 404 permit application. The cities claimed that the Clean Water Act extended only to traditional navigable waters and that the Migratory Bird Rule was not authorized under this traditional definition. In addition, the cities argued that the expanded jurisdiction exceeded Congress' broadest constitutional authority. The Supreme Court found that the Clean Water Act grants jurisdiction only over navigable waters, and in its traditional sense, waters that were or had been navigable in fact or could reasonably be navigable in fact. The Migratory Bird Rule was justified by the Corps with reference to a broad power of Congress to regulate activities substantially affecting interstate commerce rather than Congress' commerce power over navigation and thereby exceeded the scope of the Clean Water Act. Isolated wetlands may, but do not necessarily affect interstate commerce. The Clean Water Act jurisdiction, arguably, only extends to those waters, navigable waters, that clearly have been indicated by Congress.

In U.S.V. Rapanos, the Fifth Circuit rejected the Corps jurisdiction over wetlands stating that the Supreme Court in *SWANCC* established a new mode of analysis which must be utilized. 190 F. Supp 2d 1011 (E.D. Mich. 2002). In Rice v. Harken Exploration Co., 250 F.3d 264 (5<sup>th</sup> Cir. 2001), the Court held that the Clean Water Act jurisdiction extends only to a body of water that is actually navigable and adjacent to an open body of water.

An excellent article you should review is “Can *SWANCC* be Right For a New Look at the Legislative History of the Clean Water Act,” by Virginia S. Albrecht and Stephen M. Nickelsburg, 32 E.L.R. 11042, Sept. 2002.

#### 4. **Exemptions/Deep Ripping**

33 U.S.C. Section 1334(f)(1) contains certain exemptions for normal farming, ranching, and silvicultural activities. Under 33 U.S.C. Section 1334(f)(2), certain activities which convert land to other farming activities or convert wetlands to drylands arguably are recaptured within the statute and require a permit. In Bordon Ranch Partnership v. U.S. Army Corps of Engineers, 261 F.3d 810 (52 E.R.C. 2025, 9<sup>th</sup> Cir. 2001), Angelo Tsakopoulos, a California rancher, owned and operated an 8,000 acre ranch on some land that was underlain by a clay hardpan. The hardpan layer, from two to six feet below the surface of the ground, held water considered jurisdictional wetlands. The property also contained isolated pockets of water, which, in California, are called vernal pools. A three-judge panel of the Ninth Circuit Court of Appeals confirmed the district court’s holding that the farmer violated the Clean Water Act by using a farm

plowing technique called deep ripping. The district court had found that the deep ripping is an agricultural procedure in which four to seven foot long metal prongs are dragged through the soil behind a tractor or bulldozer. The farmer's intended use of deep ripping was to convert a thousand acres of his property from a cattle ranch to orchards and vineyards. The Corps of Engineers alleged that wetlands were converted to another use, and the act of deep ripping was a land disturbance activity that was considered a dredge and fill operation was in violation of the Clean Water Act. The district court held that the Clean Water Act applied to the deep ripping operations, imposed a \$500,000.00 penalty and required some restoration. The Ninth Circuit, agreeing with the district court, found that the deep ripping constituted a discharge of a pollutant into a wetland and the tractor acted as a point source of the pollution. The Court further stated that the normal farming exemption did not apply since the activities converted wetlands into a use that they were not previously prior to the activities. However, the Ninth Circuit reversed the district court on the issue concerning deep ripping of isolated vernal pools, or wetlands, in light of the SWANCC decision.

On December 10, 2002, oral arguments before the United States Supreme Court were made on issues concerning the deep ripping farming technique, whether the technique is a normal farming operation subject to the Section 404(f) exemption, and whether the process causes a discharge requiring a permit regulated under the Clean Water Act. The Court, on December 18, 2002, split 4 -

4 with Justice Kennedy recusing himself. The split decision meant that the Ninth Circuit's decision was affirmed.

**5. Exemptions/Aerial Spraying**

In a recent case in Oregon, League of Wilderness Defenders/Blue Mountains Biodiversity Project v. Forsgren, 9<sup>th</sup> Cir. No. 01-35729 (11/4/02), the Ninth Circuit ruled that the United States Forest Service must obtain a discharge permit under the Clean Water Act for aerial insecticide spraying for the Douglas Fir Tussock Moth. The aerial spraying, according to the Court, constitutes a point source pollution which requires a NPDES permit. The Ninth Circuit reversed the U.S. District Court for the District of Oregon that had granted the Forest Service summary judgment stating that the Environmental Impact Statement prepared adequately addressed the pesticide spray drift and that the aerial spraying did not require a permit. The Court held that the permit requirement was not eliminated by the fact that EPA has defined most normal silvicultural activities as nonpoint sources and ruled that silvicultural point sources in the EPA's regulation was not exclusive. The regulation talks about silvicultural nonpoint sources that are characterized by surface runoff and since the pesticide spray would land directly on water sources and not indirectly through runoff, the application was a point source. The implications of this case reach other exemptions under the Clean Water Act for farming and ranching activities and health activities such as the mosquito spraying.

**6. Cumulative Impacts to Wildlife:**

In order to obtain a Section 404 dredge and fill permit from the U.S. Army Corps of Engineers, the Section 404(b)(1) requirements including cumulative impacts to wildlife must be analyzed. In Utahns For Better Transportation v. Department of Transportation, 10<sup>th</sup> Cir. No. 01-4216, Sept. 16, 2002, the Tenth Circuit found that the Corps of Engineers issued a permit in violation of Section 404 by failing to adequately consider the impact of the project on wildlife as well as other practicable alternatives to the project. The Tenth Circuit decision reversed the district court decision, finding that the Environmental Impact Statement was inadequate. Before constructing a four-lane, divided, limited access highway from Salt Lake City for fourteen miles to U.S. Interstate 89, the Department of Transportation was required to produce an Environmental Impact Study in compliance with the National Environmental Policy Act (“NEPA”) and the Section 404(b)(1) guidelines. Included in the requirements are considerations and analyses of the cumulative project impacts on wildlife and migratory birds. The plaintiffs asserted that the Environmental Impact Statement was inadequate and violated NEPA since it only considered impacts to wildlife within an arbitrary 1,000 foot distance from the highway right-of-way. The U.S. Fish and Wildlife Service presented evidence that roads can have a significant adverse impact on bird populations as far away as 1.24 miles. By limiting the effects to 1,000 feet, the DOT ignored impacts to the surrounding ecosystem.