

**WETLAND ADVISORY COUNCIL
SUBCOMMITTEE ON EPA SECTION 404 PROGRAM REQUIREMENTS**

Summary of Issues and Recommendations

July 12, 2010

EPA #	Corrective Action Required	Original Due Date	Revised Due Date	Comments	Current Status	WAC Recommendations
1 <i>Done</i>	Complete wetland inventories in all counties.	12/31/2006			Completed December, 2006	No further action required. Subcommittee recommends that DNRE develop additional web links to state inventories, and also track inventories developed under local ordinances.
2 <i>Further discuss next Oct 1</i>	Amend Part 303 if the NREPA to explicitly state exemptions apply only to discharges that occur in areas of ongoing farm, silviculture or ranching operations.	7/31/2011	7/31/2012	Consistent with current interpretation of Part 303 exemptions. See 40 CFR Section 232.3(c)(1) -- "...to fall under this exemption, the activities ... must be part of an established [i.e. ongoing] farming, silviculture or ranching operation... Activities on areas lying fallow as part of a conventional rotational cycle are 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."		The Subcommittee intends to further discuss this issue to clarify the need for the amendment and the impact on the public.
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.	7/31/2011	7/31/2012	Primary federal concern is mechanical landclearing converting forested areas to agriculture. See "Note" following 40 CFR Section 232.3 (b) - "a permit will be required for...the conversion of a wetland from silvicultural to agricultural use..." Also 40 CFR Section 232.3(d)(3)(ii).		The Subcommittee intends to further discuss this issue to clarify the need for the amendment and the impact on the public.

DNRE to submit Drafts by year end.

4	Amend §324.30305(2)(h) to delete mention of straightening, widening, or deepening. Clarify that exemption is limited to true drain maintenance activities.	7/31/2011	7/31/2012	Consistent with current interpretation of Part 301 - Inland Lakes and Stream requirements. Needs to be consistent with federal law -- for parallel federal exemption, see 40 CFR Section 232.3 (b), Section 232.3 (c)(3), Section 232.3 (d)(3)(i)(D), and Section 232.3 (d)(ii).		The Subcommittee intends to further discuss this issue to clarify the need for the amendment, and impact on the public.
5	Promulgate rules under Part 301 that will define maintenance, operation or improvement consistent with the federal definition of "maintenance."	7/31/2011	7/31/2012	Federal regulations provide for maintenance to historic width, depth, and location.	Initiated rule development.	The Subcommittee intends to further discuss this issue to clarify the need for rulemaking under Part 301 and the impact on the public.
6	Clarify exemption for road maintenance at §324.30305(2)(k) to be consistent with federal exemption.	7/31/2010	7/31/2012	Federal exemption limits road maintenance to existing footprint (does not allow expansion in right of way). Given inconsistent ruling in Circuit Court, exemption needs to be clarified. See 40 CFR Section 232.3 (c) (2) - "Maintenance does not include any modification that changes the character, scope, or size of the original fill design."	Initiated rule development.	The Subcommittee recommends that the DNRE proceed with rulemaking to clarify this issue in cooperation with MDOT and other appropriate stakeholders.
7	Eliminate exemptions for agricultural drainage, and for tailings basins associated with iron and copper mining, found at §324.30305(2)(j) and (o).	7/31/2011	7/31/2012	Tailings basins are regulated under Part 301 and Dam Safety; elimination of Part 303 exemption would not alter permit requirement. There are no equivalent federal exemptions. Agricultural drainage exemption applies only to drainage of isolated wetlands associated with an ongoing commercial farming operation. A Part 301 permit is required if the drainage activity involves connection of a ditch or channel to an inland lake or stream, and is therefore typically subject to regulation by the DNRE.		The Subcommittee recommends that the DNRE proceed with development of a formal proposal to amend Part 303 to eliminate the exemption for iron and copper tailings basins, in cooperation with the WAC. The Subcommittee will continue work with the DNRE to explain the legal need for and practical impact of deletion of the limited Part 303 exemption for drainage of isolated wetlands, given the impact of Part 301 requirements.

8	Limit exemptions at §324.30305(2)(l) and (m) to activities that are exempted by the CWA.	7/31/2011	7/31/2012	These exemptions are generally for utility line installation and maintenance. While these activities are not exempt under the CWA, it is acceptable to authorize under general permit or minor project categories as appropriate.		The Subcommittee recommends that the DNRE work with utility interest groups in the development of suitable amendment language, and simultaneously develop general permit or minor project categories for previously exempted activities.
9	Promulgate new Part 301 rule requiring consideration of cumulative impacts before new minor permit categories are established.	7/31/2010		See Section 30105 (7) and (8).	Completed. PA 120 included necessary language.	No further action required. However, the Subcommittee may continue to discuss the changes in order to assist in clarifying regulatory requirements.
10	DNRE will develop administrative rules under Parts 301 and 303 to set a 5 year permit term limit. ONLY PARTIALLY COMPLETE	7/31/2011	7/31/2012	In practice, 5 year limit is already in place. Section 30105(8) defines 5 year limit for Part 301 general permits. PA 120 added Section 30311b(1) defining 5 year limit for Part 303 permits.	Partially completed. Need to provide rule for Part 301 Minor Permit Categories and Individual Permits.	The Subcommittee recommends that the DNRE proceed with Administrative Rulemaking to establish consistent 5 year permit limits. <i>301 - needs to be complete</i>
11	Amend rules under Parts 303 and 301 to clarify a permit becomes effective on the date when signed by both parties.	7/31/2010	7/31/2012	DNRE is considering the best options for compliance with this requirement to clearly define the effective date of each permit.	Initiated rule development.	The Subcommittee recommends that DNRE proceed with Administrative Rulemaking to resolve this issue.
12	Promulgate rules under Part 301 that are consistent with the federal regulations with respect to DNRE's authority to revoke a permit.	7/31/2010	7/31/2012		Initiated rule development.	The Subcommittee recommends that the DNRE work with the Department of Attorney General to complete Administrative Rules that are consistent with state law and federal requirements.
13	DNRE will promulgate rules under Parts 303 and 301 that incorporate the 404(b)(1) Guidelines by reference.	7/31/2010	7/31/2012	Refers to federal permit review criteria at 40 CFR Part 230. Note that at time of completion of program review, the federal Guidelines did not include the mitigation rules at Subpart J - Compensatory Mitigation for Losses of Aquatic Resources. The DNRE is <u>not</u> proposing to adopt Subpart J (Compensatory Mitigation) into the Administrative Rules.	Initiated rule development.	The Subcommittee recommends that the DNRE proceed with rulemaking to incorporate the Section 404(b)(1) Guidelines under Parts 301 and 303 in cooperation with appropriate stakeholders.

Rule changes - should go in 6- rules

14	DNRE will promulgate rules under Parts 303 and 301 that require staff to consider impacts to threatened or endangered species during permit review.	7/31/2010	11/31/2012	DNRE believes that this requirement is met through current procedures. However, the EPA has requested that DNRE regulations clearly require review by permit staff to ensure compliance with federal requirements. The Subcommittee requested additional information regarding the relationship between this requirement and the 404(b)(1) guidelines.	Initiated rule development.	The Subcommittee recommends that the DNRE initiate actions necessary to complete rulemaking in cooperation with appropriate stakeholders.
15	Promulgate rules under Part 303 regarding proper use of feasible and prudent alternatives analysis and water dependency test.		10/15/2010	Was considered complete based on promulgation of R281.922a. However, PA 120 mandates replacement of associated guidance document by 10/15/2010. Completion now depends upon replacement guidance consistent with federal requirements.	Old guidance rescinded.	The Subcommittee recommends that the DNRE provide the previous guidance on feasible and prudent alternatives, pertinent federal requirements, and a summary comparison to the entire Council. Council members may provide comments regarding desirable changes to the rescinded guidance to the DNRE and the Subcommittee. The DNRE will work with the subcommittee to revise the previous guidance as necessary to meet the October 15, 2010 deadline set by PA 120. <i>Materials in 3 weeks sent to all members (Reg)</i>
16	Revise EPA-DNRE MOA to ensure DNRE will provide notice of and provide 30-day public comment period on enforcement settlements and ensure that DNRE will not oppose intervention by any citizen when permissive intervention in a State action is authorized by Michigan Law	7/31/2009	12/31/2010	Additional revisions of the MOA are needed to clarify agency roles in compliance and enforcement. Background information on standing was provided by the Department of Attorney General.	Limited discussions with EPA. Initiated drafting of MOA.	The DNRE should pursue revision of the Section 404 Program MOA with the U.S. Environmental Protection Agency with a goal of completing revisions by the target date.
17	Ensure field staff include documentation for permit decision in every file.			Project Review Report (PRR) form updated during program review. LWMD memo dated 2/9/1999 required staff to complete PRR for every permit file.	Completed.	No further action required.
18	DNRE must provide public notices to all interested parties by mail and by one other method.			DNRE addressed requirement by developing on-line version of CIWPIS (permit tracking system).	Completed.	No further action required.

19	DNRE will develop a method to screen minor and "walk-in" permits for Threatened and Endangered species impacts.	12/1/2008	12/31/2010	Procedure developed in cooperation with EPA and USFWS. Implemented on a trial basis in March 2005, and revised as necessary.	Procedure developed and tested. Documentation of formal procedure recognizing reorganization of DNRE needed, followed by MOA with USFWS.	The DNRE should finalize administrative action with USFWS and EPA by new due date. The final DRAFT procedure will be presented to the Subcommittee for final recommendations to the Council. <i>-6 weeks (per) to submit</i>
20	DNRE will develop a method for notifying and allowing comment by another State whose waters may be affected by a discharge.	7/31/2009	12/31/2010	EPA agrees that this can be completed as component of revised program MOA. The DNRE now does this on a case-by-case basis.	Initiated discussion on MOA.	The Subcommittee recommends that the DNRE draft appropriate procedures and incorporate as part of MOA.