

**FINAL REPORT**  
**RESULTS OF THE U.S. ENVIRONMENTAL**  
**PROTECTION AGENCY REGION 5**  
**REVIEW OF**  
**MICHIGAN DEPARTMENT OF**  
**ENVIRONMENTAL QUALITY'S**  
**SECTION 404 PROGRAM**

May 2008

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## Introduction

This document is the Final Report of the U.S. Environmental Protection Agency's (EPA) review of the State of Michigan's Clean Water Act (CWA) section 404 program within the State's borders, including the administration of that program by the Michigan Department of Environmental Quality (MDEQ).

EPA received a request from the Michigan Environmental Council, submitted during February 1997, that EPA either ensure reform of Michigan's CWA section 404 program or withdraw the State's authorization to administer the program. EPA treated this request as a petition to withdraw program approval from the state of Michigan and committed to performing an informal review of the allegations made by the Michigan Environmental Council.

In addition to addressing the issues raised by the Michigan Environmental Council, EPA decided to perform a comprehensive review of the state of Michigan's CWA section 404 permitting program, including the state's statutory and regulatory provisions governing the program as well as the State of Michigan's administration of the program.<sup>1</sup>

### LEGAL STANDARDS FOR EPA'S PROGRAM REVIEW

According to 40 C.F.R. § 233.16(e), [w]henver the Regional Administrator has reason to believe that circumstances have changed with respect to a state's program, he may request and the State shall provide a supplemental Attorney General's statement, program description, or such other documents or information as are necessary to evaluate the program's compliance with the requirements of the Act and this part." The Notice of the preliminary results of EPA's review describes how EPA conducted this review and the information which EPA considered. See 68 Fed. Reg. 772, 773 (Jan. 7, 2003).

In reviewing the updated state program information provided by Michigan in response to EPA's request, EPA considered whether the program continues to be consistent with the requirements of CWA section 404 and EPA's implementing regulations at 40 C.F.R. part 233. These regulations specify certain circumstances in which EPA may decide to withdraw a state's authorization to administer the section 404 program if the State fails to take corrective action; these circumstances include a state agency's failure to properly administer the section 404 program's permitting or enforcement provisions and state court decisions or state legislative action striking

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<sup>1</sup> EPA decided to conduct a comprehensive review for a number of reasons, including the fact that there have been many changes to the relevant federal and State statutes and regulations since 1984, the year that Michigan assumed the CWA section 404 program. Among these changes were promulgation of final section 404 State Program Regulations, modifications to the Corps' Nationwide Permit Program, adoption of a federal wetland delineation manual, and changes in the scope of federal jurisdiction as a result of litigation. In addition, a body of State of Michigan judicial and administrative opinions relevant to CWA section 404 permitting in Michigan has developed.

down or limiting State authorities. See 40 C.F.R. § 233.53(b). The regulations describe the procedures EPA will follow in the event that EPA initiates withdrawal proceedings,. See 40 CFR § 233.53(c).<sup>2</sup>

#### HISTORY OF MICHIGAN’S CWA SECTION 404 PROGRAM

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 Fed. Reg. 38948 (Oct. 2, 1984). The components of that approved program are described at 40 C.F.R. §233.70. The Michigan state agency authorized in 1984 to administer the approved CWA section 404 program was the Department of Natural Resources. Later, the State of Michigan reorganized its agencies and transferred authority to administer the approved CWA section 404 program to MDEQ; EPA approved this transfer on November 14, 1997. 62 Fed. Reg. 61173. The State of Michigan was the first state in the nation, and currently is one of only two states, authorized to administer the CWA section 404 permitting program within its borders.

#### CONDUCT OF EPA’S PROGRAM REVIEW

On January 7, 2003, EPA published a Notice in the Federal Register announcing that EPA had completed its preliminary review and had decided that formal program withdrawal proceedings should not be initiated at this time, although EPA would request Michigan to take certain corrective actions. 68 Fed. Reg. 772 (Jan. 7, 2003). EPA’s detailed findings regarding all aspects of Michigan’s CWA section 404 program, as well as the corrective actions which EPA thought were necessary for Michigan to take, were contained in a document titled “Results of the U.S. Environmental Protection Agency Region 5 Review of Michigan Department of Environmental Quality’s Section 404 Program” (hereinafter, “Preliminary Report”), which is included in the public docket. Due to significant public interest in this matter, EPA provided public notice of and invited public comment on the Notice published on January 7, 2003, and on the Preliminary Report, for a period of 60 days.

EPA has reviewed the submitted public comments, has communicated further with Michigan, and has performed additional analysis both as prompted by public comments and as otherwise appropriate. (Any additional information received by, and considered by, EPA since the Notice published on January 7, 2003 is contained in the public docket for the current notice, including all public comments; a Responsiveness Summary of Comments, which contains EPA’s responses to public comments, can be found in Section 3 of this Final Report.) EPA has completed its review and analysis of all the materials and information mentioned above, and EPA now issues its Final Report on the results of its review of the State of Michigan’s CWA section 404 program.

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<sup>2</sup> 40 C.F.R. § 233.53(c) provides the procedures for conducting program withdrawal proceedings.

## RESULTS OF EPA'S PROGRAM REVIEW

EPA concludes that initiation of program withdrawal proceedings is not warranted, at this time. EPA has, however, found deficiencies in the legal authorities establishing the approved CWA section 404 program and in the program's administration. These deficiencies are identified in this Final Report, and relevant information is contained in documents located in the public docket that supports this Notice and the Notice published in the Federal Register on January 7, 2003.

EPA has consulted with the State of Michigan about needed corrective actions. Those identified to date are mentioned throughout this Final Report and are summarized in Section 4 of this Final Report. The nature of these corrective actions include regulatory action by MDEQ and legislative action by the Michigan legislature. EPA and the State of Michigan have agreed on a tentative schedule for implementing the identified corrective actions. As EPA and Michigan work together to effect the corrective actions, EPA may decide that it is appropriate to modify the corrective actions identified in this Final Report, and consequently it may become necessary to change the schedule contained in this Final Report. Any such changes will be documented and included in the public docket. Once MDEQ has completed the corrective actions EPA will make a final determination regarding the need to initiate program withdrawal proceedings.

This Final Report is divided into four major sections. Section 1 and Section 2 contain EPA's analysis of the adequacy of Michigan's CWA section 404 program, with Section 1 containing our analysis of the State's legal authorities for administering the program and Section 2 assessing how MDEQ actually is administering and implementing the program. Section 2 includes an assessment of whether all the requirements identified in the federal regulations for state assumption of a CWA section 404 program are being met, a summary of EPA's findings based on the permit file review, an assessment of Michigan's wetland delineation manual, a review and assessment of Michigan's enforcement program, and a review of MDEQ's contested case decisions. Both Section 1 and Section 2 are more abbreviated than the same sections found in the Preliminary Report. The Preliminary Report should be consulted for additional background and details of EPA's analysis. Section 3 summarizes the public comments which EPA received in response to the January 7, 2003, Notice, as well as EPA's response to those public comments and to the Michigan Environmental Council's 1997 petition for program withdrawal.

Section 4 of this Final Report summarizes EPA's final findings upon completion of the informal program review. Section 4 identifies both strengths and deficiencies in Michigan's CWA section 404 program. We note that, during the course of this program review, Michigan took many steps - such as issuing new administrative rules - which effectively addressed several shortcomings that EPA had identified to Michigan. Section 4 identifies corrective actions which the State of Michigan must take in order to ensure that Michigan's CWA section 404 program continues to be consistent with, and no less stringent than, the Clean Water Act and the federal regulations promulgated pursuant to section 404 of the Act. As mentioned, EPA has discussed these corrective actions with Michigan -- as represented by MDEQ and the Michigan Attorney

General's Office ("Attorney General's Office") - and has arrived at a schedule for implementing them; that schedule is presented in Section 4, as well.

## **SECTION 1: ANALYSIS OF LEGAL AUTHORITIES**

### **Legal Authority Concerns**

To have an adequate and acceptable program for administering CWA section 404 permits, a state must have authority to perform certain permitting activities: “[t]o issue permits which apply, and assure compliance with, any applicable requirements of [section 404], including, but not limited to, the guidelines established under subsection (b)(1) of [section 404] . . . .” 33 U.S.C. § 1344(h). CWA section 404(h) specifies additional authorities a state must possess, including authorities related to enforcement of violations of the permitting program, coordination with federal agencies, and public involvement in the permitting process.

Part 233 of Title 40 of the Code of Federal Regulations specifies the criteria that EPA applies in reviewing State submissions during either initial approval of a program or a program review. A state must regulate all discharges of dredged material or fill material into waters of the United States which the state regulates under CWA section 404(g)(1). 40 C.F.R. §233.1(b). When EPA is reviewing a state CWA section 404 program that has been approved and has been operating, EPA examines whether the state is exercising its relevant legal authorities and is properly regulating all discharges. Although a State's CWA section 404 program may have a broader scope than, or may be more stringent than, the federal section 404 permitting program, the state program cannot be approved by EPA if that program is narrower in its scope or less stringent in its requirements. 40 C.F.R. § 233.1(c) and (d).

Michigan relies on two statutes as providing the principal authority for its CWA section 404 program: Part 303 of the Michigan Natural Resources and Environmental Protection Act (NREPA), entitled Wetlands Protection, and Part 301 of the NREPA, entitled Inland Lakes and Streams. Michigan has adopted administrative rules to implement both sections.

### **JURISDICTION**

Fundamental to the issue of whether Michigan has adequate legal authority for a CWA section 404 program is the jurisdictional scope of Michigan’s program. The CWA prohibits the “discharge of any pollutant” except in compliance with specified sections of the Act.<sup>3</sup> 42 U.S.C. § 1311(a). The CWA defines “discharge of a pollutant” as “any addition of any pollutant to navigable waters from any point source[,]” and defines the term “navigable waters” as “the waters of the United States, including the territorial seas.” 42 U.S.C. §§ 1362(12)(A), 1362(7). Section 404 asserts jurisdiction over “the discharge of dredged or fill material into navigable

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<sup>3</sup> The term “pollutant” means “dredged spoil, solid waste, incinerator residue, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt, and industrial, municipal, and agricultural waste...” 42 U.S.C. § 1362(6).

waters.”<sup>4</sup> “[W]aters of the United States” is defined identically by both Corps and EPA regulations. See 33 C.F.R. § 328.3(a) and 40 C.F.R. § 230.3(s). Waters of the United States include waters which are part of a tributary system to navigable or interstate waters and wetlands that are adjacent to such waters.<sup>5</sup> The federal government also asserts that “waters of the United States” include waters that have a connection with interstate commerce even if the water lies wholly within one state, is not navigable, or is isolated from other waters of the United States. Corps and EPA regulations state that “waters of the United States” include “[a]ll 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...” 40 C.F.R. § 230.3(s)(3) and 33 C.F.R. §328.3(a)(3).

An application of EPA and Corps’ regulations known as the “Migratory Bird Rule” was put into question by the United States Supreme Court when, on January 19, 2001, it issued an opinion in Solid Waste Agency of Northern Cook County v. U.S. Army Corps, 531 U.S. 159, 121 S.Ct 675, 148 L. Ed. 2d 576(2001) (“SWANCC”) In SWANCC, the Supreme Court held that the Corps could not rely solely on migratory birds’ use of certain non-navigable waters to assert that the Corps had CWA section 404 jurisdiction over those waters if the waters were isolated from other waters (in SWANCC the waters were non-navigable water-filled gravel pits) and lay wholly within one state. 531 U.S. at 162, 167, 171. The Corps had asserted jurisdiction pursuant to 33 C.F.R. § 328.3(a)(3), because migratory birds used the water-filled gravel pits, so that degradation or destruction of those waters could affect interstate commerce. In its SWANCC opinion, the Court declared that Congress had not authorized the Corps to invoke its “Migratory Bird Rule” to regulate the particular isolated waters at issue. SWANCC, 531 U.S. at 162, 167-171. When the Court issued its decision in SWANCC, it merely struck down the Migratory Bird Rule as a basis for asserting CWA section 404 jurisdiction, SWANCC, 531,U.S. at 174. The decision did not invalidate the regulation establishing CWA jurisdiction over “waters . . . , the use, degradation, or destruction of which could affect interstate or foreign commerce” (40 C.F.R. 230.3(s)(3) and 33 C.F.R. §328.3(a)(3)), but the Court’s ruling did create uncertainty about the extent to which the CWA regulates non-navigable isolated waters.

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4 The CWA section 404 program assumed by the State of Michigan does not extend to all “waters of the United States” within the State’s borders. Under the CWA, waters over which a state can assume jurisdiction do not include “waters which are presently used, or are susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce shoreward to their ordinary high water mark . . . including wetlands adjacent thereto”. 42 U.S.C. §1344(g); 40 C.F.R. §233.70. Nor does Michigan’s CWA section 404 program extend to waters of the United States located in Indian country, as discussed later in this Final Report. Consequently, this discussion of jurisdiction should be read with recognition that Michigan’s program does not over all waters of the United States that are located within Michigan’s borders.

5 Under federal law, wetlands are “adjacent” if they are “bordering, contiguous, or neighboring,” and adjacent wetlands can be “separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like”. 40 C.F.R. § 230.2(b); 33 C.F.R. §328.3(c).

Since SWANCC's issuance, however, a large body of federal case law developed which narrowly construed SWANCC, holding that the Court only addressed isolated waters and did not change CWA jurisdiction over other categories of waters, such as tributaries and adjacent wetlands. For example, numerous courts held after SWANCC that the CWA protected waters that had a hydrological connection to a navigable-in-fact water and thus were part of a tributary system to navigable and interstate waters. These courts ruled that a hydrological connection could be formed by man-made or natural ditches or water courses, and further held that such a hydrological connection was sufficient to establish CWA jurisdiction even if the distance between the water at issue and the navigable-in-fact water spanned several miles. EPA consistently adhered to these positions in federal litigation.<sup>6</sup>

The "hydrological connection" basis for asserting CWA jurisdiction was reviewed by another Supreme Court decision in June 2006. The definition of "waters of the United States" as it relates to jurisdiction under the CWA had been challenged in two separate cases, Rapanos v. United States and Carabell v. United States. These two cases were consolidated for consideration by the Supreme Court. (For ease of reference these consolidated cases will be referred to as the Rapanos case) In a June 19, 2006, decision, the Supreme Court addressed the issue of what bodies of water are subject to CWA jurisdiction, specifically by determining under what circumstances a non-navigable tributary or its adjacent wetlands can be considered "waters of the United States." Rapanos v. United States, 126 S.Ct. 2208; 165 L.Ed. 2d 159; 2006 U.S. LEXIS 4887; 74 U.S.L.W. 4365 (2006). In the Rapanos decision, the Supreme Court justices issued five separate opinions, with no single opinion constituting a majority of the Court.

Four justices in a plurality opinion concluded that federal agency regulatory authority should extend only to "relatively permanent, standing or continuously flowing bodies of water" connected to traditionally navigable waters, and to "wetlands with a continuous surface connection to" such relatively permanent waters. Rapanos, 126 S.Ct. at 2225, 2226-2227. The plurality opinion also suggested in a footnote that "relatively permanent" waters could include "seasonal rivers, which contain continuous flow during some months of the year but no flow during dry months," and "streams, rivers, or lakes that might dry up in extraordinary circumstances, such as drought." Rapanos, 126 S.Ct. at 2221, note 5.

Justice Kennedy did not join the plurality's opinion but instead authored his own opinion which found the plurality's interpretation of the scope of the CWA to be "inconsistent with the Act's text, structure, and purpose." Rapanos, 126 S.Ct. at 2246. Justice Kennedy concluded that wetlands are "waters of the United States" "if the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'" Rapanos, 126 S.Ct. at

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<sup>6</sup> Immediately after SWANCC was issued, EPA and the Corps posited that the decision invalidated only the Migratory Bird Rule, and left 33 C.F.R. § 328.3(a)(3) intact. (See January 19, 2001, Memorandum by EPA's General Counsel and the Corps' Chief Counsel)

2248.

In a dissenting opinion, four justices concluded that EPA's and Corps' interpretation of "waters of the United States" was a reasonable interpretation of the CWA. The dissent also noted that when there is no majority opinion in a Supreme Court case, controlling legal principles may be derived from the principles espoused by five or more justices. *Rapanos*, 126 S.Ct. at 2265. In litigation following the *Rapanos* decision, the U.S. has consistently adopted this approach, arguing that federal regulatory jurisdiction under the CWA exists if either the plurality's or Justice Kennedy's standard is met. *See, e.g., United States v. Johnson*, 467 F.3d 56, 60 (1<sup>st</sup> Cir. 2006); *cert. denied*, 76 U.S.L.W. 3009 (U.S. Oct. 9, 2007) (No. 07-9); *United States v. Cundiff*, 480 F. Supp. 2d 940, 944 (W. Dist. Ky. 2007) (appeal pending).

On June 5, 2007, the Corps and EPA issued guidance on the scope of "waters of the U.S." regulated under the CWA in light of the *Rapanos* decision. This federal guidance discusses waters addressed in *Rapanos* and their status as waters of the United States. This CWA jurisdiction guidance also allows the federal agencies to assert jurisdiction over non-navigable, not relatively permanent tributaries and their adjacent wetlands where such tributaries and wetlands have a significant nexus to traditional navigable waters. The significant nexus test includes consideration of both hydrologic and ecological factors and must document that the waters in question, when considered together, have more than a speculative or insubstantial effect on the chemical, physical, and biological integrity of a traditional navigable water.

EPA considered the CWA, associated regulations, relevant case law and the *Rapanos* guidance when determining to what extent the laws of the State of Michigan -- particularly Part 303 and Part 301 of the NREPA -- assert jurisdiction over waters of the United States. EPA's concerns as to whether Michigan's jurisdiction is at least as comprehensive as the scope of the federal CWA jurisdiction and the resolution of those concerns re discussed below.

Part 303 asserts jurisdiction over the following categories of wetlands: wetlands of any size which are contiguous to the Great Lakes or Lake St. Clair, an inland lake, or pond, or a river or stream § 324.30301(p)(i). How the term "Contiguous" is defined under Michigan law and applied by MDEQ is critical to our analysis. "Contiguous" is defined by Michigan Administrative Code, R.281.921(1)(b), as meaning that a wetland must have a permanent or intermittent direct surface water connection, or must be located within 500 feet of an inland lake or pond, or a river or stream or within 1000 feet of a Great lake or Lake St. Clair. The Michigan Administrative Code, R.281.921(1)(iii) and R.281.924(4)(d) require that both surface and ground water connections be considered when determining whether a water is "[c]ontiguous." EPA has determined that Michigan's treatment of the concept of "[c]ontiguous" is comparable to the concept of "hydrological connection" as explained by federal case law predating the *Rapanos* decision..

Wetlands which are not contiguous to the above listed water bodies are regulated if the particular

wetland is larger than 5 acres in size and is either 1) located in a county with a population of at least 100,000, or 2) located in a county with a population of less than 100,000 and MDEQ has performed a wetland inventory in that county and certified the inventory. Section 324.30301(p)(ii). Michigan acknowledged EPA's concern that the State did not regulate non-contiguous wetlands of any size located in a county with a population under 100,000 and acknowledges that the State did not perform the wetland inventories that both Michigan and EPA contemplated would be promptly performed by Michigan after it assumed the CWA section 404 program in 1984. To address this concern, during the course of this program review, Michigan made the commitment to perform wetland inventories in all counties with less than 100,000 residents. In January 2007, Michigan certified that the State had completed the wetland inventories and identified all "non-contiguous" wetlands larger than 5 acres that are located in counties with less than 100,000 residents. These wetlands are now "automatically" under the state's jurisdiction.

Now that this inventory is complete, the only category of wetlands that MDEQ fails to assert MDEQ "automatic" jurisdiction over under Part 303 is non-contiguous wetlands that are 5 acres or less in size, located anywhere in Michigan. Due to Michigan's broad definition of the term "[c]ontiguous," there is a relatively small sub-set of Michigan's wetlands, those that are non-contiguous and 5 acres or less, that are not automatically regulated by MDEQ. EPA was concerned that some of these non-contiguous wetlands may be waters of the U.S. under federal law, but Michigan law failed to assert jurisdiction over these waters.

If a wetland does fall into this category of wetlands that are not automatically regulated, under Part 303 MDEQ can take steps to assert what the Michigan Attorney General's Office calls "regulatory jurisdiction" over that wetland. MDEQ is authorized by Part 303, §324.3.301(d), to make a determination that the protection of a non-contiguous wetland, regardless of size, can be regulated provided MDEQ makes an individual determination that protection of the wetland is "...essential to the preservation of the natural resources of the state from pollution, impairment, or destruction..." § 324.30301(d)(iii). The Michigan Administrative Code defines "essential to the preservation of the natural resources of the state" to include one or more of the following: 1) the wetland supports state or federal endangered or threatened plants, fish or wildlife specified in § 36501 of the 1994 Mich. Pub. Acts 457; 2) the wetland represents what the state has identified as a rare or unique ecosystem; 3) the wetland supports plants or animals of an identified regional importance; or 4) the wetland provides groundwater recharge documented by a public agency. EPA has determined that any wetlands that would be federally regulated wetlands, but are 5 acres or less and would not automatically be regulated under Part 303, may none the less be regulated under the expansive factors listed in § 324.30301(d)(iii).

EPA's review of the jurisdictional scope of Michigan's CWA section 404 program finds that the class of wetlands deemed jurisdictional under the state of Michigan's definition of contiguous is comparable to the scope of wetland that are jurisdictional under the federal requirement of a continuous surface connection to a relatively permanent tributary. The broad definition of

contiguous would also encompass the majority of adjacent wetlands and all tributaries considered jurisdictional under federal law. Even with the broad definition of contiguous there may be a small number of wetlands that are not automatically jurisdictional under Michigan law; however, those non-contiguous may be regulated by MDEQ if particular biological or hydrological factors are present at the particular wetland. When considered together, the broad definition of “[c]ontiguous” and the expansive factors which can be considered by MDEQ when making a determination regarding whether a wetland is “essential to the preservation of the natural resources of the state” result in Michigan’s scope of CWA section 404 jurisdiction being at least as broad in scope as federal CWA jurisdiction.

Now we turn to Part 301, which generally grants MDEQ the authority to regulate discharges of dredged or fill material to inland lakes, ponds, rivers and streams. EPA had concerns that an exception to jurisdiction arose because Part 301's definition of an “inland lake or stream” does not include any inland “lake or pond that has a surface area of less than 5 acres.” Section 324.30101(f). We consulted with MDEQ and the Attorney General's office, and the reach of this exception appears to be limited. If the inland lake or pond is connected to a river or stream, MDEQ considers the size of the entire interconnected water network- not only the size of the lake or pond in determining whether the 5-acre threshold is met. This practice by MDEQ means that the State treats non-navigable water bodies that have a hydrological connection to a navigable-in-fact or interstate water body as subject to section 404 jurisdiction, consistent with federal law. Part 301, as applied by MDEQ, creates jurisdiction that is at least as broad in scope as federal jurisdiction because for water body complexes that do not meet the 5-acre threshold and for sub-5-acre lakes and ponds that are not contiguous to a river or stream (i.e. isolated), the State has jurisdiction over discharges connected to one of three types of activities described in s§ 324.30102(f) and (g): 1) activity to “[c]onstruct, dredge, commence, extend, or enlarge an artificial canal, channel, ditch, lagoon, pond, lake or similar waterway where the purpose is ultimate connection with an existing lake or stream [of more than 5 acres]”; 2) activity to “[c]onstruct, dredge, commence, extend, or enlarge an artificial canal, channel, ditch, lagoon, pond, lake or similar waterway . . . where any part of the artificial waterway is located within 500 feet of the ordinary high-water mark of an existing inland lake or stream [of more than 5 acres]; and 3) activity to [c]onnect any natural or artificially constructed waterway, canal, channel, ditch, lagoon, pond, lake, or similar water with an existing inland lake or stream [of more than 5 acres] for navigation or any other purpose.” For these reasons, EPA concludes that Michigan's jurisdiction over lakes and ponds is at least as broad in scope as federal CWA section 404 jurisdiction, even in light of the exception provided by § 324.30101(f).

EPA also had been concerned that Part 301's jurisdiction over inland lakes and streams does not extend to streams that flow intermittently. CWA section 404 and its regulations explicitly extend jurisdiction over intermittent streams. 40 C.F.R. § 232.2; see also 40 C.F.R. §§ 122.2(c). In addition, the Rapanos guidance highlights that intermittent streams may be jurisdictional under the plurality standard (e.g. seasonal streams) or under the Kennedy standard, where they have a significant nexus to a traditional navigable water. MDEQ and the Attorney's General's Office

assert that they have interpreted, and will continue to interpret, Part 301's terms “inland lake or stream”<sup>7</sup> as encompassing intermittent streams. Section 324.30101(f).<sup>8</sup> Specifically, the State of Michigan interprets the statutory definition's reference to “visible evidence of continued flow or continued occurrence of water” as including streams that flow intermittently. As long as a bed and banks exist within which water can flow and as long as there is visible evidence that flow exists at times even if the flow is interrupted (i.e. flow does not have to be continuous), the State of Michigan will assert jurisdiction. In light of the State of Michigan’s reasonable interpretation of its regulations, EPA concludes that Michigan’s jurisdiction over intermittent streams is consistent with federal jurisdiction.

#### PERMIT EXEMPTIONS

Turning to another area bearing on Michigan’s legal authorities, we now address Michigan’s permitting exemptions as compared to the federal permit exemptions of CWA section 404(f)(1); how the exemptions apply is further delineated in the federal regulations at 40 C.F.R. § 232.3(c).

One difference between federal and Michigan law is that Part 301 and Part 303 do not have provisions that are identical to the CWA’s “recapture provision”. Section 404(f)(2) mandates that, even when section 404(f)(1) exempts a discharge, a permit must be obtained if the discharge is “incidental to any activity having as its purpose bringing an area of the navigable waters into a use to which it was not previously subject, where the flow or circulation of navigable waters may be impaired or the reach of such waters be reduced”. Yet, when we examined Part 301, we found that provisions which seem to be at least as stringent as CWA section 404(f)(2) are contained in § 324.30102(d) and (e); these provisions require that a Part 301 permit be obtained for activities which “[c]reate, enlarge, or diminish an inland lake or stream” or “[s]tructurally interfere with the natural flow of an inland lake or stream.” Part 303, which concerns wetlands, does not contain similar provisions with respect to altering the flow or circulation of waters in a wetland. In practice, though, as long as MDEQ ensures that only activities which truly meet an allowed exemption forego the wetlands permitting process, and as long as section 324.30305(2)(e) is changed as discussed later in this Final Report to clarify that discharges which are associated with changing an area from one exempted use to another exempted use are themselves not exempt and require a permit, the absence of an explicit recapture provision in Part 303 does not render the State of Michigan’s CWA section 404 permitting program inadequate. This conclusion is based in part on EPA’s analysis of the federal government’s use and invocation of the recapture provision in actual permitting situations.

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<sup>7</sup> Part 301 defines the terms “inland lake or stream” as a water body possessing “definite banks, a bed, and visible evidence of a continued flow or continued occurrence of water.”

<sup>8</sup> EPA here notes that Part 303’s jurisdiction extends to all wetlands that are “contiguous” to an inland lake, pond, or stream, and Part 303’s administrative rules allow contiguity to be established by a wetland’s connecting to an inland lake or stream via “a seasonal or intermittent direct surface water connection.” R 281.921(1)(b)(ii).

The first federal exemption is in CWA section 404(f)(1)(A) (it is codified at 40 C.F.R. § 232.3(c), and exempts discharges of dredged or fill material “from normal farming, silviculture, and ranching activities). Michigan’s equivalent is found in Part 303, at § 324.30305(2)(e), and applies to “farming, horticulture, silviculture, lumbering and ranching activities.” EPA asked MDEQ whether the presence of horticulture and lumbering activities in the list of exempted activities expands the universe of section 404-exempted activities. MDEQ responded in November 2003. MDEQ stated that the term “horticulture” refers to the production of non-food crops (e.g., flowers), and so encompasses a subset of section 404-exempted farming activities. MDEQ stated that the term “lumbering” refers to a subset of silviculture: it is that part of a forestry operation that involves harvesting the trees to produce lumber; moreover, MDEQ asserts that § 324.30305(2)(e) lists the single activity that is exempted by that provision’s reference to “lumbering”: “harvesting for the production of . . . forest products”. At this time, MDEQ does not propose to issue any guidance on these issues or to promulgate any new administrative rules under Part 303. Because MDEQ’s analysis of its regulations is reasonable, and because EPA is not aware of any actual permitting cases involving lumbering or horticultural operations which have had results inconsistent with 40 C.F.R. § 232.3(c), MDEQ need not take any further administrative action. EPA recommends, however, that MDEQ incorporate the analyses it provided to EPA into either internal MDEQ procedures or Part 303 administrative rules, in order to ensure that, in practice, the terms “horticulture” and “lumbering” are applied in a manner that is consistent with the exemption of certain activities from federal jurisdiction by CWA section 404(f)(1)(A).

EPA also had concerns that Michigan’s permitting exemptions at § 324.30305(2)(e) are broader in scope than the CWA section 404(f)(1)(A) federal exemptions because Michigan law does not expressly limit the lands where the exemptions apply to areas where the exempted farming, silviculture, and ranching activities were established prior to the occurrence of the discharges at issue. In delineating the scope of these federal statutory exemptions, the federal regulations explain that “to fall under this exemption” the normal farming, silvicultural, and ranching activities “must be part of an established (i.e., ongoing) farming, silvicultural, or ranching operation,• which can include fallow land. Federal regulation further explains that “[a]ctivities which bring an area into farming, silviculture or ranching use are not part of an established operation. An operation ceases to be established when the area in which it was conducted has been converted to another use or has lain idle so long that modifications to the hydrological regime are necessary to resume operation.” 40 C.F.R. § 232.3(c)(1)(ii).

During this program review, MDEQ and the Attorney General’s Office informed EPA that they interpret the § 324.30305(2)(e) exemptions so that, in reality, the exemptions apply only to areas where an exempt use already has been established and is ongoing. MDEQ and the Attorney General’s Office had relied on a Michigan Court of Appeals decision in Huggett v. Dep’t of Natural Resources, (“Huggett”) 232 Mich. App 188, 590 N.W.2d 747 (1998), as support for their position; the Huggett appellate court had looked to the legislature’s purpose in enacting Part 303, which was “to enable the state to assume authority to administer the federal Clean Water Act,”

and on that basis had found that §324.30305(2)(e) “must be enforced in accordance with, and be just as or more stringent than its federal counterpart.” *Id.* at 194-95. Thus, the Michigan Court of Appeals held that §324.30305(2)(e) only applied to areas already in established farming use. The Michigan Supreme Court in Huggett v. Dep’t of Natural Resources, 464 Mich. 711, 629 N.W.2d 915 (2001) affirmed the Court of Appeals’ conclusion that the exemption did not apply to activities undertaken to convert land to cranberry production, but it did not accept the lower court’s rationale that Michigan’s wetland law had to be interpreted to be no less stringent than the Clean Water Act. Of special concern to EPA is the Michigan Supreme Court’s ruling that the “farming exemption” contained in § 324.30305(2)(e) did not apply only in locations where there was an ongoing established farming (or ranching or silvicultural) operation. *Id.* at 721-22. While acknowledging this part of the Huggett decision, MDEQ and the Attorney General’s Office maintain that the basis for the Michigan Supreme Court’s holding in Huggett - that only the activities listed at § 324.30305(2)(e), such as plowing and cultivating, and farming activities of “the same kind, class, character or nature,” are exempted from permitting, *id.* at 722 - has the same effect as if the Michigan Supreme Court had held that § 324.30305(2)(e) explicitly imposed an ongoing and established use condition. That is because such typical farming (or ranching or silviculture) activities could not feasibly take place anywhere but on an established farming area and would not facilitate conversion of a wetland to a non-wetland.

While EPA finds that the specific holding of Huggett, as pointed to by MDEQ and the Attorney General’s Office, does narrow the impact of the Huggett court’s conclusion that § 324.3035(2)(e) exemptions are not restricted only to areas that are in established and ongoing use for farming (or ranching or silviculture), EPA still concludes that this exemption is broader than the comparable federal exemption. Thus, the State of Michigan must take corrective action by amending Part 303, pursuant to 40 C.F.R. § 233.53(b). And, in fact, MDEQ has agreed that it will seek such an amendment to limit the exemption of § 324.30305(2)(e) to areas of established agricultural operations. EPA thinks that the statutory amendment should specify that all § 324.30305(2)(e) exemptions apply only to discharges that occur in an area which, at the time of the discharge, already is part of an established and ongoing farming, silvicultural, or ranching operation, consistent with the CWA, applicable federal regulations, and relevant federal case law. To ensure that this new statutory provision is interpreted consistently with the comparable section 404 exemption, a new administrative rule should clarify that the “area” at issue is the specific area where the discharge is to occur; the bounds of the “area” where the exempted use must be ongoing and established should be consistent with rulings on this subject of federal courts such as the Third Circuit Court of Appeals in United States v. Brace, 41 F.3d 117, 125-26 (3rd Cir. 1994) and cases cited therein.

In connection with these same state law exemptions, as compared to the federal exemptions of CWA section 404(f)(1)(A), EPA thinks that Michigan’s current exemption is not sufficiently clear in barring discharges that will allow a change in use from one exempted use to another exempted use: § 324.30305(2)(e) provides “wetland altered under this subdivision shall not be used for a purpose other than a purpose described in this section without a permit.” Federal law

requires that for a discharge to be exempt it must be connected with the specific exempted use, must occur in an area where that specific use is ongoing and established, and must be related to an activity that is a normal activity for that specific use. The discharge cannot be in furtherance of trying to change from one use to another use, and cannot be in furtherance of changing a wetland to a non-wetland. See 40 C.F.R. § 232.3(d)(3)(ii) (stating that “minor drainage” associated with farming, silviculture, and ranching “does not include drainage associated with the . . . conversion from one wetland use to another (for example, silviculture to farming)”); see also 33 C.F.R. § 323.4 and Brace at 127-28.

The statutory amendment of § 324.30305(2)(e) which MDEQ will seek, as mentioned above, should explicitly remedy the language quoted in the preceding paragraph, so that the statute clearly proscribes discharges that would be connected with an exempted use which is not a use that is ongoing and established in the particular area of concern. In addition, it would be helpful to have the Attorney General’s Office issue an Attorney General’s opinion stating that the § 324.30305(2)(e) exemptions, as amended, as well as the other exemptions established by Michigan law (whether by Part 303, Part 301, or another statute), shall be interpreted and applied by MDEQ to be as stringent as the comparable federal exemptions.<sup>9</sup>

Part 303 contains another exemption which appears to exempt discharges that CWA section 404 does not exempt. Section 324.30305(2)(j) exempts from permitting requirements “[d]rainage necessary for the production and harvesting of agricultural products if the wetland is owned by a person who is engaged in commercial farming and the land is to be used for the production and harvesting of agricultural products.” (Emphasis added.) This provision could be read to exempt discharges associated with bringing a wetland into farming because the land being drained need not be in an established farming use, it merely needs to be owned by a commercial farmer who plans to begin farming it. Although the destructive impact on intact wetlands is limited by this exemption’s application only to wetlands that are not contiguous to a lake or stream and that have not been identified by MDEQ by “clear and convincing evidence to be . . . necessary to be preserved for the public interest”, EPA still views this exemption as being broader than the CWA section 404 farming exemptions.

To address this drainage exemption issue, EPA believes Michigan must amend the statute to delete the exemption at § 324.30305(2)(j). MDEQ has agreed to seek the deletion of the exemption at § 324.30305(2)(j) by the Michigan legislature.

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<sup>9</sup> It is EPA’s understanding that such an Attorney General’s opinion would bind MDEQ, including MDEQ’s Office of Administrative Law Judges, to apply this legal interpretation in all permitting situations and in all enforcement matters.

Section 404(f)(1) of the CWA contains another exemption for discharges conducted specifically “for the purpose of . . . maintenance of drainage ditches”. 33 U.S.C. § 1344(f)(1)(C). Federal regulation strictly limits this exemption to ditch maintenance activities, excluding ditch construction activities. See 40 C.F.R. § 232.3(c)(3) and § 232.3(d)(3)(ii). Furthermore, the Corps has interpreted the concept of ditch maintenance under section 404(f)(1)(C) as allowing the removal of accumulated sediment, debris, and other obstructions that, over time, have appeared in a drainage ditch, providing that such removal is not to alter a ditch’s original, as-built, contours and configuration. (Regulatory Guidance Letter 07-02 issued by the Corps on July, 4, 2007). Discharges of dredged material associated with deepening and widening a drainage ditch beyond its original dimensions are not exempt from section 404 permitting requirements. See United States v. Sargent County Water Resource Dist., 876 F. Supp. 1090, 1098-99 (D. N.D. 1994) (evidence showed drainage ditch was merely “cleaned out” and maintained; because work did not constitute “improvement” it was exempt from permitting).

Under Michigan law, three separate permit exemptions address drainage ditches. The exemptions are found at § 324.30305(2)(h), § 324.30103(g), and § 324.30103(d). Section 324.30305(2)(h) exempts from permitting “[m]aintenance, operation or improvement which includes straightening, widening, or deepening [private agricultural drains and certain public drains] necessary for the production or harvesting of agricultural products.” Section 324.30103(g) exempts from permitting “[m]aintenance and improvement of all drains legally established or constructed prior to January 1, 1973 pursuant to the drain code of 1956 . . . except those . . . drains constituting mainstream portions of certain natural watercourses . . . .” Section 324.30103(d) exempts from permitting the “[c]onstruction and maintenance of a private agricultural drain regardless of outlet.” On their face, each of these drainage ditch exemptions seem to be less stringent than CWA section 404(f)(1)(C)’s drainage ditch exemption. While the Michigan drainage ditch exemptions are narrow in scope because they are limited to agriculture-related drainage ditches and public drains, by appearing to allow discharges associated with drainage ditch construction, operation, improvement, straightening, deepening, and widening, these exemptions give EPA concern that they render Michigan law less stringent than, and not consistent with, the CWA and regulations at 40 C.F.R. § 232.3(c)(3) and (d)(3)(i).

Turning first to the Part 303 exemption, § 324.30305(2)(h) exempts discharges associated with “[m]aintenance, operation or improvement which includes straightening, widening, or deepening” of identified drainage ditches, whereas CWA section 404(f)(1)(C) and its implementing regulations (33 C.F.R. § 323.4(a)(3) and 40 C.F.R. § 232.3(c)(3)) exempts discharges associated only with true “maintenance” of drainage ditches. Federal law clearly prohibits discharges which result from altering the original contours of a drainage ditch, as this is deemed an improvement to the drainage ditch or, in effect, a construction, rather than maintenance of the ditch that previously existed. See United States v. Sargent County Water Resource Dist., 876 F. Supp. 1090, 1098-99 (D. N.D. 1994); United States v. Sargent County Water Resource Dist., 876 F. Supp. 1081, 1087-88 (D. N.D. 1992); Regulatory Guidance Letter 87-7 issued by the Corps Aug. 17, 1987; see also United States v. Huebner, 752 F.2d 1235, 1242-

43 (7<sup>th</sup> Cir. 1985). By authorizing drain “improvement” and “straightening, widening, or deepening” of drains, Part 303 appears to allow alteration of both the bottom elevations and widths of existing drains, which would render this statutory provision less stringent than CWA section 404 and its regulations.

MDEQ understands EPA’s concern on this point and has proposed to seek amendment of §324.30305(2)(h) to delete its reference to “straightening, widening, or deepening” and clarify that the exemption is limited to true drain maintenance activities. Additionally, MDEQ has proposed to promulgate rules under Part 301 that will define the terms “maintenance” and “improvement” in a manner consistent with the federal definition of the term maintenance. EPA also requests an Attorney General’s opinion addressing these same issues, and asks that such an opinion discuss the interrelationship of this Part 303 exemption with Michigan’s Drain Code.

As stated above, Part 301 appears to contain two exemptions for discharges related to work on drainage ditches: one at § 324.30103(d) -- “a permit is not required for . . . [c]onstruction or maintenance of a private agricultural drain regardless of outlet”, and one at § 324.30103(g) -- discharges associated with “[m]aintenance and improvement of” identified drainage ditches. The Attorney General’s Office and MDEQ explain, however, that these provisions do not create permit exemptions for discharges to waters of the United States which are associated with construction of private agricultural drains or altering the original dimensions of public drains; rather, both provisions apply to the construction and improvement of drains that exist in uplands, and thus exempt only associated discharges that are made to uplands. This view is grounded in the doctrine of *in pari materia*, which can be invoked when the language of a statute is ambiguous, Tyler v. Livonia Public Schools, 459 Mich. 382, 392 (1999), and which directs that when two statutes relate to the same subject matter or share a common purpose they should be harmonized -- read together -- if they do not contain unavoidable conflicting provisions, People v. Webb, 458 Mich. 265, 274 (1998); see also Michigan Oil Co. v. Natural Resources Comm’n, 406 Mich. 1, 33 (1979). Applying the doctrine to §324.30103(d), the Attorney General’s Office explains that because Part 303 does not exempt the actual discharge to wetlands of materials dredged during the construction of a private drain, and because Part 303 establishes permitting rules for discharges to wetlands, § 324.30103(d) must be read to exempt only the construction of private drains on uplands (and the discharge of associated dredged materials to uplands). Similar reasoning applies with respect to the language of § 324.30103(g). Furthermore, MDEQ has agreed to promulgate a rule under Part 301 which will define the term “improvement” so that it is limited to true maintenance. To fully satisfy EPA’s concerns on these points, EPA requests that the Attorney General’s Office issue a written Attorney General’s opinion setting forth how the doctrine of *in pari materia* applies so that these apparent discharge exemptions in Part 301 do not, in fact, exempt discharges to waters of the United States in situations other than drain maintenance which would be exempted by CWA section 404(f)(1)(C).

Part 303 contains an exemption for discharges necessitated by the “maintenance or improvement” of public roads. MDEQ now proposes to issue new administrative rules

applicable to this exemption, in order to express MDEQ's historic interpretation of the exemption, which is consistent with a similar federal law exemption. The Michigan statutory road work exemption restricts coverage as follows: the work must occur within the existing right-of-way; the work cannot entail increasing the right-of-way, adding extra lanes, or deviating from the road's existing location; and the work should be done in a manner that minimizes harm to wetlands. § 324.30305(2)(k). By comparison, the corresponding federal exemption explicitly allows only maintenance of roads<sup>10</sup> and excludes any discharges which would change "the character, scope or size of the original fill design". 40 C.F.R. § 232.3(c)(2). Although MDEQ asserts that it always has interpreted § 324.30305(2)(k) to not exempt work that would widen a road, a late 2000 decision by a state circuit court held otherwise; the circuit court ruled that a project which raised a roadbed and widened it by as much as 13 feet, causing discharges to adjacent wetlands, fit within the plain language of § 324.30305(2)(k).<sup>11</sup> MDEQ's immediate response to this decision was to issue interim guidance reiterating its position that road widening is not exempt. MDEQ has notified EPA that it intends to issue a new administrative rule interpreting the exemption along those same lines; EPA will work with MDEQ to ensure consistency with federal law.<sup>12</sup>

EPA also is concerned about the permitting exemptions at § 324.30305(2)(l) and (m) for activities, including discharges, in connection with maintenance, repair, operation, and construction of utility lines and gas and oil pipelines on condition that the discharger "assure that any adverse effect on the wetland will be minimized." Although Michigan notes that the Corps' Nationwide Permit 12 allows similar utility maintenance activities without an individual permit, Michigan's permit exemptions are not equivalent to Nationwide Permit 12 because a discharger must give advance notice to the Corps if the work entails a certain aerial extent and because Nationwide Permit 12 establishes specific limitations on the manner of the work's performance (such as allowing only temporary placement of sidecast materials into wetlands). Moreover, there is a legal and functional difference between statutorily exempting an activity from permitting -- as Michigan law does for these discharges -- and allowing that activity to be covered by a general permit.

In the Preliminary Report (see page 14), EPA stated its preference that this issue be addressed by

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10 Specifically, the federal exemption mentions not "roads" but "bridge abutments or approaches, and transportation structures".

11 In its written opinion, the Oceana County Circuit Court noted the parties' stipulation that the center line of the road was not changed, the right-of-way was not increased, and a standard-size extra lane was not added. On this factual basis, the Circuit Court held that there was no deviation from the road's existing location, and, after refusing to consider the scope of the comparable federal exemption, the court found the project to be exempt under state law. *Oceana County Bd. of Road Comm'rs v. Michigan Dep't of Env'tal Quality*, No. 00-1520-CE (Dec. 22, 2000) (unpublished). MDEQ disagrees with various conclusions by the Circuit Court, including: that widening a road by up to 13 feet was not a deviation from the road's existing location, and that a functional extra lane was not added. MDEQ also notes that the decision was highly fact-specific and is not precedential.

12 This issue was not discussed in the Preliminary Report.

deletion of § 324.30305(2)(l) and (m). At that time, MDEQ agreed to implement an acceptable alternative of promulgating administrative rules prescribing best management practices to be followed by persons engaging in these activities and discharges and requiring that those persons give advance notice to MDEQ of their proposed activities. Since the Preliminary Report was issued, however, MDEQ has agreed to seek to have Part 303 amended so that § 324.30305(2)(l) and (m) explicitly exempt only those activities that are exempted by the CWA; MDEQ also has agreed to issue best management practices for those activities that are exempted from permitting and to require advance notice to MDEQ that is similar to the notice required by Nationwide Permit 12.

The final exemption of concern to EPA is the exemption for the construction of iron and copper mining tailings basins and water storage areas, found in Michigan wetlands permitting law at § 324.30305(2)(o). Federal law has no equivalent. In response to EPA's request that this permit exemption for tailings basins and water storage areas be removed from Part 303, MDEQ agreed, in Spring 2002, to seek the deletion of § 324.30305(2)(o) by the Michigan legislature.<sup>13</sup>

#### PERMITTING AUTHORITIES

Directing our attention next to the process of a State agency's issuance of permits under the authority of CWA section 404, we look at the federal regulations promulgated at 40 C.F.R. §§ 233.20 and 233.34. Section 233.20 mandates that the authorized State agency will not issue a CWA section 404 permit in certain circumstances, including when the permit would not comply with the requirements of the CWA, its regulations, or the section 404(b)(1) Guidelines and when objections to issuance of a permit have been made by EPA Regional Administrator but have not been resolved. The prohibitions in 40 C.F.R. § 233.20 were designed to ensure that state section 404 programs comply with certain minimum conditions and contain procedures which prevent the issuance of permits that do not meet those minimum conditions. Section 233.34(a) of 40 C.F.R. requires that a Director of a state agency implementing a CWA section 404 program review all permit applications for compliance with the section 404(b)(1) Guidelines or equivalent State environmental guidelines. The Director is to render a decision on a permit application, according to 40 C.F.R. § 233.34(c), only when review of the application is complete and all comments have been considered; the Director's permit decision shall be a written determination, in accordance with the record and applicable permit-issuance regulations, and shall state a rationale for the decision.

In general, Michigan's laws and regulations ensure compliance with 40 C.F.R. §§ 233.20 and

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<sup>13</sup> MDEQ and the Attorney General's Office also provided reasons why, in practice, this exemption rarely can be invoked (implicitly relying on the doctrine of *in pari materia*). First, tailings basins almost always create an area of open water greater than 5 acres, thus requiring a permit under Part 301. If by chance a tailings basin had a surface area of less than 5 acres, it likely would be part of a larger complex of waters and wetlands and thus still subject to Part 301's permitting requirements.

233.34. EPA discusses its few concerns below.

Section 324.30307(2) had provided that a Part 303 permit will issue if MDEQ “does not approve or disapprove the permit application within the time provided by this subsection [90 days from hearing or 90 days from filing of complete permit application], the permit application shall be considered approved, and the department shall be considered to have made the determinations required by section 30311.”<sup>14</sup> Effective September 10, 2004, the Michigan legislature removed this constraint from Part 303 and inserted it in Part 13 of the NREPA. See §§ 324.1301(f)(viii) and 324.1307(1) and (4).<sup>15</sup> Despite these changes by the Michigan legislature, EPA’s analysis of this issue remains the same as it was in the Preliminary Report. In the past, EPA has been concerned that when such permit processing time provisions cause a permit to issue automatically MDEQ would not have made a written permit determination with a written rationale documenting how the permit will comply with the requirements of the CWA and the section 404(b)(1) Guidelines, as required by 40 C.F.R. § 233.34(c). But MDEQ and the Attorney General’s Office are of the opinion that when the terms of former § 324.30307(2) (and of recently effective §§ 324.1301(f)(viii) and 324.1307(1) and (4)) were triggered, a “state-only Part 303 permit is issued: and no CWA section 404 permit is issued. They assert that in § 324.30307(2)’s language the department shall be considered to have made the determinations required by section 30311” cannot be interpreted to mean that MDEQ also shall be considered to have made the determinations required by federal law. EPA will defer to MDEQ and the Attorney General’s Office’s reasonable interpretation of Michigan law. In addition, EPA and MDEQ have agreed to include a statement to this effect in the interagency Memorandum of Agreement (EPA-MDEQ MOA). EPA also requests that any “state-only” permit issued under Part 303 contain a statement which notifies the permittee that authorization under section 404 of the CWA is not being granted.

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14 See also Admin. Rules for Wetland Protection, R 281.923(3), and cases such as *Harkins v. Dep’t of Natural Resources*, 206 Mich. App. 317 (1994), which indicate that MDEQ’s deadline for making a permit decision within 90 days of receiving a complete application is firm.

15 While the Michigan legislature also imposed a new and even shorter processing time of 60 days for Part 301 permits applications, if MDEQ does not make a decision within those 60 days the result is that MDEQ owes the applicant money; a Part 301 permit is not deemed to issue. §§ 324.1301(f)(vi) and 324.1307(1) and (3).

EPA has told MDEQ of its concern that Part 301's provisions for “minor permits” (which operate similarly to “general permits” under the federal regulations) do not ensure that MDEQ determines or has a procedure for determining that each minor permit category “will cause only minimal adverse environmental effects when performed separately and will have only minimal cumulative adverse effects on the environment” as directed by 40 C.F.R. § 233.21(b). MDEQ has agreed to implement an administrative rule change ensuring that the potential for cumulative adverse effects will be considered before any new minor permit category is established.

Whereas CWA section 404(h)(1)(A)(ii) dictates that a state may not issue a permit with a term that exceeds five years, this time limitation is not currently expressed in Michigan law. MDEQ has agreed to promulgate administrative rules under Part 301 and Part 303 that document the five-year limit on the term of section 404 permits it issues.<sup>16</sup>

EPA has noted that Part 301 and Part 303 and their implementing rules do not reference all of the permit conditions that 40 C.F.R. § 233.23 states should be included in any State-issued section 404 permit (for example, the conditions stated in 40 C.F.R. § 233.23(c)(5), (c)(7), and (c)(8)). EPA and MDEQ will work together to ensure that such permit conditions become incorporated into future permits which MDEQ issues jointly under CWA section 404 and either Part 301 or Part 303. Similarly, EPA and MDEQ will work together to ensure that procedures exist so that, within an adequate time period before MDEQ makes a permit decision (including decisions to modify and revoke permits), all interested parties receive notice of permit applications and are given adequate time to review the application, to submit meaningful comment, and to request a public hearing see Section 2; Subpart D - Program Operation -of this Final Report, pages 41-42 (discussion of timing of public notices).. This will include working to ensure that members of the general public have an opportunity to learn about the permit application and determine if they would like to submit comments. These changes should allay EPA’s concerns that occasionally in the past a sufficient notice period may not have been provided for the public to submit meaningful comments on Part 301 and Part 303 permit applications, and sufficient guidance may not have been provided as to the criteria that MDEQ would apply when making a permit decision.

The actual date that a permit is issued can become important in particular permit matters. The federal regulations at 40 C.F.R. § 233.35(b)(1) state that a section 404 permit issued by an authorized State agency shall be effective on the date when both the State agency Director and the applicant shall have signed the permit. Neither Part 301, Part 303, nor their administrative rules clearly specify the effective date of permits. To remedy this, MDEQ has agreed to amend the administrative rules under both statutes to clarify that a permit becomes effective on the date when the permit has been signed by both the applicant and MDEQ Director.

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<sup>16</sup> MDEQ reports that permits are issued for terms of no more than five years.

An authorized State must have authority to modify or terminate (revoke) for cause a section 404 permit which that State has issued. 33 U.S.C. § 404(h)(1)(A)(iii). The CWA provides a non-inclusive list of three grounds that qualify as “cause” for modifying or revoking a section 404 permit. EPA promulgated regulations on this same subject, at 40 C.F.R. § 233.36, which added the option for a state agency to suspend a permit. That federal regulation also listed additional grounds for permit modification, revocation, or suspension, at 40 C.F.R. § 233.36(a), and it required a State agency to develop procedures to effect permit modification, revocation, or suspension if the grounds listed at § 233.36(a) are found to exist. 40 C.F.R. § 233.36(c).<sup>17</sup>

In the Preliminary Report, we found that MDEQ had no authority under Part 301 or its administrative rules to modify permits. We then tentatively concluded that the CWA requires that a state agency administering a section 404 permitting program have authority to modify permits. We urged MDEQ either to seek Part 301's amendment to authorize permit modifications or, at a minimum, to promulgate administrative rules to this effect. (See Preliminary Report, page 18). Upon further consideration of the text of the CWA and 40 C.F.R. § 233.36(c), however, we now withdraw that tentative conclusion. CWA section 404(h)(1)(A)(iii), uses the word “or” in the phrase “[t]o issue permits which . . . can be terminated or modified for cause”. See also 40 C.F.R. § 233.36(c) (“[t]he Director shall develop procedures to modify, suspend or revoke permits . . .”) Consequently, as long as Part 301 has adequate procedures to revoke permits, there is no inconsistency with the CWA.

With respect to MDEQ’s authority to revoke Part 301 permits for cause, § 324.30107 states “[a] permit is effective until revoked for cause,” and goes on to state that “[a] permit may be revoked after a hearing for violation of any of its provisions, any provisions of this part, any rule promulgated under this part, or any misrepresentation in [sic] application.” Part 301 administrative rules do not address what constitutes “cause” to revoke a CWA section 404 permit that is issued pursuant to Part 301's procedures. Consequently, EPA remains concerned that Michigan law could be read as limiting MDEQ’s ability to revoke a Part 301 permit (issued as a joint CWA section 404 permit) only in the three situations mentioned by § 324.30107. Although EPA, in the Preliminary Report, stated its preference that this perceived problem be addressed by the Michigan legislature’s amending § 324.30107 to add all of the grounds for revoking a permit

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<sup>17</sup> The grounds for permit modification or revocation set forth in CWA section 404(h)(1)(A)(iii) are: violating a permit condition; obtaining a permit by misrepresentation or after failing to disclose all relevant facts; a change in conditions requiring a temporary or permanent reduction or elimination of discharges. In the State Program Regulations, EPA addresses a state’s authority to modify or revoke permits in 40 C.F.R. § 233.36, and lists the “factors to [be] consider[ed]” by the state agency when it decides whether or not to modify or revoke a permit; this list includes two more “factors to consider” that are not included in CWA section 404(h)(1)(A)(iii): receipt of significant information relating to the activity authorized unavailable when a permit was issued but which would have justified denial of the application or additional permit conditions; and revisions to statutory or regulatory authority. 40 C.F.R. § 233.36(a). Section 233.36(c) then provides that the state agency “Director shall develop procedures to modify, suspend, or revoke permits if he determines cause exists for such action (§ 233.36(a)).”

provided by the CWA and its regulations, MDEQ has proposed promulgating a new administrative rule. EPA agrees that this is an appropriate corrective action and will monitor MDEQ's successful application of the new rule.

Turning to Part 303, we find that it authorizes MDEQ to modify or revoke permits on the three grounds listed by CWA § 404(h)(1)(A)(iii), and reiterated by 40 C.F.R. § 233.36(a), but Part 303 at § 324.30313(2) does not list the two additional "factors to consider" that are listed in 40 C.F.R. § 233.36(a) See footnote 19). As Michigan law contains the three grounds listed in CWA section 404(h)(1)(A)(iii), however, the absence of two "factors to consider" that are listed in the federal regulation does not render Michigan law less stringent than federal law on this subject. Moreover, § 324.30313(2) clearly seems to give MDEQ the authority to identify additional situations in which "cause" will exist to revoke or modify a permit, in that it provides "[a] permit may be terminated or modified for cause, including. . . ."

#### COMPLIANCE WITH CWA SECTION 404(b)(1) GUIDELINES

During April 2000, MDEQ promulgated a new administrative rule under Part 303:

R 281.922a is entitled "Permit application review criteria." This rule addresses many of the issues that EPA believes were unclear or worrying when this program review began. Perhaps the most important aspect of R 281.922a for this program review is that the rule provides standards for the wetland dependency test and feasible and prudent alternatives analysis which largely reflect how those criteria are established in the section 404(b)(1) Guidelines. EPA also appreciates that -- through R281.922a -- MDEQ provided standards and prescriptions on issues which include who bears the burden of establishing whether a feasible and prudent alternative to a proposed discharge exists, and who bears the burden of proving that particular facts and circumstances support issuance of a permit.<sup>18</sup> Also during April 2000, MDEQ amended R 281.925 to provide more detailed standards as to what may be acceptable mitigation of adverse impacts to wetland values which would result from permitted discharges that otherwise have been designed to minimize adverse impacts to the greatest extent possible. MDEQ's efforts respond to many of EPA's concerns regarding MDEQ's authority "[t]o issue permits which " (i) apply, and assure compliance with, any applicable requirements of this section, including . . . guidelines established under subsection (b)(1) of this section . . .", as required by 33 U.S.C. § 1344(h)(1)(A).<sup>19</sup> In the Preliminary Report, however, we stated our view that MDEQ needed

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<sup>18</sup> During January 2003, MDEQ promulgated new rules for contested case proceedings, R 324.1-324.85. One of these rules states that the petitioner "has the burden of proof and of moving forward unless otherwise required by law". R 324.64(1).

<sup>19</sup> Federal regulations promulgated for approval of State programs reiterate that a fundamental prerequisite for approval is the legal assurance that a State agency will not issue a section 404 permit that "does not comply with the requirements of the Act or regulations thereunder, including the section 404(b)(1) Guidelines (part 230 of this chapter)." 40 C.F.R. § 233.20(a). At § 233.34, EPA explains that while a State may have its own environmental review criteria, that criteria must be "equivalent" to the section 404(b)(1) Guidelines.

to promulgate equivalent Part 301 rules. This view was due to the fact that MDEQ issues CWA section 404 permits pursuant to Part 301 for projects involving types of waters other than wetlands.<sup>20</sup>

We now agreeably note that, since the Preliminary Report was issued, MDEQ has stated its intent to incorporate by reference the section 404(b)(1) Guidelines not only in the administrative rules for Part 301, but also in the administrative rules for Part 303. This corrective action will effectively address all of our remaining concerns about State law's consistency with CWA section 404(h)(1)(A) and with the section 404(b)(1) Guidelines, which EPA promulgated in response. These rule changes will effectively require that both permit writers and MDEQ's Administrative Law Judges (ALJs) apply the federal 404(b)(1) Guidelines as part of the Michigan permitting standards. Nonetheless, EPA will remain alert to any permitting matters that develop in which balancing criteria override explicit bans on permits which are specified in the section 404(b)(1) Guidelines.

EPA is aware that MDEQ also is developing other new administrative rules and guidance to clarify other parts of the permitting process and to guide applicants, reviewers, and decision makers in applying the statutory criteria and requirements. For example, MDEQ Director has instructed MDEQ staff to develop guidance as to what geographical area must be considered when the criteria of feasible and prudent alternative locations for a project is applied. In re Ocedek, No. 00-05-40 (Feb. 27, 2004).

Here, we wish to document current concerns that we have as to whether Michigan law is

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<sup>20</sup> Currently, the provision of Part 301 that is somewhat comparable to the section 404(b)(1) Guidelines is found in Part 301's administrative rule R 281.814, entitled "Environmental Assessment". R 281.814 states that MDEQ shall not issue a permit unless MDEQ finds both that all existing and potential adverse impacts to the environment will be minimal and that no feasible and prudent alternative exists. MDEQ staff and decision makers appear to utilize R 281.814 to implement the environmental impact and pollution considerations set forth in § 324.30106; to determine the potential effects a project will have on all waters of the state and the uses of those waters; and to determine whether a project will cause unlawful pollution or impair or destroy waters or other natural resources of the state. While R 281.814 provides environmental review standards that are similar to those in the section 404(b)(1) Guidelines, they are not quite the same. One important shortcoming is that, although R 281.814(2)(b) states that a specific project will not be permitted unless a feasible and prudent alternative is determined to be unavailable, no guidelines are provided for conducting an analysis of potential alternatives (or for making a decision as to whether a party did not bear its burden of proof in establishing the availability - or lack thereof - of acceptable alternatives).

We note here, too, that in many contested case decisions over the years the Office of Administrative Hearings has interpreted R 281.814 as not requiring a feasible and prudent alternatives analysis if it is found that a project will have no environmental impact or a "minimal" environmental impact; the rationale for this approach is that if a project would have no environmental impact there is no need to search for a less-environmentally harmful project that also is feasible and prudent. By contrast, 40 C.F.R. § 230.10(a)(1) requires that an analysis of practicable alternatives to a discharge into an aquatic site always occur. Provided that MDEQ forego the alternatives analysis only in situations where there truly is no, or highly minimal, adverse impacts to the environment, EPA does not find the different approach under Part 301 to be inconsistent with federal law.

consistent with the requirements of the section 404(b)(1) Guidelines. Although MDEQ's incorporation by rule of the section 404(b)(1) Guidelines should remedy all of these concerns, it seems advisable to document the fact that, in the past and to date, they have undermined Michigan law's consistency with the federal CWA section 404 program.

Under Part 303, there is no mandate that wetland dependent projects be designed and implemented to have the least damaging impact on the aquatic environment. Under federal law, not only must a practicable alternative project be performed if it exists, but whatever discharges are permitted - be they the discharges of the original project or of a practicable alternative project - the potential adverse impacts of those discharges must be minimized. 40 C.F.R. § 230.10(d). We note that one criteria in § 324.30311(2)'s public interest balance is the availability of alternative locations and methods.<sup>21</sup> In many situations the existence of this criteria will compel an applicant with a wetland dependent project to fashion the project so as to minimize adverse impacts on the environment, but there is no mandate that the applicant do so. If a contested case is pursued, the ALJ or MDEQ Director, likewise, may consider alternative locations and methods as part of § 324.30311(2)'s public interest balance and may even modify the project based on those considerations. See Huggett, No. 90-09-257W (Mar. 31, 2005) (Director significantly modified proposed project, largely based on determination that a feasible and prudent location was available, see pages 11-15); yet, again, nothing in Part 303 requires that the project be modified to effectively minimize adverse impacts, as long as the proposed project - or even a modified project - when weighed in § 324.30311(2)'s public interest balance, is found to be in the public interest. Consequently, if an applicant chooses not to use an alternative location or method, this criteria will weigh against the project in the public interest review but will not alone determine the result of that review, nor will the project's adverse environmental impact be minimized, as would occur if federal law alone was applied. As stated above, MDEQ proposes to incorporate the federal section 404(b)(1) Guidelines - which contain this adverse impact minimization mandate into Part 303 by promulgating a new administrative rule. EPA believes that the most effective method of dealing with this issue of minimization would be to have Part 303 amended; we will, however, monitor how this particular matter is handled by MDEQ after the section 404(b)(1) Guidelines are adopted by rule and we will seek an amendment to Part 303 only if adverse impacts of a permitted discharge are not minimized, as 40 C.F.R. § 230.10(d) requires.

Under both statutes, there also is a need to clarify MDEQ's obligation to examine the cumulative effects of permitting a proposed activity when viewed in the light of the possibility that a number

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<sup>21</sup> Section 324.30311(4)(b) requires an applicant to show either that a project is wetland dependent or that a feasible and prudent alternative exists; if the first is shown, the second need not be. As a result, for a wetland dependent project, there need be no determination that a feasible and prudent alternative exists, see In re: Huggett, No. 90-09-257W (Mar. 31, 2005) (p. 39); rather, only § 324.30311(2)'s direction that feasible and prudent alternative locations and methods be considered in the public interest balance is applicable to wetland dependent projects

of additional, similar activities will be, or may be, performed in the future, consistent with 40 C.F.R. § 230.11(g). Under Part 303, consideration of cumulative effects appears to be part of the “public interest” balancing to be conducted pursuant to § 324.30311(2). Yet, even when the Office of Administrative Hearings has discussed this criteria,<sup>22</sup> it often has discounted it or given it no weight. See e.g., In re Taylor, No. 01-10-0049-P (Apr. 2, 2004) (ALJ concluded project did not have “great” cumulative impact because there currently was not heavy development of wetlands in area, despite testimony that wetland filling pressures were mounting); compare In re Thomas, No. 99-10-1118-P, Mar. 15, 2004 (in light of MDEQ staff testimony that 75% of area wetlands had been lost and that MDEQ had concern that the project could set precedent for future similar projects, the ALJ found no significant potential for cumulative impacts because no witness was aware of pending wetland filling proposals). Contested case decisions also have expressed the view that each project must be reviewed on its own merits, leading an ALJ to conclude that MDEQ cannot properly deny one permit application out of a concern that new applications for similar projects will be submitted. E.g., id.; In re Swies, No. 97-12-72 (Sept. 28, 1998). On the other hand, sometimes an ALJ will find that a proposed project will have a negative cumulative impact due to evidence of other wetland fills in an area and the potential for setting a bad precedent if a specific discharge project is permitted when an upland alternative is available (most recently, these concerns supported a permit denial in In re: Zielinski, No. 01-66-0072-P (July 29, 2004); see also In re: Wagner, No. 96-1-67 (Apr. 14, 1997)). EPA contends that an administrative rule guiding application of the cumulative effects criteria, in a manner consistent with 40 C.F.R. § 230.11(g), would help MDEQ staff and decision makers to apply the criteria in a consistent fashion in all Part 303 permitting matters, ameliorating any potential for arbitrary application of this criteria. A similar rule is needed for Part 301 because neither the statute nor existing administrative rules explicitly reference the cumulative impact criteria; therefore, it is not a required element of Part 301 permitting analysis. See In re: Schenden, No. 94-10-733 (Mar. 31, 1998)).

Our final two substantial concerns as to whether Part 301 and Part 303 and their administrative rules ensure that MDEQ-issued section 404 permits always will comply with the section 404(b)(1) Guidelines spring from the mandates of 40 C.F.R. § 230.10(b) and (c). The first federal regulation states that no discharge of dredged or fill material shall be permitted if the discharge jeopardizes the continued existence of a species that is listed as federally threatened or endangered or if the discharge results in likely destruction or adverse modification of a listed species’ critical habitat. Subsection 230.10(c) bars the issuance of section 404 permits when the proposed discharge of dredged or fill material “will cause or contribute to significant degradation of the waters of the United States.” 40 C.F.R. § 230.10(c). The permitting authority’s determination of whether significant degradation will result is to be based on factual considerations outlined at 40 C.F.R. part 230, subparts B through G; the permitting authority is to consider whether significant degradation will be caused either by individual or collective effects

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22 EPA did not review particularly how MDEQ permitting staff apply this criteria

of the activity.

Part 301 does not mention the specific concepts of jeopardy to federally threatened or endangered species and critical habitat, or significant degradation, and therefore does not state that these are grounds for denying a permit. The relevant provision is § 324.30106, which states, in part:

“In passing upon an application, the department shall consider the possible effects of the proposed action upon the inland lake or stream and upon waters from which or into which its waters flow and the uses of all such waters, including uses for recreation, fish and wildlife, aesthetics, local government, agriculture, commerce, and industry. The department shall not grant a permit if the proposed project or structure will unlawfully impair or destroy any of the waters or other natural resources of the state.”

To implement the environmental review criteria created in § 324.30106, MDEQ promulgated administrative rule R 281.814, which requires that all existing and potential adverse effects of a project be determined, and which bars issuance of a Part 301 permit unless MDEQ finds both that adverse effects to the environment will be minimal and that no feasible and prudent alternative exists.<sup>23</sup> After reviewing MDEQ’s permitting activity and MDEQ Office of Administrative Hearing’s contested case decisions, it appears that R 281.814 is applied so that Part 301 permits are granted only if a project’s environmental harm is expected to be minimal. To date, this standard appears to have effectively ensured that MDEQ will not issue section 404 permits for non-wetland discharges pursuant to Part 301 - that would contribute to the significant degradation of waters of the United States or that would jeopardize endangered or threatened species and their critical habitat. As of this writing, however, MDEQ is drafting new rules addressing the subject of how endangered species are considered during Part 301 permitting. EPA welcomes this, and requests that the rules clearly prohibit issuance of Part 301 permits which jeopardize both endangered and threatened species and their critical habitat.

Turning to Part 303, EPA thinks that the statute and its rules fail to bar the issuance of permits that jeopardize endangered species and their critical habitats. We understand Michigan’s position to be that the language of § 324.30311 effectively ensures that no such permits are issued because subsection (1) says that a permit shall not be issued unless an activity is “otherwise lawful” and because subsection (4) says that a permit shall not be issued unless it is shown that an unacceptable disruption will not result to aquatic resources. Yet neither provision is equivalent to the strict protection for threatened and endangered species and their critical habitat that is provided by section 404(h)(1)(A)(i) and the section 404(b)(1) Guidelines: permits are barred if they would jeopardize threatened and endangered species or their critical habitats (whether or not those species are “aquatic”). In particular, the “otherwise unlawful” language is

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<sup>23</sup> MDEQ contested case decisions have repeatedly held that if a project poses no environmental harm - or minimal harm - then R 281.814 is not to be applied when passing on a Part 301 permit application and there is no need to review alternatives.

imprecise, and past pronouncements by MDEQ's Office of Administrative Hearings construing this term gives no assurance that MDEQ's proposed view - that the project would violate the federal (ESA) -- would be adopted.<sup>24</sup> With respect to any protection afforded by § 324.30311(4), not only is its scope limited to unacceptable disruption of "aquatic" resources, but in determining whether the disruption is "unacceptable" the statute requires application of the balancing of public interest factors listed at § 324.30311(2). As mentioned above, MDEQ has committed to promulgating a new Part 303 rule which will incorporate the federal section 404(b)(1) Guidelines, including the bar to issuing permits which jeopardize the continued existence of a federally threatened or endangered species or which likely would adversely impact critical habitat, 40 C.F.R. § 230.10(b)(3). This corrective action may address EPA's concerns on this point, but we will need to see how the new rule is applied in practice, in combination with the public interest balancing mandated by § 324.30311(2). If we observe that Michigan is issuing permits that would be barred under 40 C.F.R. § 230.10(b)(3), then we will request that Michigan take additional corrective action (i.e., amend Part 303).

With respect to whether Part 303 comports with the 40 C.F.R. § 230.10(c)'s bar on issuing permits when discharges of dredged or fill material "will cause or contribute to significant degradation of the waters of the United States", EPA's concern stems from the balancing criteria contained in § 324.30311 and the inclusion of the economic value of the proposed project to the applicant, the community (e.g., increased tax revenue), and other individuals. Under

Part 303 a permit cannot issue if a project is not in the "public interest" or if a project will have an "unacceptable adverse impact on aquatic resources", but it is possible that the economic value of a proposed project would be so great that significant harm to the aquatic environment is outweighed, causing MDEQ to find that the project is in the public interest and that the disruption to aquatic resources is not unacceptable. Disagreeing with EPA, MDEQ and the Attorney General's Office have averred that MDEQ has adequate legal authority to choose not to issue permits that will cause or contribute to significant degradation of aquatic resources, and that MDEQ exercises this authority.

In the Preliminary Report, we stated our opinion that both Part 301 and Part 303 themselves should clearly prohibit permit issuance in the circumstances described in the previous paragraph.

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<sup>24</sup> The State also asserts that the otherwise unlawful" language invokes provisions of the MEPA and Part 365 of the NREPA. But Part 365 does not establish protection for critical habitat. As for the MEPA, it provides that "[i]n administrative, licensing, or other proceedings, and in any judicial review of such a proceeding, the alleged . . . destruction of the air, water, or other natural resources . . . shall be determined, and conduct shall not be authorized or approved that has or is likely to have such an effect if there is a feasible and prudent alternative consistent with the reasonable requirements of the public health, safety, or welfare." While invoking this language through the "otherwise lawful" language of § 324.30311(a) might bar issuance of some permits that jeopardize federally endangered species and their critical habitat, the underlined language and the lack of a clearly-worded prohibition on issuing such permits does not eliminate the potential for Part 303/section 404 permits being issued that violate 40 C.F.R. § 230.10(b).

In the past, the State of Michigan's position has been that those statutes and their administrative rules provide adequate assurance that permits will not be issued in these circumstances; in the Preliminary Report, we were critical of the State's position. (See Preliminary Report, at page 20.) Regardless of whether it still holds that position, the Michigan has now committed to incorporating into its applicable rules 40 C.F.R. § 230.10(c), as well as the remainder of the section 404(b)(1) Guidelines. As with the issue of whether Michigan's adoption by rule of the section 404(b)(1) Guidelines will provide the equivalent protection for federally endangered species that is provided by federal law, EPA will monitor whether this action of Michigan's effectively bars issuance of section 404 permits in situations where significant degradation of waters of the United States otherwise would result, or whether the mandate of 40 C.F.R. § 230.10(c) is weakened, in practice, by other provisions of Part 301 or Part 303 and their implementing rules.

A discussion as to whether the section 404(b)(1) Guidelines are applied and satisfied when permits are issued as a result of contested case proceedings can be found in the Analysis of Final Agency Permit Decisions in Administrative Contested Cases subsection of Section 2 of this Final Report.

#### ENFORCEMENT CONCERNS

An opportunity for public participation in the state of Michigan's enforcement process for section 404 matters shall be provided through one of two alternative routes, according to 40 C.F.R. § 233.41(e). Michigan elects to follow the public participation procedures set forth in § 233.41(e)(2), which contains three requirements. EPA believes that MDEQ is adequately authorized to, and is observing, the first of these requirements (investigation of, and written response to, citizen complaints). As to the second and third requirements, it is not clear that either requirement is embodied in Michigan law or regulation. To remedy this situation, MDEQ has agreed to include in EPA-MDEQ MOA commitments that it will not oppose intervention by any citizen when permissive intervention in a State enforcement action is authorized by Michigan law, and that it will publish notice of, and provide a 30-day public comment period for, all proposed settlements of enforcement actions filed in State court. EPA considers these measures to be adequate.

In the Preliminary Report (at page 22), EPA raised concerns as to whether Part 303's provisions authorizing MDEQ to seek criminal fines for violations of permits were consistent with those of the CWA and with EPA's state program requirements. The concerns related to the standard of proof of intent or knowledge for criminal liability to be imposed and the amount of penalties that could be sought. As a part of our program review EPA has examined the criminal enforcement provisions of both Part 301 (regulating discharges of dredged or fill material into inland lakes and streams) and 303 for comparison with the CWA 404 criminal enforcement provisions and with the requirements imposed on state programs by CWA section 404(h). As discussed below, EPA has concluded that Michigan's criminal enforcement provisions contain sufficient intent

standards to satisfy the federal program requirements. We also conclude that the lower criminal penalty amounts authorized under Michigan law do not warrant a finding that the program is deficient.

Section 404(h)(1)(G) of the CWA merely requires that a state seeking to administer a section 404 program have the authority “[t]o abate violations of the permit or the permit program, including civil and criminal penalties and other ways and means of enforcement.” 33 U.S.C.

§ 1344(h)(1)(G). Thus, the CWA itself does not require that state law create any particular criminal violations which are subject to any particular types of fines or punishments. The State Program Regulations, however, are more detailed. 40 C.F.R. § 233.41(a)(3)(i) requires that a state agency have the authority to assess civil penalties and to seek criminal fines against persons who perform “discharges of dredged or fill material without a required permit or in violation of any section 404 permit condition in an amount of at least \$5000 per day of such violation.” A state is required to have authority to seek a criminal fine “in the amount of at least \$10,000 per day of violation” against any person who willfully or with criminal negligence discharges dredged or fill material without a required permit or violates any permit condition issued under section 404.” 40 C.F.R. § 233.41(a)(3)(ii). In a separate provision, the federal regulations specify that “[t]he burden of proof and degree of knowledge or intent required under state law for establishing violations under paragraph (a)(3) of this section shall be no greater than the burden of proof or degree of knowledge or intent EPA must bear when it brings an action under the Act.” 40 C.F.R. § 233.41(b)(2).

We turn first to 40 C.F.R. § 233.41(b)(2) and its mandate that state law not establish a degree of knowledge or intent greater than the degree of knowledge or intent that EPA must bear when it brings a criminal enforcement action under the CWA. Federal case law has supported EPA’s position that, under the CWA, EPA can criminally prosecute acts of “ordinary negligence” which violate the CWA, pursuant to 33 U.S.C. § 1319(c)(1). See United States v. Ortiz, 427 F.3d 1278, 1282-83 (10<sup>th</sup> Cir. 2005) (“Under the [CWA]’s plain language, an individual violates the CWA by failing to exercise the degree of care that someone of ordinary prudence would have exercised in the same circumstance, and, in so doing, discharges any pollutant into United States waters without an NPDES permit. . . . the CWA does not require proof that a defendant knew that a discharge would enter United States waters.”); United States v. Hanousek, 176 F.3d 1116 (9<sup>th</sup> Cir. 1999) (finding that CWA section 1319(c)(1) does allow a person to be criminally prosecuted for a violation of the CWA that results from ordinary or simple negligence, and finding that due process is not thereby violated because the CWA is a public welfare statute). Criminal “negligence” is generally divided into two types: ordinary/ simple negligence and gross negligence. Gross negligence, as opposed to simple negligence, generally requires proof that a person acted with reckless disregard of the consequences for the safety or property of another-- a greater degree of knowledge or intent than a [a mere failure to exercise reasonable care] [simple carelessness or neglect].

There are two relevant provisions of Part 303: §324.30316(3) establishes that a person who

“willfully or recklessly violates a condition or limitation in a permit issued by [MDEQ] . . . is guilty of a misdemeanor, punishable by a fine of not less than \$2500.00 nor more than \$25,000.00 per day of violation”; thus the burden of proof and level of knowledge set by § 324.30316(3) appears on its face to be gross negligence. By contrast, §324.30316(2) establishes that a person who merely violates Part 303 “is guilty of a misdemeanor, punishable by a fine of not more than \$2500.00.” This latter provision does not on its face require a showing of any degree of knowledge or intent, i.e., not even simple negligence, to impose criminal liability. Section 324.30316(3) would apply to any violation of Part 303, which would include both discharges into wetlands without a permit and violations of permits issued pursuant to Part 303.

Section 324.30112 also has two provisions imposing misdemeanor criminal liability for violations of Part 301 permits and discharges of dredged or fill material into lakes and streams without a permit (See § 324.30112(3) and (4)). Neither of these provisions on their face specify any level of intent or knowledge required to impose liability. Section 324.30112(3) states that “a person who violates this part or a permit issued under this part is guilty of a misdemeanor, punishable by a fine of not more than \$10,000.00 per day for each day of violation.” Section 324.30112(4) provides that a “person who commits a minor offense is guilty of a misdemeanor, punishable by a fine of not more than \$500.00 for each violation.”

Because Sections 324.30316(3) and 324.30112(3) and (4) do not specify any intent standard, EPA requested the Michigan Attorney General’s office to provide its interpretation of what standard of proof is required to establish criminal misdemeanor liability under Parts 301 and 303. (EPA was aware that a Michigan Supreme Court decision, People v. Datema, 448 Mich. 585, 605 (1995) equated “criminal negligence” under Michigan law with “gross negligence”). The response from the Chief of the Attorney General’s Natural Resources and Agriculture Division, stated “that the relevant provisions of Parts 303 and 301 impose strict criminal liability and require no showing of a specific intent to violate those statutes in order to impose criminal penalties.” Strict liability generally means that liability for violation of a statute may be imposed purely if the actor committed the actions in question regardless of his state of mind. Thus, a strict liability standard is a lesser standard of proof than simple negligence, the standard held to apply to prove criminal violations under Section 1319(c)(1) of the CWA. The Attorney General’s response identified Michigan case law recognizing the State’s ability to create strict criminal liability offenses, citing in particular to People v. Quinn, 440 Mich 178; 487 N.W. 2d 194 (1992) and People v. Lardie, 452 Mich 231, 240-41, 551 N.W. 2d 656 (1996). The author of the response further stated that he had discussed the question of what intent standard is applied with the head of the office’s Criminal Division and with the Office of Criminal Investigations of the MDEQ, who both concurred with the analysis and confirmed that they successfully bring criminal cases under Sections 303 and 301 without presenting proof of intent, i.e., as strict liability crimes.

The criminal fine levels authorized by Part 303 are less than the minimums required by 40 C.F.R. § 233.41(a)(3)(ii) (\$10,000 minimum). However, MCL §750.504, governing punishment for

misdeemeanors, sets out a maximum jail time of 90 days for such offenses. 40 C.F.R. §233.41(d)(1) allows a Regional Administrator to approve a state program even where the state lacks the authority to set these minimum fine levels, as long as the Regional Administrator can determine that the state has an alternative enforcement program that is demonstrably effective in ensuring compliance and deterring violations of section 404 of the CWA. We have found that Michigan's enforcement program does meet that threshold. EPA has determined that §§ 324.30112(3) and 324.30316(2), in conjunction with MCL § 750.504, provide an adequate 404 criminal enforcement program.

The preliminary report had noted one additional concern with Part 303—that it failed to include authority to seek criminal fines for knowingly making false statements in a permit application or who tampers with or falsifies a permit-required monitoring device. Authority to seek criminal fines up to \$5,000.00 for each such violation is required by the State Program Regulations. See 40 C.F.R. § 233.41(a)(3)(iii). EPA was given similar authority by Congress. 33 U.S.C. § 1319(c)(4). While such a provision was included in Part 301 (at § 324.30112(5)), Part 303 did not include such authority. MDEQ has explained to EPA that Michigan has adequate authority to address and penalize false statements under Section 750.248 of the Michigan Penal Code. This statute has been used to prosecute persons who file false public documents, according to the Michigan Attorney General's office. The statute makes an offense punishable by imprisonment for up to 14 years. An example of the use of this statute to prosecute individuals who made false statements in a wetland permit application was provided by the Attorney General's office. Although §750.248 does not authorize the attorney general to obtain a monetary fine, EPA considers the authority to impose a substantial prison term as a sufficient alternative enforcement scheme for deterring persons from falsifying information in permit applications or monitoring reports.

#### INDIAN LANDS

The draft Attorney General's Statement submitted to EPA during this program review includes a statement that the State of Michigan will not seek approval of section 404 state program authority over 'Indian lands'." See 40 C.F.R. § 233.12(b). That draft Attorney General's Statement, though, explains that "this decision is based on MDEQ's understanding of the term 'Indian lands' as constituting lands owned by or on behalf of a federally recognized Indian tribe or a tribal member and located within 'Indian country' as that term is defined by 18 U.S.C. § 1151 and applicable case law." The state of Michigan considers "Indian lands" to be a subset of "Indian country." In essence, the draft Attorney General's Statement says that the state of Michigan is seeking approval to administer the section 404 program in those portions of "Indian country" which the State felt were not also "Indian lands". EPA disagrees with MDEQ's understanding of the term "Indian lands." EPA defines the term "Indian lands" to be the same as the term "Indian country," which is defined by statute (18 U.S.C. § 1151) to include, among other types of lands, all land within the limits of an Indian Reservation regardless of whether that land is owned by an Indian or a non-Indian.

During the course of this program review, the two agencies made their views on this issue known to each other. We note that the final Attorney General's Statement, which was signed on March 23, 2006, makes no mention of "Indian lands" or whether the state of Michigan is making any claim that it has authority to exercise the CWA section 404 program in "Indian lands", however that term is defined.

EPA's determination that the term "Indian lands" has the same meaning as the term "Indian country" has been explicitly approved by the Ninth Circuit Court of Appeals in State of Washington Dep't of Ecology v. U.S. Environmental Protection Agency, 752 F.2d 1465, 1467, n.1 (9th Cir. 1985). Moreover, EPA has consistently interpreted the term "Indian lands" to be the same as "Indian country." For example, this interpretation is contained in EPA regulations implementing RCRA Subtitle D. 40 C.F.R. § 258.2; see also 40 C.F.R. § 144.3 (Safe Drinking Water Act regulations defining "Indian lands" to be same as "Indian country"). In addition, it is clear that EPA has used the terms "Indian country" and "Indian lands" interchangeably in many situations, such as when authorizing a state program under RCRA Subtitle C. See, e.g., 71 Fed. Reg. 12141, 12144 (March 9, 2006) (Michigan); 67 Fed. Reg. 49617 (July 31, 2002) (Michigan); 65 Fed. Reg. 29973, 29978 (May 10, 2000) (West Virginia); 65 Fed. Reg. 46606, 46610 (July 31, 2000) (Virginia). EPA notes that, although the definition of Indian country appears in a criminal code, it has been extended to civil judicial and regulatory jurisdiction. DeCoteau v. District County Court, 420 U.S. 425, 427 n.2 (1975).

When, on October 16, 1984, EPA first approved the State of Michigan to administer the section 404 program, Michigan did not seek authority over Indian lands; consequently, at that time, EPA stated that "the Corps [of Engineers would] continue to operate its 404 program on any Indian lands or reservations." 49 Fed. Reg. 38947, 38947. As EPA has not found that the State of Michigan has authority within Indian country (which has the same meaning as Indian lands), and as EPA has not approved any exercise by the State of Michigan of such authority, Michigan's approved section 404 program does not, and has not, applied in Indian country within the state of Michigan

Despite this disagreement, EPA does not conclude that Michigan's iteration, in the draft Attorney General's Statement, of its legal theory as to what are "Indian lands" creates a basis for withdrawal of the approved section 404 program. EPA maintains that the agency's interpretation that the terms "Indian lands" and "Indian country" have the same meaning is the correct and valid interpretation. EPA will review, however, any materials or documents subsequently submitted by Michigan in accordance with applicable law

#### EFFECT OF NEWLY-PROMULGATED RULES

As discussed throughout this Final Report, to resolve many of EPA's concerns about MDEQ's legal authority in the permitting and enforcement realm, MDEQ already has promulgated new rules under Part 301 and Part 303. In addition, as a result of this program review EPA is

requesting that MDEQ promulgate additional rules, as outlined in this Final Report.

During spring 2002, MDEQ proposed procedures to make future administrative rules issued under Part 301 and Part 303 effective immediately on promulgation. The public, including permit applicants and petitioners in contested permit cases, would be kept on notice of the development of such rules, and would be notified of each rule's final, effective date. EPA approves of this proposal by MDEQ as being effective, efficient, and fair.

EPA requests that the Attorney General's Office issue a written opinion analyzing whether MDEQ has authority to make all new rules effective immediately and applicable even to permit applications which are being processed and to permit decisions which already have been made by MDEQ staff at the time that the rule is issued. The opinion also should analyze the extent to which such newly-effective rules must be considered by MDEQ's ALJ's and Director during contested case proceedings.

#### NOTICE OF WHICH LEGAL PROVISIONS CONSTITUTE MICHIGAN'S PROGRAM

MDEQ should request that the Attorney General's Office prepare an updated statement identifying the State laws and regulations constituting Michigan's approved CWA section 404 program, to then be promulgated by EPA as revisions to 40 C.F.R. § 233.70.

## **Analysis of Effect of State Takings Law on Program Implementation**

The Attorney General's Statement that a State submits in order to obtain initial approval to administer a CWA section 404 program shall "contain a legal analysis of the effect of State law regarding the prohibition on taking private property without just compensation on the successful implementation of the State's program." 40 C.F.R. § 233.12(c). In its letter to MDEQ initiating this program review, EPA requested that the Michigan Attorney General's Office submit a Statement including such a takings law analysis. That office did so, with its submittal consisting of three separate documents: a Takings Analysis with an attached 1998 Takings Assessment Guidelines, which are drafted and regularly updated by the Attorney General for use by State agencies (Tab B of Attorney General's Statement); and a legal analysis and review of relevant Michigan state court decisions that the Michigan Attorney General had provided to EPA's Office of Regional Counsel in a letter dated August 27, 1996, in connection with the litigation *National Wildlife Federation v. Adamkus*. The Attorney General's Office concludes, in the Takings Analysis document, that "Michigan's takings jurisprudence does not present a legal impediment to the successful implementation of the State of Michigan's § 404 program." The Attorney General's Office also reports that "to date there have been no successful takings cases brought against the State based on wetland regulation". (Takings Analysis, pp. 5-6,12.)

During EPA's analysis of whether Michigan state court decisions regarding takings law affected the successful implementation of the section 404 program, EPA reviewed the current federal takings law and its principles as announced by the United States Supreme Court and lower federal courts, as well as Michigan case law. EPA needed to determine whether Michigan state courts have ruled that government application of CWA-related regulations cause regulatory takings in situations where federal takings law jurisprudence would not so conclude. (Actual, physical takings are not implicated in wetlands regulation.)

EPA agrees with the Attorney General's Office that decisions by the Michigan state courts in takings actions do not impede the implementation of the section 404 program.

In this Final Report, EPA will not engage in a detailed analysis of current federal takings law nor engage in a comparison of the relevant Michigan takings law decisions. The former is available from numerous scholarly sources, and the Michigan Attorney General has provided a good analysis of Michigan takings law decisions. We find it sufficient to state here that Michigan case law on this issue to date has properly announced and applied the major principles of regulatory takings jurisprudence, including principles concerning when a categorical taking has occurred, the balancing test to be applied when a categorical takings does not exist (including determining a landowner's reasonable, investment-backed expectations), the "parcel as a whole" delineation, burdens of proof, and the ripeness of a takings claim.

However, this is not necessarily the end of the inquiry. The relevant federal regulation, by calling for "a legal analysis of the effect of state law regarding the prohibition on taking private

property without just compensation on the successful implementation of the state's program", 40 C.F.R. § 233.12(c), suggests that the analysis should go beyond a review of the legal content of state court takings decisions; the analysis should consider whether and how the state agency's implementation of the CWA section 404 program has been affected by the existence of State law takings provisions and the assertion of takings claims by landowners. A state's implementation of a CWA section 404 program, in both the permitting and enforcement realms, may be affected by state decision makers' worries that potential takings claims may be filed and ultimately may be successful. Such fear of takings claims and the risk of a state incurring significant monetary costs from successful claims could permeate the implementation of a CWA section 404 program.<sup>25</sup>

EPA has not found, however, that Michigan's section 404 program is being operated incorrectly, or unsuccessfully, due to a concern for takings claims. EPA has conducted an extensive review of both MDEQ's permitting program and enforcement program. In doing so, EPA did not find that a concern for potential takings claims was causing MDEQ either to permit activities that should not be permitted, nor to fail to engage in enforcement. There has been only one situation, within EPA's knowledge, in which takings law concerns appeared to affect MDEQ's decision making.<sup>26</sup> A single instance in which MDEQ chose to evade its responsibility to make and adhere to a CWA section 404 permit decision does not impair Michigan's implementation of the section 404 program to the extent that EPA finds that takings law issues create a basis for commencing, or further investigating the need for, program withdrawal proceedings.

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<sup>25</sup> EPA previously made this point in responding to a petition to withdraw the CWA section 404 program from the State of Michigan (see July 2, 1997, letter from D. Ullrich, EPA, to National Wildlife Federation and Michigan United Conservation Clubs, pp. 2-3, where EPA identified the key issue as being whether the State agency is continuing to issue permits and to enforce violations appropriately under section 404 and the State Program Regulations, not whether written State takings jurisprudence is consistent with federal takings jurisprudence).

<sup>26</sup> That situation was MDEQ's issuance of a state-only permit to Michigan Peat for its peat removal activities at the Minden Bog near Minden, Michigan. MDEQ had proffered a joint section 404/Part 303 permit but, after being sued by the company for a taking, MDEQ chose to issue a state-only permit which allowed more discharges and had less restrictive conditions than did the earlier joint permit.

## **SECTION 2: ASSESSMENT OF PROGRAM ADMINISTRATION**

### **Assessment of Program Implementation for Compliance with the State Program Regulations**

The information which follows is EPA's assessment of MDEQ's administration of the wetland permitting program. This section focuses on the State Program Regulations found at

40 C.F.R. part 233. A legal analysis of the State of Michigan's statutes as they relate to the State Program Regulations can be found in Section 1 of this Final Report.

#### **Subpart C -Permit Requirements**

##### **§ 233.20 - Prohibitions**

**This section of the regulations states that no permit shall be issued by the state in the following circumstances:**

- **When the permit does not comply with the requirements of the CWA or the regulations thereunder, including the section 404(b)(1) Guidelines;**
- **When the Regional Administrator has objected to the issuance of the permit and the objection has not been resolved;**
- **When the proposed discharges would be in an area which has been prohibited as a disposal site by the Administrator under section 404(c) of the CWA; or**
- **If the Secretary of the Army determines that anchorage and navigation of any of the navigable waters would be substantially impaired**

The file review found that in almost all cases, applications which resulted in a permit being issued included documentation of compliance with the section 404(b)(1) Guidelines as part of the permit decision. This documentation was generally in the form of the Project Review Report (PRR). However, in the majority of the files reviewed, the assessment of compliance with the section 404(b)(1) Guidelines and/or State of Michigan wetland law was only documented by the checking of a box on the PRR forms. Interviews with the staff indicated that they did consider the factors outlined in the section 404(b)(1) Guidelines relating to both the alternatives analysis and project impacts to the aquatic environment. The PRR form was revised by MDEQ in 2000, and the new guidance for completing the PRR was included in MDEQ's updated program description materials submitted to EPA in 2002. The new PRR forms have been in use since 2001. The new forms do a good job of documenting compliance or non-compliance with the 404(b)(1) Guidelines. When utilized by MDEQ staff, these new and revised materials will result

in improved documentation of the factors staff consider when making a particular permit decision.

In our review of contested cases, we found several instances where an ALJ either reversed a permit denial decision or authorized an increase in the scope of a project without documentation of compliance with either the section 404(b)(1) Guidelines or with Michigan statutes other than a statement that the permitted project would meet the Michigan statutes. These decisions rarely mentioned any new information or documented why the ALJ found the initial permit decision regarding compliance with the State statutes to be incorrect. See Preliminary Report, Section 2, Analysis of Final Agency Permit Decisions in Administrative Contested Cases. We recommend that, in cases where the original permit decision is overturned or modified through a contested case proceeding, MDEQ provide documentation which supports the final permit decision and demonstrates compliance with the section 404(b)(1) Guidelines, and therefore § 233.20(a), as well as the appropriate Michigan statutes.

During the 20 years since the State of Michigan assumed the federal wetland program, there have been 7 cases in which the State was not able to resolve objections raised by EPA. In each of these cases MDEQ issued a “state-only” permit which authorized work only under State law, and was not an authorization under section 404 of the CWA. In general, MDEQ has done a good job of addressing concerns raised by the federal agencies and taking appropriate action, usually by reducing the project scope, adding conditions to a project, or permit denial.

The Administrator has not identified any areas in Michigan which are prohibited for use as a disposal site. Therefore, the State of Michigan has not issued any permits for prohibited areas.

MDEQ does not have section 404 permitting authority over Section 10 (of the River and Harbors Act) waters. This authority is retained by the Corps; therefore, no permits have been issued by the State which have resulted in the impairment of anchorage or navigation of any Section 10 waters.

### **§ 233.21 - General permits**

**The regulations at § 233.21 allow for the state to administer and enforce general permits previously issued by the Secretary of the Army. The State also may issue general permits for categories of similar activities if it determines that the regulated activities will cause only minimal adverse environmental effects when performed separately and only minimal cumulative adverse effects on the environment. Any general permit issued must comply with the section 404(b)(1) Guidelines.**

**In addition to the conditions specified in § 233.23, the regulations – at 40 CFR 223.21(c) require that each general permit contain:**

- **A specific description of the types of activities authorized, including limits for**

- **any single operation;**
- **A precise description of the geographic area to which the general permit applies, including limitations on the types of waters where operations may be conducted;**
- **Pre-discharge notification or other reporting may be required by the State; and**
- **The State may require any person authorized under a general permit to apply for a general permit, this discretionary authority will be based on concerns for the aquatic environment including compliance with the section 404(b)(1) Guidelines.**

The State of Michigan has issued general permits for a number of categories of activities. Activities covered by general permits include:

- construction of small ponds;
- boardwalks or elevated platforms;
- walkways, driveways;
- utility lines;
- oil, gas, and mineral well access roads;
- stormwater outfalls;
- culverts;
- emergency drain maintenance;
- septic tank replacement;
- repairs to structures;
- completed enforcement actions;
- spill clean-up;
- hazardous substance clean-up;
- maintenance dredging of artificial treatment ponds and lagoons;
- road maintenance projects;
- minor fills;
- restoration of altered wetland areas;

Our review of these categories of activities finds that most are equivalent in scope and effect to activities authorized under the nationwide permits of the federal program. The activities authorized by the Corps under the Federal Nationwide Permit Program have been found by the Corps to cause not more than minimal adverse environmental effects on the aquatic environment and to be in compliance with the section 404(b)(1) Guidelines.

The State of Michigan's general permit program requires any person interested in receiving authorization for work under a general permit to submit an application to MDEQ prior to initiation of work. If the project qualifies for a general permit, MDEQ reviews each permit application using expedited general permit processing procedures. Each category of activity which can be authorized by a general permit has specific conditions, including size limitations which must be met in order to be processed under the general permit procedures.

MDEQ has placed restrictions on the use of general permits. Projects are not considered minor, and do not qualify for a general permit, if they are proposed for wetlands associated with waters which have significant features associated with them. These would include having a federal or state designation as a wild and scenic river, identification as having federally threatened or endangered species, or identification as being unique from an ecological perspective. MDEQ also reserves the right to require processing as a major (individual) permit if the determination is made that public input would benefit the review of the application, or if MDEQ determines that a specific activity would lead to adverse cumulative impacts to the aquatic environment. During our review of MDEQ permit files, we did not encounter any files in which MDEQ had processed a permit as an individual permit due to one of the restrictions listed above. The program description materials submitted did not include any guidance regarding how MDEQ might make the determination as to when public input would benefit the review of a proposed project.

We find that MDEQ's general permit program is consistent with the requirements outlined in 40 C.F.R. § 233.21. MDEQ staff review each proposal and complete a PRR for each project documenting compliance with Michigan statutes and compliance with the conditions of the general permit. Based on a limited review of minor project files during EPA's visits to MDEQ field offices, we found that MDEQ staff conducted site visits and confirmed that the proposed project did qualify for a minor permit.

Although we found the general permits in effect in Michigan cover activities which are similar in scope and effect to many of the activities covered by the Corps' nationwide permits, some activities subject to permitting under the federal program are exempt under the Michigan program. EPA also has concerns that MDEQ does not have a procedure for assessing the cumulative impacts of minor permits. A more detailed discussion of these two issues can be found in the Permit Exemptions and Compliance with CWA section 404(b)(1) Guidelines sections of Section 1 of this Final Report.

### **§ 233.23 - Permit Conditions**

**Each section 404 permit shall include conditions meeting or implementing the following requirements:**

**For each permit the Director shall establish conditions which assure compliance with all applicable statutory and regulatory requirements including the 404(b)(1) Guidelines, applicable section 303 water quality standards, and applicable section 307 effluent standards and prohibitions.**

MDEQ staff frequently placed conditions on permits to assure that the authorized activity would be in compliance with the section 404(b)(1) Guidelines. Conditions were variable but typically included:

- Best Management Practices such as use of erosion control measures to ensure that

- sediment did not enter undisturbed portions of wetlands or other waters of the state
- requirements to maintain existing hydrology in areas not directly impacted by a project
  - requirements to restore or create wetlands as mitigation for project related impacts
  - requirements for monitoring wetland mitigation sites and reporting requirements associated with the monitoring

**(1) A specific identification and complete description of the authorized activity, including name and address of the permittee, location and purpose of the discharge, and type and quantity of the material to be discharged.**

All issued permits that EPA reviewed did include a specific identification and complete description of the authorized activity, name and address of the permittee, and location and purpose of the permitted activity. Often permits referred to specific dated materials or plans from the permit file in order to provide detailed descriptions of the approved activities and/or special conditions such as wetland mitigation required as part of the permit.

**(2) Only the activities specifically described in the permit are authorized.**

MDEQ permits do not specifically state that only the activities described in the permit are authorized, however, they do specifically describe the activities for which permission is granted.

**(3) The permittee shall comply with all conditions of the permit even if that requires halting or reducing the permitted activity to maintain compliance. Any permit violations constitute a violation of the CWA as well as a violation of State statute or regulation.**

MDEQ permits include a condition which states that failure to comply with conditions of the permit may subject the permittee to revocation of the permit and criminal and/or civil action as cited by the specific State Act, Federal Act, or rule under which the permit is granted.

**(4) The permittee shall take all reasonable steps to minimize or prevent any discharge in violation of the permit.**

The first standard condition of MDEQ permits states that initiation of any work on the permitted project confirms the permittee's acceptance and agreement to comply with all terms and conditions of the permit. Failure to comply with the conditions of the permit may subject the permittee to revocation of the permit, as stated in the permit limitations.

**(5) The permittee shall inform the Director of any expected or known actual noncompliance.**

There does not appear to be any general state requirement, or condition inserted in individual permits, that the permittee inform the Director of any expected or known noncompliance with the permit terms and conditions.

**(6) The permittee shall provide such information to the Director, as the Director requests, to determine compliance status, or to determine whether cause exists for permit modification, revocation or termination.**

Part 303, at § 324.30314, authorizes MDEQ to require the holder of a permit to provide information the Department reasonably requires in order to assess compliance with Part 303. This section gives MDEQ the authority to obtain information necessary to assess permit compliance. We are not aware of any instances in which MDEQ has exercised this authority. There is no similar provision in Part 301.

**(7) Monitoring, reporting and record keeping requirements as needed to safeguard the aquatic environment.**

The standard permit conditions for MDEQ Section 404 permits do not require any specific monitoring or reporting requirements specifically targeted toward safeguarding the aquatic environment. Permit conditions do require the applicant to notify MDEQ within one week of completion of the permitted activity in writing and the permittee cannot transfer the permit without written approval from MDEQ. Additional monitoring and reporting requirements are required on a case-by-case basis. The most common reporting required on a case-by-case basis was monitoring of progress toward meeting the performance standards for mitigation wetlands. In our initial review of project files, we did not find project specific monitoring requirements included as permit conditions. However, since the promulgation of the mitigation rule by Michigan in 2001, specific monitoring requirements are now routinely included as permit conditions.

**(8) Inspection and entry. The permittee shall allow the Director, or his authorized representative, upon presentation of proper identification, at reasonable times to:**

- (i) Enter upon the permittee's premises where a regulated activity is located or where records must be kept under the conditions of the permit**
- (ii) Have access to and copy any records that must be kept under the conditions of the permit,**
- (iii) Inspect operations regulated or required under the permit, and**
- (iv) Sample or monitor for the purposes of assuring permit compliance or as otherwise authorized by the Act, any substances or parameters at any location.**

MDEQ permits do not include a condition which gives the Director or his authorized representative right of entry, access to records or right to conduct sampling or monitoring at a project site. During our file review we found very few files which indicated that MDEQ staff had visited a project site to assess compliance with the permit conditions. Due to time constraints, staff typically do not make such inspections. We did not find any files in which MDEQ staff had done any sampling or monitoring at either a project site or a mitigation site.

**(9) Conditions assuring that the discharge will be conducted in a manner which minimizes adverse impacts upon the physical, chemical and biological integrity of the waters of the United States, such as requirements for restoration or mitigation.**

Twenty-five of the permit files that EPA reviewed included a mitigation requirement to either create or restore wetland acreage. Many of the permits we reviewed included conditions which would minimize impacts to the aquatic environment. These conditions usually included best management practices designed to minimize impacts to aquatic resources remaining on a project site. Practices included use of erosion control measures on site and taking steps to maintain existing hydrology on site. In addition, the Administrative Rules for Wetland Protection, specifically R 281.925 (which was promulgated under Part 303 and was amended in April 2000), allow MDEQ to consider mitigation proposed by an applicant to off-set project related impacts to wetlands.

**Subpart D - Program Operation**

**§ 233.30 -Application for a permit**

**This section of the State Program Regulations outlines when a permit application is required and what information must be found in an application for it to be considered complete. The information required in an application includes:**

- **Name, address, phone number of applicant and names and addresses of adjoining property owners complete description of the proposed project;**
- **Description of the type, composition, source and quality of the material to be discharged, the method of discharge, the site, and plans for disposal of the dredged or fill material;**
- **A certification that all information in the application is true and accurate; and**
- **The applicant will be required to furnish additional information on alternate methods and sites as necessary for preparation of environmental documentation.**

The application form used by MDEQ is a joint form which is also used by the Corps. This application form does require the applicant to provide all the information listed above with one exception. The application form only requires the names and addresses of adjoining riparian owners, not adjoining property owners as required in the federal regulations. The applicant must sign the application acknowledging that all the information provided is accurate. In addition, the applicant acknowledges that they must obtain a permit prior to commencing the project. Section 30306 of Part 303 does provide for the applicant to supply an environmental assessment which will include assessment of the effects of the project on wetland functions and values and effects on water quality, flow and levels, and the effects on wildlife, fish and vegetation within a contiguous lake river or stream. In general, none of the files we reviewed included a request from MDEQ to the applicant for additional environmental information.

### **§ 233.31 - Coordination requirements**

**This section of the regulations requires the Director to provide an opportunity to any State to provide written comments on any project which involves a proposed discharge which may affect the biological, chemical or physical integrity of that State's waters. If the recommendations of the affected State are not accepted by the Director, he shall notify the Regional Administrator prior to permit issuance, in writing, of the Department's failure to accept the recommendations.**

The current EPA-MDEQ MOA requires federal review of any project which may affect the waters of another State. This MOA provision gives the Regional Administrator with the opportunity to review and comment on such projects.

It is not clear from MDEQ program submittal that procedures are in place which would ensure that an adjacent State would be notified if a project had the potential to affect that State's waters. Our file review did not encounter any projects which impacted the waters of another State -- nor is EPA aware of any instances in which another state has been notified of potential project impacts or commented on a proposed project.

MDEQ needs to develop guidelines for determining when a proposed project will impact waters of an adjacent state and a process for notifying that State of the pending permit. There should be a specific process which provides affected States with an opportunity to comment on the proposed project, and the process should include notification of EPA.

### **§ 233.32 - Public notice**

**The regulations under this section require MDEQ to give public notice of the following actions:**

- **Receipt of a permit application;**
- **Preparation of a draft general permit;**
- **Consideration of a major modification to an issued permit;**
- **Scheduling of a public hearing; or**
- **Issuance of an emergency permit**

Our review of the files found that MDEQ is giving public notice of the actions outlined above. MDEQ permit processing procedures require the preparation of a public notice for all projects which do not fall in the minor (or general) permit category. Not requiring a public notice for projects in the minor or general permit category is consistent with the federal program. In almost all cases, our file review found that files which did not fall in the minor or general permit categories did have a public notice in the file. MDEQ has issued public notices for all general permits proposed under Part 303. General permits are public noticed and reissued every 5 years. Our file review did not encounter any projects for which MDEQ had decided re-noticing was

needed due to a major modification of a permit that had been issued. In June 27, 2002, MDEQ issued interim guidance regarding revisions to permits. The guidance states that if the requested revisions are not minor as defined in the guidance, then the permittee must submit a new application for the proposed additional work. MDEQ does issue a public notice whenever a public hearing has been scheduled

### **Timing and Distribution**

The regulations at 40 C.F.R. § 233.32 require that the public notice provide a reasonable period of time, normally 30 days, within which interested parties may express their views concerning a permit application. In addition, notice for a public hearing shall be given at least 30 days before the hearing. The Regional Administrator may approve a program with a shorter public notice period if the Regional Administrator determines that sufficient public notice is provided for.

The current MDEQ public comment period is 20 days. During EPA's initial review of Michigan's program, the Regional Administrator determined that a 20-day comment period was sufficient and approved the program. Our current review finds that a 20-day comment period is sufficient. EPA expects that all interested parties will receive notification of the public comment period as soon as the comment period is opened. Under MDEQ's current system, the applicant, adjacent property owners, and agencies with jurisdiction over the activity do receive the public notices in a timely fashion; yet interested parties which may depend on the subscribers list for notification of pending projects may not receive a requested public notice in time to provide comments within the comment period. The subscribers list is discussed in more detail below.

The regulations at 40 C.F.R. § 233.32(c) require the state agency to provide public notice by mail to the applicant, any agency with jurisdiction over an activity or disposal site, adjacent property owners, and all persons who have specifically requested copies of public notices, as well as any State whose waters may be affected by the proposed discharge. In addition, the state agency must provide notice in at least one other way reasonably calculated to cover the area affected by the activity (such as publication in a newspaper of sufficient circulation).

### **40 C.F.R. § 233.32(c)(2).**

MDEQ public notice mailing lists included an extensive list of agencies and a list of adjacent landowners who received the public notices. While the State Program Regulations require notification of owners of property adjoining the property where the regulated activity will occur, it was difficult to tell from the files reviewed if all adjacent property owners received a public notice. The permit application form asks the applicant to list only adjacent riparian owners, which would not include adjacent landowners who did not own waterfront property. Yet the federal regulation does not limit notification of adjacent landowners to waterfront property

owners.

MDEQ has updated its public notice procedures. The revised procedures were provided to EPA in an April 26, 2004 submittal. In its revised public notice procedures, adjacent property owners and those whose property is affected by a project are sent a public notice automatically. MDEQ has taken additional steps to increase access to public notice information and to expedite distribution of public notices. In August 2002, MDEQ implemented an on-line system via the Internet that publishes all public notices and notices of public hearings. The system is linked to the Coastal and Inland Waters Permit Information System (CIWPIS) database, and public notices are available as soon as the notice is issued. Comments may be submitted electronically through the CIWPIS system as well. Under MDEQ's revised public notice procedures, citizens requesting a full copy of a public notice now have three options for receiving the public notice. They may access the public notice and provide comment on the public notice on-line using the CIWPIS system, they may request MDEQ staff to e-mail a copy of the public notice to them, or, if a hard copy of the notice is requested, the notice is mailed to the requestor within one business day of the request.

MDEQ continues to mail a bi-weekly list of public notices to those who subscribe to this service. The subscriber list is now also available on-line. The on-line version is updated on a daily basis and includes all public notices issued over the past six weeks. There is no fee for using the on-line service. Every public notice is now available as an electronic file that can be e-mailed, and a draft procedure for e-mailing public notices has been developed. Most state and local agencies in Michigan have chosen to receive copies of public notices via e-mail rather than surface mail.

The changes that MDEQ has made to its public notice distribution procedures have resolved EPA's concerns that not all interested persons were receiving public notices with sufficient time to submit comments to MDEQ.

### **Information in public notices**

**The State Program Regulations at § 233.32(d) require that the following information be contained in a public notice:**

- **Name and address of the applicant and the location of the proposed activity;**
- **Name and address of the person to contact for further information;**
- **A brief description of the proposed activity, its purpose and intended use;**
- **A plan and elevation drawing showing the general and specific site location and character of all proposed activities, including size relationship of the proposed structures to the impacted waterway and depth of water in the area;**
- **A paragraph describing the various evaluation criteria on which decisions are based;**
- **Any other information which would significantly assist interested parties in evaluating the likely impact of the proposed activity; and**

- **A description of comment procedures and public hearing request procedures**

**Notice of a public hearing shall contain the following information:**

- **Time, date and place of hearing;**
- **Reference to the date of any previous public notices relating to the permit; and**
- **Brief description of the nature and purpose of the hearing**

The public notices issued by MDEQ for permit applications and public hearings include all the information listed above with the exception of a paragraph which describes the evaluation criteria considered, including the section 404(b)(1) Guidelines. While the public notices do not list a specific contact person, they do list the address and phone number of MDEQ district office handling the permit application.

§ 233.33 - Public hearing

**(a) Any interested person may request a public hearing during the public comment period as specified in § 233.32. Requests shall be in writing and shall state the nature of the issues proposed to be raised at the hearing.**

**(b) The Director shall hold a public hearing whenever he determines there is a significant degree of public interest in a permit application or a draft general permit. He may also hold a hearing, at his discretion, whenever he determines a hearing may be useful to a decision on the permit application.**

Part 303 section 30307 provides for holding public hearings on applications currently under consideration by MDEQ. The Department may hold a public hearing either on its own initiative or at the request of an interested party. The interested party must submit its request for a public hearing in writing to the Department within 20 days after the mailing of notification of the permit application. If any interested party requests a public hearing, the Department will hold a public hearing in the county where the activity is to take place. Our review of MDEQ permit files indicates that MDEQ has held public hearings for projects proposed under Part 301 or Part 303 whenever a hearing is requested in writing. In addition, MDEQ has held public hearings on its own initiative after determining that the permit application is of significant impact and so warrants a public hearing. Based on our review of permit files for this program review and our ongoing oversight of MDEQ wetland program we have found MDEQ to be very responsive to requests for public hearings on proposed projects.<sup>27</sup>

**(c) At a hearing any person may submit oral or written statements or data concerning the**

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<sup>27</sup> Our primary concern is that all interested persons receive sufficient notice of the proposed project so that such persons can submit a request for a public hearing. See discussion in this Section 2 of this Final Report on the State's compliance with 40 C.F.R. § 233.32 requirements (pages 42-43), as well as comment at page 18 in Section 1 of this Final Report.

**permit application or draft general permit. The public comment period shall automatically be extended to the close of any public hearing under this section. The presiding officer may also extend the comment period at the hearing.**

The procedure for changes to the public comment period after a public hearing is held are not described in the program description provided by MDEQ. Discussions with MDEQ's 404 program coordinator indicate that the public comment period is extended until the close of any public hearing, and often is extended for an additional time period after a public hearing is held. The updated program submittal should include a description of how the public comment period is affected when a public hearing is held.

**(d) All public hearings shall be reported verbatim. Copies of the record of proceedings may be purchased by any person from the Director or the reporter of such hearing. A copy of the transcript (or if none is prepared, a tape of the proceedings) shall be made available for public inspection at an appropriate State office.**

All public hearings are taped. The tapes are available to the public. Transcripts of the tapes can be obtained by any person upon request, providing that person pays for the transcription.

### **§ 233.34 - Making a decision on the permit applications**

**The Director will review all applications for compliance with the section 404(b)(1) Guidelines and/or compliance with equivalent State environmental criteria as well as other applicable State laws.**

MDEQ uses the PRR form for documentation of compliance with the section 404(b)(1) Guidelines and with Michigan statutes, and for documenting the final permit decision. The amount of information provided in completed PRRs was somewhat variable. In general, for projects with larger impacts there was more information in the PRR. The more detailed information usually consisted of detailed notes describing the resource to be impacted. During our file review, we looked at 353 permit files and found PRRs in 78% of those files; therefore, 78% of those files had documented compliance with the section 404(b)(1) Guidelines as required by the Federal State Program Regulations.

Projects for which a permit was being denied, or for which a modified permit of smaller scope was proposed, usually had good written documentation which explained why the originally proposed project did not comply with Michigan statutes and could not be authorized. In many cases, the PRRs had a box checked which indicated that some of the factors evaluated under the section 404(b)(1) Guidelines had been considered. For example, the PRR would indicate that alternatives had been considered, but neither the PRR nor the permit file contained specific information as to what alternatives had been considered or how they were evaluated. Other PRRs included a written description of the site and a statement that the project impact area was

the least damaging alternative available.

Although we found PRRs in the majority of files, it was often difficult to tell what factors had been considered when staff made decisions on project compliance with the section 404(b)(1) Guidelines and the environmental criteria contained in relevant Michigan statutes. A check mark in a box was usually the only information available. Interviews with district staff during our file reviews indicated that, in general, staff were considering most of the factors which need to be evaluated in order to determine compliance with the 404(b)(1) Guidelines, but there was no written documentation of the factors evaluated. The updated program materials submitted by MDEQ for this program review include a revised PRR form and detailed instructions for completing the form. The revised form should ensure that MDEQ staff do a better job of providing documentation of the factors considered when evaluating a project for compliance with the Guidelines.

Detailed information on the factors considered during the evaluation of projects for compliance with the Guidelines was lacking from most of the PRRs that EPA reviewed, in most files, however, there was some documentation in the files that indicated compliance with the 404(b)(1) Guidelines and the environmental factors in Michigan statutes had been evaluated prior to making a permit decision. Based on our file reviews and interviews with MDEQ staff, we found that MDEQ staff were adequately completing the required review of applications as outlined in § 233.34.

One concern we have about MDEQ compliance with this section of the State Program Regulations relates to the documentation of compliance with the section 404(b)(1) Guidelines and/or the State statutes for permits issued in final decisions through the contested case hearing process. In several contested cases we reviewed, the ALJ reversed a MDEQ staff decision to deny a permit for a project, yet there did not appear to be any new documentation supporting the finding that the project was now in compliance with the section 404(b)(1) Guidelines and the applicable State statutes. For a more detailed discussion of this issue, see the discussion of 40 C.F.R. § 233.20(a) above.

We recommend that in cases where a project was initially found not to be in compliance with the section 404(b)(1) Guidelines and/or with Michigan statutes, but after a contested case hearing was found to be in compliance with the necessary legal and environmental standards imposed by law, MDEQ ensure that the final permit decision, as embodied by the final contested case decision, document the evaluation process for compliance with those legal standards.

**The Director shall consider all public comments received on an application.**

The majority of files we reviewed did not have any public comments. In those cases where public comments were received, either in response to the public notice or at a public hearing, the comments were part of the file and issues raised were addressed by MDEQ staff prior to making a permit decision.

**The Director shall prepare a written determination on each application outlining his decision and rationale for his decision. The determination shall be dated and signed prior to the final action on the application. The official record shall be open to the public.**

In most cases, the files we reviewed contained a signed and dated PRR which contained the written rationale for the permit decision. In some cases, there would be little or no decision rationale included in the PRR, however, the letter to the applicant informing them of the permit decision typically included documentation outlining why the permit had been issued. If a permit was denied or modified, a detailed written analysis of the project, usually in the form of a letter to the applicant, was included in the file and was the basis for the permit decision. For small projects, the amount of written documentation as to the reasons for the permit decision was often minimal.

Since the PRR form contains the determination for many permit decisions, during the file review we checked to see that the PRRs were signed and dated. Although we often found that a PRR had been filled out, they were not always signed and dated; thus, it was difficult to assess whether or not the determination - or the PRR - had been dated and signed prior to MDEQ taking final action on the application. Still, in general it appeared from our file review that PRRs usually were completed before a decision letter was sent to an applicant.

The new PRR form includes a section which will explain the reviewer's findings and document the final permit decision. Making sure that this section of the PRR is always filled out, signed, and dated, or that other written documentation of the rationale for the permit decision is made part of every file, including contested case files, will ensure that the Michigan wetland program meets § 233.43(c) of the State Program Regulations. The PRR serves as the documentation for the permit decision.

The official record for each file is open to the public unless the permit is going through the contested case process or is subject to some other legal challenge. For these cases, once the legal proceedings are completed, the file is opened to the public for review.

### **§ 233.35 - Issuance and effective date of permit**

This section of the State Program Regulations outlines the procedures to be followed by the Director when a permit is either issued or denied. If a Regional Administrator comments on a permit application or a draft general permit, the Director shall follow the procedures outlined in section 233.50 when issuing a permit. If the Regional Administrator does not comment on a permit application, the Director shall make a final permit decision and notify the applicant. If the decision is to deny the permit, the Director will notify the applicant in writing of the reasons for denial.

We found that MDEQ was in compliance with this section of the State Program Regulations. In all cases when EPA provided federal comments on proposed projects, MDEQ has followed the procedures outlined in § 233.50. There have been no cases of MDEQ issuing a CWA section 404 permit over EPA's objection. In the seven cases where the federal objection was not resolved, MDEQ issued a state-only permit, and the applicants had to apply to the Corps for a CWA section 404 permit.

Further discussion regarding the effective date of permits under Michigan law can be found in Section 1 of this Final Report, Analysis of Legal Authorities (page 19).

### **§ 233.36 - Modification, suspension or revocation of permits**

**This section of the regulations outlines the conditions under which the State may modify, suspend or revoke a permit. These regulations list six factors to be considered, which include:**

- **The permittee's noncompliance with any term or condition of the permit;**
- **The permittee's failure to disclose all relevant information during the permit process;**
- **Information that indicates that an activity authorized by a general permit will have more than a minimal effect on the environment;**
- **Circumstances relating to the authorized activity have changed since the permit was issued and justify changed permit conditions;**
- **Availability of significant new information which would have justified different permit conditions at the time of issuance; and**
- **Revisions to statutory or regulatory authority**

Our file review did not encounter any instances in which MDEQ has suspended, revoked or modified a permit.

**The Director shall develop procedures to modify, suspend or revoke permits if a determination is made that just cause exists.**

When MDEQ proposes to revoke a Part 301 permit, or proposes to revoke or to modify a Part 303 permit, the permittee may initiate a contested case proceeding. §§ 324.30110, 30313(1). The procedures that apply to a contested case proceeding are set forth in Michigan's Administrative Procedures Act, found at Michigan Compiled Laws § 24.271 et seq., and in the rules promulgated therefore, R. 324.1, et seq. In addition, before MDEQ acts to modify or to revoke such permits, MDEQ informs the permittee of the factual and legal bases for MDEQ's intended action, and MDEQ provides a permittee with an informal process to present information to MDEQ which might influence MDEQ's decision. Mich. Comp. L. § 24.292; See Rogers v. State Board of Cosmetology, 68 Mich. App. 751 (1976). Additional discussion regarding MDEQ's legal authority to modify, revoke, or suspend Part 301 and 303 permits, and whether this legal authority is consistent with the CWA and 40 C.F.R. § 233.36, can be found in Section 1 of this Final Report, Analysis of Legal Authorities (pp. 19-20).

**SUBPART F - FEDERAL OVERSIGHT**

**§ 233.50 - Review of, and objection to, State-proposed permits**

Section 233.50 of the State Program Regulations outlines the process and time line to be followed during federal review of, and objection to, permit applications and proposed State-issued section 404 permits. MDEQ has done an excellent job of providing EPA with public notices that are subject to federal review in a timely manner. MDEQ also provides copies of these public notices to the other commenting federal agencies (Corps and the U.S. Fish and Wildlife Service). EPA has 30 days from receipt of the public notice to notify MDEQ whether or not the Regional Administrator intends to comment on a particular project, and to request any additional information deemed necessary to review the project for compliance with the section 404(b)(1) Guidelines, the Clean Water Act, and the State Program Regulations. Once EPA notifies MDEQ of our intent to comment, EPA has 90 days from the date we receive the public notice to provide comments to MDEQ. If EPA objects to a permit application, or requires that one or more conditions be imposed in a permit, MDEQ cannot issue a permit until the objection is resolved or the requested condition is incorporated into the permit. MDEQ has 90 days from the date of EPA objection letter to either resolve the objection to EPA's satisfaction or to deny the permit. In the event that the federal objection is not resolved within that 90-day period, authority to process the permit transfers to the Corps.

The time line detailed in the State Program Regulations does not mesh easily with Part 303's requirement that a permit decision be made within 90 days of MDEQ's receiving a complete application (see pages 17-18 of this Final Report). In practice, though, EPA and MDEQ usually are able to work with applicants to ensure that any problems are resolved within the required time period. Although it is possible that the 90-day time period imposed by Part 303 may expire

before federal comments are received and/or objections can be resolved, in practice this rarely occurs. In most cases, EPA is able to provide comments to MDEQ within the 90-day time frame and MDEQ is able to work with the applicant to resolve any federal objections and then issue the permit. If EPA has significant concerns with a project that MDEQ cannot resolve before Part 303's 90-day deadline, MDEQ either denies the permit or the applicant withdraws the application.

We are aware of only one or two cases where a MDEQ permit was issued by “operation of law” due to the fact that Part 303's 90-day time limit had expired. MDEQ has never issued a Part 303/section 404 permit by “operation of law” for a project which had an unresolved federal objection.

In summary, although the Part 303 90-day time line does not mesh well with the time lines set in the State Program Regulations, to date MDEQ staff have done a good job of working with EPA staff to ensure that problems with specific projects are resolved in a manner which meets the time requirements of both Michigan and federal law. In spite of the fact that Part 303 does allow a permit to be issued by “operation of law” after 90 days have passed from MDEQ’s receipt of a complete application -- regardless of whether or not the permit meets the requirements of the section 404(b)(1) Guidelines, the CWA, and the State Program Regulations -- MDEQ rarely has issued a permit as a result of this 90-day deadline. Where a Part 303 permit has issued by “operation of law”, MDEQ and the Attorney General’s Office assert that the permit issued is issued under Michigan state law alone: such a permit is not a section 404 permit, but a “state-only” permit. See discussion of this subject at pp. 16-17 of this Final Report.

## **§ 233.52 - Program Reporting**

The State Program Regulations require the State to report to EPA on an annual basis. EPA-MDEQ MOA establishes the end of the calendar year as the end of the annual reporting period for MDEQ. Within 60 days of the end of December, MDEQ is to submit to EPA an annual report which evaluates MDEQ’s administration of its program. Items to be addressed in the annual report are listed at 233.52(b). EPA-MDEQ MOA provides for annual reporting from Michigan to EPA on the following items:

- The number and nature of individual and general permits issued, reissued, modified, revoked and denied by MDEQ during the year;
- The number of acres of each of the categories of state regulated waters which were filled either by authorized or unauthorized activities (over one acre in size);
- The number of permits issued under emergency conditions; and
- The number of persons in the State discharging dredged or fill material under general permits and an estimate of the cumulative impacts of these activities.

EPA-MDEQ MOA does not require MDEQ to report against all of the items listed in 233.52(b), but only the items listed above. MDEQ has submitted the annual reports, including the

information mentioned in EPA-MDEQ MOA. All of these reports have been reviewed by EPA, and receipt of these reports is acknowledged by EPA. However, Michigan has not always been timely in submitting its reports. The reports for the years 1994 through 1999 were a year or more late. The issue of timeliness of submission of annual reports was raised with MDEQ in the past, and after MDEQ updated its permit tracking system the 2000 annual report was received in a timely manner. However, since 2001 MDEQ has again been late in submitting annual reports. We have recently raised this issue with MDEQ and MDEQ indicated that it will be more timely in the future. EPA will continue to work with MDEQ staff to ensure that annual reporting is submitted in a timely manner.

### **Summary of Permit File Review**

During the spring of 1999, staff from EPA visited all MDEQ district and field offices in order to conduct a review of files. The number of permit files reviewed at each office varied depending on the number of reviewers and the amount of time available for review in each office. Files from the years 1995 through 1999 were selected for review. The files to be reviewed were selected by picking a number between 0 and 9 and then looking at files which ended with that number. In addition, some files were selected randomly from the file cabinets. Files for projects which would not be regulated under the federal section 404 program were not reviewed. The files were reviewed to determine if decisions were documented and were consistent with the section 404(b)(1) Guidelines. A total of 353 permit files were reviewed.

The amount of information found in the files was highly variable, but generally corresponded to the significance of a project's potential impact on the aquatic resource. In the majority of the files reviewed, the only form of documentation supporting the permit decision was the PRR. The PRRs in those files had a box which was checked if the project was determined to meet the section 404(b)(1) Guidelines, with little or no other information documenting why the project was found to comply with the Guidelines. Interviews with MDEQ staff during the file reviews indicated that the majority of staff were considering most of the appropriate factors when making a decision on compliance with the section 404(b)(1) Guidelines. Staff indicated that factors they considered during the decision making process included avoidance and minimization of impacts, project effects on plant and wildlife communities, changes to hydrology, riparian rights, adjacent land use, and water quality impacts. Most files had little or no information from the applicant to document that an alternatives analysis had been completed. Since the majority of the files reviewed were for projects with fairly minor impacts, a detailed alternatives analysis may not have been appropriate. Some files indicated that alternatives had been considered, but there was no documentation of exactly what alternatives were considered during the analysis. In many files it was evident from the field notes that staff were doing a good job of getting applicants to avoid and minimize project impacts, resulting in the permitted project impacting a smaller area of wetland than was originally proposed in the application.

MDEQ staff did a good job of making site inspections on almost all permit applications. The

majority of sites were inspected by MDEQ staff prior to making a permit decision. In some files comments made by MDEQ staff indicated that site visits had been made, but there was no specific documentation in the file to verify the site visit. Files for projects which had been field inspected often had photographs in them which were presumably taken during a site inspection, yet few of the photographs had basic information attached to them, such as when and where the photos were taken and who took the photos. Documentation of conditions on site was variable. Many PRRs included a brief description of site conditions including plant communities present, notes on soils, and observations on water depth and circulation patterns. The site descriptions often included notes or diagrams illustrating project alternatives which would result in less impact to the resource than the originally proposed project.

Very few of the files reviewed contained wetland delineations. Interviews with staff indicated that staff typically check the delineation during the site inspection. In cases where the wetland boundary had been flagged by a consultant, MDEQ staff verify the delineation and make adjustments as required. These changes are usually noted and drawn on the project plans by MDEQ staff. For many small projects, MDEQ staff walk the site and verify the information provided in the application. MDEQ staff were not consistent in making notes for the file or on a PRR regarding whether the delineation in an application was accurate. There were one or two cases where a wetland delineation had been completed previously and was on file under a wetland assessment number different from the permit file number, but was not included in the permit file (when a delineation already exists, this information should be included in a permit file).

It was not clear from either the file review or the program submittal what steps would be taken if a significant change in delineation was necessary, specifically for cases where the amount of wetland impact was significantly greater than that reported in the application and public notice. We could not determine if the file would be returned to the Permit Consolidation Unit for a corrected public notice or if the permit process would proceed without a new public notice. In cases where a wetland delineation is found to be incorrect and/or the amount of wetland impacted is significantly under-estimated, MDEQ should have a procedure to ensure that such projects are public noticed a second time.

A total of 44 of the files reviewed required wetland mitigation to offset project impacts. In most cases, the mitigation ratio was at least 1.5:1 and, in some cases, higher. The information provided in the mitigation plans was variable. Some information was as simple as a description of the acreage, location and type of wetland to be established, while other plans included detailed grading and planting plans and descriptions of how hydrology was to be restored on the site. Few of the mitigation plans included performance standards. Consequently, it would be difficult to assess compliance with the mitigation requirements of the permit, as well as difficult to enforce them. Although monitoring was required for some permits, few monitoring reports were found in the permit files. MDEQ staff indicated that they did not have the time to follow up on the monitoring requirements and often did not check to see if mitigation had been completed,

unless they were in the project area while making another site inspection.

The PRR form is usually the only information in the file which documents why a permit decision was made. Of the 35328 files reviewed, 74, or 22%, did not have PRRs in the file. The PRRs contained in the files we reviewed did not provide very detailed documentation of how the determination was made that a project met the requirements of the section 404(b)(1) Guidelines and the applicable Michigan statutes. Based on the file review and our discussions with staff, we found that approved projects seemed to be in compliance with the Guidelines. Yet the level of documentation and completeness of the PRRs was extremely variable and may not have been enough to support the decision had the decision been challenged. Typically, when a permit was denied, more extensive documentation of the reason for the permit decision was included in the denial letter.

The PRRs found in the files we reviewed had only a box to check to indicate that the section 404(b)(1) Guidelines had been met. This fact, coupled with the fact that the PRRs sometimes were not completely filled out, made assessing the appropriateness of the permit decision difficult in some cases. MDEQ has developed and now uses a new PRR form (dated April 2000). If filled out completely, this new PRR form will do a better job of documenting the factors considered when determining a project's compliance with the section 404(b)(1) Guidelines. The new PRR form asks the decision maker to explain the findings and the final recommendation concerning issuance or denial of the permit. Additionally, the new PRR form includes a section to be completed during field review in order to document the plants at a site and the soils at a site, to describe the hydrology, and to make other notes or comments. This information will better document the existing wetland conditions at a site.

Interviews with staff during the file reviews revealed that some field offices have a walk-in permit program. Applicants seeking permits for certain minor activities were able to apply directly to those field offices rather than the Permit Consolidation Unit (PCU) processing system. No guidance outlines when an applicant may apply for a permit by “walking in” to a field office and when a permit application must be processed through the PCU. There was no consistency among the field offices with regard to whether or not they accepted walk-in applications.

An additional concern with walk-in applications is that they do not seem to be screened for impacts to federally threatened and endangered species or critical habitat. Following EPA’s issuance of the Preliminary Report, MDEQ management has made it clear to all staff that all applications regardless of whether they are received at the District Office or are processed through the PCU, are to be screened for potential impacts to federally threatened and endangered species and their critical habitat.

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28 19 files reviewed were not checked for presence of the PRR form.

## **Conclusions**

In general, MDEQ is doing a good job with administering its permit program. MDEQ staff are following agency procedures when processing permits; however, they need to do a better job of ensuring that the PRRs are completed and included in every permit file for which a permit decision is made. Staff also need to be sure they clearly document site visits and the findings of the site visits, including verification of wetland delineations and documentation of any changes made to the applicant's delineation. Also, all photographs taken during site visits and included in the file should be labeled.

The majority of files reviewed were complete and included documentation of the permit decision. Based on information in the files and interviews with MDEQ staff, we found permits issued were consistent with the section 404(b)(1) Guidelines. Our file review found that MDEQ staff visit the majority of project sites before a permit decision is made. The files also document that staff are often successful in working with applicants to avoid or minimize the project impacts to wetlands or other aquatic resources.

## **Comments on Michigan Department of Environmental Quality's Wetland Identification Manual: A Technical Manual for Identifying Wetlands in Michigan**

In March 2001, MDEQ finalized its Wetland Identification Manual. This manual provides background information and field methods for identifying and evaluating site characteristics necessary for determining whether or not a site is a wetland as defined by Part 303. MDEQ has adopted administrative rules stating that, under normal circumstances, a two parameter approach shall be used to make a wetland determination. The two parameters used are hydrology and vegetation. This is a departure from the 1987 Federal Wetland Delineation Manual, which uses a three parameter approach, considering vegetation, hydrology and soils to make wetland delineations. MDEQ Wetland Identification Manual does, however, state that in situations where there is a predominance of wetland vegetation and no direct visible evidence of water at or near the surface, the person conducting the determination may use the physical and chemical characteristics of the soil as an indicator of current or recent inundation or saturation. Although MDEQ manual does not require the use of all three parameters to establish presence of a wetland, extensive information is provided in the manual for using presence of hydric soils as an indicator of hydrology. This makes MDEQ manual functionally equivalent to the 1987 Federal Wetland Delineation Manual.

MDEQ manual uses methods to evaluate dominant vegetation, presence of wetland hydrology, and presence of hydric soils which are similar to the methods used in the 1987 federal manual. The procedures for evaluating presence of wetland on disturbed or problem sites are very similar to the 1987 federal manual as well. In summary, we have found that MDEQ Wetland Identification Manual is comparable to, and would result in the same delineation on a site as

would, the 1987 Federal Wetland Delineation Manual.

## **Assessment of Coordination under the Endangered Species Act**

There are currently 23 federally-listed threatened or endangered (T & E) species that occur in Michigan. In order to screen incoming applications for the potential to affect T & E species, MDEQ relies on their CIWPIS. The CIWPIS database is tied into the Michigan Natural Features Inventory (MNFI) database which contains the most up-to-date information on documented occurrences of T & E species. MDEQ staff run a search of the CIWPIS database which checks the township, range and section in which the project is located as well as the surrounding eight sections to determine if T & E species have been documented in any of the sections in or adjacent to the project. If CIWPIS shows that a T & E species has been documented as present at the project site or in the surrounding sections, the file is sent to the Michigan Department of Natural Resources (MDNR) Natural Heritage staff who determine whether there is reasonable potential for the project to affect T & E species. If there is a potential for an impact, MDEQ staff are notified that the permit application meets the criteria for federal review, it becomes a “red file”, is put out on public notice and sent to the federal agencies for review.

This process gives the United States Fish and Wildlife Service (USFWS) an opportunity to review the project and provide comments. With respect to T & E species impacts, the USFWS typically recommends denial of the permit, modification of the project, or the addition of permit conditions that will ensure the project will not jeopardize a federally listed species or adversely modify or destroy designated critical habitat. The USFWS’s comments are included in the federal comment letter provided to MDEQ by EPA. If EPA objects to the issuance of a permit MDEQ either denies the permit, or works with the applicant to resolve the federal issues, including any T & E concerns. The USFWS has found MDEQ to be responsive to comments made by the federal agencies, and that MDEQ takes the steps necessary to either ensure that a project is modified or that the permit is conditioned in such a way that the potential for impacts to T & E species are removed or minimized (USFWS personal communication).

While this procedure is working for permit applications that require public noticing, projects which meet the criteria for processing as minor or general permits<sup>29</sup> were not always being screened for T & E impacts. The USFWS identified this as a concern in their October 4, 1999 and April 9, 2003 letters regarding this program review. In order to address this concern MDEQ, the USFWS, and EPA have been working to develop a procedure for reviewing general/minor permit applications for the potential to impact federally listed species. The procedure that has been developed by the agencies requires that all permit applications -- including those meeting the criteria for minor/general permits and any “walk-in” permit applications -- be screened using the CIWPIS system as outlined above. If the screening indicates that the proposed project is in the proximity of a known occurrence of a federally listed species, a copy of the application is

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<sup>29</sup> Under Part 301, activities that are similar in nature and have minimal potential for causing harmful interference can be authorized using a Minor Permit. In Part 303, activities that are similar in nature, will cause only minimal adverse environmental effects, and will have only minimal cumulative adverse environmental effects can be authorized using a General Permit.

forwarded to the MDNR and to the MNFI for additional screening. If the MDNR or the MNFI find there is likely to be no impact, the application can be processed as a minor/general permit. If the MDNR or the MNFI determine, based on the nature and scope of the proposed activity, that there is the general likelihood of an impact to a listed species, MDEQ field staff make a site visit. Depending on the results of the site visit, MDEQ may initiate informal coordination (as outlined in the procedures) with the USFWS or, if the MDNR makes a definite statement that there will be an impact to a T & E species, the application no longer meets the criteria for a minor/general permit and will be processed as a “red” file. Under the new procedure, all minor/general permit files resulting in a “hit” in CIWPIS for T & E impacts must include a worksheet documenting that the project was evaluated for impacts to federally listed species.

This draft procedure was distributed to MDEQ field staff in March 2005, and currently is being implemented. MDEQ will be coordinating with the USFWS and EPA regarding the effectiveness of the procedure and has committed to finalizing the procedure by July 2008. With the implementation of this procedure for screening minor/general permits, one of the major concerns of the USFWS with the State’s section 404 program has been addressed. In order to formally document these procedures, EPA is committed to working with MDEQ and the USFWS to develop an interagency agreement that outlines each agency’s responsibilities regarding such things as notifying the other agencies of the potential for impact to T & E species, gathering and providing necessary information, communicating with the other agencies, and methods for resolving differences among the agencies. EPA finds that with the new minor/general permit review procedures in place, MDEQ is doing a good job of assessing T & E species impacts under the section 404 program. The development of an interagency agreement and the finalization of MDEQ’s review procedures will formally document each agency’s role in the T & E review process.

## **Analysis of Final Agency Permit Decisions in Administrative Contested Cases**

After MDEQ staff in the Land and Water Management Division (LWMD) decide whether to grant a permit application, grant a permit for a modified project, or deny a permit application, the applicant may seek further review of that decision within MDEQ. The applicant does so by filing a petition for a contested case. A contested case hearing then is conducted by an ALJ with MDEQ's Office of Administrative Hearings who, following the hearing, writes a Proposal for Decision. If either MDEQ staff or the applicant file exceptions to a Proposal for Decision, the decision is then reviewed and the reviewer issues MDEQ's Final Decision on the permit application. For a period of time, Final Decisions were made by MDEQ's Chief Administrative Law Judge; during 1999 the Director of MDEQ withdrew this authority from the Chief ALJ, and now either the Director or his designee reviews Proposals for Decision and issues Final Decisions. A Final Decision may embody one of three possible permitting actions: the decision by MDEQ staff to deny a permit may be affirmed; the decision by MDEQ staff to deny a permit may be overturned and the decision maker may order MDEQ staff to issue a permit for a project as described in the application; or the decision maker may outline the terms of a modified permit which will contain terms and conditions different than had been contemplated by MDEQ staff, and then order MDEQ staff to issue such a modified permit.

Because MDEQ's Office of Administrative Hearings and MDEQ Director review decisions of MDEQ permitting staff and render final agency permit decisions, EPA is analyzing these decisions as part of its section 404 program review. EPA already has identified some weaknesses in Michigan law that render the law as written less stringent than required by CWA section 404 and EPA-promulgated State Program Regulations. EPA now analyzes whether -- through its final contested case decisions - MDEQ applies Michigan legal provisions so as to be consistent with, and as stringent as, federal section 404 law. This analysis also considers whether contested case decisions, by applying Michigan law as written to reach certain factual and legal conclusions, demonstrate ways in which Michigan law is less stringent than federal wetlands law (or, alternatively, if the decisions interpret the law in a manner consistent with the CWA and regulations).

In EPA's Preliminary Report, an analysis of contested case decisions issued between 1994 and 2000 identified a number of serious concerns regarding how MDEQ's Proposals for Decision and Final Decisions were applying important legal concepts such as what is a feasible and prudent alternative, what is a wetland dependent project, and who bears burdens of proof and persuasion during contested cases. Please refer to the Preliminary Report for that discussion.

In preparing this Final Report, EPA reviewed final contested case decisions made during 2004. Almost all of the concerns identified in the Preliminary Report have fallen away. This change is in large part due to a new administrative rule under Part 303 that MDEQ issued in April 2000 - R 281.922a - as well as to the ALJs' and MDEQ Director's interpretation and application of this new rule (and pre-existing statutory and rule requirements of Part 301 and Part 303). One issue which continued to concern EPA - despite the fact that R 281.922a addressed the issue - was how the feasible and prudent alternatives analysis mandated by

§324.30311(4) was to be undertaken. For a few years, MDEQ contested case decisions continued to interpret § 324.30311(4) so that a permit was barred if a feasible and prudent alternative to a project could be affected at the subject property, but not if a feasible and prudent alternative could be affected off-site. In early 2004, however, MDEQ Director issued a Final Decision In re Ocedek, No. 00-05-0040 (Feb. 27, 2004) which, in EPA's view, interpreted Michigan state law in a manner that was both correct and consistent with federal law on this issue.

Below we briefly review the current status of concerns we raised in the Preliminary Report. A discussion of additional rules which EPA thinks would be beneficial for MDEQ to promulgate under Part 301, as well as Part 303, can be found in Section 1: Analysis of Legal Authorities, at pages 10-26 of this Final Report.

#### SECTION 404(B)(1) GUIDELINES - BACKGROUND DISCUSSION

The underlying question we asked during our analysis of contested case decisions was whether MDEQ's Office of Administrative Hearings is assuring compliance with CWA section 404(h)'s mandate that a State program issue permits which "apply, and assure compliance with, any applicable requirements of [section 404], including . . . the guidelines established under subsection (b)(1) of this section . . . . 33 U.S.C. §1344(h). A State's obligation to apply the section 404(b)(1) Guidelines is imposed a number of times in the State Program Regulations. For example, 40 C.F.R. § 233.34(a) mandates that before each permit is issued the Director of a State agency implementing that State's EPA-approved section 404 program "review all applications for compliance with the 404(b)(1) Guidelines and/or equivalent State environmental criteria as well as any other applicable State laws or regulations." See also 40 C.F.R. §§ 233.20(a) and 233.23(a) (the former bars a Director from issuing a section 404 permit if it does not comply with the Guidelines; the latter requires conditions be placed in each permit that will ensure the project's compliance with the Guidelines). Michigan specifically agreed in 1983 (in the MOA signed by EPA and MDEQ's predecessor, the MDNR) to administer and enforce the 404 program in accordance with the State Section 404 Program Assumption Regulations [and] the 404(b)(1) Guidelines. This obligation to ensure that all permits are consistent with the 404(b)(1) Guidelines applies to all of MDEQ, including the Office of Administrative Hearings; and the obligation exists whether or not a permit decision was issued as a consequence of contested case proceedings. A State's failure to comply with the section 404 program MOA can be a basis for program withdrawal. 40 C.F.R. § 233.53(b)(4).

As explained earlier, the Attorney General asserts in general terms that environmental criteria contained in Part 301, Part 303, and their administrative rules are roughly equivalent to the section 404(b)(1) Guidelines. As described elsewhere in this Final Report, the manner in which MDEQ staff applies Michigan's environmental criteria -- such as through using the PRR form when examining a proposed project -- seems to be ensuring that when MDEQ staff make initial permit decisions, they are actually applying environmental criteria that is equivalent to, and as stringent as, the section 404(b)(1) Guidelines.

By contrast, at the time EPA issued its Preliminary Report, it was clear that MDEQ's Office of

Administrative Hearings had repeatedly failed to apply Michigan's environmental criteria in a manner that was consistent with the section 404(b)(1) Guidelines; in some contested case decisions, the decision maker indicated that he affirmatively had decided to not apply the section 404(b)(1) Guidelines<sup>30</sup>, despite the urging of MDEQ's representatives both broadly to apply the Guidelines, and specifically to apply section 404-consistent positions<sup>31</sup> on issues such as a proposed activity's wetland dependency and whether feasible and prudent alternatives existed. These decisions were undermining the State of Michigan's ability to administer a program that meets the terms of CWA section 404(h) and the State Program Regulations.

#### PROCEDURAL RULES AND BURDENS OF PROOF

In the Preliminary Report, EPA recommended that MDEQ promulgate administrative rules that specifically would apply to the conduct of MDEQ permitting contested cases, and the legal standards which apply in deciding whether a Part 301 or Part 303 permit must be issued by MDEQ.

One reason for this recommendation was EPA's concern that an ALJ would accept information and evidence which had not been before MDEQ staff when staff considered a permit application, and that an ALJ would use that new information to fashion a new project and order MDEQ staff to issue a permit for that new project; such a practice created a real risk that the public would not have been able to submit comments as to the new scope and impact of the project. Recent MDEQ decisions, however, do not embody this practice and seem to eliminate our concern. See e.g., In re Dubuc, No. 02-40-0016-P (Oct. 8, 2004) (applicant cannot change nature of proposed activity during the contested case hearing process and argue a different project is a feasible and prudent alternative); In re Scheer, No. 01-20-0005-P (Apr. 13, 2004) (ALJ found applicant failed to rebut regulatory presumption that building on upland would have less adverse impact and failed to bear burden of proving a feasible and prudent alternative did not exist, but the ALJ gave the applicant a chance to file a new application with acceptable plan for the alternative identified during proceedings). Accord In re Jurries, No. 02-70-0063-P (Aug. 24, 2004).

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30 See In re Carabell, No. 93-14-602 (Sept. 30, 1998) (in Final Decision, Chief ALJ stated only issue before him was whether applicant should be given State permit; the Chief ALJ ordered MDEQ staff to issue a Part 303 permit despite awareness that federal agencies' objections were unresolved and applicant would have to seek a section 404 permit from the Corps). See also In re CCMS Assocs., Inc., No. 97-04-0138 (Oct. 10, 2000) (in Final Decision MDEQ Director endorsed ALJ's refusal to consider project's compliance with section 404 or the Guidelines, and ordered issuance of "State-only" Part 303 permit in light of EPA's outstanding objections, reaching conclusion of law that "issuance of a Part 303 permit does not negate the requirement for the Petitioner to obtain all other necessary permits" such as a section 404 permit from the Corps; In re Prado, Inc., No. 96-08-0088 (Mar. 1, 1999) (Final Decision ordered issuance of "State-only" Part 303 permit). Cf. In re Schultz, No. 91-5-160W (Nov. 25, 1996) (ALJ did not let MDEQ staff testify about section 404(b)(1) Guidelines).

31 Again, section 404(h) and the State Program Regulations does not require a State to apply the Guidelines themselves, rather, it merely requires that State permit decisions be consistent with section 404 law. MDEQ ALJs and final decision makers could apply Michigan laws and regulations in ways that are consistent with federal section 404 law. In Section 1, we explain that MDEQ has agreed not only to make certain specific amendments to applicable administrative rules, but also to incorporate, by reference, the section 404(b)(1) Guidelines.

Another reason for our recommendation was that, in a number of pre-2004 contested case decisions, the ALJ made no explicit finding that the applicant had met its burden of proving that unacceptable adverse environmental impacts would not result, and it was unclear whether the applicant actually had borne the necessary burden of proof. In fact, in many pre-2004 contested case decisions, it seemed clear that the ALJ placed the burden of proof on MDEQ staff, demanding that they prove facts such as whether a proposed activity would cause unacceptable adverse environmental impacts, or that there was a feasible and prudent alternative. Not only did these decisions misplace the burden of proof, but they failed to demonstrate that the facts in a particular situation were such that issuing a permit would comply with the section 404(b)(1) Guidelines or equivalent State environmental criteria. This occurred despite the direction in both Part 301 and Part 303 that MDEQ not issue a permit unless it finds that the applicant has established certain facts, including that unacceptable adverse environmental impacts will not result from a discharge.

Effective January 28, 2003, MDEQ now has administrative rules establishing contested case procedures. R 324.1-324.75. These rules should ensure that final permit decisions made by the Office of Administrative Hearings apply either the section 404(b)(1) Guidelines or equivalent State environmental criteria in such a way that the principles of the Guidelines are respected. See particularly R 324.64 (burden of proof) and R 324.74 (standards for final decision maker).

#### WATER DEPENDENCY AND FEASIBLE AND PRUDENT ALTERNATIVES

In determining whether to issue a dredge and fill permit, two major issues that must be resolved are whether a proposed activity is “wetland dependent” (water dependent, under federal law) and whether there are feasible and prudent alternatives to a project as proposed (practicable alternatives, under federal law). As discussed in EPA’s Preliminary Report (see pages 58-65), many contested case decisions contain erroneous findings and conclusions on both of these issues. Yet the contested case decisions issued during 2004 - both Proposals for Decision and Final Decisions - do not contain such erroneous findings and conclusions. Therefore, MDEQ’s CWA section 404 permit decisions issued as a result of contested case proceedings no longer reflect substantial inconsistency with federal law on these two issues. Following is a brief discussion of the issues.

The federal legal standards on these two issues are established by 40 C.F.R. § 230.10(a). Michigan’s parallel standards are set forth in Part 303: “[a] permit shall not be issued unless the applicant also shows either . . . : (a) The proposed activity is primarily dependent upon being located in the wetland. (b) A feasible and prudent alternative does not exist.” § 324.30311(4).

In many contested case decisions that were issued during the 1990s, ALJs and MDEQ’s final decision makers repeatedly found that, if an applicant’s proposed activity could not be built on the applicant’s chosen parcel without necessitating discharges to, and filling of, “the wetland” located at the chosen parcel, then the project was wetland dependent. There are numerous decisions concluding that building a house or other structure is wetland dependent -- meeting the permit criteria of § 324.30311(4) -- because the parcel chosen by the applicant is largely wetland and the project chosen by the applicant is designed such that it can only be constructed on that

parcel if wetlands are filled. See the Preliminary Report, pages 60-61, for case analyses.

It appears that this view of the wetland dependency test began with the 1992 contested case decision In re Brammer, Nos. 88-6-500 and 90-6-159W (Sept. 28, 1992). The presiding officer in Brammer rejected MDEQ staff's (correct) argument that an activity is wetland dependent if it is the type that can be performed only in a wetland. The conclusion in Brammer, and its perpetuation by presiding and reviewing officers for years afterward, was rooted in the flawed wording of the wetland dependency provision at § 324.30311(4). As explained by the Chief ALJ in another contested case: "The operative term in [§ 324.30311](4)(a) is 'being located in the wetland'. The plain and unambiguous meaning of this term is whether the activity must extend into the portion of the parcel which is wetland. If the entire parcel is wetland, the activity must occur in it so as to allow a use of the parcel. If, as in this case, the existing upland is not large enough to accommodate the feasible and prudent alternative, impact on the wetland is unavoidable. Therefore, the proposed activity is primarily dependent on being located in the wetland." In re Carabell, No. 93-14-602 (Sept. 30, 1998).

During 2004, by contrast, not a single Final Decision issued by MDEQ contained an incorrect conclusion - or a conclusion inconsistent with federal law -- as to whether a proposed activity was wetland dependent. See, e.g., In re Owens, No. 002-46-0072-P (Oct. 12, 2004) (residential development is not wetland dependent); see also, In re Thomas, No. 99-10-1118-P (Mar. 15, 2004) (in Final Decision, Director corrected ALJ's conclusion that building a home was wetland dependent, noting that interpretation was common prior to promulgation of R 281.922a, even though statute's wording always has been plain and unambiguous).

Nonetheless, EPA still has a tangential concern about Michigan's wetland dependency test. On its face, Part 303 seems to preclude a feasible and prudent alternatives analysis if the primary purpose of a proposed activity is deemed to be wetland dependent; in a recent Final Decision, MDEQ Director confirmed that this is the correct reading of Part 303's § 324.30311(4): after the Director found that cranberry farming is a wetland dependent activity, he concluded, given this, it is unnecessary to reach the question of whether the Applicant has shown a feasible and prudent alternative [under 30311(4)(b)] does not exist. In re Huggett, No. 90-09-257W (Mar. 31, 2005) (page 39). By contrast, under federal law, even projects deemed water dependent must undergo an alternatives analysis to determine if there exists a less-environmentally damaging alternative (a feasible and prudent alternative under Michigan law). 40 C.F.R. § 230.10(a)(3). An acceptable alternative may eliminate discharge to waters of the United States, or it may entail discharges which cause less harm to the aquatic ecosystem and the environment as a whole, as long as the alternative also is technically and financially feasible and consistent with overall project purposes. This Final Report already has substantially discussed this issue, when it discussed the need to minimize the impacts of even wetland-dependent discharges, see pages 22-23. We reach the same conclusion regarding the need for a corrective action as we did at the end of that discussion: although we would prefer that Part 303 be amended, we will monitor MDEQ's administration of the program to see whether, after the section 404(b)(1) Guidelines are incorporated by rule into MDEQ's permit decision making process and criteria, wetland dependent discharges are examined for the availability of feasible and prudent alternatives,

despite the wording of § 324.30311(4).<sup>32</sup>

We now turn to the treatment of the feasible and prudent alternatives analysis in the contested case decisions. The reader will recall that federal law requires that if an alternative to a project as proposed in a permit application is practicable (feasible and prudent), is consistent with overall project purposes, and will cause less harm to the aquatic ecosystem without creating other significantly adverse environment effects, the discharges associated with the proposed project shall not be permitted. EPA observed, in the Preliminary Report (see page 61), that ALJs from the Office of Administrative Hearings and the final MDEQ decision maker had correctly applied this principle in most contested cases. See, e.g., Prado, No. 96-08-0088 (Mar. 1, 1999) and In re Charfoos and Co., No. 87-14-824W (Aug. 29, 1996) (both decisions held that an alternative need be economically feasible only; an alternative can be feasible without maximizing applicant's profit). See also In re Testolin, No. 98-08-0064 (Mar. 19, 1999) (explaining that the alternatives analysis must objectively examine whether a particular alternative is economically achievable; it is not to examine the subjective matter of an applicant's financial resources and ability to perform the alternative). Contested case decisions issued during 2004 continue to adhere to these section 404-consistent principles. See e.g., In re Dubuc, No. 02-40-0016-P (Oct. 8, 2004) (denied application because MDEQ staff had identified alternative parcels where project could occur, and, despite applicant's stated desire to only develop the chosen parcel; fact that applicant might realize a lower profit if it used an alternative was not determinative under R 281.922a); cf. In re Zielinski, No. 01-66-0072-P (July 29, 2004). In cases where a permit is granted, the final decisions issued during 2004 appear to make an honest effort to minimize environmental impacts by making project modifications (but see pages 22 and 61-62 of this Final Report, regarding minimizing impacts of wetland-dependent projects). The Huggett Final Decision already referenced, which was issued during March 2005, treated this issue consistent with the 2004 contested case decisions; in Huggett, the Director found that a significant reduction in the acreage of a cranberry farming operation was prudent (as well as feasible) because an operation of that size was commercially viable, even though it would not achieve applicant's profit goals. In re Huggett, No. 90-09-257W (see pages 14-15).

In the Preliminary Report, EPA also discussed MDEQ Director's Final Decision in In re Knowles, No. 98-06-0210 (Mar. 14, 2000) (Preliminary Report, pages 64-65). In Knowles, MDEQ Director determined that the feasible and prudent alternatives analysis imposed by § 324.30311(4) - as opposed to the feasible and prudent alternatives analysis imposed by § 324.30311(2) - should be applied only to the site chosen by the applicant; the effect of this

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<sup>32</sup> In the Huggett Final Decision, MDEQ Director extensively analyzed whether a feasible and prudent alternative location - including a substantially reduced footprint for the project and discharges - existed as compared to the discharges that would occur as proposed in the Part 303 permit application. The Director entered into this analysis, ultimately authorizing a permit for a substantially reduced project, pursuant to S 324.30311(2), before his analysis had reached the mandates of S 324.30311(4). While the result of this analysis in Huggett may have been that feasible and prudent alternatives for a wetland dependent project were considered the same as they would have been under federal law alone, such is not the inevitable result of applying the statutory mandates of S 324.30311(4) in combination with S 324.30311(2). See our discussion of this issue at pages 22-23 and note 25 of this Final Report.

interpretation of how the alternatives analysis/analyses under § 324.30311 is/are to be conducted is that even if a project could feasibly and prudently be performed at an alternative location, a Part 303 permit is not absolutely unobtainable; rather, the existence of a feasible and prudent alternative location will be one of many factors to be considered by MDEQ during the balancing it is to perform in determining, under § 324.30311(2), if a project will cause an unacceptable disruption to aquatic resources. By contrast, the availability of any other type of a feasible and prudent alternative (e.g., an alternative method, changing the scope of the project) would be a basis for denying a Part 303 permit for any non-wetland dependent project, pursuant to § 324.30311(4). In the Preliminary Report, EPA noted that this ruling was directly contrary both to the Guidelines' alternatives analysis - which call for minimizing a project's reasonably foreseeable adverse impacts to the aquatic environment, 40 C.F.R. § 230.10(a) - and the Guidelines's requirement that no permit be issued if it will cause a significant degradation of the waters of the United States, 40 C.F.R. § 230.10(c). See 40 C.F.R. § 233.20(a). The Knowles ruling also seemed to be unsupported by Part 303 itself. (EPA also noted that Knowles may have been the first time that MDEQ had announced, or applied, this interpretation of § 324.30311.)

Two years after the Knowles decision, in September 2002, MDEQ Director issued a Final Decision that re-announced the conclusion that the feasible and prudent alternatives test of § 324.30311(4) did not apply to alternative project locations, but was to analyze only the availability of on site alternatives. That Final Decision was issued in In re James, No. 00-38-0027-P (Sept. 25, 2002), and it specifically made clear that this interpretation of § 324.30311 applied despite the promulgation of a new administrative rule, R 281.922a.<sup>33</sup> The James decision engendered serious concern within EPA, for awhile. But that decision was overturned by MDEQ Director on February 27, 2004, in the contested case of In re Ocedek, No. 00-05-0040. In Ocedek, the Director held that “§ 30311(4)(b) unambiguously requires that any alternative, whether it is on site or off-site, be utilized if it is \*feasible and prudent\*”, and directed MDEQ staff to consider off-site alternatives when applying the mandates of § 324.30311(4) to a permit application. This specific ruling of Ocedek was repeatedly applied to Part 303 contested cases decided during 2004. Due to the fact that the Ocedek ruling now represents current Michigan law, and the fact that the ruling is consistent with federal CWA section 404 law, EPA concludes that, with regard to this subject, Michigan's section 404 program is satisfactory under CWA section 404(h) and 40 C.F.R. part 233. Furthermore, as a body, the 2004 decisions reflect a more careful and thoughtful approach to analyzing not only project alternatives, but also all of the criteria in § 324.30311. EPA, of course, will review future contested case and state court decisions to see if the Ocedek ruling continues to be applied.

Another aspect of the alternatives analysis that we should briefly revisit, as it was discussed in the Preliminary Report, is the misconception held by ALJs that a feasible and prudent alternative to a proposed activity cannot be “no action” (Preliminary Report, page 64). We

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<sup>33</sup> The Director, as support for his conclusion, cited to the decision in Brammer, Nos. 88-6-500 and 90-6-159W (Sept. 28, 1992), while the ALJ, who had come to the same conclusion, had cited to the decision in Knowles, No. 98-06-0210 (Mar. 14, 2000).

observe that this misconception has not been applied in any recent contested case decision; consequently, it does not seem to be a current problem in MDEQ's administration of the section 404 program.

In the Preliminary Report, EPA expressed concern as to a rule of interpretation utilized in contested case decisions for Part 301 permits (Preliminary Report, page 62). Specifically, if a Part 301 permit application for a proposed activity which the decision maker finds would have no environmental impact, or would have a de minimis environmental impact, then a feasible and prudent alternatives analysis is not to be performed.<sup>34</sup> (It appears that MDEQ permitting staff applies this same rule when processing a Part 301 permit.) This "rule" is rooted in a Part 301 administrative rule, R 281.814, with the rationale that, if a discharge will have no adverse environmental impact, then a feasible and prudent alternative which would cause less impact cannot exist; conducting a feasible and prudent alternatives analysis would serve no end. After examining decisions that apply this "rule", EPA now concludes that it seemingly has not been applied to factual situations other than those where there was actually no environmental impact expected to be caused by a proposed activity (or a very minor impact). So, although there is no federal counterpart to this MDEQ "rule" of interpretation - federal law provides that any discharge to waters of the United States shall not be permitted unless the permitting agency determines that no less harmful alternative exists - as applied, EPA cannot find that it renders the Michigan section 404 program less stringent than federal law.<sup>35</sup>

#### PUBLIC TRUST AND ENVIRONMENTAL IMPACT REVIEW UNDER PART 301

Although EPA did not discuss, in the Preliminary Report, the issue of how review of environmental impacts from projects to be permitted under Part 301 is mixed up with the concept of adverse effects to the "public trust" as referenced in § 324.30106, we would like to briefly discuss the issue in this Final Report. Section 324.30106 is worded in a way that makes its interpretation somewhat difficult. The first sentence of the section states that [MDEQ] shall issue a permit if it finds that the structure or project will not adversely affect the public trust or riparian rights. While this sentence does not seem to reference an environmental impact review, other wording in § 324.30106 - particularly the sentence "[MDEQ] shall not grant a permit if the proposed project or structure will unlawfully impair or destroy any of the waters or other natural resources of the state" - has been construed by Michigan to require just such an environmental impact review. Furthermore, MDEQ final decision makers turn to administrative rule R 281.814 as providing the framework for that review; R 281.814 bars issuance of a Part 301 permit unless impacts to the environment are found to be minimal and no feasible and prudent alternative to a project is available. These legal constructions of the requirements of § 324.30106 and R 281.814 have been utilized in a number of contested cases decisions issued through 2004. See, e.g., In re

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<sup>34</sup> This "rule" appears to first have been pronounced in the contested case decisions *In re Kreeger*, No. 90-9-409 (Feb. 10, 1994), and *In re Schenden*, No. 94-10-733 (Mar. 31, 1998).

<sup>35</sup> EPA does ask MDEQ to consider whether providing some guidance (perhaps even a new administrative rule) on the issue of what is a "minimal" adverse impact to the environment under R 281.814 would be beneficial.

Taylor, No. 01-10-0049-P (Apr. 2, 2004). Finally, MDEQ has defined the public trust as including the paramount concern of the public in protecting, and the duty of the State to protect, “the air, water, and other natural resources of [the State] against pollution, impairment, and destruction. R 281.811(g).”

Notably, MDEQ continues to apply this approach when reviewing applications for Part 301 permits, despite a 2001 State court decision which held that once the first sentence of § 324.30106 was satisfied - and MDEQ finds that a project will not adversely effect either the common law concept of the “public trust” or riparian rights - then MDEQ must issue a

Part 301 permit, without any consideration of other environmental effects of the project. Oceana County Bd. of Road Comm’rs v. Dep’t of Env’tal Quality, 2001 WL 1585291 (Dec. 11, 2001) (per curiam). Another significant aspect of this State court’s reference to the common law concept of “public trust” is that only navigable-in-fact waters (i.e., waters on which logs are capable of floating) are impressed with the public trust; consequently, under this court’s reasoning, a Part 301 permit would always issue for projects in non-navigable lakes and streams as long as riparian rights were not adversely affected.<sup>36</sup>

As long as MDEQ contested case decisions continue to apply the environmental review analysis under Part 301 as they have in the past, and as long as no other State court adopts the reasoning of the nonprecedential and unreported Oceana decision, EPA does not find this public trust issue to be in any way rendering Michigan’s section 404 program inconsistent with federal law. We will, however, keep close watch on future administrative and civil decisions on this subject. Lastly, while we realize that MDEQ and the Attorney General’s Office are aware of this issue and have attempted to deal with it, it may be appropriate for MDEQ to issue further guidance or perhaps a rule on how environmental impacts of a project are to be considered as part of any trust analysis, or request that the Attorney General issue an opinion on this issue.

#### OTHER CONCERNS

Here we briefly mention a few continuing concerns that EPA has with Michigan law which, perhaps, are made most visible to the public through contested case decisions interpreting that law. One such concern is the confused and varying approach to the cumulative effects which a proposed project may have; this concern is discussed in greater detail in the Legal Authority Concerns section of this Final Report, at pages 23-24.

Another concern is how MDEQ addresses permit applications which have been made after unauthorized discharges already have occurred; in many contested case decisions over the years, MDEQ has repeatedly held that such unauthorized discharges cannot be considered under the “unlawful” language of Part 303. EPA’s proposal for how MDEQ might effectively deal with

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<sup>36</sup> Although contested case decisions likewise state that only navigable-in-fact waters are impressed with the public trust, in applying the first sentence of § 324.30106, those decisions go on to perform an environmental impact review, using R 281.814.

unauthorized discharges at the permit application stage is mentioned in the Enforcement and Compliance Review section of this Final Report, at page 75.

### CONCLUSION

In general, the proposals for decision developed by MDEQ ALJs, as well as the Final Decisions issued by MDEQ Director, during 2004 reflect better adherence to state statutory and regulatory requirements and standards, properly apply rules promulgated in the last few years, and show a greater thoughtfulness in following procedures and considering the evidence presented - or lack of evidence - in a contested case proceeding. One result has been MDEQ permit decisions which are consistent with section 404 and provide protection of waters and wetlands that is equivalent to the protection provided by section 404 and its Guidelines. Moreover, MDEQ is continuing efforts to develop rules, guidance, and procedures that will address potential issues that still exist (for example, identifying the geographic area to be considered when MDEQ determines if a feasible and prudent alternative location exists, see Ocedek).

Based on the corrective actions already taken by MDEQ, the improved character of MDEQ's contested case decisions as briefly discussed above, and the corrective actions which MDEQ has committed to take in the future, EPA finds no basis to conclude that the contested case process is undermining Michigan's administration and enforcement of its CWA section 404 program or provides grounds for EPA to initiate program withdrawal proceedings. EPA will examine contested case decisions issued in the future to monitor whether this continues to be true.

## **Enforcement and Compliance Review**

A central part of EPA's review of MDEQ's section 404 program was the evaluation of their enforcement and compliance program. The purpose of the review was to identify and evaluate the strengths and weaknesses of MDEQ program. Our evaluation also will provide an "informal" determination regarding whether Michigan has maintained an effective program that initiates "timely and appropriate" enforcement actions, which results in wetland restoration and deterrence of wetland violations.

The scope of the evaluation consisted of a review of 327 citizen complaints received by MDEQ reporting wetlands filled without permits. With respect to these citizen complaints, our review focused upon whether MDEQ investigated the complaint and whether an appropriate response was completed. In addition, our review examined 55 enforcement actions pursued by MDEQ to obtain injunctive relief. The types of injunctive relief obtained by MDEQ were: (a) issuing cease and desist orders to stop the violation; (b) requesting information on the project activity; (c) ordering removal of the discharged materials and restoration of the wetlands; (d) referring the violation for criminal or civil prosecution; and (e) mitigating environmental impacts.

EPA-MDEQ MOA requires that MDEQ take "timely and appropriate" enforcement actions against persons violating permit conditions and against persons conducting unauthorized discharges of dredged or fill materials into waters of the United States. Although EPA-MDEQ MOA does not explicitly define the parameters for "timely and appropriate" action, for purposes of our review we have relied upon guidance which EPA prepared regarding enforcement management systems (EMS) authorized under section 402<sup>37</sup> of the CWA. That EMS guidance provides that the process of determining whether an alleged violation is actionable, i.e., an enforcement action is warranted, should not exceed 45 days. It also notes that violation of an order issued by a State is a serious violation; a violation of a State enforcement order should be treated as a significant noncompliance issue when the violator fails to provide required reports more than 30 days after the compliance date, fails to initiate construction or attain final compliance within 90 days of the compliance date, or fails to comply with the order for two months during two consecutive quarters.

In addition, the timeliness and appropriateness of MDEQ enforcement responses, federal regulatory requirements at 40 C.F.R. part 233 provide that MDEQ will maintain minimum specifications for a State-assumed program. These specifications include the following:

- 1) Maintain a program designed to identify persons who have failed to obtain a permit or who have failed to comply with conditions of an issued permit;
- 2) Have the legal authority to enter any site to perform an inspection and otherwise to investigate compliance with EPA-approved program;
- 3) Provide for inspections to be conducted, samples to be taken, and other information to be gathered, in a manner that allows their use in enforcement proceedings;

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<sup>37</sup> The Enforcement Management System for the National Pollutant Discharge Elimination System, 1989.

- 4) Maintain a program to receive information from the public regarding alleged violations and ensure that the information is properly considered;
- 5) Have authority to restrain any person from engaging in unauthorized activities;
- 6) Sue to enjoin any threatened or continuing violations and assess or sue to recover civil penalties and criminal remedies;
- 7) Investigate and provide written responses to all citizen complaints submitted pursuant to State procedures, and
- 8) Provide public notice of and at least 30 days for public comment on any proposed settlement of a State enforcement action.

### **REVIEW OF CITIZEN COMPLAINTS**

EPA's review of citizen complaints reporting wetland filling to MDEQ was completed over a five-month period. Each MDEQ district field office was evaluated between April 1999 through August 1999. EPA randomly selected 327 complaint files.

MDEQ district field offices receive a significant volume of citizen complaints. Annual reports prepared by MDEQ suggest that MDEQ investigated an average of 800 citizen complaints each year from 1990 through 1997. Based upon the number of citizen complaints reviewed by EPA, our evaluation finds that the extent and number of complaints have remained constant. The district field offices make a concerted effort to address these complaints.

According to the minimum requirements, we conclude that MDEQ has maintained a program designed to identify persons who have failed to obtain a permit or to comply with conditions of an issued permit. In accordance with the 2001 MDEQ Compliance and Enforcement Guidance Manual (2001 Manual), each district field office maintains a uniform citizen complaint file dedicated solely to recording violations reported by the public. When the district field office receives a complaint, the complaint is assigned a uniform docket number which indicates the year, a county number, and the file number for the complaint. MDEQ tracks the complaint through the docket system. The district field office then assigns the complaint to an inspector who decides whether to inspect the site.

In the 327 complaint files which EPA reviewed, most citizen complaints were routinely followed-up by inspections. Generally, we found some type of documentation in the complaint file, such as handwritten notes, a topographic map or township map of the site, site photographs, schematic drawings, or a partially completed Project Review Report (PRR), showing that an inspector had visited the site. Because the district field offices are close to the violations, our review found that MDEQ has been responsive to citizen complaints by conducting inspections within 60 days -- and routinely within two weeks. Delays in the complaint investigation were rare, and when delays occurred, they generally were due to weather conditions or other workload priorities, such as permit reviews.

Our 1999 review of citizen complaint files found several issues that needed to be resolved. We routinely found that the file documentation was deficient in accurately recording when MDEQ staff had conducted inspections and the findings of each inspection. The draft procedure manual

specified that upon completion of an inspection, a Complaint Investigation Report (CIR) was to be filed. Our file review found that often the CIR was not filled out, and that site visit documentation was poorly recorded and often included unsigned and undated field reports and undated photographs. Our review also found that in about 50% of the citizen complaint files, PRRs were used to document the observations made by the inspector during the site inspection. While the PRR may have some practicality in documenting inspections, a completed PRR does not contain the information necessary to record the technical and scientific information to document site conditions of a potential violation. An additional concern was that complaint files were often transferred to the permit processing group, processed as after-the-fact permits, and the complaint file closed without any documentation in the complaint file that the complaint had been resolved by issuance of an after-the-fact permit.

The 2001 Manual outlines how initial enforcement reviews are to be conducted. If staff determine that a site visit is necessary, the 2001 Manual identifies the minimum information that must be gathered during a site inspection and requires the completion of a CIR form. The new procedures also require all complaints received be logged into the Compliance Tracking Database and tracked until a final action is taken. In cases where an unauthorized activity is determined to be an activity that may have been permitted, the 2001 Manual outlines the procedures for sending an after-the-fact letter advising the violator that work may be permissible, but that a permit application must be submitted for processing. The use of the Compliance Tracking Database will track the final action taken on the violation, including whether an after-the-fact permit was issued. We find that the procedures outlined in the 2001 Manual, if followed, will address our concerns regarding processing of citizen complaint files.

### **ENFORCEMENT CASE FILE REVIEW**

In January 1999, EPA notified MDEQ of its intent to initiate an informal review of the section 404 program, including the enforcement program. As part of the review, EPA requested that MDEQ provide a cumulative list of enforcement files between 1990 and 1998. The goal was to obtain a list of enforcement actions, including cases initiated both by the MDNR before the 1995 reorganization and by MDEQ after the reorganization, from which EPA randomly could select cases for review.

MDEQ could not fulfill our request. MDEQ explained that at the time it was transferring the requested enforcement data from manual data files to CIWPIS, its new automated information system. However, using annual reports prepared by MDEQ pursuant to the reporting requirements of EPA-MDEQ MOA, EPA requested 87 enforcement files be available for our review. During our district field office visits, only 23 of the requested files were available. MDEQ explained that most of the enforcement files were not in the district field offices, and either had been closed or had been archived.

EPA scheduled a second enforcement file review in March 2000 to supplement the cases it had reviewed with more recent enforcement actions. MDEQ provided a recommended list of cases in February 2000.

Overall, our review concludes that MDEQ has maintained a satisfactory enforcement program. Michigan has designed the enforcement program to identify un-permitted activities, initiate timely enforcement responses to violations and, most important, correct violations through either restoration of wetlands or mitigation of a project's environmental impacts.

Before MDEQ makes a final enforcement recommendation, our review found that the district field offices routinely check a computer database, i.e., CIWPIS, to determine whether MDEQ has previously investigated a violation at a site. After determining whether the activity may be a repeat violation, the site inspection and an inspection report are routinely completed. Information from the inspection is used to prepare an initial Notice of Violation (NOV). Typically, within one week following completion of the inspection MDEQ issues a NOV and a request for information about the project activity. The NOVs and information requests properly communicate the nature of the violation and require compliance within 30 days. Follow-up inspections are conducted by district field offices to determine compliance. Status follow-up to the information request included a written record that notified the violator of noncompliance for failure to submit the required information. Enforcement response was escalated in an appropriate manner if noncompliance continued. Our review concludes that MDEQ is taking appropriate enforcement actions within acceptable time frames.

One concern that we asked MDEQ to address pertained to the delegation of authority to issue administrative NOVs and orders to restore wetlands. The draft enforcement guidance had delegated this authority for dual signature by the LWMD and the Law Enforcement Division. Our review noted MDEQ did not consistently follow this procedure in the district field offices. In older enforcement files, we found the District Supervisor and the Law Enforcement Division sometimes issued NOVs (according to the guidance document), but sometimes NOVs were issued by the field investigator. Conversely, in enforcement cases initiated after 1995, our review found that MDEQ issued NOVs under dual signatures of the site investigator and the District Supervisor. We recommended that MDEQ designate MDEQ staff as signatories of NOV letters in order to ensure timely enforcement actions are taken. In the final 2001 Manual, MDEQ has delegated signature authority for NOV letters to MDEQ professional staff, unless the violation is substantial in which case the District supervisor must be the signatory.

MDEQ has made very good use of seeking voluntary compliance before undertaking escalated and more formal enforcement. Many violations reviewed consisted of minor wetland fills, covering such activities as driveway access, road expansion, or pond excavations. Following issuance of a NOV, the district field offices have been very successful in obtaining either full restoration or partial restoration and appropriate mitigation. In situations where MDEQ recommended mitigation, we did not find mitigation to be less than 1.5:1 (acres mitigated:acres lost). EPA considers this mitigation ratio to be appropriate.

An enforcement tool that MDEQ has used occasionally are settlements through administrative consent agreements. EPA's review identified three specific violations pursued by MDEQ and resolved by consent agreements signed by the defendant and the Chief of the LWMD. In each case, MDEQ expended significant time and effort to negotiate on site restoration, on site

mitigation, avoidance of future impacts, and special environmental projects that included conservation of the resource through deed restrictions. The negotiated consent agreements generally provided for additional mitigation funding through an independent nonprofit organization for resource management assistance. We believe these types of negotiated agreements provide a reasonable alternative to more formal enforcement and recommend greater use of this tool.

More formal enforcement cases are referred by MDEQ to the Attorney General's Office for civil prosecution, or to a local county prosecutor for criminal prosecution. A number of the cases reviewed by EPA were active at the time. Due to the sensitive nature of active enforcement cases and MDEQ requests, this Report does not relate specific information pertaining to these cases. However, EPA's review did focus upon processes and procedures followed by the district field offices in referring cases for additional enforcement.

The process MDEQ follows in referring cases is outlined in the 2001 Manual. It requires that a memorandum be prepared and transmitted to the Law Enforcement Division. It requires submission of an Office of Criminal Investigation (OCI) Criminal Complaint Investigation Request, a supplemental information form for OCI referrals, the case file, a chronology of events leading to the referral, and other pertinent information including related files or cases, witness names, proof of ownership, and local agency findings.

We found that referred enforcement cases typically included those violations where the State had not obtained compliance through its administrative process or where a violation was considered repeat or continuing in nature. Each case file that we reviewed contained many inspections by the district field offices showing the nature and extent of the violations. Referrals typically contained very good photo documentation and contemporaneous reports of the inspector's observations. The inspection reports, including diagrams of the site, a list of vegetation, notes on hydrology and frequent use of photographic logs (dated and signed by the inspector) were routinely complete.

Including two additional elements in the referral document can strengthen MDEQ's enforcement referral. First, to supplement the documentation provided in the State wetland determination and delineation, MDEQ should provide information showing the nature and extent of environmental harm. The referrals provided good descriptions of the aerial extent of filled wetlands, but also should describe the environmental damage to wetland functions and values. MDEQ should clearly explain when cumulative environmental impacts support the need for immediate corrective actions. MDEQ has addressed this concern and the 2001 Manual requires MDEQ staff to highlight impacts to public health, safety, and natural resources when referring a case.

A second element that would strengthen the referral process is to include preliminary cost estimates with the restoration plan. This preliminary cost estimate would be an analysis of the cost the violator might incur for site restoration and would allow for the consideration of this expense versus mitigation. This element also would be beneficial in determining if the cost of restoration is within the violator's financial means. Where the restoration costs would be reasonable, inclusion of such information in the referral would clearly show the feasibility of immediate corrective measures. Finally, a reasonable cost estimate of required restoration will

show that sequencing of alternatives for the project is impracticable, as required under section 404(b)(1) Guidelines.

### **SUMMARY OF CONCLUSIONS**

In response to citizen complaints and follow-up to those complaints, we find that the district field offices did respond to the complaints with a timely site inspection and recommended an initial course of action. MDEQ has finalized its Compliance and Enforcement Guidance Manual, and in early 2002 training was provided on the manual to all district offices. Part of the training included stressing the expectation that all field staff would follow the procedures outlined in the 2001 Manual. Although some discretion and variation in investigation and enforcement process should be allowed at the district level, depending on specific circumstances, we expect that the majority of actions will follow the procedures established in the 2001 Manual.

Interviews with district field offices confirmed some shortcomings, especially the fact that site inspection reports are frequently not fully completed and finalized. Consistently, personnel in the field offices indicated their desire to commit more effort to responding to citizen complaints and developing enforcement actions. Based on the number of citizen complaints reported, timely follow-up on all violations cannot be expected by district staff that also are responsible for issuing permits within short time frames (e.g., 90 days for Part 303 permits). Many district field office staff expressed frustration and communicated a perception that MDEQ management would not support enforcement case development; therefore, staff was reluctant to pursue violations.

During EPA's initial review, we could not determine the extent to which MDEQ management supports development of enforcement cases and response to citizen complaints. EPA notes, however, that during the period of this program review, MDEQ added staff targeted for enforcement and compliance work to several field offices; the volume of citizen complaints investigated and the number of initial cease and desist orders issued shows that district field offices are responsive to citizen complaints. Moreover, since we issued our Preliminary Report, MDEQ has committed to building its enforcement program; it has applied for and received grant funding from EPA to develop an enforcement unit and to hire additional enforcement staff.

Our review concludes that, overall, MDEQ has maintained an effective enforcement program that initiates timely and appropriate enforcement actions and, as importantly, provides appropriate injunctive relief through wetlands restoration, wetlands mitigation, and penalties. There is a need to revise EPA-MDEQ MOA to define what is a "timely and appropriate" enforcement action by the State, and to outline a process of referring to EPA repeat and flagrant violations.

#### **Recommendations:**

1. In the Preliminary Report, EPA recommended that MDEQ revise and finalize its draft compliance manual, addressing certain components of its program which needed to be strengthened. As of December 2001, MDEQ finalized its Compliance and Enforcement Guidance Manual. EPA has reviewed the 2001 Manual, and we find that MDEQ has addressed the majority of the issues which we raised earlier, and which are summarized below:

a. Require that a complaint investigation report be routinely completed following an inspection. Our review found that inspection reports are not routinely completed, and that inspectors did not routinely date and initial photographs of violation sites.

●The 2001 Manual requires that a Complaint Site Investigation Report be completely filled out for every site visit.

b. Provide that, in cases initiated by citizen complaints, when inspectors recommend an after-the-fact-permit, the citizen complaint file be closed with a completed PRR, a copy of the public notice, and a copy of the issued permit. Our review found no clear reference to complaints closed with recommendations for State permit authorization. The PRR is to be used by MDEQ to show that potential fills will not cause more than minimal environmental impacts.

●The 2001 Manual requires all complaint files be tracked through the compliance tracking database, this will ensure that the outcome of all complaints can be tracked. For complaints resolved through the after-the-fact permit process, the violator is required to apply for a permit and the application is then processed according to standard permit processing procedures which include the completion of a PRR form.

c. Support expanded use of administrative consent agreements entered into between MDEQ's LWMD Division Chief and the violator to resolve violations. In all cases reviewed, EPA found MDEQ's process in negotiating these consent agreements effectively resolved the violation and resulted in additional environmental restorations and conservation of wetlands.

d. Add a procedure, consistent with a recommendation from an assistant Attorney General, to ensure that once MDEQ elects to pursue enforcement of a violation the violator is not entitled to pursue other administrative remedies, such as an after-the-fact permit or a contested case hearing, until the enforcement case is resolved. We believe these procedures are critical to sustain appropriate enforcement by MDEQ. Adopting such procedures appears to be within the discretion which the Michigan legislature granted to MDEQ to accept or deny permit applications where discharge activities were conducted in violation of Part 301 or Part 303. See § 324.30104(4) and § 324.30306(5).

e. In instances when a violator is allowed to seek an after-the-fact permit, establish procedures for determining when MDEQ should assess whether enforcement action against the violator has become warranted. For example, if a certain number of months or years have passed and the after-the-fact permit is still being processed, it may be appropriate to conclude that the violator's participation in the permit process has not been in good faith and that an enforcement action should be commenced.

●Although the 2001 Manual does not identify a specific time frame for taking an enforcement action against a violator who has been allowed to seek an after-the-fact permit, the 2001 Manual does require MDEQ staff to track complaints until they are resolved. Use of the complaint tracking system will help staff track cases where an after-the-fact permit has not been applied for, or where the violator has not expeditiously worked with MDEQ in order to attain after-the-fact

authorization; thus, the complaint tracking system should facilitate more timely follow up on these cases.

f. Standardize and provide in the 2001 Manual uniform guidance to district and field office personnel. The draft enforcement Manual was not consistently applied by all district offices and field staff. Consequently, MDEQ staff appeared to be using their own discretion regarding the use of complaint investigation reports and PRRs, as well as discretion in issuing NOV's, cease and desist orders, etc.

- With the 2001 Manual now in effect, staff have been directed to follow the procedures outlined in the 2001 Manual.

The above-listed issues have been addressed in the 2001 Manual.

2. MDEQ should take affirmative steps to strengthen its enforcement program. EPA's recommendations in its Preliminary Report were:

a. Complete the transition from manual reporting of information to an updated and automated information database.

- MDEQ completed its compliance tracking database during 2000.

b. Update and revise EPA-MDEQ MOA to define "timely and appropriate" enforcement actions by the State, as well as to describe a referral process to EPA for repeat and flagrant violations of the CWA.

- As MDEQ has agreed to revise EPA-MDEQ MOA, this issue will be addressed.

c. Include provisions to describe environmental impacts and environmental harm from violations that MDEQ refers to State attorneys for criminal or civil enforcement. Prior to 2001, the referral procedures had focused on the extent of wetlands impacted and the extent of culpability exhibited. Additional documentation of environmental harm should help in getting more cases filed for criminal or civil enforcement.

- The 2001 Manual requires staff to address environmental harm issues as part of the case referral. .

Based upon the interviews which EPA conducted at MDEQ district and field offices, we note that, in the past, staff perceived that MDEQ management did not treat enforcement actions as a priority, and had even discouraged enforcement case development. In the Preliminary Report, based upon our review of the enforcement case files that MDEQ provided, we concluded that MDEQ had pursued enforcement sufficiently to achieve satisfactory results. We did recommend, however, that MDEQ managers address the issue of enforcement's priority during in-service training.

- Since the Preliminary Report was issued, MDEQ management has addressed this issue more

forcefully by committing to the development of an enforcement unit and to further increasing enforcement staff. In addition, the 2001 Manual provides guidance on rating a violation as being high, medium or low priority

## **SECTION 3: RESPONSIVENESS SUMMARY OF COMMENTS**

### **Discussion of Public Comments**

In response to the January 7, 2003, Federal Register notice, EPA received 26 comment letters or e-mail responses. Commenters included two federal agencies (USFWS and the U.S. Forest Service<sup>38</sup>), the Grand Traverse Band of Ottawa and Chippewa Indians, two county drain commissioners, two representatives of the Michigan Drain Code Coalition, a member of the Indian Mission Conservation Club, and 19 individual citizens. In addition, the Michigan Wetland Action Coalition (MWAC) representing 52 conservation organizations provided extensive comments.

#### **SUMMARY OF COMMENTS RECEIVED FROM THE PUBLIC AND RESPONSES BY EPA**

The majority of commenters agreed with the findings of EPA's review and were supportive of the proposed corrective actions, with several commenters requesting that the corrective actions be implemented as soon as possible.

Four comments were received stating that Michigan should continue to administer the section 404 program. These commenters felt that since the State of Michigan's program is more stringent than the federal program, Michigan was doing a better job of protecting the Great Lakes than would the federal government if it administered the program using federal law.

One commenter requested MDEQ to require permits for draining any wetlands regardless of size. EPA agrees that such an action would provide better protection for wetlands. Because section 404 does not regulate the draining of wetlands, however, such a requirement would be more stringent than the federal program. Therefore, Michigan's failure to do so does not render its program inconsistent with the requirements of the CWA and EPA's regulations. EPA can only require the State's program to be as stringent as the federal program. Therefore, the State must decide whether to require permits for the draining of all wetlands under state law.

Two commenters cited failure of wetland compensatory mitigation as a problem with Michigan's section 404 permitting program. While EPA acknowledges that there is a problem with the success of compensatory mitigation developed for the State's section 404 program, the National Academy of Sciences (NAS) report "Compensating for Wetland Losses under the Clean Water Act" (2001) identified compensatory mitigation success as a problem on a national level. The

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<sup>38</sup> We address the comments of these federal agencies in the next two subsections.

Corps and EPA have issued a draft regulation to address the issues raised in the NAS report regarding compensatory mitigation under the CWA section 404 program. 71 Fed. Reg. 15,520 (March 28, 2005). This regulation should address the problems at a national level. Region 5 is committed to working with MDEQ to improve compensatory mitigation performance and to ensure that the State of Michigan remains consistent with the federal program once federal compensatory mitigation rules are finalized.

Five commenters wanted MDEQ's enforcement program strengthened. We received a number of comments desiring that MDEQ receive more funding for enforcement, that MDEQ devote more resources to it, and that MDEQ prioritize enforcement. One commenter stated that commercial developers often receive after-the-fact permits for unauthorized fill, while private citizens often receive Notices of Violation rather than after-the-fact permits. EPA's review of Michigan's program found enforcement to be adequate, as described in more detail in this document. In addition, Michigan is working to strengthen its enforcement program and has committed to the development of an enforcement unit and the addition of several enforcement positions. During EPA's review of the enforcement actions taken by MDEQ, we did not find that private individuals were receiving notices of violation more frequently than developers.

One commenter expressed the concern that MDEQ does not allow enough public participation in the permit process. The commenter indicated that it had requested a public hearing on a permit application and had been told, by MDEQ staff, that a public hearing was not needed. EPA's review of MDEQ's public noticing process found it to be consistent with the federal requirements. EPA found that, overall, MDEQ was very responsive to requests for public hearings, and that MDEQ held public hearings with much greater frequency than does the Corps for projects being considered for federal authorization under section 404. At least one commenter said that the public is not given an opportunity to comment on revised applications. The federal regulations, at 40 C.F.R. § 233.32, require that MDEQ provide a public notice when it is considering a major modification to an issued permit, but does not address explicitly whether a new public notice should be issued if a project is significantly modified after a public notice is issued and before a final permit decision is made; nonetheless, we intend to discuss with MDEQ whether issuing a second public notice in such cases is advisable.

Several commenters requested that the State of Michigan's inventory of wetlands in counties with populations below 100,000 expedited so that more wetlands would be protected. As noted earlier in this report, the wetland inventory was completed in 2006.

The MWAC submitted many comments. One comment addressed the issue of Michigan's lack of regulatory jurisdiction over isolated wetlands that are located in counties of less than 100,000 people<sup>39</sup>, criticizing the proposed corrective action that MDEQ perform wetland inventories in each such county as Michigan law currently provides as a prerequisite to MDEQ's having

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<sup>39</sup> As discussed earlier in this Final Report, CWA jurisdiction extends to isolated Michigan wetlands only if the wetlands also were navigable or had a connection with interstate commerce other than use by migratory birds. Thus, Michigan law may extend jurisdiction over isolated wetlands which are not subject to CWA jurisdiction.

jurisdiction over such wetlands. Other comments expressed a desire for greater protection of small and isolated wetlands. The MWAC asserted that having MDEQ perform the wetland inventories was an inadequate and impractical action. One drain commissioner made a similar comment. One ground for this comment was skepticism that the inventories actually would be completed within the five-year time period, considering that they had not been performed since 1979 when the Michigan law in question was first enacted. Another ground for this comment was that, to complete the inventories, MDEQ had to notify each property owner via the tax rolls, and this would be a costly action that also would require the cooperation of local units of government. These commenters also thought that the resulting inventories would be of little value, as much of the information is available elsewhere. Finally, the MWAC suggested that a more timely and cost effective action would be amending the Michigan statute and addressing jurisdictional issues in the State's legal definition of wetlands. In response, EPA acknowledges that changing the Michigan statute may be a more timely and cost effective corrective action for the jurisdiction issue - yet, there is no certainty that the Michigan legislature would amend the statute, nor that the amendment would be effective at an earlier date than the date of completion of the wetland inventories. As indicated in the jurisdiction section of this report, MDEQ has now completed and certified their wetland inventory and EPA considers this action adequate in resolving this scope of jurisdiction issue.

Many commenters agreed with the finding that the State's permitting program included permit exemptions that are not consistent with the federal section 404 program. A number of commenters cited the drainage exemptions as a problem and four comments were received that supported the elimination of the exemptions for mining tailings basins under Part 303. A number of commenters concurred with EPA's findings that Michigan's exemptions for drainage, farming, and construction of tailings basins were less stringent than the federal regulations and supported EPA's position that the statute needs to be changed. One commenter suggested that, once the exemptions are remedied, MDEQ consider allowing minor permits for some projects that no longer will be exempt. Commenters also supported the recommendation that MDEQ seek a formal opinion from the Michigan Attorney General's Office regarding the effect of drainage ditch exemptions on the administration of Parts 301 and 303. Commenters also supported the development of new rules that prescribe best management practices for utility and pipeline work in wetlands. The commenters also stated that if MDEQ could not provide assurance of the enforceability of the best management practices, then the exemption found at § 324.30305(l) and (m) should be deleted. EPA agrees that if Michigan does not provide assurance that it will impose best management practices for the installation of utilities and pipelines in wetlands, the exemption will have to be deleted.

In its submitted comments, the MWAC disagreed with EPA's finding that the absence of an explicit recapture provision does not render the permitting program inadequate. It felt that the absence in Michigan law of an explicit recapture provision does render the permitting program inadequate; it stated that there are several instances where the current statutory ambiguity resulted in impacts to water resources, however, they provided no examples. MWAC also stated that Michigan would avoid future litigation by adding a recapture provision clarifying that anything not listed as an exemption is not an exemption. For the reasons stated in the Final Report, EPA's

position is that Part 301 appears to have provisions that are at least as stringent as the recapture clause of CWA section 404(f)(2), and that the absence of an explicit recapture provision in Part 303 does not render the State of Michigan's CWA section 404 permitting program inadequate because the strict application of exemption provisions in Part 303 should prevent the need to rely on any type of recapture provision.

With regard to permitting authority issues, the MWAC concurred with EPA's concerns regarding Part 301 provisions for minor permits and agreed that rule changes were needed to ensure that cumulative adverse effects will be considered before general permit categories are established.

The MWAC also agreed with our finding that Parts 301 and 303 do not reference all parts of permit conditions that should be included in State-issued section 404 permits, but it felt that EPA's proposed corrective action was too vague; it proposed that the permit conditions be integrated into the statutes or administrative rules. In our Final Report we state that we have committed to work with MDEQ to ensure that these conditions are included in all future permits. It may turn out that the agencies will conclude that the only effective way to achieve the goal is to change administrative rules or the statutes, rather than for MDEQ merely to change its internal procedures. Thus, we will keep this public comment in mind. If MDEQ first makes only procedural changes and EPA's future oversight of the program finds that MDEQ is not including all conditions mandated by 40 C.F.R. § 233.23 in future permits, then EPA will revisit the need for formally integrating the conditions into rule or statute.

The MWAC also agreed with EPA's position that the date when a permit becomes effective should be clarified in administrative rules. It also agreed with EPA's finding that Parts 301 and 303 and their administrative rules do not provide MDEQ with full and express authority to modify and revoke permits as is provided in the CWA and its regulations, and it agreed with EPA's selected corrective action of requiring MDEQ to promulgate administrative rules ensuring that MDEQ has proper authority to modify or revoke a permit.<sup>40</sup>

In its comments, the MWAC specifically requested that EPA require MDEQ to develop administrative rules that provide authority to explicitly revoke jurisdictional determinations based on the availability of new information or a change in statutory or regulatory authority. To support its request for this change, the MWAC discussed one situation in which a wetland was filled after MDEQ had determined it was non-jurisdictional; MDEQ later determined that the wetland in fact was jurisdictional, but took no further action with respect to the fill. We think that the corrective actions selected in the Final Report with respect to permit modification and revocation should provide MDEQ with the authority to revoke a permit based on an incorrect wetland determination if new information becomes available revealing that MDEQ erred. EPA seemingly cannot require any more explicit change in Michigan law than incorporating the bases for permit modification/revocation contained at 40 C.F.R. § 233.36(a).

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<sup>40</sup> In this Final Report EPA has modified its preliminary conclusions on this issue; still, we conclude that new administrative rules under Parts 301 and 303 need to be promulgated. See pages 19-20.

The MWAC agreed with the finding that there is a need to make sure that the Michigan permitting program is consistent with the section 404(b)(1) Guidelines. One proposed corrective action was to have MDEQ adopt by reference the section 404(b)(1) Guidelines. MDEQ has committed to taking this corrective action.

The MWAC was concerned about EPA and MDEQ's contention that MDEQ can issue a state-only permit which may not adhere to the section 404(b)(1) Guidelines. The MWAC said it understood the legal argument, yet felt that the issuance of a state-only permit was confusing to the public and supports the notion that Michigan wetland permits are governed solely by Michigan state law. It must be noted that Michigan permits are based on Michigan state law. In order for a State to assume the CWA section 404 program it, must demonstrate that the State's laws provide the authority specified in CWA section 404(h)(1). EPA agrees that, in the rare instances when MDEQ issues a state-only permit, over EPA's objection, there can be confusion in light of the fact that the Michigan program is supposed to be consistent with the federal permitting program. Once the corrective actions outlined in EPA's review of the Michigan section 404 program are implemented, the Michigan program will comply with the requirements of federal law and it is EPA's expectation that situations will no longer arise in which MDEQ decides to issue a state-only permit. In fact, the federal regulations governing State assumption of a section 404 program (40 C.F.R. part 233) recognize that there may be instances when a state cannot resolve federal objections to a proposed permit; in those instances, the federal regulations provide that the Corps processes the section 404 permit application and make the final section 404 permit decision. 40 C.F.R. § 233.50(j). The situation of a state issuing state-only permits as a widespread practice, potentially undermining the State's implementation of the section 404 program, does not exist with respect to the State of Michigan's program

In this same discussion of state-only permits, the MWAC stated that the concept that an MDEQ permit issuance constitutes a state-only action has the unintended effect of reducing the opportunity for citizens to seek judicial remedies when citizens think MDEQ has erred; its most pressing example of this unintended effect is what the MWAC claims is the inability of citizens to seek redress in federal court when federally threatened or endangered species may be adversely affected by a MDEQ permit decision because that decision is considered "state only".<sup>41</sup> Our response is twofold: first, the MWAC does not provide any legal research to support its claim that citizens of Michigan have been denied access to federal courts to challenge MDEQ permit decisions, and we have declined to perform our own research to confirm the claim; second, if this situation exists, it must be remedied, we think, either by Congress or by the courts, and not by EPA through this program review; indeed, the MWAC does not ask that EPA take any specific corrective action, such as mandating a change to Michigan law, to effect such a remedy.

The MWAC made a few comments regarding MDEQ's contested case process. While heartily agreeing with EPA that MDEQ - as represented by ALJs and the Director -- have rendered permit

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41 The MWAC does not claim that citizens cannot seek redress in state courts. It is likely that a federally listed species also would be a protected species under State law, and a citizen should be able to bring a claim under the State's MEPA statute against MDEQ for failure to protect that species.

decisions in contested cases that interpret Michigan law in a manner inconsistent with federal law, the MWAC critiqued EPA's proposed corrective actions of promulgating administrative rules to explicate the correct legal standards; the MWAC complained that promulgating such rules would take too much time, and might not ever become effective due to the Michigan legislature's ability to intervene. The MWAC went on to suggest that EPA take a number of actions that would insert EPA lawyers into MDEQ's contested case proceedings, including having EPA review all draft contested case decisions. The MWAC agreed with EPA, though, that in contested cases where the original permit decision is overturned or modified, MDEQ provide documentation which supports the final permit decision and demonstrates compliance with the section 404(b)(1) Guidelines, and therefore 40 C.F.R. § 233.20(a), and Michigan statutes.

In response to these comments, we note that, since we published our Preliminary Report, almost all of the concerns we had identified in this area have fallen away. This has transpired in large part due to MDEQ's enactment of a number of significant rule changes which address such issues as feasible and prudent alternatives and wetland dependency, and which assigns to the petitioner the burden of proof in contested case proceedings; it also is due to the ALJs' and MDEQ Director's interpretation and application of this new rule (and pre-existing statutory and rule requirements of Part 301 and Part 303). In general, proposals for decision and final decisions issued by MDEQ during 2004 reflect better adherence to Michigan statutory and regulatory requirements and standards, properly apply rules promulgated in the last few years, and show a greater thoughtfulness in following procedures and considering the evidence presented in a contested case proceeding. Consequently, during 2004, these permit decisions were not inconsistent with section 404 and did not provide less protection of waters and wetlands than does section 404 and its Guidelines. Moreover, MDEQ is continuing efforts to develop rules, guidance, and procedures that will address troublesome matters that still exist. A more detailed discussion of the rule changes can be found at the "Analysis of Final Agency Permit Decisions" section of the Final Report. At this time, we think MDEQ's recently-promulgated rules should ensure that final permit decisions made by ALJs and MDEQ Director apply either the section 404(b)(1) Guidelines or equivalent State environmental criteria in such a way that the principles of the Guidelines are respected. To ensure that the new rules are applied in a manner that is consistent with federal law, as is MDEQ's current intent, EPA will monitor future contested case decisions by MDEQ. Such an action was also suggested by MWAC..

The MWAC also commented that EPA's Preliminary Report seemed to ignore citizens' concerns that they are unable to participate in contested case proceedings, specifically because MDEQ ALJs have issued opinions which deny legal standing to third parties, thus preventing interested citizens from becoming parties to contested case proceedings, or filing contested cases themselves. These recent ALJ opinions, the MWAC stated, did not comport with decisions by the U.S. Supreme Court or the Michigan Supreme Court as to the standing requirements for a citizen or group. The MWAC supported its comment with a report by the Michigan Environmental Law Center (MELC). The MWAC was particularly concerned that citizens have access to the administrative contested case process because it is a more cost-effective way for citizens to be involved in the judicial review of a permit decision, as compared to filing a case in State court. The MWAC said that it had considered that the contested case process was to provide, at the State level, the

equivalent of a federally-filed citizen suit under the CWA. The MWAC concluded by asking EPA to recommend that MDEQ promulgate a rule allowing any citizen who can meet the standing requirements of Michigan civil law to file a contested case and challenge a permit decision.

Our official response to this comment of the MWAC is that the issue of standing in permit matter adjudications is not identified by CWA section 404(h) or by the State Program Assumption regulations as a component of an acceptable state CWA program. In fact, neither CWA section 404(h) nor EPA regulations require State section 404 permit programs to provide for administrative appeals of permits. Consequently, this issue is beyond the proper scope of our program review, and it is inappropriate for EPA to require, or even to recommend, that Michigan take any corrective action on this issue.

For the benefit of the MWAC and the readers of this Final Report, however, we provide a brief analysis of the issue of standing in administratively-filed cases. We have reviewed a copy of the MELC's report. The MWAC is correct that recent MDEQ ALJ decisions hold that a person has standing to file a contested case only if that person has suffered an actual or threatened injury to an economic or substantial interest, and then go on to find that a "substantial" interest must involve a property or economic interest. Since the MWAC submitted its comments a Michigan appellate court has issued a ruling similar to the contested case decisions of which the MWAC complains: the court ruled that a person who had submitted to MDEQ an application for an after-the-fact wetland permit did not have standing to file a contested case when MDEQ refused to process the application. The court ruled that a person could file a contested case only if he was "aggrieved" as provided by the relevant provision of Part 303, and that only a person who has suffered harm to a legal interest or a pecuniary or property interest is "aggrieved". Maxwell v. MDEQ, 264 Mich. App. 567 (2004). The reason for this disparity in the requirements for "standing" is due to the different nature and quality of administratively-filed cases challenging an agency's permit action and of civil actions challenging final agency actions on the grounds that the action violates a specific statutory provision that imposes a non-discretionary duty on an agency. In fact, Michigan's contested case process is not the equivalent of a CWA citizen's suit; rather, it is comparable to the administrative permit appeals process administered by the Corps for the federal section 404 program, under 33 C.F.R. part 331. The Corps' appeals process also allows an affected party to pursue an administrative appeal of certain Corps decisions. But at 33 C.F.R. § 331.2, the Corps defines who is an "affected party": "a permit applicant, landowner, a lease, easement or option holder (i.e., an individual who has an identifiable and substantial legal interest in the property) who has received an approved [jurisdictional determination], permit denial, or has declined a proffered individual permit." This definition is functionally the same as the standard for who is an "aggrieved party" and may petition for a contested case under Part 303 of Michigan law.

The MWAC and other commenters disagreed with EPA's finding that MDEQ is adequately authorized to, and is observing, the federal requirements with regard to investigation of citizen complaints. One commenter asserted that MDEQ was slow to investigate citizen complaints, which often resulted in a wetland being degraded before MDEQ investigated. As stated in the Review of Citizen Complaints subsection of Section 2 of this Final Report, our review of 327

complaint files, which included minor complaints, found that the State was doing a reasonable job of responding to complaints in a timely fashion.

We received a number of comments criticizing MDEQ's enforcement efforts, in general. Commenters disagreed with EPA's finding that MDEQ conducts an adequate wetland enforcement program, with some complaining that MDEQ issued ATF permits too often, instead of taking enforcement action, and complaining that penalties which were imposed were too low. The MWAC and others urged EPA to require an increase in enforcement activity.

Commenters also stated that they did not think that MDEQ was adequately monitoring permittees' compliance with permit conditions. The MWAC suggested that MDEQ perform compliance inspections for every large project and for a subset of small projects. EPA agrees that an increase in monitoring of compliance with permit conditions by MDEQ staff would be beneficial to the resource and would strengthen Michigan's permitting program; however, we have not found that a specific corrective action was necessary to address this problem.

The MWAC cited concerns with EPA's methodology for conducting the enforcement file review. Since the enforcement files reviewed by EPA were chiefly major violations, the MWAC did not feel the review was representative of MDEQ's enforcement program as a whole. It is EPA's position that the enforcement files reviewed were representative of enforcement actions taken by MDEQ because the files reviewed were chosen randomly from a list compiled from MDEQ's annual reports. In addition, EPA reviewed 327 randomly selected citizen complaints - many of which were minor violations - and found that the majority of the complaints were routinely followed up with site inspections by MDEQ staff, with MDEQ staff taking appropriate follow-up action.

The MWAC did, however, agree with EPA's recommendations that EPA-MDEQ MOA be changed to ensure that MDEQ will not oppose intervention by any citizen when permissive intervention is authorized by Michigan law. The MWAC also agreed with our finding that Michigan's laws regarding what constitutes a criminal violation should be amended to be consistent with federal law.

Both the MWAC and the Grand Traverse Band of Ottawa and Chippewa Indians provided comments on EPA discussion of the State of Michigan's jurisdiction over Indian lands. The Grand Traverse Band agreed with EPA's finding that MDEQ did not have legal jurisdiction to issue section 404 permits on Indian lands. Yet the Grand Traverse Band criticized EPA's failure to identify a concrete corrective action to remedy the situation of Michigan's asserting jurisdiction over a portion of "Indian lands" due to Michigan's different interpretation of that term. While the MWAC also agreed with EPA's analysis of this issue, it felt the wetland resource would suffer if MDEQ withdrew its permitting program from Indian lands. The MWAC stated that there were much broader issues with respect to cooperation between Michigan and the tribes, and it encouraged MDEQ and Native American communities to work together to protect wetland resources. EPA would be supportive of any partnership formed between Native American communities and the State of Michigan to protect wetland resources. In response to the Grand Traverse Band's comment, we note that the issue of Michigan asserting jurisdiction over Indian

lands is an issue that exists in contexts other than that of CWA section 404 authority, and we agree that this issue cannot be resolved as part of this program review alone. As discussed earlier, EPA has not found or approved authority by the State of Michigan within Indian country (a term with the same meaning as Indian lands), and thus Michigan's approved section 404 program does not, and has not, applied in Indian Country within the State of Michigan.

The MWAC agreed with EPA's finding that MDEQ is not currently providing public notices to interested persons in a timely manner and is not acting consistent with the requirements of 40 C.F.R. §233.32(c)(1). In April 2004, MDEQ provided additional information regarding its public notice procedures for the CWA section 404 program. We have reviewed this information, and we find that MDEQ now is currently providing public notices to interested parties either by mail or electronically in a timely fashion, and in a manner that is consistent with the federal regulations. For a more detailed discussion of the revised MDEQ procedures, see the public notice discussion in Section 2's Assessment of Program Administration subsection.

Five commenters requested that the provisions to protect Endangered Species be made as strong as possible and supported the proposed actions. A number of commenters expressed generalized concern with the protection that the Michigan permit program afforded federally threatened and endangered species, in part due to perceptions that MDEQ was not performing an adequate review of projects to determine whether T & E species would be affected. The MWAC complained that Section 7 of the federal ESA - which directs the level of consultation that a permitting agency must have with the USFWS to determine whether a project seeking a permit might affect any T & E species - was not being complied with during MDEQ's processing of section 404 permits; consequently, T & E species within Michigan were not receiving the same protection as were T & E species in other States. The MWAC went on to state that it agreed that there is a need for the development of formal procedures which MDEQ would follow in screening all permit applications for impacts to federally listed species, with the USFWS being involved at an earlier stage than currently; the MWAC also thought that MDEQ needed to use an improved informational infrastructure to determine when impacts might occur. In response to the comment about the applicability of Section 7 consultation, we refer to the discussion of that issue in our response to the comments of the USFWS. In response to the other comments by the MWAC on this issue, we refer to our discussion in Section 2, "Assessment of Coordination under the Endangered Species Act." The USFWS has felt that existing procedures used by MDEQ to screen for potential endangered species impacts by "standard" permits is adequate, including MDEQ's use of the MNFI database. To address the USFWS' concern that potential impacts from minor permit projects were not being adequately screened, MDEQ has developed, in cooperation with EPA and USFWS, screening procedures to be used for minor and walk-in permit applications (similar to the existing screening procedures for "standard" permits). These procedures, in draft form, are currently being applied by MDEQ staff and are expected to be finalized during 2008.

The MWAC and other commenters also raised concerns regarding the issue of enforcement of mitigation; the MWAC cited a study which indicated the majority of mitigation sites were not in compliance with permit conditions. With regard to the issue of enforcement of mitigation, mitigation success is a nationwide issue. In a 2001 report the National Academy of Sciences

found mitigation projects often fail to meet permit conditions, if they are undertaken at all. MDEQ report on mitigation did document that mitigation success is low in Michigan as well. EPA acknowledges that poor mitigation performance is an issue in Michigan, as well as the rest of the nation. EPA is committed to working with MDEQ to ensure that better mitigation plans are developed and that mitigation performance standards are included as conditions of permits. MDEQ is actively working to ensure that staff include mitigation site design plans and performance standards as permit conditions, and has issued guidance addressing wetland conditions in permits. EPA anticipates that this action will help MDEQ in future permit condition compliance efforts.

One commenter stated that EPA needed to require MDEQ adhere to specific deadlines in taking corrective action, and should commence program withdrawal proceedings if those deadlines are not met. EPA has already discussed time frames within which the different categories of corrective actions (e.g., promulgating new rules or seeking statutory amendments) are to be achieved.

#### PETITION FOR PROGRAM WITHDRAWAL AND RESPONSE

In Section 3 of the Preliminary Report, EPA explained how, during February 1997, the Regional Administrator of EPA Region 5 received a letter and report from the Michigan Environmental Council and the Lone Tree Council; the letter and report identified what those organizations perceived to be “serious deficiencies in Michigan’s wetland protection program” which they “believe[d] nullify assurances [Michigan] has made that it can successfully administer section 404 of the Clean Water Act in lieu of the federal government.” These organizations asked EPA to review their claims and then either insist that Michigan take specific remedial measures or withdraw the section 404 program. In a February 26, 1997, response letter EPA told the two organizations that it would consider their submission as a petition to withdraw program approval from the State of Michigan; EPA stated that it would perform an informal review of the deficiency allegations, as provided for by 40 C.F.R. § 233.53(c)(1), and would determine if cause existed to commence program withdrawal proceedings.

In the Preliminary Report, EPA set forth the reasons why we proposed denying the petition to withdraw program approval. We did so after first discussing each of the petition’s deficiency allegations (see pages 89-91 of Preliminary Report). Some of the deficiency allegations were not appropriate for EPA to consider within its role of federal overseer of Michigan’s administration of the section 404 program. Certain other allegations, though, EPA did consider and EPA is requiring corrective actions which are responsive to those allegations. We note that EPA’s own program review extended to the entire section 404 program, and while we found deficiencies we have not concluded that the program should be withdrawn before Michigan has an opportunity to implement certain prescribed corrective actions. Consistent with that conclusion, we determined that the petition of the Michigan Environmental Council and the Lone Tree Council - which mention fewer issues than EPA’s own program review encompassed - did not justify commencing program withdrawal proceedings at this time.

In this final report EPA has now completed its review of the Michigan Section 404 program. In

this report EPA identified several deficiencies in the Michigan Program that need to be addressed in order to keep the Michigan program comparable to the federal Section 404. The MDEQ has agreed to under take certain corrective actions to address these deficiencies. These actions are summarized in Appendix A. The MDEQ has committed to completing the corrective actions within 36 months of the date of the publication of this report. At this time, EPA is not taking a final action on the petition to withdraw the program. When Michigan has completed all of the corrective actions or 36 months have passed, EPA will review the corrective actions taken by Michigan and make a final decision regarding the petition to withdraw the program.

## **Summary of Comments from the U.S. Fish and Wildlife Service and Responses by EPA**

The U.S. Fish and Wildlife Service submitted to EPA a letter dated April 9, 2003, which contained its official comments and recommendations on the Preliminary Report and the notice published in the Federal Register on January 7, 2003. Many of the concerns raised by USFWS have been addressed either in the Assessment of Coordination under the ESA section or in the Legal Authority Concerns section of this Final Report. The comments provided by USFWS are summarized below. Following each summarized comment, EPA provides its response.

Regarding the scope of jurisdiction provided by Michigan law over wetlands, the USFWS acknowledges the difficulty that the SWANCC decision created in assessing whether Michigan's jurisdiction is co-extensive with federal jurisdiction (that is, the jurisdiction that the Corps could assert in Michigan if the State was not administering the section 404 permit program). The USFWS also understands EPA's reluctance in seeking any changes to State statutes until the Corps and EPA develop guidance on the jurisdictional issues raised by SWANCC and its progeny.

The USFWS notes that the five-acre restriction in Part 303 prevents State jurisdiction from being technically equivalent to federal jurisdiction. To remedy this situation, the USFWS not only supports the State's commitment to complete the wetland inventories - thus ultimately nullifying the five-acre restriction - but also urges the State to utilize its existing Part 303 authority to assert jurisdiction over sub-five-acre wetlands by making the preservation determinations specified at § 324.30301(p)(iii). Notwithstanding the above, the USFWS expresses concern over the lack of a mechanism to ensure that the State's program will remain as rigorous as any program the Corps would administer, even as changes occur to federal section 404 jurisdiction over time. The USFWS does not propose a remedy. The only workable mechanism that EPA can identify to achieve the USFWS' desired end, or to ensure that Michigan's section 404 permit program remains in compliance with the standards set forth at 40 C.F.R. § 233.1, is EPA's periodic future review of the program, as well as EPA's ongoing review of individual permits and cases.

The USFWS supports MDEQ's stated intention of incorporating the federal section 404(b)(1) Guidelines into Michigan law, although the USFWS urges that EPA ensure that, if the Guidelines are incorporated only through MDEQ administrative rules, this effectively requires Michigan-issued permits to be in compliance with the Guidelines, as required by CWA section 404(h)(1)(A)(i). EPA agrees with the USFWS.

On a related matter, the USFWS recommends that MDEQ revisit its April 2000 version of MDEQ's PRR to ensure that it provides for full documentation of a project's compliance with the section 404(b)(1) Guidelines (as well as full documentation of any determination that the project does not comply with the Guidelines). The USFWS recommends that EPA explicitly require that MDEQ permit files fully document these determinations of compliance or non-compliance with the Guidelines. EPA agrees with the spirit of the USFWS's comments on this subject; although EPA thinks that the April 2000 version of the PRR does call for the documentation that the USFWS seeks - if the PRR is completed by MDEQ staff. EPA will revisit this issue with MDEQ during future corrective action discussions.

The USFWS remains critical of the inclusion, in Michigan's Part 303, of § 324.30307(2)<sup>42</sup>, which provides that if MDEQ "does not approve or disapprove the permit application within the time provided by this subsection [90 days after a complete permit application is filed with MDEQ, or 90 days after a hearing], the permit application shall be considered approved . . . ." The USFWS criticizes this provision of Michigan law because its 90-day time frame is inconsistent with the timelines provided for federal review by 40 C.F.R. § 233.50. More substantially, the USFWS asserts that § 324.30307(2)'s 90-day time frame unduly limits the amount of time that federal agencies (including the USFWS) have to review projects. The USFWS would prefer either that the 90-day time frame be deleted from § 324.30307(2), or that the Michigan legislature amend § 324.30307(2) to make it explicit that if a wetlands permit is issued by MDEQ pursuant to the constraints of the 90-day time frame, that wetland permit is considered to have been issued under State law only: it is not a CWA section 404 permit.

We discussed this issue in the subsection on "Subpart F - Federal Oversight" of Section 2 of the Final Report, as well as in the "Permitting Authorities" subsection of Section 1. To summarize, 40 C.F.R. § 233.50 gives EPA 90 days after it receives a public notice to provide any comments to the State agency, and the State agency has another 90 days after that to either resolve the proposed project with the permit or to deny the permit. Thus, if a particular permit application file is deemed by MDEQ to be complete on the same day that the public notice is issued, under section 233.50, EPA and other federal agencies would have 90 days to review the permit application with a subsequent 90-day period for MDEQ to resolve any comments made by the Federal agencies. Section 324.30307(2)'s 90-day time frame cuts in half section 233.50's total review and resolution period.

We agree that the 90-day time frame does not mesh well with the time frames allowed at

40 C.F.R. § 233.50. But we have concluded that, to date MDEQ, EPA, and other reviewing federal agencies have been able to work together to ensure that -- before the state's 90-day deadline is reached and a wetland permit issues by operation of law -- either any problems with specific projects are resolved appropriately or MDEQ denies the permit or has the applicant withdraw the application. We appreciate the USFWS' concern that Michigan's § 324.30307(2) pressures the USFWS and other federal agencies to review wetland permit applications more quickly than does the federal State Program Regulations, and we appreciate that this can disrupt the USFWS' other work commitments. We also agree that the optimal situation would be for the Michigan legislature to remove the 90-day time frame from Michigan law. Consequently, we will again raise this issue with MDEQ. But given the fact during in the past 20 years almost no wetland permits have been issued by MDEQ without federal objections having been resolved, and considering that MDEQ and the Attorney General's Office assert that they will ensure that any future wetland permit issued by operation of law pursuant to § 324.30307(2)'s 90-day time frame will be legally considered to be a "state-only" permit and not a CWA section 404 permit, we do not feel that we can demand that Michigan amend § 324.30307(2) to eliminate the 90-day time

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42 The statutory authority for this 90-day permit processing deadline was moved by the Michigan legislature effective September 10, 2004. See p. 18 of this Final Report.

frame. If in the future, the 90-day permit application processing time frame causes significant problems with Michigan's proper issuance of CWA section 404 permits, we will revisit this issue.

The USFWS recommends that MDEQ require that a confirmed wetland delineation be submitted to MDEQ before a permit application is considered to be complete. If MDEQ changed its procedures to require that a delineation be submitted as part of the application, the USFWS asserts that MDEQ staff would have adequate time to confirm that delineation (presumably, the USFWS is suggesting that, under current practices, applicants are allowed to submit wetland delineations some time after having submitted a "complete" application, and that MDEQ staff often do not have sufficient time to confirm those delineations before the deadlines in § 324.30307(2) or federal regulations are reached). Moreover, MDEQ (and reviewing federal agencies) would be able to better assess the potential impacts of the proposed project, and more information could be contained in public notices. Also, it would be more likely that those projects which should be subject to federal review are identified. While we agree that the USFWS' proposal would be optimal, in our experience wetland delineations usually are included in permit applications.

The USFWS comments that EPA needs to submit this informal program review and EPA's review and potential approval of the State's corrective actions to the consultation requirements of section 7 of the ESA.<sup>43</sup> The USFWS argues that EPA is taking federal action which imposes on EPA the obligation to formally consult with the USFWS pursuant to section 7(a)(2) of the ESA, in order to ensure that these actions are "not likely to jeopardize the continued existence of a listed species or result in the destruction or adverse modification of designated critical habitat."

EPA disagrees with the USFWS' positions on this issue. We do not intend to enter into formal consultation with the USFWS pursuant to section 7(a)(2) of the ESA regarding the conclusions that we reach in the Final Report, including EPA's agreement with Michigan about corrective actions. The reason for this position is that EPA does not think that its conduct of this informal program review and its agreements with Michigan on corrective actions which should be taken by Michigan qualify as a "federal action" implicating ESA section 7(a)(2). Once a State section 404 program is approved by EPA, the Clean Water Act identifies a "withdrawal of approval" as the only subsequent formal action by EPA. See 33 U.S.C. § 1344(i). Nor do the State Program Regulations at 40 C.F.R. Part 233 identify our actions here as "federal action"; in fact, the conduct of an informal review by EPA sua sponte is not recognized by those regulations.<sup>44</sup>

EPA conducted an informal review of MDEQ's administration of the CWA section 404 program and, based upon Region 5's review of both Michigan's proposals for future corrective actions and those actions already taken by Michigan, EPA has decided against initiating formal withdrawal

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43 The USFWS also asserts that Michigan's original assumption, during 1984, of the CWA section 404 permit program should have been subjected to formal consultation with the USFWS, pursuant to Section 7 of the ESA (reiterating positions that the USFWS had stated in letters dated April 8, 1983, and August 19, 1983). At that time, EPA had determined that approval of Michigan's section 404 program was not a "federal action" and, therefore, EPA did not invoke Section 7's consultation requirement.

44 33 C.F.R. § 233.53(c) does note that the Administrator can informally review allegations in a withdrawal petition submitted by a third party.

proceedings at this time. EPA is not “approving” Michigan’s proposed corrective actions. Consequently, EPA is not taking any federal action with respect to Michigan’s CWA section 404 program; rather, EPA has specifically decided not to initiate a formal, federal action.

During March 2004, EPA shared its legal conclusions regarding the ESA section 7 consultation issue with the East Lansing Field Office of the USFWS. At that time, the USFWS did not present any additional arguments. EPA emphasized that we hoped to get the USFWS and MDEQ to work together to resolve concerns (which also were expressed in citizens’ comments) about whether MDEQ’s administration of the program is potentially jeopardizing threatened and endangered species or their critical habitat (see the subsection “Assessment of Coordination under the Endangered Species Act ” of Section 2 of the Final Report). EPA Region 5 will participate in those future discussions.

The USFWS goes on to express its concerns that, as MDEQ currently conducts its permit program, its process for screening proposed projects to ensure that they will not jeopardize threatened or endangered species, or critical habitat, is inadequate. A major concern is that Michigan (both MDEQ and the MDNR) does not have access to databases with sufficient, accurate information about the presence of species and habitat. The USFWS offers its cooperation to remedy these shortcomings and to work with Michigan and EPA to ensure that the USFWS has full opportunity to exercise its role in determining the potential for jeopardy to E & T species or impacts to designated critical habitat. The USFWS would like the Michigan-administered program to functionally provide the same level of protection as is provided by the CWA section 404 permit program that is administered by the Corps in 48 states. The USFWS supports the implementation of improved procedures to be followed by Michigan in screening all permit applications (including those for minor and “walk-in” permits and including the establishment of minor permit categories) for potential jeopardy effects. The USFWS also supports improved practices for communication among it, Michigan, and EPA on these issues. The USFWS suggests that we develop a new Memorandum of Agreement addressing these subjects, to be signed by Michigan, EPA, and the USFWS.

While EPA disagrees with the USFWS’ legal conclusions regarding ESA section 7 consultation, we fully support, and have participated in the development of T & E review procedures for minor/general permit applications. We trust the state and federal agencies will be able to effectively work together and improve procedures and communication in order to achieve a high level of protection for T & E species and designated critical habitat.

As part of its discussion of this issue, the USFWS notes that section 9 of the ESA prohibits the unauthorized “take” of an individual of a T & E species, regardless of whether or not that “take” would jeopardize the species as a whole. The USFWS also notes that the section 404(b)(1) Guidelines do not address the subject of “take”, and that MDEQ’s issuance of a CWA section 404 permit is not a legal authorization to effect a “take”. Rather, such a “take” may only be authorized by the USFWS’ issuance of an incidental take statement, by the USFWS’ issuance of an ESA section 10 permit, or by an exemption from the Endangered Species Committee. We agree with the USFWS’ statements on this point: we caution those who receive permits from MDEQ that

those permits should not be considered to be authorizations to “take” federal T & E species..

Other than the subjects discussed above, the USFWS states that it commends EPA’s review of Michigan’s CWA section 404 program and Michigan’s cooperation during the review and the development of corrective actions. The USFWS states its support for EPA’s other conclusions in the Preliminary Report. Finally, it urges adherence to time frames for implementing the corrective actions and recommends the use of benchmarks to measure progress.

## **Summary of Comments from the U.S. Forest Service and Responses by EPA**

The U.S. Forest Service (USFS) indicated that it had some concerns with how MDEQ is handling permitting on Wild and Scenic Rivers in Michigan. The USFS indicated that Michigan's assumption of the CWA section 404 program did not waive the need for federal review of applications involving discharges within critical areas established under federal law, including components of the National Wild and Scenic River System. The USFS indicated that there have been some instances of MDEQ staff either issuing a permit for activities for which the USFS has made an adverse finding due to Wild and Scenic River concerns, or issuing modifications to permits after a Section 7 determination was made by the USFS without coordinating with the USFS on the proposed modifications. The USFS has requested EPA's support in improving coordination between the USFS, MDEQ, the USFWS and the Corps. The USFS has requested that EPA work to develop a procedure outlining how the agencies will coordinate when a project may have some effect on Wild and Scenic Rivers.

EPA is not aware of any instances where MDEQ has issued or modified permits after a Section 7 determination was made by the USFS, without first coordinating with the USFS. EPA points out that MDEQ public notice procedures currently require all projects proposed on Wild and Scenic Rivers be sent to the federal agencies, including the USFS, when appropriate, for comment. With regard to the USFS request to develop procedures outlining how EPA, USFS and MDEQ will coordinate when a project may effect a Wild and Scenic River, procedures for federal oversight and federal comment on state public notices are already laid out in 40 C.F.R. §233.50. Although these regulations only require coordination with the USFWS and the USACE, EPA has indicated to the USFS that it is willing to include in the combined federal comment letter, any USFS comments that pertain to CWA Section 404(b)(1) Guideline related issues, providing the time frames outlined in the federal regulations are met. Although the USFS has not provided any comments to EPA for inclusion in a federal comment letter, EPA has indicated to the USFS that it is willing to do so and it is EPA's position that this existing process would provide adequate opportunity for coordination between the agencies.

## **SECTION 4: FINDINGS**

### **Summary of Findings and Corrective Actions**

The program review was divided into two parts: an analysis of the State of Michigan's legal authority to administer the CWA section 404 program, and an assessment of how MDEQ actually is implementing the program. The review found a number of strengths and weaknesses in the program. This section of the Final Report summarizes these findings and identifies necessary corrective actions.

EPA's preliminary finding is that formal program withdrawal proceedings under 40 C.F.R. §233.53, should not be initiated at this time. Still, EPA has identified several significant deficiencies in Michigan's legal authorities that establish EPA-approved section 404 program. EPA also has identified several problems with MDEQ's administration of its section 404 program. In a November 7, 2003, letter to EPA, MDEQ proposed a series of corrective actions in response to the results of EPA's program review, as presented in the Preliminary Report. MDEQ also proposed a schedule for the completion of the corrective actions. In a December 22, 2004, letter to MDEQ, EPA stated that the proposed corrective actions and the proposed implementation timeline were acceptable to EPA. The proposed corrective actions and implementation schedule are included below. If the deficiencies identified in this Final Report<sup>45</sup> are not corrected within the time frame established by EPA and MDEQ, EPA then will reconsider whether withdrawal proceedings should be initiated.

#### **Program Strengths**

Program strengths include the fact that MDEQ not only regulates filling activities in wetlands and other waters, but also has jurisdiction over activities not currently regulated by the federal section 404 program. Such MDEQ-regulated activities include wetland excavation/dredging and some drainage activities. MDEQ field staff are doing a good job of administering the permitting program. Staff are able to make visits to the majority of project sites before making a permit decision. Our file review indicated that staff work effectively with applicants to ensure that all possible steps are taken to avoid and minimize impacts to wetlands and other aquatic resources. Often as the result of a site visit, MDEQ staff are able to work with the applicant to reduce or eliminate project impacts to the State's waters. Finally, the permit file review found that in the majority of cases, MDEQ staff are doing a good job of evaluating and documenting whether or not proposed projects will comply with the section 404(b)(1) Guidelines.

#### **Program Deficiencies and Weaknesses**

This program review identified some problems with the State of Michigan's legal authorities and with program implementation. These problems and the necessary corrective actions are

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<sup>45</sup> We are not using the term "deficiencies" in the manner that it is used in 40 C.F.R. § 233.53(c)(8)(iii).

summarized below. More detailed discussion of the issues presented here can be found in the previous sections of this Final Report.

## Legal Authority

### Jurisdiction Issues

The scope of jurisdiction provided by Michigan law is problematic in that Michigan law does not give MDEQ jurisdiction over waters as extensive as is the jurisdiction established by section 404 of the CWA and the federal regulations promulgated pursuant to section 404. In particular, Michigan's section 404 program does not extend jurisdiction over isolated wetlands in counties which have a population of less than 100,000 people, and MDEQ will be unable to do so, under State law, until a state-wide wetland inventory is completed (see § 324.30301(p)). Nor does MDEQ have jurisdiction over any noncontiguous wetlands which are smaller than 5 acres, or over noncontiguous lakes or ponds with surface areas of less than 5 acres.

### *Corrective Actions:*

MDEQ has now completed the statewide wetland inventory. As a result, the jurisdictional prerequisite established in § 324.30301(p) has been fulfilled throughout Michigan, and EPA's primary concern about the extent of Michigan's jurisdiction over wetlands will be equivalent to federal CWA jurisdiction has been resolved. With respect to EPA's concerns that Michigan law does not extend regulatory jurisdiction to non-contiguous wetlands, lakes, or other water bodies which are less than 5 acres in size, we have determined that despite the specific language in Parts 301 and 303 that impose these limitations, in practice, the scope of jurisdiction provided by Michigan law is at least as broad in scope as is federal CWA section 404 jurisdiction, and we do not find that Michigan's jurisdiction over lakes and ponds has a narrower scope. See pages 5-10 of this Final Report.

### Exemption Issues

1) State exemptions for farming and other activities (horticulture, silviculture, or ranching) are broader in scope than the exemptions in the federal regulations. Part 303 of the NREPA does not explicitly require that the farming or other operation be ongoing and established, as is required in the federal regulations. And while the State statute exempts discharges associated with drainage or other activities in a wetland that allow the wetland area to be changed from one exempted use to another exempted use (e.g., from farming to silviculture), federal law explicitly does not exempt such discharges.

Also, State regulations relating to agricultural drainage, at § 324.30305(2)(j), appear to exempt discharges associated with bringing a wetland into farming use as long as the wetland is owned by a person engaged in farming.

*Corrective Actions:*

EPA has determined that Michigan needs to amend the statute to explicitly state that § 324.30305(2)(e) exemptions apply only to discharges that occur in an area which, at the time of the discharge, already is part of an established and ongoing farming, silvicultural, or ranching operation, consistent with the CWA, applicable federal regulations, and relevant federal case law. The statute should make clear that the “area” at issue is the specific area where the discharge will be occurring. MDEQ has agreed to seek such a Part 303 amendment from the Michigan legislature. MDEQ agrees to initiate this process within 6 months of the date of the publication of this Final Report in the Federal Register. See pages 11-12 of this Final Report.

The Michigan legislature also needs to amend § 324.30305(2)(e) to correct its apparent authorization of discharges which would allow an area to be converted from one exempted use to another exempted use; Michigan law should make clear that any such discharges are subject to Part 303's permitting requirements. See pages 12-13 of this Final Report. MDEQ is to initiate the statutory amendment process within 6 months of the date of the publication of this Final Report in the Federal Register.

With respect to EPA's concern about the permit exemption provided by § 324.30305(2)(j), MDEQ has agreed to seek the deletion of the exemption at §324.30305(2)(j) by the Michigan legislature. See page 13 of this Final Report. MDEQ is to initiate the statutory amendment process within 6 months of the date of the publication of this Final Report in the Federal Register.

Finally, it would be helpful to have the Attorney General's Office issue an Attorney General's opinion stating that the § 324.30305(2)(e) exemptions, as amended, as well as the other exemptions established by Michigan law (whether by Part 303, Part 301, or another statute), shall be interpreted and applied by MDEQ to be as stringent as the comparable federal exemptions. See pages 12-13 of this Final Report.

2) The drainage permit exemptions contained in Parts 301 and 303 are less stringent than the federal regulations for discharges associated with improvements of drains and the construction of some types of drains - are exempted. The most environmentally damaging provisions of Michigan law regarding drainage ditches may be the exemption for discharges associated with the improvement (meaning altering the dimensions of an existing drain and straightening its course) of all public drains that were established prior to 1973, as well as all public and private drains that are used for agricultural purposes.

*Corrective Actions:*

MDEQ has proposed seeking amendment of § 324.30305(2)(h) (which exempts discharges associated with maintenance, operation, or improvement [of certain drains] which includes straightening, widening, or deepening) to delete that provision's mention of “straightening, widening, or deepening” and to clarify that the exemption is limited to true drain maintenance activities,. MDEQ is to initiate the statutory amendment process within 6 months of the date of the publication of this Final Report in the Federal Register. Additionally, MDEQ proposes to

promulgate rules under Part 301 that will define the terms “maintenance, operation or improvement” in a manner consistent with the federal definition of the term “maintenance.” Such a rule amendment is to be effected within 24 months of the publication of this Final Report in the Federal Register. Finally, EPA requests that the Attorney General's Office issue written opinions regarding the effect of the drainage ditch exemptions provided in Parts 301 and 303. See page 14 of this Final Report.

MDEQ also has agreed to clarify the scope of exempted drainage activities at § 324.30103 and to define “maintenance and improvement”, as used in that provision, in a limited manner that is consistent with the federal definition of the term “maintenance”. The Attorney General’s Office and MDEQ explain, however, that these provisions do not create permit exemptions for discharges to waters of the United States which are associated with construction of private agricultural drains or altering the original dimensions of public drains; rather, both provisions apply to the construction and improvement of drains that exist in uplands, and thus exempt only associated discharges that are made to uplands.

EPA has identified concerns with exemptions contained in §§ 324.30103(d) and (g) for discharges associated with construction, maintenance and improvement of certain private and public drains. Since we issued the Preliminary Report, however, the Attorney General’s Office and MDEQ have argued that these provisions do not create permit exemptions for discharges to waters of the United States which are associated with construction of private agricultural drains or altering the original dimensions of public drains; rather, both provisions apply to the construction and improvement of drains that exist in uplands, and thus exempt only associated discharges that are made to uplands. To fully satisfy EPA’s concerns on these points, EPA requests that the Attorney General’s Office issue a written Attorney General’s opinion setting forth how the doctrine of *in pari materia* applies so that these apparent discharge exemptions in Part 301 do not, in fact, exempt discharges to waters of the United States in situations other than drain maintenance which would be exempted by CWA section 404(f)(1)(C). See page 15 of this Final Report.

3) While federal law exempts discharges made for the maintenance of roads only, exclusive of any discharges which would change “the character, scope or size of the original fill design”, 40 C.F.R. § 232.3(c)(2), Michigan law has a provision, § 324.30305(2)(k), which can be read to exempt discharges which would widen a road.

*Corrective Actions:*

While MDEQ asserts that it has always interpreted and applied § 324.30305(2)(k) in a manner that is as restrictive as the comparable federal exemptions for road maintenance discharges, a recent state court ruling has prompted MDEQ to develop a new administrative rule interpreting this exemption. See pages 15-16 of this Final Report. MDEQ is to promulgate this new Part 303 rule within 24 months of the publication of this Final Report in the Federal Register.

4) Michigan’s legal exemptions for the construction of tailings basins and water storage areas associated with iron and copper mining has no equivalent in federal law. Nor does the exemptions in §§ 324.30305(2)(l) and (m) for utility maintenance activities.

*Corrective Actions:*

EPA has requested that MDEQ seek deletion of the permit exemptions found at §§ 324.30305(2)(l), (m) and (o). MDEQ has agreed to seek the legislative deletion of § 324.30305(2)(o). MDEQ also has agreed to seek to have Part 303 amended so that §§ 324.30305(2)(l) and (m) explicitly exempt only those activities that are exempted by the CWA. MDEQ also proposes to issue rules that establish best management practices for those activities that are exempted from permitting and require that dischargers give advance notice to MDEQ that is similar to the notice required by Nationwide Permit 12. See page 16 of this Final Report. MDEQ is to initiate the statutory amendment process within 6 months of the date of the publication of this Final Report in the Federal Register, and is to amend the Part 303 rules within 24 months of the publication of this Final Report in the Federal Register.

*Permitting Authority Issues*

1) EPA has concerns that Part 301's provisions for minor permits do not ensure that MDEQ determines or has a procedure to determine whether each minor permit category “will cause only minimal adverse environmental effects when performed separately and will have only minimal cumulative adverse effects on the environment” as required under federal regulations.

*Corrective Actions:*

MDEQ has agreed to promulgate a new Part 301 rule requiring the consideration of cumulative impacts before new minor permit categories are established. Rules will be promulgated within 24 months of the publication of this Final Report in the Federal Register. See page 18 of this Final Report.

2) The federal regulations dictate that a State may not issue a permit with a term limit that exceeds five years. Michigan law does not have such a time limit on MDEQ-issued 404 permits.

*Corrective Actions:*

MDEQ has agreed to develop administrative rules under Parts 301 and 303 that set a five-year permit term limit. See page 18 of this Final Report. This action will be taken within 24 months of the publication of this Final Report in the Federal Register.

3) Parts 301 and 303 and their implementing rules do not reference all of the permit conditions that 40 C.F.R. § 233.23 directs be included in State-issued section 404 permits.

*Corrective Actions:*

EPA and MDEQ will work together to ensure that such permit conditions are incorporated into future permits which MDEQ issues jointly under CWA section 404 and either Part 301 or 303. Those efforts are ongoing. See pages 18, 37-39, and 81 of this Final Report.

4) The federal regulations provide that a section 404 permit issued by an authorized State agency shall be effective on the date when both the State agency Director and the applicant shall have signed the permit. Michigan law does not have a comparable provision, potentially creating problems when a permit must be enforced.

*Corrective Actions:*

MDEQ has agreed to amend the administrative rules under both Parts 301 and 303 to clarify that a permit becomes effective on the date when the permit has been signed by both the applicant and MDEQ Director. See page 19 of this Final Report. This rule change will be promulgated within 24 months of the publication of the Final Report in the Federal Register.

5) Part 301 and its administrative rules do not seem to provide MDEQ with full and express authority to revoke permits, as outlined by the CWA and its regulations.

*Corrective Actions:*

Under Part 301, MDEQ proposes to promulgate a new administrative rule which will list all of the bases on which MDEQ can revoke a Part 301 permit and will include all of the bases which are listed in the CWA and its implementing federal regulations. While EPA has stated its preference that this issue be dealt with by the Michigan legislature's amending § 324.30107 to add all of the grounds for revoking a permit provided by the CWA and its regulations, we accede to MDEQ's proposal and intend to monitor the situation to see if the rule promulgation is an effective corrective action. See page 20 of this Final Report.

MDEQ will promulgate these new rules for Part 301 to be effective within 24 months of the publication of this Final Report in the Federal Register.

*Compliance with CWA section 404(b)(1) Guidelines*

1) MDEQ needs to demonstrate that it can incorporate the CWA section 404 requirements, including the section 404(b)(1) Guidelines, into its permit decisions. During this program

review, MDEQ developed administrative rules under Part 303 to address some EPA concerns regarding application of principles under the section 404(b)(1) Guidelines, such as water dependency, burdens of proof, and feasible and prudent alternatives.

*Corrective Actions:*

Recently, MDEQ has proposed to address EPA's ongoing concerns about whether, during Part 301 and Part 303 permit processing, proper consideration is given to the criteria contained in the section 404(b)(1) Guidelines by promulgating future administrative rules under both Part 301 and Part 303 that incorporate the Guidelines by reference. In this manner, the criteria contained in the Guidelines will be considered during MDEQ's decision making process. See pages

22-26 of this Final Report. MDEQ will promulgate these rules within 24 months of the

publication of this Final Report in the Federal Register.

In addition, EPA will continue to monitor whether proposed and final permit decisions issued as part of contested case proceedings apply MDEQ's recently-issued administrative rules and otherwise apply the 404(b)(1) Guidelines and principles and criteria consistent with the Guidelines.

2) EPA is concerned that Michigan law does not clearly prohibit the issuance of permits that will either jeopardize the continued existence of T&E species and designated critical habitat or will result in significant degradation of waters of the United States.

*Corrective Actions:*

MDEQ has agreed to promulgate administrative rules for Parts 301 and 303 that will incorporate the federal section 404(b)(1) Guidelines by reference. MDEQ believes that since 40 C.F.R. § 230.10(b) of the Guidelines prohibits the discharge of fill material if it jeopardizes the continued existence of a T&E species or results in the destruction or adverse modification of critical habitat, such rule changes will effectively allow MDEQ to deny section 404 permit applications that would have such effects. In addition, MDEQ has agreed to promulgate administrative rules for Parts 301 and 303 that would specifically direct staff to consider impacts to T &E species during the permit review process. MDEQ is proposing to promulgate these rules within 24 months of the publication of this Final Report in the Federal Register.

EPA will review the administrative rule changes proposed by MDEQ on this issue and will consider MDEQ's legal arguments that these rule changes provide MDEQ with sufficient authority to ensure that MDEQ will not issue section 404 permits that will jeopardize the continued existence of a threatened or endangered species or will result in the destruction or adverse modification of critical habitat (including section 404 permits that are issued by MDEQ after contested case proceeding are conducted). Similarly, EPA will consider whether such administrative rule changes are adequate to ensure that permits are not issued that will result in significant degradation of regulated waters including wetlands. Once MDEQ has promulgated its new rules incorporating the federal section 404(b)(1) Guidelines, EPA will monitor whether Michigan law, in practice, does give protection to T & E species and their designated critical habitat which is equivalent to the protection extended by federal law. If not, EPA will discuss with Michigan the need for future statutory amendments. See pages 24-26 of this Final Report.

*Permitting through Contested Case Proceedings*

MDEQ's ALJs and MDEQ's final decision maker in contested case proceedings<sup>46</sup> often have not interpreted and applied Michigan law in a manner consistent with the mandates of section 404(b),

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46 Previously, the final contested case decision maker was the MDNR's Natural Resources Commission, followed by the Chief ALJ of the MDNR and then by of MDEQ beginning in 1995. Since 2000, the final decision maker has been MDEQ Director.

section 404(h), the State Program Regulations, EPA-MDEQ MOA, and, most critically, the section 404(b)(1) Guidelines. Earlier in this Final Report (as well as in the Preliminary Report), EPA reviewed the types of erroneous analyses and legal conclusions made in some proposed and final contested case decisions. See pages 57-66 of this Final Report.

*Corrective Actions:*

In the past few years, MDEQ has promulgated new rules under Part 303 addressing such issues such as the proper way to conduct a feasible and prudent alternatives analysis and the proper test for wetland dependency. Our review of contested case decisions issued during 2004 shows that conclusions on many issues now are consistent with, and no less stringent than, federal section 404 law and regulation; these changes in administrative decision making seem largely due to the promulgation of the new administrative rules. As discussed elsewhere in this Final Report, EPA has requested - and MDEQ has proposed - that additional rules under Part 303 and Part 301 be promulgated to address other section 404-related concerns. EPA will review future contested case decisions to evaluate the effect which the new rules have on contested case decisions.

*Enforcement*

1) An opportunity for public participation in the State's enforcement process for section 404 matters shall be provided through one of two alternate routes, according to 40 C.F.R. § 233.41(e). EPA has determined that MDEQ is adequately authorized to, and is observing, the first of three requirements under the chosen alternative, but it is not clear whether the second and third requirements are being met.

*Corrective Actions:*

MDEQ has agreed to revise EPA-MDEQ MOA to make the commitment that MDEQ will not oppose intervention by any citizen when permissive intervention in a State enforcement action is authorized by Michigan law. The revised EPA-MDEQ MOA also will bind MDEQ to publish notice of, and to provide a 30-day public comment period for, all proposed settlements of enforcement actions filed in State court. See page 27 of this Final Report.

*Indian Lands*

EPA and MDEQ differ on the definition of the term "Indian lands". MDEQ asserts that it has section 404 jurisdiction over properties that EPA considers to be "Indian Lands." EPA, by contrast, is of the view that the State of Michigan has never had the authority to issue section 404 permits in "Indian lands" (which EPA defines to be the same as "Indian country"). The conduct of this program review does not alter EPA's view of this issue. See pages 29-30 of this Final Report.

*Corrective Actions:*

EPA will continue its dialogue with the State on this issue, but at this time EPA does not consider

the difference in definition of the term Indian Lands to be a basis for program withdrawal.

Findings Related to Administration of the Permitting Program

1) In general, MDEQ is doing a good job of administering its permit program. MDEQ staff are following agency procedures when processing permits. The majority of files reviewed (72%) contained the Project Review Report (PRR) form, which serves as documentation of the permit decision. Since the PRR form serves as the documentation for compliance or non-compliance with the section 404(b)(1) Guidelines, MDEQ staff must make sure that the completed form is present in every file including contested case files. See pages 44-46 and 50-52 of this Final Report.

*Corrective Actions:*

Improve the documentation of the basis for each permit decision. Staff must ensure that documentation for the permit decision is included in every permit file, in the form of a completed PRR.

2) The public notice procedure which MDEQ was using since it assumed the section 404 program through the first years of this program review was problematic for four reasons. First, that system did not always ensure that interested persons received the public notice with sufficient time to provide comment to MDEQ. A second problem with the public notice system was that it was not clear to EPA that all adjacent property owners were always receiving copies of the public notice, as the federal regulations require. Third, the federal regulations require that the guidelines or criteria on which permit decisions are based be included in the public notice. MDEQ's public notices have not been reciting, and currently do not recite, all such criteria. Finally, the federal regulations require that a state agency provide notice to all interested parties by mail and in at least one other way reasonably calculated to cover the area affected by the activity (such as advertisement in a newspaper of sufficient circulation). For some years prior to, and during, this program review, MDEQ did not provide notice to the extent required.

*Corrective Actions:*

To address the first problem identified above, MDEQ has developed an Internet-based system that makes public notices available to the public. We have determined that MDEQ's use of this Internet-based system meets the federal requirement of providing notice in at least one way in addition to mail. As for the second problem, MDEQ is now providing public notices to all adjacent property owners. MDEQ will address the third problem - its past failure to include all criteria used in permit decision making in each public notice - by, simply, doing so.

Regarding providing notices to all interested persons, the final problem identified above, MDEQ is now following procedures which, if consistently implemented, will ensure that each person who requests a copy of a public notice receives the notice in a timely manner (via the requester's chosen communication route of mail or internet access) so that the requester has sufficient time to submit comments. See pages 42-43 of this Final Report.

The actions taken by MDEQ as of the date of this Final Report, and the actions which MDEQ commits to taking in the near future, resolve our various concerns regarding MDEQ's issuance of public notices.

3) EPA's program review found that coordination under the federal ESA is effective for larger projects. The system currently in place to screen projects for potential to impact a T or E species is doing a good job of identifying projects which may affect a T or E species. These projects are all forwarded to the federal agencies for review and coordination if needed. Minor permits are more difficult to screen for potential T & E impacts. This review identified a need to develop formal guidelines to help MDEQ staff identify projects needing T & E coordination. Finally, it is not clear when permits are issued out of the district offices on a walk-in basis, they are being screened for potential T & E impacts.

*Corrective Actions:*

In the Preliminary Report, we stated that MDEQ, the USFWS, and EPA needed to develop a procedure and/or memorandum of agreement regarding how coordination on T&E species issues would proceed when a project may affect a T & E species; we also stated that MDEQ needed to work with EPA and the USFWS to develop procedures for screening minor and "walk-in" permits for the potential to impact threatened and endangered species and their critical habitat. Work on the first item -- an interagency agreement setting forth the agencies' mutual obligations to communicate, provide information, and resolve differences -- is ongoing. As for the second item, the agencies have developed draft procedures for screening minor/general permit and "walk-in" permits for the potential to impact federally T & E species; these procedures are similar to the existing procedures that MDEQ uses to screen standard permit applications. Recently these procedures have been implemented on a trial basis. The procedures are scheduled to be finalized by 2008. See pages 55-56 of this Final Report.

4) The State Program Regulations require that the state permitting agency provide another state whose waters may be affected by a discharge with the opportunity to comment on the relevant project. During the program review, we did not discover that Michigan had any procedures providing for notification of an adjacent state if a proposed discharge or project had the potential to affect that State's waters. (Nor are we aware of any projects in Michigan which actually impacted the waters of another State.)

*Corrective Actions:*

While this is a minor issue because it seems to arise rarely, MDEQ needs to develop guidelines for determining when a proposed project will impact waters and needs to develop a process for notifying an adjacent State (and EPA) and allowing that State to comment on the proposed project. See pages 40-41 of this Final Report.

5) EPA's review found some final agency permit decisions made as the result of contested case proceedings to be problematic. In a number of contested cases, MDEQ's Office of Administrative Hearings made rulings without applying the section 404(b)(1) Guidelines or without interpreting

State laws and rules in a manner that is consistent with the section 404(b)(1) Guidelines. In addition, the contested case files did not include a completed PRR supporting the final agency action.

*Corrective Actions:*

MDEQ recently has promulgated rules under Part 303 which require both the alternatives analysis and water dependency tests to be conducted in a manner consistent with the section 404(b)(1) Guidelines. See pages 20-21 of this Final Report. In addition, MDEQ has agreed to promulgate administrative rules for Parts 303 and 301 which will incorporate the section 404(b)(1) Guidelines by reference. See page 22 of this Final Report. A more detailed discussion of the proposed rule changes to address this issue can be found in the Corrective Actions - Permitting Authority subsection of this Section 4.

Documentation, such as a PRR form, supporting the final permit decision must be included in every permit file, including cases which go through the administrative hearing process. See pages 46 and 52 of this Final Report.

MDEQ also has agreed to issue a new public notice for any Proposal for Decision or Final Decision that authorizes a project and attendant discharges that are substantially different than the project as described in the original permit application and public notice (i.e., would have substantially greater adverse impacts to natural resources).

## **Findings Related to Administration of the Enforcement Program**

Finally, EPA summarizes its findings regarding Michigan's enforcement of section 404. Here, EPA does not specify any essential corrective actions which MDEQ must take, but recommends changes that EPA believes will enhance the effectiveness of MDEQ's enforcement program. MDEQ could strengthen their enforcement program, and this was one comment repeatedly made by those persons who submitted comments to EPA on this program review. See pages 84-85 of this Final Report. For example, MDEQ could enhance its monitoring of permittees' compliance with permit terms and conditions (including conditions requiring performance of wetland mitigation projects). See page 87 of this Final Report.

EPA commends the level-of-effort by the district field offices in responding to citizen complaints with a timely site inspection and recommended initial course of action. As mentioned previously, during the course of this program review, MDEQ finalized the 2001 Manual and has provided training on the 2001 Manual for MDEQ staff. Prior to the publication of the 2001 Manual EPA found that MDEQ had not set priorities for enforcement response or developed clear procedures. See pages 76-77 of this Final Report. In the past, the draft guidance manual allowed district field offices much discretion in responding to violations, maintaining records through photo documentation, completing inspection reports, and recommending after-the-fact permit applications without completion of PRRs. EPA's review of the 2001 Manual finds that the issues listed above have been addressed adequately in the manual.

Interviews with district field offices acknowledged some of these shortcomings, especially the issue that site inspection reports frequently are not fully completed and finalized. Consistently, the field offices indicated a desire to commit more effort to responding to citizen complaints and developing enforcement actions, but identified the number of citizen complaints reported, and the statutory responsibility to make Part 303 permit decisions within a 90 period, as limiting factors. See page 74 of this Final Report.

For the enforcement program, EPA's review concludes that MDEQ has maintained an effective enforcement program that, in the vast majority of cases, initiates timely and appropriate enforcement actions and, more importantly, provides appropriate injunctive relief through wetlands restoration, wetlands mitigation, and penalties. See page 74 of this Final Report. One area for improvement is that MDEQ must notify the public upon resolution of enforcement actions. Another area for improvement is the handling of "after-the-fact" permits. Prior to accepting an application for an after-the-fact permit, MDEQ should decide whether or not to take enforcement action. If the decision is made to bring an enforcement action, EPA recommends that MDEQ not accept the application for processing until the enforcement action is resolved. See page 75 of this Final Report. If the decision is made not to bring an enforcement action and to process the after-the-fact application, EPA recommends that, if the processing of that application exceeds some reasonable time period, MDEQ reassess its enforcement options; otherwise, violators may manipulate the application process to their benefit. See page 76 of this Final Report.

Additionally, our review found that public notices proposing after-the-fact permit authorizations often did not explain that the proposed permit resulted from the resolution of a State administrative enforcement action. MDEQ has agreed to public notice all proposed settlements of enforcement actions. See page 27 of this Final Report.

We recommend that Michigan expand its use of administrative consent agreements - made between MDEQ Division Chief and the violator -- to resolve violations. In all cases reviewed, we found that MDEQ's process of negotiating these consent agreements effectively resolved the violation and resulted in additional restorations, reclamations, and conservation of wetlands. See page 72 of this Final Report. In addition, we recommend that, once MDEQ elects to pursue enforcement against a violator, the violator should not be entitled to pursue other administrative remedies - such as seeking an after-the-fact permit or a contested case hearing - until the enforcement action is resolved. See page 75 of this Final Report. We believe these procedures are critical to sustain appropriate enforcement. We further recommend that MDEQ develop procedures to refer cases to EPA. Finally, MDEQ should define what a "timely and appropriate" enforcement action is (the current EPA-MDEQ MOA requires the State to take timely and appropriate enforcement action against persons violating permit conditions or conducting unauthorized discharges of dredged or fill materials); this definition then will be inserted into a revised EPA-MDEQ MOA. See page 76 of this Final Report.

#### Other Matters

The current EPA-MDEQ MOA will be revised to implement any relevant corrective actions discussed in this Final Report, including but not limited to: 1) the issue of Part 303 permits which are issued by operation of law as a consequence of the 90-day permit application processing deadline imposed by §§ 324.1301(f)(viii) and 1307(1) and (4), being state-only permits and not CWA section 404 permits (see page 18 of this Final Report); 2) define what is a "timely and appropriate enforcement action by the State (see page 75 of this Final Report); 3) establish a process for referring to EPA repeat and flagrant violators of the CWA (see page 76 of this Final Report). The MOA will be revised within 6 months of the date of the Federal Register Notice for this report.

The current EPA-MDEQ MOA also will be generally revised to improve procedures.

## Appendix A

### Summary Time Table for Corrective Action Completion

<b>CORRECTIVE ACTION</b>	<b>DUE DATE</b>	<b>STATUS</b>
1. Complete wetland inventories in all counties	December 31, 2006	Completed Dec, 2006
2. Amend Part 303 of the NREPA to explicitly state exemptions apply only to discharges that occur in areas of on going farming, silvicultural or ranching operations	Initiate within 6 months of date of Federal Register Notice (FRN); complete within 36 months of date of FRN	
3. Amend § 324.30305(2)(e) to require a permit for discharges which allow an area to be converted from one exempted use to another	Initiate within 6 months of date of FRN; complete within 36 months of date of FRN	
4. Amend § 324.30305(2)(h) to delete mention of straightening, widening, or deepening. Clarify that exemption is limited to true drain maintenance activities	Initiate within 6 months of date of FRN; complete within 36 months of date of FRN	
5. Promulgate rules under Part 301 that will define maintenance, operation or improvement consistent with the federal definition of "maintenance"	Rules to be promulgated within 24 months of FRN date	Rule development initiated

<b>CORRECTIVE ACTION</b>	<b>DUE DATE</b>	<b>STATUS</b>
6. Clarify exemption for road maintenance at § 324.30305(2)(k) to be consistent with federal exemption	Initiate within 6 months of FRN date; rules to be promulgated within 24 months of date of FRN	
7. Eliminate exemptions for agricultural drainage and tailings basins associated with iron and copper mining found at §§ 24.30305(2)(j) and (o).	Initiate within 6 months of date of FRN; complete within 36 months of date of FRN	
8. Limit exemptions at §§ 24.30305(2)(l) and (m) to activities that are exempted by the CWA	Initiate within 6 months of date of FRN and complete within 36 months of date of FRN	
9. Promulgate new Part 301 rule requiring consideration of cumulative impacts before new minor permit categories are established	Promulgate rules within 24 months of date of FRN	Initiated
10. MDEQ will develop administrative rules under Parts 301 and 303 to set a 5 year permit term limit.	Initiate within 6 months of date of FRN; rules promulgated within 24 months of date of FRN	Initiated for 301 rules
11. Amend rules under Parts 303 and 301 to clarify a permit becomes effective on the date when signed by both parties	Initiate promulgation within 6 months of FRN; promulgate rules within 24 months of date of FRN	Initiated for 301 rules
12. Promulgate rules under Part 301 that are consistent with the federal regulations with respect to MDEQ's authority to revoke a permit	Rule development underway for Part 301; promulgate rules within 24 months of date of FRN	Initiated for 301 rules

<b>CORRECTIVE ACTION</b>	<b>DUE DATE</b>	<b>STATUS</b>
13. MDEQ will promulgate rules under Parts 303 and 301 that incorporate the 404(b)(1) Guidelines by reference	Initiate promulgation within 6 months of date of FRN; promulgate rules with in 24 months of date of FRN	Initiated for 301 rules
14. MDEQ will promulgate rules under Parts 303 and 301 that require staff to consider impacts to threatened or endangered species during permit review	Initiate promulgation within 6 months of FRN ; promulgate rules with in 24 months of date of FRN	Initiated for 301 rules
15. Promulgate rules under Part 303 regarding proper use of feasible and prudent alternatives analysis and water dependency test	Rules promulgated in 2000	Completed
16. Revise EPA-MDEQ MOA to ensure MDEQ will provide notice of and provide 30 -day public comment period on enforcement settlements and ensure that MDEQ will not oppose intervention by any citizen when permissive intervention in a State action is authorized by Michigan Law	Initiate work on MOA within 6 months of FRN date; execute a revised MOA within 1 year of date of FRN	
17. Ensure field staff include documentation for permit decision in every file.	Division management have required staff to complete a PRR form for every permit file. Memo dated February 9, 1999.	Completed

<b>CORRECTIVE ACTION</b>	<b>DUE DATE</b>	<b>STATUS</b>
18. MDEQ must provide public notices to all interested parties by mail and by one other method.	MDEQ now makes public notices available on their internet site as well providing copies by mail to interested parties	Completed
19. MDEQ will develop a method to screen minor and “walk in” permits for Threatened and Endangered species impacts	Procedures to be finalized by 2008	Procedures drafted
20. MDEQ will develop a method for notifying and allowing comment by another State whose waters may be affected by a discharge.	Develop procedure within one year of date of FRN	