RESULTS OF U.S. ENVIRONMENTAL

PROTECTION AGENCY REGION 5

REVIEW

OF

MICHIGAN DEPARTMENT OF

ENVIRONMENTAL QUALITY'S

SECTION 404 PROGRAM

NOVEMBER 2002

TABLE OF CONTENTS

Page

Introduction

History of Michigan's CWA section 404 Program 1
Legal Standard for EPA's Program Review 1
Conduct of EPA's Program Review and this Report 2

SECTION 1: ANALYSIS OF LEGAL AUTHORITIES

Legal Authority Concerns

Jurisdiction 5
Permit Exemptions 9
Permitting Authorities 15
Compliance with CWA Section 404(b)(1) Guidelines 18
Enforcement Concerns 22
Indian Lands 22
Effect of Newly-Promulgated Rules 23
Notice of Which Legal Provisions Constitute Michigan's Program 24

Analysis of Effect of State Takings Law on Program Implementation 25

SECTION 2: ASSESSMENT OF PROGRAM ADMINISTRATION

Assessment of Program Implementation for Compliance with the State Program Regulations 28

Subpart C – Permit Requirements 28
Subpart D – Program Operation 34
Subpart F – Federal Oversight 42

Summary of Permit File Review 44

Comments on Michigan Department of Environmental Quality's Wetland Identification Manual: A Technical Manual for Identifying Wetlands in Michigan 48

Assessment of Coordination under the Federal Endangered Species Act 49

Analysis of Final Agency Permit Decisions in Administrative Contested Cases 51

Section 404(b)91) Guidelines-Background Discussion 51
Procedural Rules and Burdens of Proof 53
Water Dependency and Feasible and Prudent Alternatives 58
Unauthorized discharges Being Permitted 65
Conclusion 65

Enforcement and Compliance Review 68
Review of Citizen Complaints 69
Enforcement Case File Review 71
Summary of Conclusions 74

SECTION 3: SUMMARY OF COMMENTS
Summary of Issues Raised by the Public 77

Summary and Review of Comments from the U.S. Army Corps of Engineers, Detroit District Office 82

Summary and Review of Comments from the U.S. Fish and Wildlife Service, East Lansing Field Office 86

Petition for Program Withdrawal and Response 89

SECTION 4: FINDINGS
Summary of Findings and Corrective Actions 92

Introduction

On January 22, 1998, the U.S. Environmental Protection Agency (EPA) initiated an informal but comprehensive review of the State of Michigan's Clean Water Act (CWA) section 404 permitting program and the program's administration by the Michigan Department of Environmental Quality (MDEQ). EPA decided to initiate this review for a number of reasons. First, there have been a number of changes to the relevant federal and State statutes and regulations since Michigan assumed the program in 1984. Some of these changes include publication of Final Section 404 State Program Regulations in the Federal Register, numerous changes to the Corps of Engineers Nationwide Permit Program, adoption of a Federal Wetland Delineation manual, and changes in the scope of federal jurisdiction as a result of legal challenges. In addition, a body of State of Michigan judicial and administrative opinions relevant to permitting under the CWA section 404 program (section 404 program) has developed. In recent years EPA has received a number of comments and complaints about Michigan's administration of the section 404 permitting program. In February 1997 the Michigan Environmental Council submitted a request that EPA either ensure reform of Michigan's section 404 program or withdraw it. EPA stated it was treating the February 1997 request as a petition to withdraw, and committed to performing an informal review of the allegations in that petition, as provided for by 40 C.F.R. § 233.53(c)(1). See notices published at 62 Fed. Reg. 14846, 14847 (1997), and 62 Fed. Reg. 61177, 61174 (1997).

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 stated at 40 C.F.R. § 233.70. The Michigan state agency authorized in 1984 to administer the approved section 404 program was the Department of Natural Resources. Later, the State of Michigan reorganized its agencies and transferred authority to administer the approved section 404 program to the MDEQ; EPA approved this transfer on November 14, 1997. 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.

Legal Standard for EPA's Program Review

According to 40 C.F.R. § 233.16(e), "[w]henever 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." EPA also may decide to commence an informal review of a State program in response to a petition for review, with the goal of determining whether formal withdrawal proceedings should be conducted. 40 C.F.R. § 233.53(c)(1). After receiving and analyzing such information and documents, EPA is to determine whether the State program no longer complies with section 404 (including the requirements which are listed in subsection 404(h)

for initially approving a State program) and the regulatory requirements of 40 C.F.R. Part 233. The situations that would lead EPA to find that the State program, in one or more aspects, no longer complies with the CWA and its regulations are listed at 40 C.F.R. § 233.53(b). Program deficiencies of concern could be the result of State legislative action or inaction, the result of a State agency's failure to properly and adequately administer the program (as to permitting or enforcement activities), or the result of State court decisions that interpret State law, regulations, or agency permitting decisions in ways that impede implementation of the approved program in a manner that is consistent with, and as stringent as, CWA section 404 and the federal regulations. If EPA finds the State program to no longer be satisfactory, EPA may and should ask the State to act to correct the program's deficiencies. If the State does not take adequate corrective action, then it is incumbent upon EPA to begin formal withdrawal proceedings, as CWA section 404(i) requires and as 40 C.F.R. § 233.53 outlines.

Conduct of EPA's Program Review and this Report

The purpose of EPA's section 404 program review was to make a determination whether or not Michigan's section 404 program was still in compliance with section 404 of the Clean Water Act, the regulatory requirements of 40 C.F.R. part 233, and the section 404(b)(1) Guidelines promulgated at 40 C.F.R. part 230. The Regional Administrator of Region 5, EPA, informed the Director of MDEQ of the commencement of the program review in a letter of January 22, 1998.

The program review was initiated by requesting that MDEQ provide an updated program description (40 C.F.R. § 233.11); and by requesting a new Attorney General's statement confirming that Michigan's laws and regulations provide adequate authority to administer the section 404 program in Michigan, which was to include an analysis of the effect of any State court takings decisions on administration of the section 404 program and a statement concerning whether Michigan seeks to have its program cover activities on Indian lands (40 C.F.R. § 233.12). EPA also requested a compilation of all current, relevant Michigan laws and regulations. During June 1999 MDEQ submitted an initial set of materials to EPA, including a draft Attorney General's statement. Since June 1999 MDEQ and the Michigan Attorney General's Office have submitted revised and supplemental materials to EPA, including further explanations of how MDEQ implements the program and Michigan laws and regulations, changed administrative procedures and rules effected by MDEQ during the pendency of this program review, and proposals for additional changes in MDEQ's procedures and rules. EPA has reviewed those revised and supplemental materials and has incorporated into this report that review, changing earlier, tentative conclusions when warranted. In addition to reviewing the materials submitted by the State, EPA staff visited all thirteen MDEQ District offices and the central MDEQ office in Lansing, Michigan, where EPA reviewed permit and enforcement files and interviewed MDEQ personnel. EPA reviewed a total of 353 permit files, 327 citizen complaint files, and 55 enforcement files, as well as written decisions issued by MDEQ in contested permitting cases (which are final agency actions in individual permit matters processed under Michigan's approved section 404 program), all of which were developed between the years 1995 and 1999. Initial comments on MDEQ's program description materials and on MDEQ's administration of the permitting program were solicited from the Detroit District office of the U.S. Army Corps of

Engineers and from the East Lansing Field office of the U.S. Fish and Wildlife Service. Initial public input on MDEQ's administration of the permitting program was solicited during two one-day listening sessions held for stakeholder groups in Lansing, Michigan. The majority of the program review was completed by December of 2000, however, in early January 2001, the United States Supreme Court issued an opinion in Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers relating to the scope of federal jurisdiction under section 404 of the CWA over waters of the United States. This decision resulted in EPA having to revisit portions of the program review and delayed publication of the review findings until 2002.

EPA's program review had two principal components: an analysis of the legal authorities Michigan possesses and relies upon in administering the section 404 program, and an analysis of how MDEQ actually is implementing the program. EPA's preliminary findings are presented in this report. The report is divided into four major sections. The first section is the analysis of the State's legal authority to administer the section 404 program. This first section includes a review of the scope and detailed provisions of Michigan statutes and regulations that the State identified as constituting its section 404 program. This section also includes a review of the State's takings analysis and an assessment of the State's statement regarding Indian lands.

The second section of this report assesses how MDEQ actually is administering and implementing its section 404 permitting program. This second section includes an assessment of whether or not the State's program is meeting all the requirements identified in the federal regulations for State Program Assumption of a CWA section 404 program. This section also includes a summary of the findings of the review of permit files, an assessment of Michigan's wetland delineation manual, a review and assessment of the State's enforcement program, a review of MDEQ's contested case decisions, and an assessment of Michigan's compliance with § 230.10(b)(3), which states no permit shall be issued if it jeopardizes threatened or endangered species or destroys or adversely modifies critical habitat.

The third section summarizes the comments EPA received from the federal agencies, comments made at the stakeholder listening sessions, and comments contained in letters from the public. Also addressed is the petition for program withdrawal received in February 1997.

The fourth and final section summarizes EPA's findings, outlines program strengths and weakness, summarizes deficiencies identified in Michigan's section 404 program, and identifies corrective actions EPA thinks the State must take in order to ensure that Michigan's 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.

Results of EPA's Program Review

EPA now has completed its review and analysis of all the materials and information mentioned above. EPA has decided to publish in the Federal Register its preliminary conclusions as to the adequacy of the State of Michigan's approved program, although publication is not required by

the federal regulations. EPA made this decision due to the significant public interest in this matter.

EPA has preliminarily concluded that formal program withdrawal proceedings should not be initiated. EPA has, however, found deficiencies in the legal authorities establishing the approved section 404 program and in the program's administration. These deficiencies are identified in this report and other documents that are contained in the administrative record that supports the Notice published in the Federal Register. EPA has consulted with the State of Michigan about needed corrective actions. Those identified to date are mentioned elsewhere in this report and supporting documents, although they may be modified based on future input, consideration, and experience. EPA expects that certain corrective actions may be implemented through regulatory action by MDEQ, but that other corrective actions will require action by the Michigan legislature. EPA and the State of Michigan also have agreed on a tentative schedule for implementing the identified corrective actions, although we expect that schedule modifications likely will occur.

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 take certain actions with respect to permitting activities. According to section 404(h), the State must have authority "[t]o issue permits which apply, and assure compliance with, any applicable requirements of this section, including, but not limited to, the guidelines established under subsection (b)(1) of this section . . . ." 33 U.S.C. 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 EPA applies in reviewing State submissions during either initial approval of a program or a program review.

A State must have the authority, and must exercise the authority, to regulate all discharges of dredged material and 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). Although a State's 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 principally relies on two statutes as providing the authority for Michigan's section 404 program: Part 303 of the NREPA entitled Wetlands Protection, and Part 301 of the NREPA entitled Inland Lakes and Streams. Administrative rules exist for both.

JURISDICTION

The initial issue to be examined in determining whether Michigan has adequate legal authority for a section 404 program is the scope of Michigan's jurisdiction over discharges of dredged and fill materials into "waters of the United States" (termed "navigable waters" in section 404) within the State's borders[1]. CWA section 404 establishes jurisdiction over all waters of the United States regardless of areal size. Waters of the United States include, inter alia, all waters which are part

[1] The section 404 program assumed by the State of Michigan does not extend to all "waters of the United States" within the State's borders. By statute, it does not extend to "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); see 40 C.F.R. § 233.70. Nor does Michigan's section 404 program extend to waters of the United States located in Indian country, as discussed later in this document. Consequently, this discussion of jurisdiction should be read with recognition that Michigan's section 404 program does not cover all waters of the United States that are located within Michigan's borders.

of a tributary system to navigable or interstate waters and wetlands that are adjacent[2] to such waters. 40 C.F.R. § 230.3(s) and 33 C.F.R. § 328.3(a). Historically, the federal government (through the Corps of Engineers and EPA) also have asserted that waters of the United States include waters which have a connection with interstate commerce even if the water lies wholly within one State, is not navigable in any sense, and is isolated from other waters of the United States. The federal government made this assertion in regulations by stating 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). Until recently, this view generally was upheld by the federal courts.

On January 9, 2001, the United States Supreme Court issued an opinion in Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers, 121 S.Ct. 675 (2001) ("SWANCC"). The Court held that the Corps of Engineers could not extend its CWA section 404 authority to an isolated set of gravel pits which were used by migratory birds. Although the waters at issue were isolated from other waters, were non-navigable, and lay wholly within the State of Illinois, the Corps of Engineers had asserted jurisdiction pursuant to 33 C.F.R. § 328.3(a)(3), because migratory birds used those waters and, therefore, 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 use its "Migratory Bird Rule" to regulate the particular non-navigable, isolated, and intrastate waters at issue. Consequently, in future EPA and the Corps will not assert jurisdiction over non-navigable, isolated, intrastate waters which, if degraded or destroyed by discharges of dredged or fill material, could affect interstate or foreign commerce solely by virtue of the fact that migratory birds use those waters. While the Court did not hold that the Corps did not have section 404 jurisdiction over all non-navigable, isolated, and intrastate waters, the Court's opinion casts a cloud over the extent to which the CWA properly regulates non-navigable isolated waters. (See January 19, 2001 opinion of EPA's General Counsel and Corps' Chief Counsel.) EPA expects to issue guidance and go through rulemaking to further articulate which previously-regulated isolated waters remain jurisdictional in light of SWANCC.

Because EPA is still in the process of defining which isolated waters are, and are not, jurisdictional in light of SWANCC, at this time we do not expect Michigan to amend its statutes or regulations to regulate specific additional waters. EPA asks that once EPA and the Corps have developed final guidance on this issue, MDEQ and the Attorney General's Office commit to discussing with EPA whether State law and regulations need to be changed to be consistent with the federal guidance and the federal agencies' interpretation of CWA section 404's jurisdictional scope.

[2] Wetlands are "adjacent" if they are "bordering, contiguous, or neighboring," and such wetlands can be "separated form 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).

Taking account of the holding in SWANCC, we now turn to the extent of jurisdiction contained in the laws of the State of Michigan, particularly Part 303 and Part 301 of the NREPA. We discuss concerns EPA had during this program review as to whether Michigan's jurisdiction falls short of CWA jurisdiction, even after SWANCC, and the resolution of those concerns.

Part 303 asserts jurisdiction over the following categories of wetlands: wetlands of any size which are contiguous to the Great Lakes, Lake St. Clair, and inland lakes, ponds, rivers and streams, as well as wetlands which are not contiguous to the above-listed water bodies if the particular wetland is both 1) larger than 5 acres in size and 2) is located in a county with a population exceeding 100,000 people if a wetland inventory has not been performed in that county. § 324.30301(d). This leaves two categories of wetlands over which Part 303 fails to provide MDEQ "automatic" jurisdiction: 1) noncontiguous wetlands of any size located in counties with populations of less than 100,000 (Michigan has never performed wetland inventories in any of these counties) and, 2) noncontiguous wetlands that are 5 acres or less in size that are located anywhere in Michigan. With respect to a wetland that fits into either of these categories, under Part 303 MDEQ can take steps to assert jurisdiction over it (what the Attorney General's Office calls "regulatory jurisdiction") by making an individual determination that protecting that wetland is "essential to the preservation of the natural resources of the state from pollution, impairment, or destruction and the department has so notified the owner." § 324.30301(d)(ii) and (iii).[3]

Although the SWANCC decision has clouded the extent of the CWA's jurisdiction over isolated or noncontiguous wetlands, as noted above, EPA has not yet formally addressed such wetlands in rulemaking. Accordingly, given this narrow interpretation by EPA, Michigan's longstanding exclusion from regulation of all noncontiguous wetlands of any size that are located in a county with a population under 100,000 is a continuing concern for EPA. Michigan acknowledges EPA's concern as well as the fact that Michigan never performed the wetland inventories that both Michigan and EPA contemplated would occur after Michigan assumed the section 404 program. To address these issues, Michigan has committed itself to performing wetland inventories in all counties with populations of less than 100,000 over the next five years, and has secured funding for this purpose. If the wetland inventorying project is completed, EPA believes that our most significant concern with the scope of jurisdiction with Part 303 will be resolved. Furthermore, EPA expects that during the five years that these wetland inventories are being performed, the issues of the CWA's jurisdiction over isolated wetlands will be resolved and that EPA will have future discussions with Michigan regarding how the resolution of the CWA's jurisdiction impacts on Michigan's administration of the section 404 program.

With respect to the 5-acre limitation imposed by Part 303's definition of the term "wetland" at § 324.30301(d), in light of the uncertainties about federal CWA jurisdiction created by the SWANCC decision, and the absence of EPA or Corps final guidance on the effect of SWANCC, at this time EPA does not conclude that Part 303's exclusion from regulatory jurisdiction of

[3]Automatic jurisdiction over wetlands larger than 5 acres that are located in counties with populations of less than 100,000 would have kicked in if the MDEQ had fulfilled the prerequisite described in § 324.30301(d)(ii) and certified completion of a wetland inventory in each county.

noncontiguous wetlands that are 5 acres or less renders Michigan's law less stringent than the federal law. This issue, too, may be revisited by EPA and Michigan in the future.

Now we turn to Part 301, which generally grants MDEQ the authority to regulate discharges of dredged and fill material to inland lakes, ponds, rivers and streams. An exception to jurisdiction arises, however, from the fact that Part 301's definition of an "inland lake or stream" does not include any inland "lake or pond that has a surface areas of less than 5 acres." § 324.30101(e). After consulting with MDEQ and the Attorney General's office about this exception, however, it appears to be of limited scope. One reason for this exception's limited scope is that if the inland lake or pond is connected to a river or stream, MDEQ considers the size not only of the lake or pond, but also of the river or stream, in determining whether the 5-acre threshold is met. In addition, even for those waterbody 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 ("isolated"), MDEQ has jurisdiction over discharges connected to one of three types activities described in § 324.30102(f) and (g): 1) an 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) an 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) an 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[4], and due to the uncertainties about federal CWA jurisdiction resulting from the SWANCC decision, EPA currently cannot conclude that Michigan's jurisdiction over lakes and ponds is narrower in scope than is federal CWA section 404 jurisdiction, even in light of the exception provided by § 324.30101(e).

EPA also was concerned that Part 301's jurisdiction over inland lakes and streams did not extend to streams that flow intermittently, whereas the section 404 regulations explicitly include intermittent streams as "waters of the United States." 40 C.F.R. § 232.2; see also 40 C.F.R. §§ 122.2(c) and 230.3(s)(3), and 33 C.F.R. § 328.3(a)(3). Section 404's jurisdiction extends to all water bodies that are part of a tributary system to traditionally navigable waters, including streams that do not flow continuously. MDEQ and the Attorney's General Office assert that they have, and will continue to, interpret the definition of "inland lake or stream", which requires that a water body possess "definite banks, a bed, and visible evidence of a continued flow

[4] The State also asserts that even as to the restricted category of lakes and ponds ultimately created by the exception of § 324.30101(e), Michigan's lack of jurisdiction has no significant practical effect and has no negative impact on aquatic resources because Michigan landowners rarely place fill in small lakes and ponds (but, rather, typically create or enlarge small lakes and ponds).

or continued occurrence of water", as encompassing intermittent streams. § 324.30101(e).[5] Specifically, the State 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 for the water to flow within, and there is visible evidence that flow exists at times even if it is interrupted, a stream will fall within the State's permitting and enforcement jurisdiction. In light of this position provided by the State, EPA has concluded that Michigan's jurisdiction over intermittent streams is consistent with federal jurisdiction and EPA's concerns regarding this issue are allayed.

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 if an exemption listed in section 404(f)(1) otherwise would apply, a permit be obtained if a 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"). In examining Part 301, however, we find 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." EPA does not find in Part 303 similar provisions with respect to altering the flow or circulation of waters in a wetland. In practice, though, EPA thinks that if MDEQ ensures that only activities which truly meet an allowed exemption forgo the wetlands permitting process, the absence of an explicit recapture provision in Part 303 does not render the State's CWA section 404 permitting program inadequate. This conclusion is based in part on EPA's review of the federal government's use and invocation of the recapture provision in actual permitting situations. Still, any additional written analysis which MDEQ or the Attorney General's Office can provide regarding how provisions of Part 303 (as well as Part 301) and MDEQ's implementation of its permitting authorities address the concerns embodied in the CWA's recapture provision will be welcome.

The first federal exemption is stated in CWA section 404(f)(1)(A), and restated 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 has asked MDEQ whether the presence of horticulture and lumbering activities

[5] EPA also here notes that Part 303's wetland jurisdiction extends to all wetlands that are "contiguous" to an inland lake, pond, or stream, and contiguity can be established by the wetland's connecting to the inland lake or stream via "a seasonal or intermittent direct surface water connection." R 281.921(1)(b)(ii).

in the list of exempted activities could expand the universe of section 404-exempted activities. The MDEQ has agreed to provide EPA with references to existing rules or internal procedures which explain that § 324.30305(2)(e)'s reference to "horticulture" falls within the federally-contemplated activity of "agriculture," and that its reference to "lumbering" falls within the federally-contemplated activity of "silviculture." If MDEQ is unable to reference existing rules or internal procedures, EPA concludes that MDEQ should add rules that define these two terms appropriately and consistently with the federally-exempted activities.

We also are concerned 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).

MDEQ and the Attorney General's Office have informed EPA that they interpret these Part 303 exemptions so that in reality, they apply only to areas where an exempt use already has been established and is ongoing, and had relied on a Michigan Court of Appeals decision in Huggett v. Dept of Natural Resources, 232 Mich. App 188, 590 N.W.2nd 747 (1998), as support. Specfifically, 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 therefore 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. Dept of Natural Resources affirmed the Court of Appeals' decision that the exemption did not apply to the activities undertaken to convert land to cranberry production but it did not accept the lower court's rationale for its decision." Of concern to EPA is the latter portion of the opinion where the Michigan Supreme Court ruled 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 primary holding of the Court dictates that the exemption will operate as the functional equivalent of the federal requirement that the land be in established use for farming (ranching or silviculture), MDEQ and the Attorney General's Office assert that the actual holding of Huggett effectively has the same effect as if § 324.30305(2)(e) explicitly imposed an ongoing and established use condition. That is because the Michigan Supreme Court held 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. As a consequence, they assert their belief that such typical farming 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) does not apply 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 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 § 324.3035(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 exemption does not state with sufficient clarity that one cannot perform 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 discussed above should explicitly address this issue, as well. 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.[6]

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 exemptions application only to wetlands that are not contiguous to a lake or stream and that MDEQ has not identified by "clear and convincing evidence to be a wetland that is 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 these drainage exemption issues EPA believes Michigan must amend the statute to delete the exemption at § 324.30305(2)(j), only allow minor drainage to be exempt under § 324,30305(2)(e), and allow that exemption only in areas that are in ongoing and established use for agriculture. MDEQ has agreed to seek the deletion of the exemption at § 324.30305(2)(j) by the Michigan legislature, which would address EPA's concerns stated above.

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 40 C.F.R. § 232.3(d)(3)(ii). Furthermore, under federal law the concept of ditch "maintenance" is the removal of silt, vegetation, and other obstructions that over time have appeared in a drainage ditch; such removal is not to alter a ditch's original contours. 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, and work did not constitute "improvement"). See also Regulatory Guidance Letter 87-7 issued by the U.S. Army Corps of Engineers on Aug. 17, 1987 (maintenance of a drainage ditch means physically preserving original, as-built, configuration of ditch while allowing removal of accumulated sediment and debris).

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 requirements "[m]aintenance, operation or improvement which includes

[6] 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.

straightening, widening, or deepening [private agricultural drains and certain public drains] necessary for the production or harvesting of agricultural products." (Emphasis added.) 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." (Emphasis added.) 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. True, the Michigan drainage ditch exemptions are narrow in scope because they are limited to agriculture-related drainage ditches and public drains; but 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 and not consistent with the CWA and regulations at 40 C.F.R. §§ 232.3(c)(3) and 232.3(d)(3)(i). MDEQ has agreed to promulgate rules under Part 301 which clarify the scope of this exemption and ensure consistency with Section 404.

Turning 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 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. 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 would like issuance of an Attorney General's opinion addressing these same issues, particularly if such an opinion discusses 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. (Emphasis added.) The Attorney General's Office and MDEQ have explained, however, that these provisions do not exempt from permitting 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, they assert that 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 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, therefore § 324.30103(d) of Part 301 must be read to exempt only the construction of private drains on uplands (as well as 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 defines the term "improvement" so that it is limited to true maintenance. To 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 the apparent discharge exemptions in Part 301 do not, in fact, allow for discharges to waters of the United States in situations other than drain maintenance as exempted by CWA section 404(f)(1)(C).

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 of Engineers' 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 areal 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 extending jurisdiction to an activity but allowing that activity to be covered by a general permit.

EPA would prefer that its concerns be addressed by deletion of §§ 324.30305(2)(l) and (m). The MDEQ then could create a general permit category for these utility maintenance activities with terms and conditions similar to Nationwide Permit 12. MDEQ has agreed to implement an acceptable alternative: MDEQ will promulgate an administrative rules prescribing best management practices to be followed by persons engaging in these activities and discharges and has agreed to require that those persons give advance notice to MDEQ of their proposed activities. Such new rules should effectively set standards for minimizing wetland impacts which will be at least consistent with Nationwide Permit 12.

The final exemption which concerns EPA is that 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). While acknowledging that this Michigan statutory exemption has no equivalent in federal law, MDEQ and the Attorney General's Office provide a number of 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.[7] And if by chance a tailings basin had a surface area of less than 5 acres, it likely will be "contiguous" to an inland lake or stream (as the term "contiguous" is defined in Part 301) and thus still be subject to Part 301's permitting requirements.

Nevertheless, EPA requests that MDEQ seek deletion of the permit exemption for tailings basins and water storage areas. If it so desires, MDEQ then could issue a general permit for discharges associated with the creation of these structures, with appropriate conditions. If MDEQ is correct that, in practice, the construction of every tailings basin and water storage area ends up falling under the permitting requirements of Part 301, eliminating § 324.30305(2)(o) should not be problematic: there will not be any significant change to MDEQ's permitting scheme. In spring 2002, MDEQ agreed to seek the deletion of § 324.30305(2)(o) by the Michigan legislature.

PERMITTING AUTHORITIES

Directing our attention to the process of a State agency's issuing 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 made by the EPA Regional Administrator 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 section 404 program review all permit applications for compliance with the CWA 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

[7] Additionally, the State asserts that if a dam or similar structure is constructed to impound an area of at least 5 acres of open water, regulations at Part 315 (Dam Safety) of the NREPA also apply. Part 315's only standard for issuing a dam permit, though, is that MDEQ find the project "will not have a significant adverse effect on public health, safety, welfare, property, or natural resources," § 324.31514, without further guidance as to when a significant adverse effect exists. Thus, Part 315 does not impose permitting standards that are adequate when analyzed under CWA section 404.

been considered; that 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 233.34. EPA does have a few concerns, though, as discussed below.

A provision of Part 303, § 324.30307(2), provides 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."[8]. While EPA was concerned that when such a permit automatically issued MDEQ would not be issuing a written permit determination with a written rationale documenting how the permit will comply with the requirements of the CWA and the CWA section 404(b)(1) guidelines, as required by 40 C.F.R. § 233.34(c), MDEQ has shown EPA that it does in fact make the required determination in writing. The MDEQ and the Attorney General's Office are of the opinion that when the terms of § 324.30307(2) are triggered a "State-only" permit pursuant to Part 303 is issued: a CWA section 404 permit is not issued. The State's position is that § 324.30307(2)'s language that "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. This is a plausible view and EPA will defer to MDEQ and the Attorney General's Office's interpretation of Michigan law. In addition, EPA and MDEQ have tentatively agreed to include a statement to this effect in the interagency MOA. EPA also requests that a statement be added to any "State-only" permit issued under Part 303 which notifies the permittee that authorization under section 404 of the CWA is not granted by the State-only permit.

EPA has told MDEQ of its concern that Part 301's provisions for "minor permits" (which operate as do "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). The MDEQ already 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 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. The MDEQ already has agreed to promulgated administrative rules under Part 301 and Part 303 that

[8] See also Admin. Rules for Wetland Protection, R281.923(3) and cases such as Harkins v. Dept. 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.

document the five-year limit on the term of section 404 permits it issues (in practice, MDEQ reports that permits typically are issued for less than five-year terms).

EPA has noted that Part 301 and Part 303 and their implementing rules do not, variously, 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 timing of public notice section in the Compliance with State Program Regulations portion of this report). 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 to the public for submitting meaningful comments on Part 301 and Part 303 permit applications, and sufficient guidance may not have been provided as to the criteria MDEQ would apply when making a permit decision.

The actual date that a permit is considered to have issued can become an important issue in particular permit matters. The federal regulations at 40 C.F.R. § 233.35(b)(1) 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. Neither Part 301, Part 303, nor their administrative rules clearly specify the date on which a permit shall be considered effective. 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 the MDEQ Director.

An authorized State must have the authorities to modify or terminate (revoke) for cause a section 404 permit which that State has issued, according to the CWA. 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(a), 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.[9]

To EPA it appears that Part 301 and Part 303 and their administrative rules do not provide MDEQ with full and express authority to modify and revoke permits, as outlined by the CWA and its regulations. With respect to Part 303, even though it does not authorize MDEQ to modify or revoke permits on two of the grounds stated in 40 C.F.R. § 233.36(a) (if new information becomes available that if known when the permit was issued would have justified different permit conditions or denial of the permit application, and if statutory or regulatory authorities are revised), § 324.30313(2) seems to give MDEQ the authority to identify additional situations in which "cause" to revoke or modify a permit will exist. On this point, therefore, EPA asks that MDEQ promulgate a Part 303 administrative rule adding the two grounds just identified.

With respect to revocation of a Part 301 permit 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 is concerned that Michigan law could be read as authorizing MDEQ to revoke a Part 301 permit (issued as a joint CWA section 404 permit) only in the three situations mentioned by § 324.30107. EPA prefers that this perceived problem be addressed through amendment of § 324.30107 to add all of the grounds for revoking a permit provided by the CWA and its regulations. Yet if MDEQ and the Attorney General's Office conclude that § 324.30107 authorizes MDEQ to promulgate a rule that lists additional grounds for permit revocation, and if they provide EPA with a written analysis supporting that conclusion, after reviewing that analysis EPA may agree that such an administrative rule change by MDEQ is an adequate corrective action.

EPA has been unable to find a provision of Part 301 which expressly authorizes MDEQ to modify a permit; nor do Part 301's administrative rules address the issue of permit modification. As a consequence, MDEQ does not appear to have the authority to modify permits that it issues under Part 301 as joint federal and state permits. Yet the CWA requires that a State agency administering a section 404 permitting program have authority to modify permits. Moreover, the option of modifying a permit can be a very useful tool that allows a permitting agency to more

[9] 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 failure to disclose all relevant facts; a change in conditions requiring a temporary or permanent reduction or elimination of discharges. At 40 C.F.R. § 233.36(a), EPA added the grounds of: receipt of information showing activities authorized by a general permit do not have minimal individual and cumulative adverse effects and thus should be individually permitted; receipt of significant new information unavailable when a permit was issued but which would have justified permit denial or added permit conditions; revisions to statutory or regulatory authority.

appropriately respond to new circumstances or new information than an agency can if its only options are either to allow a permit to continue in effect or to revoke it. An amendment to Part 301 to give MDEQ the express authority to modify permits may be needed, followed by MDEQ's promulgation of appropriate permit modification rules. But if MDEQ and the Attorney General's Office concludes that this concern can be dealt with through promulgation of administrative rules alone, and if they can provide EPA with a satisfactory written statement setting forth the basis of MDEQ's authority to promulgate Part 301 rules for permit modification, EPA will be willing to consider whether this is an appropriate corrective action.[10]

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

Recently MDEQ has promulgated various new administrative rules under Part 303 addressing issues that EPA believes were unclear at the time this section 404 program review commenced. EPA believes that MDEQ may be developing additional administrative rules, as well. The most important of the issues to be addressed and clarified through new administrative rules may be MDEQ's full and proper application of the section 404(b)(1) Guidelines during MDEQ's permit decision making process. EPA appreciates MDEQ efforts to address in the new Part 303 rules such section 404(b)(1)-related subjects as when a proposed activity is dependent upon being located in wetlands or other waters of the United States, how to determine if an alternative activity is feasible and prudent, and who bears the burden of establishing whether a feasible and prudent alternative to proposed discharges exists, as well as such subjects as who bears the burden of proof in establishing that the facts and circumstances support issuance of a permit, and mitigation of environmental impacts. 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).[11] Yet it is important for MDEQ to promulgate equivalent new Part 301 rules. Because MDEQ issues CWA section 404 permits pursuant to Part 301 for projects involving types of waters other than wetlands, EPA thinks that the section 404(b)(1) guidelines also must be incorporated into the permitting decisions MDEQ makes under Part 301.

---

[10] If MDEQ promulgates new Part 301 and Part 303 rules regarding permit modification and revocation, EPA requests that it also consider promulgating rules regarding permit suspension, as referenced in 40 C.F.R. § 233.36. The current lack of permit suspension procedures, though, does not render Michigan's CWA section 404 program legally inadequate.

[11] 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.

In addition, EPA ask that, under both Part 301 and Part 303, MDEQ promulgate additional rules to clarify that even water-dependent projects must be designed and implemented to have the least damaging impact to the aquatic environment. Moreover, such rules should recognize that when a feasible and prudent alternative is expected to have a lesser adverse impact on the aquatic ecosystem and the environment as a whole, the activity proposed by the permit applicant shall not be permitted. See 40 C.F.R. § 230.10(a). New rules for both statutes also would be appropriate 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 of additional, similar activities will be performed in future, consistent with 40 C.F.R. § 230.11(g).

EPA has two remaining and related serious concerns regarding whether provisions of Part 301 and Part 303 and their administrative rules ensure that MDEQ-issued section 404 permits always will comply with the CWA section 404(b)(1) guidelines. At subsection 230.10(b) the federal regulations state that no discharge of dredged or fill material shall be permitted if it jeopardizes the continued existence of a species that is listed as federally threatened or endangered or if it results in likely destruction or adverse modification of a listed species' critical habitat. 40 C.F.R. § 230.10(b). Another bar on issuance of certain section 404 permits is established by subsection 230.10(c): "no discharge of dredged or fill material shall be permitted which 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 of the activity.

As EPA has discussed with the State, the concern that Michigan law does not clearly prohibit the issuance of permits that either will jeopardize the continued existence of threatened and endangered species and their critical habitats or will result in significant degradation of waters of the United States. In EPA's opinion, both Part 301 and Part 303 themselves should contain such clear prohibitions. The State's position is that Part 17 of the NREPA, § 324.30311 of Part 303, and administrative rules under Part 301 and Part 303 provide adequate assurance that permits will not be issued in these circumstances. Yet these arguments by the State, in EPA's view, rely on interpretations of the wording of laws and rules that are too attenuated to fully assure EPA that permits falling into one of these two categories will not be issued.

While Part 301 does not mention jeopardy to endangered species and critical habitat, or significant degradation, as being grounds for denying a permit, the State has asserted that it believes that administrative Rule 281.814 provides adequate authority on these points. EPA considers Rule 281.814's text as too vague to provide adequate assurance. As of this writing, however, MDEQ is drafting new rules addressing the subject of endangered species. EPA requests that these rules clearly prohibit issuance of Part 301 permits which jeopardize both endangered and threatened species and their critical habitat.

Part 303 and its rules likewise fail to contain a bar on issuing permits that jeopardize endangered species and their critical habitats. We understand the State'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 a permit shall not be issued unless it is shown that an unacceptable disruption will not result to aquatic resources. Yet EPA is not confident that either of those provisions provide the protection for threatened and endangered species and their critical habitat that is required by section 404(h)(1)(A)(i) and the section 404(b)(1) Guidelines. That is because neither provision plainly bars the issuance of permits that would jeopardize threatened and endangered species or their critical habitats (whether those species are considered "aquatic" or not). In particular, the "otherwise unlawful" language is imprecise, and past pronouncements by the MDEQ's Office of Administrative Law Judges construing this term leads EPA to conclude that, in the first contested case in which MDEQ argued that its denial of a permit was due to jeopardy posed to a threatened or endangered species or its critical habitat in contravention of the federal Endangered Species Act, the ALJ would conclude that issuing a permit with such a jeopardy impact was not "otherwise unlawful." With respect to the protection afforded by § 324.30311(4) on this issue, 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). For these reasons, it seems to EPA that Part 303 itself must be amended to explicitly state that a project will not be permitted if the project will have the effects on threatened and endangered species and critical habitat that are described in 40 C.F.R. § 230.10(b)(3). MDEQ has, however, proposed to deal with this problem by drafting new administrative rules for Part 303 that explicitly incorporate the federal section 404(b)(1) Guidelines and, therefore, 40 C.F.R. § 230.10(b)'s mandate that no permit shall e issued if it "jeopardizes the continued existence of species listed as endangered or threatened under the Endangered Species Act of 1973... or results in likelihood of destruction or adverse modification of...critical habitat." (Explicit incorporation of the section 404(b)(1) Guidelines also would incorporate 40 C.F.R. 230.10(c)'s bar on the issuance of permits that would cause or contribute to significant degradation of the waters of the United States, so presumably MDEQ views this same new Part 303 rule as addressing EPA's concern on that point, as well.)EPA is willing to review the new rule(s) that MDEQ drafts and any legal arguments presented by MDEQ that this action will be an effective corrective action

On this issue, the State also asserts that the "otherwise unlawful" language invokes the provisions of MEPA[12] and Part 365 of the NREPA. But Part 365 does not establish protection for critical habitat. As to 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 this language, when invoked through the "otherwise lawful" language of § 324.30311(a), might bar issuance of

[12] Michigan notes that MEPA independently applies to any State licensing procedure.

permits that jeopardize endangered species and their critical habitat, the underlined language and the lack of a clearly-worded prohibition on issuing a permit which would have this effect does not eliminate the potential for Part 303/section 404 permits to be issued that violate the terms of 40 C.F.R. § 230.10(b).

With respect to the section 404(b)(1) guidelines' prohibition on issuing permits when discharges 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), EPA's concerns again stem from the balancing criteria contained in § 324.30311 and the inclusion of the economic concerns of the applicant (i.e., applicant's need to use the property as he sees fit to realize the profit he desires) and of the local community (e.g., job generation and tax revenue) in that balancing process (as endorsed in a number of administrative rulings by MDEQ ALJs). 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 exercises this authority. EPA will continue to pursue this issue with the State, and believes that after further discussions an adequate corrective action dealing with this subject, such as a rule change, will be developed.

Significant concerns related to whether the section 404(b)(1) Guidelines are applied and satisfied when permits are issued as a result of contested case proceedings are discussed in this report's section on Analysis of Final Agency Permit Decisions made in Administrative Contested Cases.

In order to address the issues discussed above, and to insure compliance with the 404(b)(1) Guidelines, MDEQ proposed to amend its administrative rules for both Part 301 and Part 303 to incorporate by reference the federal 404(b)(1) Guidelines, thus requiring that both permit writers and MDEQ ALJs apply the federal 404(b)(1) Guidelines as part of the process of applying Michigan permitting standards. This action should resolve all of EPA's concerns.

ENFORCEMENT CONCERNS

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). The State of Michigan elects to follow the public participation procedures set forth in § 233.41(e)(2), which contains three requirements. EPA believes MDEQ is adequately authorized to, and is observing, the first of these requirements (investigation of and response to citizen complaints). As to the second and third requirements, it is not clear to EPA that either is embodied in Michigan law or regulation. To remedy this situation, MDEQ already has agreed to include in the 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.

EPA and the State should further discuss which aspects of Part 303's provisions authorizing MDEQ to seek criminal fines, and the amount of those fines, need to be amended. An important concern is that while 40 C.F.R. § 233.41(b)(2) directs that the burden of proof and degree of knowledge mandated by State law to prove a criminal violation of a permit shall be no greater than the criminal negligence standard applicable under federal law for violations of federally-issued CWA section 404 permits, Part 303 requires that the State of Michigan meet a higher standard – that the permit term or condition was "willfully or recklessly violated", see § 324.30316(3). In addition, EPA is concerned that Part 303 does not provide for adequate penalties to be imposed against those who discharge without a permit. See 40 C.F.R. § 233.41(a)(3)(ii). Nor does Part 303 clearly provide that MDEQ can seek a criminal fine of up to $5,000 per violation against any person who makes a false statement in a permit application or other documents. See 40 C.F.R. § 233.41(a)(3)(iii).

INDIAN LANDS

The draft Attorney General's Statement includes a statement that the State of Michigan "will not seek approval of § 404 state program authority over‹Indian lands'." See 40 C.F.R. § 233.12(b). That 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." In essence, the State was saying that it did seek approval to administer the section 404 program in those portions of "Indian country" which the State felt were not also "Indian lands;" the State considers "Indian lands" to be a subset of "Indian country." 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.

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 Dept. 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 the 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 when addressing authorization of state programs under RCRA Subtitle C. See 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, the State did not seek authority for Indian lands. Recently, the state has made it clear that its definition of "Indian lands" is narrower than EPA's definition of "Indian Country". Given EPA's interpretation that the term "Indian lands" and "Indian country" are the same, The State's program has never extended to any part of "Indian country." EPA's conclusion is not altered by the State of Michigan's 1999 statement of opinion submitted to EPA that "Indian lands" is a term that is narrower in scope than "Indian country." Nor does EPA conclude that the State's expression of this opinion in the draft Attorney General's Statement is a basis for withdrawal of the approved section 404 program in Michigan. In summary, the scope of the section 404 program administered by MDEQ does not extend to Indian country.

EFFECT OF NEWLY-PROMULGATED RULES

As discussed throughout this document, 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. EPA is requesting that MDEQ promulgate additional rules as discussed in this Report, and MDEQ is working on issuing more rules both in response to EPA's concerns and due to its own concerns.

EPA requests that the Attorney General's Office issue a written opinion analyzing the applicability and effect of all such new rules. Among other subjects, this opinion should address the applicability of new administrative rules to permit applications that have been filed as of the date a new rule becomes effective. This opinion also should analyze whether a new rule applies to a permit decision made by MDEQ staff where the rules is issued after the permit decision has been made, and the extent to which such newly-effective rules must be considered by MDEQ's administrative law judges and its Director when ruling in contested cases.

During spring 2002, MDEQ also 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 prior to their finalization, and would be notified of such rules' final, effective date. EPA approves of this initiative by MDEQ, for it will more rapidly implement needed improvements and clarifications to State rules, and provide fair notice of them to the public.

NOTICE OF WHICH LEGAL PROVISIONS CONSTITUTE MICHIGAN'S PROGRAM

Finally, EPA requests that the Attorney General's Office prepare an updated and accurate statement identifying the Michigan laws and regulations constituting Michigan's approved CWA section 404 program, to be included by EPA in a newly published notice at 40 C.F.R. § 233.70.

Analysis of Effect of State Takings Law on Program Implementation

The Attorney General's Statement submitted by a State in order to obtain initial approval to administer a 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 has done so; its submittal consists of three separate documents: a Takings Analysis and 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." Furthermore, the Attorney General's Office 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 state of federal takings law and its principles as announced by the United States Supreme Court and lower federal courts, as well as Michigan case law. The question to be answered is, have Michigan state courts ruling on takings law claims held that government application of regulations have resulted in regulatory takings in situations where federal takings law jurisprudence would not so conclude? (Actual, physical takings are not implicated in wetlands regulation.) Such a result could be due to Michigan State courts either announcing incorrect principles of takings jurisprudence or misapplying correctly-stated principles.

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. The Michigan state courts have pronounced and applied the principles of takings law jurisprudence correctly. The only reported case in which a court's takings law analysis was seriously in error was rectified by a 1998 decision by the Michigan Supreme Court that correctly stated a number of takings law principles. K & K Construction, Inc. v. Dept. of Natural Resources, 456 Mich. 570 (1998); rev'g 217 Mich. App. 56 (1996), cert. denied, 119 S. Ct. 60 (1998). In fact, the Michigan Supreme Court's pronouncement of how a court is to determine in any particular takings claim what piece of property is to be considered the "parcel as a whole" has been favorably cited by a federal appellate court. See e.g., Forest Properties, Inc. v. United States, 177 F.3d 1360 (1999).

In this 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 (although we note that other, non-wetlands related takings decisions which are not discussed by the Michigan Attorney General also support EPA's conclusion here). 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.

This is not necessarily the end of the inquiry for EPA, though. The wording of the federal regulation, that there be "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) (emphasis added), suggests that the concern on this issue goes beyond whether State takings law is being interpreted and applied by State courts consistently with federal takings law jurisprudence. The concern extends to a consideration of how the State agency's implementation of the State program has been affected by the existence of State law takings provisions and the exercise of takings law claims by landowners. Implementation of a section 404 program by a State, in both the permitting and enforcement realms, potentially may be affected by State decision makers' worries that a takings claim may be brought in any particular wetland regulation matter, and that the claim may be successful. Or such fear of takings claims could permeate the implementation of a section 404 program. EPA previously made this point in responding to a petition to withdraw the 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, in which 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, regardless of whether or not State takings jurisprudence is consistent with federal takings jurisprudence).

EPA has not found, however, that Michigan's section 404 program is being operated incorrectly, or unsuccessfully, due to a concern for takings claims. As EPA explains elsewhere in this report, it has extensively reviewed both MDEQ's permitting program and enforcement program. EPA has found neither that activities that should not be permitted are being permitted by MDEQ due to a concern for potential takings claims, nor that MDEQ is failing to engage in enforcement due to a concern for potential takings claims. Nor has any matter been identified to EPA in which takings law concerns have affected MDEQ's decision making, with one exception. That exception is MDEQ's issuance of a "State-only" permit to Michigan Peat for its peat removal activities at the Minden Bog near Minden, Michigan. The "State-only" permit was issued after Michigan Peat had rejected a permit offered by MDEQ under both State wetlands law and CWA section 404. The "State-only" permit authorized discharge activities on far more acreage than had the proffered section 404 permit, and it lacked certain restrictive conditions. During the period between MDEQ's preparation of the two permits, Michigan Peat both had filed a contested case petition challenging the conditions in the proffered section 404 permit and had filed a takings claim against the State. Michigan Peat, and some members of the public, have represented

MDEQ's issuance of the "State-only" permit as having been motivated by concern about the results of the takings litigation. While EPA disagreed with MDEQ's action in that matter, EPA cannot conclude that the State's possible takings claim concerns in the Michigan Peat matter alone rise to the level of a "[f]ailure to exercise control over activities required to be regulated [by MDEQ under section 404 and the State assumption regulations]." 40 C.F.R. § 233.53(b)(2)(i).

For these reasons, EPA concludes that takings law issues do not create any basis for commencing, or further investigating the need for, program withdrawal proceedings.

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 how MDEQ is administering 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's statutes as they relate to the State Program Regulations can be found in the Legal Authority Concerns section of this program review report.

PROGRAM REGULATIONS

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 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.**
- **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 the files for applications which resulted in a permit being issued had some level of documentation of compliance with the 404(b)(1) Guidelines included as part of information used to make the permit decision. This documentation was generally in the form of the Project Review Report (PRR). In the majority of the files reviewed, the assessment of compliance with the 404(b)(1) Guidelines and/or State 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 404(b)(1)Guidelines relating to both the alternatives analysis and project impacts to the aquatic environment. The PRR form recently was revised by MDEQ, and new guidance for completing the PRR was contained in MDEQ's updated program description materials. When utilized by MDEQ staff, these new and revised materials will result in improvement of the documentation of the factors staff consider when it making a particular permit decision.

In our review of contested cases we found several instances where an administrative law judge (ALJ) either reversed a permit denial decision or authorized an increase in the scope of a project

without documentation compliance with either the 404(b)(1) Guidelines or State statutes other than a statement that the permitted project would meet the State statutes. These decisions usually rarely mentioned any new information or documented why the ALJ found the initial permit decision regarding compliance with the state statutes to be incorrect. The lack of documentation in these ALJ decisions of compliance with either the 404(b)(1) Guidelines or state statutes raises concerns that some final agency decisions rendered through the contested case process are not in compliance with § 233.20(a). In fact, as discussed in a later section of this report, it seems that MDEQ, acting through ALJs and the Director as a final decision maker in contested case proceedings, consistently fail to ensure compliance with the section 404(b)(1) Guidelines. We recommend that, in cases where the original permit decision is overturned or modified, MDEQ provide documentation which supports the final permit decision and demonstrates compliance with the 404(b)(1) Guidelines as well as the appropriate State statutes.

During the 18+ 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 the MDEQ issued a "State-only" permit which only authorized work under the 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 has not issued any permits for prohibited areas.

The MDEQ did not assume the authority to regulate navigable waters under the federal program. Therefore, there have been no instances where the State has issued a federal/state permit which would substantially impair a navigable water.

§ 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 which have been determined to cause only minimal adverse environmental effects. Any general permit issued must comply with the 404(b)(1) Guidelines.

In addition to the conditions specified in § 233.23, each general permit shall 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**

· **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 404(b)(1)Guidelines**

The State 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 COE under the Federal Nationwide Permit Program have been found to cause not more than minimal adverse environmental effects on the aquatic environment and comply with the 404(b)(1) Guidelines.

The State'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.

The 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 a federal or state designation as wild and scenic rivers, identification as having threatened or endangered species, or are identified as unique from an ecological perspective. MDEQ also reserves the right to require processing as a major 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. 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.

In general we find that MDEQ's general permit program is consistent with the requirements outlined in § 233.21. MDEQ staff review each proposal and complete a PRR form for each project documenting compliance with the State statutes and compliance with the conditions of the general permit. Based on a limited review of minor project files during EPA's visits to the MDEQ field offices, we found that MDEQ staff made 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 Permit Authority sections of the Legal Authority Concerns portion of this report.

§ 233.23 -- Permit Conditions

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

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 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.

(1) 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 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

(2) Only the activities specifically described in the permit are authorized.
The 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 this 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 codification, revocation or termination.
Part 303, section 324.30314 of the Wetlands Protection Act 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 under 301.

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

As stated above, monitoring and reporting requirements associated with wetland mitigation projects are included as special conditions of MDEQ permits when appropriate. Although some projects included a mitigation requirement and monitoring of the mitigation site, we did not find any files during our file review which actually had the required monitoring reports in them. This section of the State Program Regulations also requires that any non-compliance with the permit be reported as well. As stated above, EPA did not find any instances of non-compliance with the permit being reported by the applicant, nor did the EPA file review find any files in which MDEQ staff had found a project to be out of compliance with the permit. Discussions with field staff indicate that there is little time to check projects for permit compliance or to check on mitigation sites for compliance. Staff indicated that they did look at completed project sites and mitigation sites if they had occasion to be in the area, but regular compliance inspections are not made.

(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 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 (R281.925, promulgated

under Part 303) allow MDEQ to consider mitigation proposed by an applicant to off-set project related impacts to wetlands. Further analysis of the State's authority to implement these conditions can be found in the Legal Authority Concerns section of this report.

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**
- **A complete description of the proposed project**
- **Description of the type, composition, source and quality of the fill material**
- **A certification that all information contained in the application is true and accurate**
- **The applicant will be required to furnish additional information which the Director deems appropriate to assist in the evaluation of the application. The additional information may include environmental data and 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 used by the Corps of Engineers as well. 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 324.30306 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 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 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 MOA between EPA and MDEQ requires federal review of any project which may affect the waters of another State. This provision of the MOA provides the Regional Administrator with the opportunity to review and comment on such projects.

It is not clear in the MDEQ program submittal that there are procedures 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 some specific process which provides the adjacent State with an opportunity to comment on the proposed project and the process should also 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**
- **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 which fall 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. The MDEQ has issued public notices for each general permit proposed. Although our file review did not encounter any projects as to which MDEQ had decided re-noticing was needed due to a major modification of the project, EPA is aware of several instances in which MDEQ has issued a second public notice as a result either of major modification of the project or of a determination that the impact to the aquatic environment was substantially greater than stated in the original public notice.

Timing and Distribution

The regulations at § 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 the 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 provided all interested parties 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 § 233.32(c) require the State agency to provide by mail public notice to the applicant, any agency with jurisdiction over the activity or disposal site, adjacent property owners, and all persons who have specifically requested copies of the public notices, and 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 (such as advertising in a newspaper of sufficient circulation) reasonably calculated to cover the area affected by the activity.

The 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 only asks the applicant to list 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.

The MDEQ has a subscriber list available to any person who desires to receive notification of pending permit applications. The list is published bi-weekly and includes the location of the project and an one or two word project description. In order to get more detailed information on the project or to find out if the project will be put out on public notice, an interested person would have to contact MDEQ by mail. This system has resulted in interested persons not receiving a complete public notice until the comment period was closed or with very little time remaining in the comment period. As stated above, the regulations require that public notices be provided by mail with reasonable time to comment to all persons who have specifically requested copies of public notices.

During most of the period of this program review, MDEQ was not providing public notice in a manner other than through the mail, which was not consistent with the current State Program Regulations. In August 2002 the MDEQ implemented an on-line system via the internet that publishes all public notices and notices of public hearing. The system is linked to the CIWPIS data base and it is MDEQ's intent that this on-line system will make public notices available as

soon as the notice is issued and remain available for review as long as the public comment period is open. Comments may be submitted electronically through this system as well.

While MDEQ's institution of an on-line system for public notice review and comment will resolve MDEQ's need to comply with 40 C.F.R. 233.32(c)(2), EPA remains concerned that not all interested persons who wish to receive public notices by mail are receiving the public notices and receiving them with sufficient time to submit comments to the MDEQ. Therefore, the MDEQ must revise its public notice system to make sure that the public notice information is distributed in a manner consistent with the requirements of § 233.32(c)(1), including ensuring that all adjacent property owners and any interested persons receive public notices well before the comment period has expired, by mail if so requested.

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 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 factors including the 404(b)(1) Guidelines or state equivalent criteria on which decisions are based**
- **Any other information which would significantly assist interested parties in evaluating the likely impact of the proposed activity**

In addition, 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**
- **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 factors considered, including the 404(b)(1) Guidelines. While the public notices do not list a specific contact person, they do list the address and phone number of the 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 324.30307 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 were 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 303 whenever one is requested in writing. In addition, MDEQ has held public hearings 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 the MDEQ wetland program we have found MDEQ to be very responsive to requests for public hearings on proposed projects.

An analysis of the comparability of MDEQ's statutory authority to hold public hearings with the State Program Regulations can be found in the Permitting Authorities Section of Legal Authority Concerns portion of this report.

(c) At a hearing any person may submit oral or written statements or data concerning the 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 often extended 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 404(b)(1) Guidelines and/or compliance with equivalent State environmental criteria as well as other applicable State laws.

The MDEQ uses the PRR form for documentation of compliance with the 404(b)(1)Guidelines and State statutes and for documenting the final permit decision. The amount of information provided in the PRR forms was somewhat variable. In general, projects with larger impacts had 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 PRR forms in 78% of those files; therefore, 78% of those files had documented compliance with the 404(b)(1) Guidelines as required by the State Program Regulations.

Projects for which a permit was being denied ,or a modified permit of smaller scope 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 PRR forms had a box checked which indicated that some of the factors evaluated under the 404(b)(1)Guidelines had been considered. For example the PRR form indicated that alternatives had been considered but neither the PRR form or the file provided specific information on what alternatives had been considered or how they were evaluated. Other PRR forms included a written description of the site and a statement that the project impact area was the least damaging alternative available.

Although we found PRR forms 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 404(b)(1) Guidelines and the environmental criteria in State 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 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 filling out 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.

Although detailed information on the factors considered during the evaluation of projects for compliance with the Guidelines was lacking from most of the PRRs EPA reviewed, in most files there was some documentation in the files that indicated that compliance with the Guidelines and the environmental factors in State statutes had been evaluated prior to 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 with MDEQ compliance with this section of the State Program Regulations relates to the documentation of compliance with the 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 404(b)(1) Guidelines and the applicable State statutes.

For a more detailed discussion of this issue, see the section of this report which discusses administrative contested case decisions.

MDEQ must document that every permit issued complies with the Michigan statutes, and the Michigan statutes and rules must be interpreted in a manner consistent with the 404(b)(1) Guidelines.

We recommend that in cases where a project was initially found not to be in compliance with the Guidelines and state 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 looked at did not have any public comments. In those cases where there were public comments 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 the 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 form which contained the written rationale for the permit decision. In some cases there would be little or no decision rationale included in the PRR, but the letter to the applicant informing them of the permit decision would include documentation outlining why the permit had been issued. Typically, 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 outlining the reasons for the permit decision was often minimal.

Since the PRR form serves as the determination for many permit decisions, during the file review we checked to see that the PRR forms were signed and dated. Although we often found the PRR forms to be filled out, they were not always signed and dated so it was difficult to assess whether or not the determination or PRR was dated and signed prior to the taking final action on the application. In general it appeared from the files that the PRR forms were filled out before the decision letter was sent to the 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 always is 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 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 contested case proceedings are completed the file is then open 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 the Regional Administrator comments on a permit application or draft general permit the Director shall follow the procedures outlined in § 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.

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

Further discussion regarding issuance and effective date of permits can be found in the Legal Authority Concerns section of this program review report.

§ 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:

- **Permittee's noncompliance with any term or condition of the permit**
- **The permittee's failure to disclose fully 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**
- **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.
MDEQ does have a process in place to have a hearing to consider suspension of a permit. The process involves going through a "Rodgers Hearing." Additional discussion regarding permit modification and revoking permits can be found in the Legal Authority Concerns section of this report.

SUBPART F -- FEDERAL OVERSIGHT

§ 233.50 -- Review of and objection to State-proposed permits.

Section 233.50 of the State Program Regulations outline the process and time line to be followed during federal review of, and objection to, permit applications and proposed State permits. The MDEQ has done an excellent job of getting public notices subject to federal review to EPA in a timely manner. The MDEQ also provides copies of these public notices to the other commenting federal agencies (U.S. Army Corps of Engineers 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. In addition, within 30 days of receipt of a public notice, EPA may request any additional information deemed necessary to review the project for compliance with the 404(b)(1) Guidelines, the Clean Water Act, or the State Program Regulations. Once EPA notifies MDEQ of its intent to comment, EPA has 90 days from the date of receipt of the public notice to provide those comments to MDEQ. If EPA objects to the permit application, or requires a permit condition, MDEQ cannot issue a permit until the objection is resolved or the requested condition is incorporated into the permit. The MDEQ has 90 days from the date of the EPA objection letter to either resolve the objection to EPA's satisfaction or to deny the permit. In the event that the federal objection cannot be resolved within 90 days of the federal objection, authority to process the permit transfers to the Corps of Engineers.

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. 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 line may expire before federal comments are received and/or objections can be resolved, in practice this usually does not happen. Typically, EPA notifies MDEQ of its intent to comment well before the Part 303-imposed 90-day period is over, and in most cases EPA is able to get comments to MDEQ within that 90-day time frame. MDEQ usually is able to work with the applicant to get the federal objection resolved and a permit is either denied or issued. If EPA has significant concerns with a project that MDEQ cannot resolve before the Part 303 90-day deadline, MDEQ either denies the permit or the applicant withdraws the permit application.

Almost without exception, MDEQ is able to modify projects to satisfy the federal concerns, deny the permit, or the applicant withdraws the application before the 90-day deadline arrives. We are

aware of only one or two cases where a MDEQ permit was issued by "operation of law" due to the fact that the Part 303 90-day time limit expired. MDEQ has never issued a Part 303/section 404 permit by "operation of law" for a project which had an unresolved federal objection. There have been three cases in which the federal objection was not resolved within the 90-day period set in § 233.50. All three projects have gone to the Corps of Engineers for permit processing.

In summary, although the Part 303 90-day time line does not mesh well with the time lines set in the State Program Regulations, 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 state 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 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.

§ 233.52 – Program reporting

The federal program regulations require the State to report to EPA on an annual basis. The 1983 Memorandum of Agreement (MOA) between EPA and the MDNR (now MDEQ) establishes the end of the calender 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 include:

> 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);
>
> Number of permits issued under emergency conditions;
>
> Number of persons in the State discharging dredged or fill material under general permits and an estimate of the cumulative impacts of these activities.

MDEQ has submitted the annual reports as required by the MOA. The annual reports have included all the information outlined above and past reports have been approved by EPA. However, the State has not been timely in submitting its reports. The reports for the years of 1994 through 1999 have been a year or more late. The issue of timeliness of submission of annual reports has been raised with the MDEQ. Recently MDEQ updated their permit tracking system and the 2000 annual report was received in a timely manner. It appears that the updated tracking system has resolved this problem.

Summary of Permit File Review

During the spring of 1999, staff from the EPA (and on one district visit staff from the Detroit District office of the Corps of Engineers) 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 of 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 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 the impact on the aquatic resource. In the majority of the files reviewed, the only form of documentation supporting the permit decision was the Project Review Report (PRR). The PRR forms had a box which was checked if the project was determined to meet the 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 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 photos in them which were presumably taken during a site inspection, yet few of the photos had basic information attached to them, such as when and were the photos were taken and who took the photos. Documentation of conditions on-site was variable. Many PRR forms included a brief description of site conditions including plant communities present, notes on soils on the sites and observations on water depth and circulation patterns on the site. 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 were the wetland boundary has 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. On many small projects MDEQ staff walked the site and verified the information provided in the application. MDEQ staff were not consistent in making notes for the file or on the PRR form regarding whether or not the delineation in the application was accurate. There were one or two cases where a delineation had been completed previously and was on file under a wetland assessment number different from the permit file number, however the delineation was not included in the permit file. In cases where a delineation (wetland assessment) already exists, this information should be included in the permit file.

It was not clear from either the file review or the up dated 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 just proceeded with out re-public noticing. In cases where the delineation was found to be incorrect and/or the amount of wetland impact was significantly under estimated, MDEQ should develop a procedure to ensure that such projects are re-public noticed.

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 were 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. Some of the permits required monitoring of the mitigation. Few of the mitigation plans included performance standards. Consequently, assessing the extent of compliance with the mitigation requirements of the permit would be difficult, and so those permit conditions would be difficult to enforce. 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 the 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 reached. Of the 353[13] files reviewed, 74, or 22%, of the files reviewed did not have PRRs in the file. The PRR forms 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

[13] 19 files reviewed were not checked for presence of the PRR form.

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

Interviews with staff during the file reviews reveled that some field offices have a walk in permit program. Applicants seeking permits for certain minor activities were able to apply for a permit directly to the field office rather than going through the Permit Consolidation Unit(PCU) processing system. There is no guidance developed which outlines when an applicant may apply for a permit by "walking in" to a field office and when a permit application must go through the PCU group for processing. There was no consistency between 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 Threatened and Endangered Species impacts.

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 PRR forms are completed and included in every permit file for which a permit decision is made. Staff also need to be sure that they clearly document site visits and the findings of the site visits, including verification of delineations and documentation of any changes made to the applicant's delineation. Also, all photos 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 404(b)(1) Guidelines. Our file review found that MDEQ staff make site visits to 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, the Michigan Department of Environmental Quality finalized their 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 that state 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 Federal manual which uses a three parameter approach, considering vegetation, hydrology and soils to make a wetland delineation. The 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 the 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 the MDEQ manual functionally equivalent to the 1987 Federal Wetland Delineation Manual.

The 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 federal manual as well. In summary, we have found that the MDEQ Wetland Identification Manual is comparable to, and would result in the same delineation on a site, as the 1987 Federal Wetland Delineation Manual.

Assessment of Coordination under the Federal Endangered Species Act

There are currently 23 federally-listed threatened or endangered (T & E) species that occur in Michigan. Almost all of these potentially could be impacted directly or indirectly by MDEQ's section 404 permitting program. Some of these species, however, are closely associated with coastal wetland habitats which are subject to Corps jurisdiction. The Corps, therefore, performs most of the interagency consultations pursuant to section 7 of the Endangered Species Act of 1973 (ESA), as amended. In addition, many of the T & E species that have been listed during the last five to ten years, and many species which are associated with interior wetlands under jurisdiction of the State-assumed program, are limited in distribution. Thus, since Michigan's assumption of the section 404 permit program, through 1999, there have been less than 10 projects that have been determined to have the potential to affect T & E species. In these instances, MDEQ staff have been responsive to comments made by federal agencies on T & E species issues, and have worked with USFWS as needed to ensure either that a project is modified or that a permit is conditioned in such a way that impacts to T & E species are removed (USFWS personal communication).

Under the current arrangement, MDEQ is relying on their CIWIPS database to identify projects that are likely to affect T & E species. The CIWIPS database checks the township, range and section in which the project falls, as well as the surrounding eight sections to determine if T & E species have been documented as occurring there. If CIWIPS finds a listed species in close proximity to the proposed project, the file is sent to the Michigan Department of Natural Resources (MDNR), which then determines whether the project may affect a T & E species.

If MDNR determines a project may impact a T & E species, the file is treated as a "red file" and forwarded to the federal agencies for review and comment. This gives the federal agencies an opportunity to review the project and work with MDEQ to modify the project or recommend its denial in order to ensure that the permitted action will not jeopardize a federally listed T & E species or modify designated critical habitat.

As noted above, this system is working well for major permits. However, for many applications for minor projects, the MDNR does not have enough information to determine whether a project may affect a T & E species, and the application is forwarded to MDEQ field staff, who must then conduct a site visit in order to make the determination. If MDEQ staff determine a project may affect a T & E species, they must then decide if the project should become a red file, subject to formal federal review. USFWS indicated confidence that -- as of the date of its October 4, 1999, letter -- most individuals within MDEQ and MDNR are doing a good job of identifying projects which should be provided for federal review. USFWS is concerned, however, that future staffing or policy changes could adversely affect the current situation, and recommended that formal guidelines be developed for making these determinations.

In most cases, the impacts to T & E species are minor in scope and can be removed through the appropriate conditioning of the permit. In these cases, discussions regarding modifications or

additions to permit language have been conducted informally between MDEQ and USFWS. In some cases MDEQ has appropriately conditioned permits to remove adverse affects to T & E species without USFWS input.

One concern with Michigan's program relates to the fact that a permit could be issued by "operation of law" if the 90-day period established by Part 303 expires. If a permit were issued for a project which would affect T & E species by "operation of law" MDEQ would not have made a determination as to whether the permit complied with the 404(b)(1) Guidelines. Although MDEQ has not yet issued a permit by operation of law for a project which has affected a T & E species, EPA recommends MDEQ develop a procedure to ensure that no project which impacts a T & E species be permitted due to Part 303's 90-day time period expiring.

In order to be sure that MDEQ does not issue any permits which would have an adverse impact on a T &E species, we recommend that a procedure for notifying USFWS of any projects which have the potential to impact T & E species be developed. This would ensure that USFWS is aware of all projects that may affect a T & E species and can assist MDEQ staff in working with the applicant to modify a project so as to ensure that potential impacts to T & E species are eliminated. To ensure that adequate coordination under the ESA occurs, MDEQ should work with USFWS, EPA, and MDNR to complete development of procedures for screening all permit applications, including "walk in permits", for potential to impact federally-listed T & E species. These procedures should also include development of guidelines for MDEQ field staff to follow when making a determination of the effect of a proposed project on T & E species during site visits. Once a staff determination is made the guidance should also outline when the project's effect on T & E species is significant enough to trigger designation as a "red file," thus requiring federal review. The procedure should also define how MDEQ, EPA, and USFWS will coordinate on projects which may affect a T & E species. The procedure should outline each agency's responsibilities under this procedure.

Analysis of Final Agency Permit Decisions in Administrative Contested Cases

After MDEQ staff, typically in the Land and Water Management Division, 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 held by an administrative law judge 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, it is then reviewed and the reviewer issues MDEQ's Final Decision on the permit application. Until recently the final reviewer and issuer of Final Decisions was MDEQ's Chief Administrative Law Judge (ALJ); 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 now the Director) reviews the permit decisions of MDEQ permitting staff and renders final agency permit decisions, these decisions must be analyzed as part of EPA's section 404 program review. EPA already has identified various weaknesses in Michigan law and regulations that render the law as written less stringent than required by CWA section 404 and the State Program Regulations promulgated by EPA. EPA now analyzes whether through its contested case decisions MDEQ's Office of Administrative Hearings correctly applies Michigan legal provisions so as to be consistent with, and as stringent as, federal section 404 law. This analysis also considers whether these contested case decisions, by applying Michigan law as written to reach certain factual and legal conclusions, demonstrate the ways in which Michigan law is less stringent than federal wetlands law (or, alternatively, if the decisions remedy those inadequacies). In conducting this review, EPA primarily analyzed contested case decisions issued between January 1994 and March 2000.

Section 404(b)(1) Guidelines – Background Discussion

The underlying question EPA asked during its analysis of contested case decisions was whether MDEQ's Office of Administrative Hearings is assuring compliance with the mandate of CWA section 404(h) 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 particularly the section 404(b)(1) Guidelines was reiterated a number of times in the State Program Regulations. For example, at 40 C.F.R. § 233.34(a) EPA mandated that before each permit is issued the Director of a State agency implementing a 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, and 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, 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 MDEQ issues are consistent with the 404(b)(1) Guidelines applies to all of MDEQ, including the Office of Administrative Hearings, and applies whether a permit decision was issued by MDEQ without challenge, or whether a permit decision was subject to contested case proceedings. Moreover, a State's failure to comply with the section 404 program memorandum of agreement signed by that State 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 CWA section 404(b)(1) guidelines. As described elsewhere in this report, the manner in which MDEQ staff applies Michigan's environmental criteria -- such as through using the Project Review Report form when examining a proposed project -- seems to be ensuring that when MDEQ staff make initial permit decisions they actually are applying environmental criteria that is equalivant to, and as stringent as, the section 404(b)(1) Guidelines.

EPA's analysis, however, clearly shows that MDEQ's Office of Administrative Hearings has repeatedly failed to apply Michigan's environmental criteria in a manner that is consistent with the CWA section 404(b)(1) Guidelines, and consequently has undermined the State's ability to administer a program that meets the terms of CWA section 404(h) and the State Program Regulations. In fact, MDEQ's presiding officers have repeatedly rejected the correct views of MDEQ permitting staff on a number of subjects relating to the section 404(b)(1) Guidelines, such as whether a proposed activity is wetland dependent and whether feasible and prudent alternatives exist. In fact, some contested case decisions indicate that the decision maker affirmatively decided to not apply the section 404(b)(1) Guidelines, despite the urging of the Department's legal representatives.

For example, the Chief ALJ, in his Final Decision in the contested case In re Carabell and Gordenker, No. 93-14-602 (Sept. 30, 1998), stated that the only issue before him was whether the applicant should be granted a State permit. The Chief ALJ ordered MDEQ staff to issue a Part 303 permit despite being aware that the federal review agencies' objections to the proposed project would not be resolved, and he acknowledged that the applicant would have to apply to the Corps for a section 404 permit. The Director recently endorsed this view in his Final Decision in In re CCMS Associates, Inc., No. 97-04-0138 (Oct. 10, 2000). During the hearing in that case the presiding officer ruled that, in reaching his Proposal for Decision, he would not consider whether the project complied with section 404 or the section 404(b)(1) Guidelines. The Director noted that EPA had objected to the permit application and ordered issuance of a "State-only" Part 303 permit, reaching the conclusion of law that "issuance of a Part 303 permit does not negate

the requirement for the Petitioner to obtain all other necessary permits" – that is, a section 404 permit. See also In re Prodo, Inc., No. 96-08-0088 (March 1, 1999) (Final Decision ordered MDEQ staff to issue a Part 303 permit that would be a "State-only permit"); In re Schultz, No. 91-5-160W (Nov. 25, 1996) (on related issue, during hearing presiding officer refused to allow MDEQ staff to testify about section 404(b)(1) guidelines and whether they were satisfied by the project at issue, ruling that contested case hearing was limited to a review under Goemaere-Andersen Wetlands Act (Part 303's predecessor)). The basis for these decisions seems to have been a mistaken belief that because contested case proceedings are administrative proceedings under State law, and because the ultimate issue for decision was whether a permit should issue under a particular State permitting statute (such as Part 303), federal section 404 issues were irrelevant.

Clearly, though, MDEQ as a whole is obliged to administer the section 404 program by issuing section 404 permits that comply with the mandates of section 404, including subsections 404(b) and 404(h), and the State Program Regulations. MDEQ's obligation as an agency continues to exist even when the final permit decision is being made by a MDEQ presiding officer or reviewing officer after adjudication of a contested case proceeding. That obligation does not apply only to MDEQ staff who make an initial permit decision. In fact, the contested case rulings just discussed undermine the proper application of the section 404(b)(1) Guidelines by MDEQ staff, for by communicating to staff that section 404's mandates and the Guidelines will not be applied by the final decision maker, staff is discouraged from ensuring that the initial permit is consistent with those provisions – indeed, staff's application of those standards may have resulted in an initial permit decision that the presiding officer or reviewing officer finds to be legally unsupported because that officer has eschewed application of section 404.

Despite these conscious decisions not to apply the section 404(b)(1) Guidelines during contested case proceedings, EPA would have less cause for concern if the permit decisions which emerged from the contested case process demonstrated that the presiding officers and review officers actually engaged in analysis which was consistent with the requirements of CWA section 404 and its regulations. That is, those officials could be applying Michigan laws and regulations in ways that are consistent with federal section 404 law. Regrettably, in a number of areas discussed below the contested case decisions do not reflect such analysis; on certain issues they also reflect a misunderstanding of the legal standards that should be applied.

Procedural Rules and Burdens of Proof

Some of the problems discussed here have their origin, EPA opines, in the absence of procedural rules defining the role of the Office of Administrative Hearings and the legal standards it is to apply. Although the Michigan Administrative Procedures Act (APA) authorizes contested case hearings, it does not provide rules specific to MDEQ permitting contested cases. The Michigan APA does establish a standard for admissibility of evidence. It also requires that a final decision contain findings of fact based exclusively on evidence, that it be accompanied by a concise statement of the underlying facts in support as contained in the hearing record, and that it contain

conclusions of law supported by authority or reasoned opinion. §§ 24.275, 24.285. But the Michigan APA does not define the issue to be decided in a MDEQ permitting contested case, nor does it assign burdens of proof on specific issues to particular parties. EPA urges MDEQ to develop its own procedural rules so that "rules" are not created and applied ad hoc by the ALJs.

In the absence of such procedural rules, the Office itself has determined that it has the authority to conduct a de novo review of permit decisions made by MDEQ staff, without being able to cite legal authority supporting this conclusion. See Carabell, No. 93-14-602 (Sept. 30, 1998) (Final Decision's citations to Michigan APA §§ 24.203(3) and 24.285 inapposite). Furthermore, according to certain contested case decisions the issue a presiding officer is to decide is not "whether the Department erred in denying the application [for this] would eliminate the de novo nature of this Tribunal's jurisdiction," id.; rather, the presiding officer can himself fashion a proposed project and order MDEQ staff to issue a modified permit. As part of the de novo review, presiding officers are free to accept evidence that had not been presented to MDEQ staff at the time the initial permit decision was made, including evidence about project modifications. Or at least this was the holding in Carabell, and reviews of such new evidence have been effectively conducted in a number of contested cases. On the other hand, some final decisions express a different view holding, for instance, "it is not the Department's duty to plan or design a project. Rather, the Department must review a plan, submitted in the form of an application for a permit, under the criteria of the appropriate statute and determine whether it is permissible". In re Sidebottom, No. 96-07–0503 (Aug. 3, 1998) (presiding officer correctly imposed burden on applicant to present evidence on feasible and prudent alternatives and, finding applicant failed to meet burden, upheld MDEQ staff's denial of application). Still, in the Final Decision of In re Baughn, No. 90-11-461 (July 1, 1997), the latter principle was stated yet not applied: after describing the issue for resolution as an applicant's "entitle[ment] to a permit within the scope of that for which he applied" the Chief ALJ ordered MDEQ staff to issue a permit for a different and smaller project than had been outlined in the permit application.

A case in which the absence of procedural rules defining the issue to be decided and burdens of proof resulted in a particularly egregious decision is In re Relleum, Inc., No. 88-11-0352W (June 18, 1996). A contested case hearing was held during 1995 over MDEQ staff's denial of a 1992 permit application. The applicant's first permit application, submitted to MDEQ in 1988, also had been denied. As part of its first application, the applicant had provided MDEQ an expert wetlands delineation showing 19 acres of wetlands on the property; the presence of wetlands was confirmed in 1991 by the applicant's contractor. But during the contested case proceedings the applicant denied that wetlands were present on the property: between the application date and the hearing date, the applicant had performed extensive land-clearing activities on the property, removing surface vegetation and as much as seven inches of soil. The Proposal for Decision, adopted by the Final Decision without further explication, reveals confusion as to what legal standards were to be applied to the evidentiary issues; and to the extent that it announces legal standards, seems to fail to apply them to the facts of the case. The presiding officer began by correctly placing on the applicant the burden of proving whether wetlands were present at the property. He then stated that because the property had been disturbed the criteria of whether

wetlands vegetation was present should not be applied (rejecting evidence presented by MDEQ that during site inspections wetlands vegetation was observed despite the severe disturbance); instead the soil characteristics criteria should be examined. MDEQ presented evidence that the soils at the property were wetland-type soils. The applicant presented no evidence on soil characteristics, but instead presented results from three years of piezometer readings collected at the property after the 1992 application had been filed and after the landclearing. In finding that wetlands did not exist at the property, the presiding officer appears to have relied solely on this hydrological evidence, even basing conclusions about the soil characteristics criteria on the hydrological data, and appears to have wholly rejected MDEQ's evidence. Moreover, after finding that there was insufficient evidence to establish what the soil characteristics were in one portion of the property the presiding officer, rather than ruling that the applicant had not borne its burden of proof on this issue, found that the lack of evidence supported a decision to issue the permit. Finally, without stating any authority for applying this standard, the presiding officer determined that the issue at the contested case hearing should be not whether wetlands existed at the time the permit application was filed, or at the time the application was denied by MDEQ, but at the time the hearing was held. In doing so, the presiding officer rejected not only all of MDEQ's scientific and technical evidence showing that wetlands existed, but also disregarded the applicant's own earlier wetland delineations.

In EPA's view, the ultimate issue for decision in contested cases should be whether MDEQ staff's denial of a permit application was in error. While it may be appropriate to allow admission of evidence at hearing developed after the permit denial, such evidence should relate to the proposed project as described in the application and should relate to conditions at the site as they existed when MDEQ permitting staff made its decision. Regardless of EPA's view on these subjects, it is for MDEQ to decide what issues are to be resolved during contested case hearings, as well as what legal standards and burdens of proof are to be applied. Of greatest importance is that procedural rules be established to direct the unguided discretion of the deciding officials, which has led to inconsistent and ad hoc findings of fact and conclusions of law. Those rules should ensure that final permit decisions made by the Office of Administrative Hearings apply either the CWA section 404(b)(1) Guidelines or equivalent Michigan environmental criteria in such a way that the principles of the Guidelines are respected.

For example, if a presiding officer decides to overturn MDEQ permitting staff's decision to deny a permit, or if a presiding officer decides to fashion his own permit terms, the final decision must be based on scientific, ecological, and technical data and evidence in the record, and there must be specific citations to that supporting evidence. Instead, the contested case decisions often reject technical testimony and evidence presented by MDEQ staff without citing to any contrary evidence presented by the applicant that supports the decision to issue a permit or permit as modified by the presiding officer. This occurs despite the direction in both Part 301 and Part 303 that MDEQ is not to issue a permit unless it finds that the applicant has established certain matters, including that unacceptable adverse environmental impacts will not result. Under State law, as under the Clean Water Act, it is the applicant's burden to show that a permit should be issued; thus it is the applicant who must make the *prima facie* case that it has met the statutory

and regulatory prerequisites to permit issuance. Yet, in many contested case decisions it seems clear that the presiding officer placed on MDEQ staff the burden to show such things as that the proposed activities would cause unacceptable adverse environmental impacts, or that there was a feasible and prudent alternative. Not only do these decisions misplace the burden of proof, but in rejecting MDEQ-offered evidence and failing to cite to supporting evidence elsewhere in the record these decisions fail to demonstrate that the facts in a particular situation are such that issuing a permit will comply with the section 404(b)(1) Guidelines or equivalent State environmental criteria.

To review, under the section 404(b)(1) Guidelines no discharge of dredged or fill material is to be permitted "if there is a practicable alternative . . . which would have less adverse impact on aquatic ecosystem, so long as the alternative does not have other significant adverse environmental consequences." A practicable alternative includes an activity "which do[es] not involve a discharge . . . into the waters of the United States . . . [or involves] discharges . . . at other locations in waters of the United States" and can be buying property "not presently owned by the applicant which could reasonably be obtained, utilized . . . to fulfill the basic purpose of the proposed activity." 40 C.F.R. § 230.10(a). Additionally, no discharge of dredged or fill material is to be permitted if it causes or contributes to violations of State water quality standards or toxic effluent standards, or if it jeopardizes the continued existence of a federally threatened or endangered species or likely will adversely modify such a species' critical habitat. 40 C.F.R. § 230.10(b). Nor shall any discharge be permitted if it "will cause or contribute to significant degradation of the waters of the United States," considering both the individual and collective effects of the activity. 40 C.F.R. § 230.10(c). Finally, "no discharge of dredged or fill material shall be permitted unless appropriate and practicable steps have been taken which will minimize potential adverse impacts of the discharge on the aquatic ecosystem." 40 C.F.R. § 230.10(d).

A discussion of some contested case decisions will illustrate EPA's concern on this point. In In re Oceana County Road Commission re: Crossing of Carlton Creek, No. 96-09-0355 (April 15, 1999) the MDEQ Director reversed a Proposal for Decision ordering that a permit issue for construction of two bridges. The presiding officer had so ordered after finding that the bridge projects would not materially adversely affect fish and the aquatic ecosystem, although to reach that finding he had to reject a significant amount of expert testimony and evidence presented by MDEQ staff about the adverse impact the project would have on the aquatic ecosystem. The only evidence on environmental impacts the applicant seems to have presented was a county Drain Commissioner's testimony that he was not concerned about there being any impact on fish or fisheries and his recounting personal experiences of catching fish under bridge culverts.

In some cases presiding officers fashion their own permit terms and find that a permit for a project as they have modified it will not cause unacceptable environmental harm. This done despite the apparent lack of evidence in the record as to the environmental impact of the modified project. In such cases it appears a presiding officer extrapolates conclusions on environmental impacts from evidence that had been presented about the likely impact either of the project as proposed in the

application or modified projects discussed by the parties at hearing. In re Charfoos and Company, No. 87-14-824W (Aug. 29, 1996), is one such case. MDEQ permitting staff had denied a permit application to fill 45 acres of wetlands for the construction of a residential development. The denial was based on severe adverse impacts to biological communities that provide nesting, breeding, and feeding habitat for a variety of wildlife. Discounting MDEQ staff's testimony because MDEQ had not shown the property supported "unique or consistent wildlife usage" and because he concluded merely insignificant and partial displacement of wildlife would occur, the presiding officer drew up his own project that would result in filling 32 acres of wetlands. While acknowledging that his modified project would cause considerable destruction of wetlands, the presiding officer found this destruction would not have a probable impact on fish or wildlife. There was no citation to record evidence supporting this conclusion of no probable adverse impact. To EPA, the project as originally proposed and as modified by the presiding officer seems to be the type of project that should not be permitted because it will significantly degrade the aquatic ecosystem, see 40 C.F.R. § 230.10(c).

Two cases with similar facts resulted in similar rulings after the presiding officer rejected MDEQ evidence on the proposed project's adverse environmental impacts and then ordered that permits be issued for shed-building projects with smaller wetland "footprints" than had been sought in the permit applications. The cases are In re Schnetzler, No. 94-5-118 (Oct. 25, 1996), and In re Stanzcak, No. 94-05-0229 (Nov. 27, 1996). The presiding officer's reason for rejecting the evidence MDEQ introduced indicating unacceptable disruptions of aquatic resources (including water circulation, habitat, pollutant filtration, flood storage) was that the evidence was not specific enough and did not quantify the adverse impacts. Again, the presiding officer did not cite to any record evidence indicating that the applicant had met its burden of showing the absence of unacceptable adverse environmental impacts. (In Stanczak the applicant testified to his own personal opinion that his project would not have a negative impact, but provided no data or evidence to support his opinion). Nor, in imposing his own modified project, did the presiding officer cite to any record evidence establishing that it would not adversely impact the environment. (In Stanczak, the presiding officer also found that wetlands at issue were not providing a public "use", thus not recognizing that the wetland's functions and values and the environmental services they provided were public uses under State law.) See also In re Shadyview, Nos. 97-15-1364-7 and 94-7-53 (May 14, 1999) (Director granted application, overturning presiding officer's compromise project.)

Similarly, in decisions ordering permit issuance without modification by the presiding officer, presiding officers frequently reject evidence of significant adverse environmental impact presented by MDEQ staff without adequate explanation or citation to contrary evidence in the record. For example, in In re Aldridge, No. 91-07-305 (Dec. 26, 1995), a contested case in which MDEQ staff testified that the wetlands bordering an inland lake provided benefits to fisheries and wildlife, and identified the wildlife staff had observed during site visits, the presiding officer rejected the MDEQ evidence because, as in Stanczak and Schnetzler, MDEQ could not testify with certainty as to the quantity and type of fish that would be negatively affected and "had no scientific evidence to verify or quantify this consideration". The presiding officer made no finding that the

applicant had met its burden of proving that unacceptable adverse environmental impacts would not result. As support for his order that the permit issue, the presiding officer found that the environmental impact of the project would be minimal because the wetland in question was equal to 1/300th of the lake area; in fact he found, in the face of MDEQ's evidence, that the wetland was "more of a detriment than a benefit".

Other cases in which presiding officers made findings of fact and conclusions of law on the environmental harm factor that contradicted evidence presented by MDEQ staff, and without citing to other record evidence as support, include the following: Carabell (presiding officer concluded 16 acres of wetlands at issue provided so little in way of wetland functions and values that after applicant filled 12 acres and enhanced 4 remaining acres greater wetlands functions and values would result); In re Baughn, No. 90-11-461 (July 1, 1997) (final decision endorsed presiding officer's order to issue permit for a smaller beach construction project than described in application despite MDEQ staff's testimony that any fill would harm lake and fish, with presiding officer opining, for example, that while some fish might be harmed others would be helped, and finding that because project would not significantly destroy aquatic ecosystem, non-environmental considerations favoring project prevailed); In re Schultz, No. 91-5-160W (Nov. 25, 1996) (rejecting substantial testimony by MDEQ staff about adverse environmental impacts a project would cause because MDEQ did not quantify impacts; presiding officer found "project construction will not impact the ecology of the area; it will be maintained"); see also Relleum.

Yet in some cases the proposals for decision and final decisions from the Office of Administrative Hearings document that full and proper consideration was given to evidence of environmental harm presented by MDEQ staff, and that the applicant was held to the burden of proof on the issue of environmental impacts. The presiding officer in In re Wagner, No. 96-1-67 (April 14, 1997), accepted testimony by MDEQ staff as to the adverse impact a project would have on wetlands without demanding the type of specific and quantitative data that was demanded in decisions discussed above. In upholding the denial of one permit application, the presiding officer noted the applicant's failure to produce any evidence refuting MDEQ's evidence that the wetland at issue provided valuable wetland services for fish and wildlife and would be impaired by the project. In re Haggart, No. 93-7-53W (Dec. 26, 1995). Likewise in In re North Shore Dunes Associates Property, No. 94-OT-04A (June 10, 1997), the petition challenging MDEQ's increased setbacks along the Lake Michigan shore was denied because the petitioner had failed to rebut MDEQ's scientific and technical evidence addressing the need for the new setback limits; while acknowledging some people might disagree with MDEQ's technical conclusions, the presiding officer opted to defer to MDEQ's expertise. While these decisions are heartening, they also highlight the inconsistent treatment of this issue by officials with the Office of Administrative Hearings.

Water Dependency and Feasible and Prudent Alternatives

In determining whether to issue a dredge and fill permit, two major issues to be resolved besides the likely adverse environmental impact is whether a project 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). The contested case decisions contain many erroneous findings and conclusions on these issues.

The presiding officers seem to struggle constantly with the concept of wetland dependency. In part this struggle may be attributable to Part 303's provision that "[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). On its face the statute seems to preclude a feasible and prudent alternatives analysis if the primary purpose of a proposed activity is determined to be wetland dependent. MDEQ permitting staff certainly treat the wetland dependency question in this manner. See Project Review Report, July 1999 version, Program Description, Figure III-8, which asks in section 19.f "Has the applicant shown that the proposed activity is wetland dependent, OR Has the applicant shown that no feasible and prudent alternatives exist?" By contrast, under federal law even projects deemed water dependent still must undergo an alternatives analysis to determine if a less damaging alternative exists. 40 C.F.R. § 230.10(a)(3).[14] A review of the contested case decisions suggests that sometimes officials with the Office of Administrative Hearings may improperly define or apply the wetlands dependency test because they are in effect conflating an alternatives analysis with the wetland dependency inquiry. See In re RRRT Partnership, No. 95-5-253W (Aug. 18, 1997), and In re Clear, No. 96-11-0033 (July 14, 1997). In both of these decisions the presiding officer concluded the activity of building houses on the parcels in question was not wetland dependent only because the feasible and prudent alternative of building solely on uplands at the parcels existed.

Some confusion on the wetland dependency determination is inherent in the issue itself – defining the underlying activity that is to be examined to determine its wetland dependency character is often difficult. Yet the appropriate test is stated in the federal regulations: "where the activity associated with a discharge . . . does not require access or proximity to or siting within the special aquatic site to fulfill its basic purpose (i.e., is not 'water dependent') . . . ." 40 C.F.R. § 230.10(a)(2). MDEQ's Project Review Report correctly explains it is the "proposed activity" that is to be examined. The new, proposed instructions for MDEQ's Project Review Report likewise explain that the activity must be wetland dependent; they helpfully suggest that one ask the question: can the activity be performed on an upland? As an example, building a house is not a wetland dependent activity because houses can be built on uplands; on the other hand, one cannot harvest peat from an upland. App. III-L, p. 26.

Under the federal regulations, once it is determined that a proposed activity is wetland dependent, the permit decision maker must take another step and decide if there are any practicable alternatives (feasible and prudent alternatives under Michigan law). An acceptable alternative may entail no discharge to waters of the United States, or may entail discharges which cause less harm to the aquatic ecosystem and the environment as a whole, as long as the alternative also is

[14] The need to amend Part 303 to conform it to this part of the section 404 regulations is mentioned earlier, in the Legal Authority Concerns section of this report.

technically and financially feasible and consistent with overall project purposes. For example, if an applicant wants to deposit fill to create a walkway from his house to a lake, that activity typically would be wetland dependent because most natural lakes are bordered by wetlands. Yet feasible and prudent alternatives causing less environmental harm might exist and should be reviewed. Perhaps an alternative route could be used that crosses less wetland area or links up to a nearby neighbors' walkway. Or perhaps the area to be filled and volume of fill could be reduced by building a narrower walkway or placing it on pilings. Because Part 303 does not require that wetland dependent activities be analyzed to determine if an acceptable alternative that will cause less environmental harm exists, and because contested case decisions do not always properly analyze whether an activity truly is wetland dependent, Michigan law as written and as applied is less stringent than federal law.

EPA next discusses those contested case decisions where the proper analysis of wetland dependency and/or the existence of feasible and prudent alternatives analysis was not conducted, resulting in erroneous decisions that do not comply with the section 404(b)(1) Guidelines.

Presiding officers have repeatedly found that, if a single-family home or an outbuilding of a single-family home cannot be built on the applicant's chosen parcel without necessitating the filling of wetlands, then the project is wetland dependent. This clearly erroneous holding was made in the following cases: In re Testolin, No. 98-08-0064 (March 19, 1999); In re Sidebottom, No. 96-07-0503 (Aug. 3, 1998) ("as a matter of law, the proposed project is wetland dependent"; "the project proposed by the petitioner is not the type of activity that can only be performed in a wetland. However, the proposed activity necessarily involves utilization of wetlands and is therefore dependant upon being located, at least partially, in the wetland."); In re Schultz, No. 91-5-160W (Nov. 25, 1996) (involving a lakefront lot that was almost entirely wetlands but had been part of a larger lot that prior to being subdivided had contained uplands); In re Grant, No. 92-5-91G (March 18, 1996) (building house on a parcel that was 100% wetlands was a wetland dependent project). See also In re Stanczak and In re Schnetzler (two cases in which it was found that applicants' desire to build storage sheds near their existing homes meant there were no feasible and prudent alternative locations, and because the sheds could not be built at the chosen locations without some impact to wetlands, the shed-building was wetland dependent). See also In re Duncan, No. 90-11-208 (July 16, 1996) (building road to a particular upland site found to be wetland dependent because was no other feasible and prudent way to get access to the site).

The same wetland dependency conclusion has been made regarding multi-family residential projects slated for construction on large sites. Although upholding the denial of the application, the presiding officer in Prodo, No. 96-08-0088 (March 1, 1999), held that if the applicant applied to build one of the alternative projects MDEQ staff had outlined a permit should be issued. MDEQ staff sought review of the presiding officer's rationale that the housing project was wetland dependent because placing such a project on the 27-acre property necessarily would entail filling wetlands. In rejecting MDEQ's challenge, the Chief ALJ held that the presiding officer had correctly found the activity to be wetland dependent and had correctly applied "this Tribunal's" wetland dependency analysis from an earlier contested case decision, In re Brammer,

Nos. 88-6-500 and 90-6-159W (Sept. 28, 1992). In another final decision ruling on MDEQ staff's challenge to a wetland dependency finding, the Chief ALJ further explained his reasoning on the issue: "The operative term in [§ 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 in being located in the wetland." Carabell, No. 93-14-602 (Sept. 30, 1998) (again relying on wetland dependency analysis as described in Brammer). Finally, in one of those decisions where a presiding officer crafted his own modified project -- one which require filling approximately 32 of the 45 acres of wetlands on a property -- he found that his own "alternative is primarily dependent upon being located in a wetland. Although the proposed activities are not those that are wetland dependent in the sense they can only be performed in a wetland, the wetlands must be utilized to some extent." In re Charfoos and Company.

EPA notes that early in MDEQ's administration of the section 404 program, the wetland dependency test was properly described and applied. For instance, one final decision found that building a home was not a wetland dependent activity even though the lot chosen by the applicant was entirely wetlands. In re Mellerowicz, No. 85-11-162 (May 12, 1989) (interpreting provision of Goemaere-Andersen statute that was identical to relevant provision of Part 303). It appears that the erroneous wetland dependency test as stated in the 1992 Brammer decision, and its perpetuation by presiding and reviewing officers, is the root of this problem. That exposition of an erroneous test was directly due to the flawed wording of the wetland dependency provision at § 324.30311(4). The presiding officer in Brammer rejected MDEQ staff's argument that an activity is wetland dependent if it is the type that can be performed only in a wetland. He reasoned that, if this view was correct, only those uses that can be performed solely in wetlands could receive permits under the Goemaere-Andersen Wetlands Act (Part 303's predecessor).

We now turn to the treatment of the feasible and prudent alternatives analysis in the contested case decisions. The reader will recall 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. In most cases, officials from the Office of Administrative Hearings have correctly applied this principle. But see In re Archer, No. 94-7-629 (July 25, 1996) (inexplicably reasoning that, because fixing a damaged drain pipe would achieve the same results as filling a wetland, no feasible and prudent alternative to the filling existed and ordering that permit issue). For example, presiding officers have held that in considering whether an alternative is feasible and prudent MDEQ properly is to examine economically feasible alternatives and is not obliged to eliminate feasible alternatives that fail to maximize an applicant's profit. Prodo, No. 96-08-0088 (March 1, 1999). See also Charfoos and Company, No. 87-14-824W (Aug. 29, 1996) (alternatives need be economically feasible only, not maximize applicant's profit). Cf. Harkins v. Dept. of Natural Resources, 206 Mich. App. 317 (1994) (landowner denied through wetlands regulation the most

profitable use of his property does not suffer a compensable takings). Similarly, it has been explained that the feasible and prudent alternatives analysis must objectively examine whether a particular alternative is economically achievable; it is not to be an inquiry into the subjective matter of a particular applicant's financial resources and ability to perform the alternative. In re Testolin, No. 98-08-0064 (March 19, 1999).

Yet there have been problematic findings and conclusions on certain aspects of the feasible and prudent alternatives analysis. One erroneous "rule" that apparently has become established in the contested case decisions is that, if an application is filed under Part 301 and MDEQ staff (or the presiding officer) determines the proposed activity will have a de minimis environmental impact, then a feasible and prudent alternatives analysis need not be performed. This "rule" is said to be rooted in the administrative rules of Part 301, Rule 281.814. Yet, after reading both Rule 281.814 and Part 301 itself, EPA cannot find this de minimis environmental impact "rule". In fact, Rule 281.814 clearly directs that "a permit shall not be issued unless [MDEQ] determines all of the following: (a) That the adverse effects to the environment and the public trust are minimal . . . . (d) That no feasible and prudent alternative is available." Of course, this "rule" also is contrary to federal regulations, which provide that any discharge to waters of the United States shall not be permitted unless the permitting agency determines that no less harmful alternative exists. See 40 C.F.R. § 230.10(a). This "rule" was most recently pronounced in the Director's Final Decision in Oceana County Road Commission, No. 96-09-0355 (April 15, 1999) (yet after stating rule, Director found would be more than de minimis environmental impacts from project and ultimately ordered application's denial, reversing presiding officer). In an earlier decision, In re Schenden, No. 94-10-733 (March 31, 1998), the "rule" was tied to the parties' stipulation that a project would not have significant environmental impacts; if such a stipulation is entered, then the presiding officer is not obliged by Part 301 to assess whether a project's environmental impacts are minimal, nor is he obliged to perform a feasible and prudent alternatives analysis.

Correctly assigning the burden of proof on the availability of feasible and prudent alternatives has also been a problem. True, in some cases, such as Sidebottom, No. 96-07–0503 (Aug. 3, 1998) (application denied because project not in public interest), the presiding officer correctly assigned that burden of proof to the applicant. Indeed, in Sidebottom the presiding officer stated that he could not make a finding on whether a feasible and prudent alternative existed because the applicant had not presented any proposals as to feasible and prudent alternative locations and methods for the project. Yet a reading of many other decisions indicates that this burden of proof often is not actually placed on applicants. Even in a decision where the presiding officer declared that showing the lack of feasible and prudent alternatives is a "considerable burden" that the applicant must bear, commented that an applicant cannot so narrowly define a project's purpose so as to preclude use of alternative sites, and commented that alternative locations need not accommodate "components of a project that are merely incidental to the applicant's basic purpose," a reading of the decision indicates that when it came to adjudicating the issue the presiding officer did not hold the applicant to its burden of proof. The decision does not mention whether the applicant had presented any evidence about feasible and prudent alternative locations, nor does the decision show that the applicant proved that alternative sites were not available.

Charfoos, No. 87-14-824W (Aug. 29, 1996) (presiding officer finds no alternatives exist to building housing development on this property, though decision discusses only one alternative site, which had been proposed by MDEQ but rejected by applicant as not nice enough). In another contested case, one in which MDEQ staff's denial of a permit application was upheld, the presiding officer nonetheless criticized MDEQ for failing to present evidence that alternative building sites identified by MDEQ were actually available, as well as affordable, for purchase by the applicant and construction of a house. The presiding officer then found no practicable off-site alternative locations existed for the project without apparently holding the applicant to Part 303's clear mandate that the applicant prove "a feasible and prudent alternative does not exist". Testolin. The burden of proving the lack of alternatives also does not appear to have been placed on the applicant in Carabell. Actually in Carabell the Chief ALJ seems to have asked the question the wrong way around, for he states "[t]he Proposal for Decision found, and the record supports, the proposal of 112 units with enhancement is a feasible and prudent alternative to the Department's proposal of a project with less impact in the wetland." This statement clearly suggests that the project proposed in the application should have been denied a permit because MDEQ's alternative proposal was feasible and prudent.[15]

Related to the burden of proof issue is the question of whether an applicant's knowledge of the presence of wetlands, and additional knowledge that a permit would be needed in order to fill the wetlands and effect the use the applicant desired, should bear on the feasible and prudent alternatives analysis. In In re Haggart, No. 93-7-53W (Dec. 26, 1995), the presiding officer found that it was relevant to the feasible and prudent alternatives analysis that before the applicant bought the property he knew he would need to obtain a wetlands permit to fill wetlands and build a house. EPA thinks this is the correct view, and a view that effects proper protection of wetlands. A person should not be allowed to purchase such a piece of property with knowledge of the permitting restrictions and then argue that it is not feasible – or merely personally desirable – for him to buy another piece of property that will not require him to destroy wetlands. Yet in Schultz, No. 91-5-160W (Nov. 25, 1996), the presiding officer ignored the views expressed in Haggart. During the Schultz hearing a MDEQ employee testified that he had told the applicant, before the applicant had bought the property at issue, that MDEQ already had denied permits for projects similar to what the applicant intended. Despite this circumstance, and despite introduction of some evidence by MDEQ that building on other vacant lots located even on the same lake might cause less of a negative impact to wetlands, the presiding officer determined that no feasible and prudent alternatives existed. As in other cases, the decision does not reveal that the applicant was required to present any significant and adequate information on alternative project locations.

---

[15] For guidance on considering when feasible and prudent alternatives exist and the burden of proof, two federal cases are helpful: O'Connor v. Corps of Engineers, 801 F. Supp. 185 (N.D. Ind. 1992) (applicant failed to show his purchase of another lot, perhaps on another lake, was not a practicable alternative; Corps' denial of permit correct); Hough v. Marsh, 557 F. Supp. 74 (D. Mass. 1982) (geographic scope covered by applicants' search for alternative properties too narrow, and applicants' definition of project's scope and need for project should be reviewed).

Another misconception held by officials with the Office of Administrative Hearings is that taking no action cannot be a feasible and prudent alternative. The logic behind this idea, as explained in In re Propvest Ltd., Glova, No. 94-10-1171W (April 25, 1997), is that because the very definition of a feasible alternative is something that is capable of being put into effect, and because a person cannot put a "no action" alternative into effect, taking no action cannot be a feasible and prudent alternative to an activity proposed in a permit application. "[A] feasible and prudent alternative cannot be equivalent to doing nothing . . . . is logically not something which is capable of being put into effect to accomplish a purpose". Id. (Final Decision ordered MDEQ to issue permit authorizing building a road to service a housing development that would be built in future, rejecting MDEQ's position that a feasible and prudent alternative was taking no action). Similar reasoning was applied by the presiding officer in In re Baughn, No. 90-11-461 (July 1, 1997), who rejected various alternatives outlined by MDEQ to the proposed construction of a beach, including the alternative of the applicant's using an existing sandbar for recreational purposes. As the presiding officer saw it, this alternative was an unacceptable "no action" alternative because the sandbar already was available for recreational use. The reasoning supporting these views on the unacceptability of "no action" alternatives not only seems highly unsound, but serves to defeat the very purpose of the Clean Water Act: stopping unnecessary wetland destruction. Rather, under 40 CFR § 230.10(a), if the basic purpose of an activity can be achieved by a "no action" alternative that does not entail discharges to waters of the United States, that alternative must be selected.

The final part of our discussion on the proper application of the feasible and prudent alternatives analysis is an examination of some relatively recent pronouncements on the subject by MDEQ's ALJ and its Director. In In re Knowles, No. 98-06-0210 (March 14, 2000), the Director in his Final Decision made certain statements of law that are inconsistent with the section 404(b)(1) Guidelines, and even appear to contradict the plain language of Part 303. One such statement of law was that once alternative methods have been used in the attempt to minimize the reasonably foreseeable detriments that a proposed project will have on affected waters, the availability of feasible alternative locations if of limited, or no, importance. As explained in the early part of this subsection of EPA's report, a project must always be designed to have the least impact to waters and aquatic resources. If the least impact will result from locating the project in an alternative location which is feasible, then the project should not be permitted in the original location even if alternative methods could be utilized in the original location.

Also in Knowles, the Director determined that the feasible and prudent alternative 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, and is to be applied as part of the determination of whether unacceptable disruption to aquatic resources will result from the project. The former ruling is directly contrary to the section 404(b)(1) Guidelines' alternatives analysis requirement, and it does not seem to have any basis in the text of § 324.30311(4). The latter ruling is directly contrary both to the Guidelines' alternatives analysis 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. § 233.20(a)). And, again, the latter ruling seems

unsupported by Part 303 itself. Indeed, this may be the first time that either ruling has been announced in a MDEQ contested case decision.

In this context, EPA notes that Michigan's Natural Resources Commission, in an early contested case decision, In re Kuras Properties, Inc., No. 88-6-5W (Nov. 14, 1990), reviewed the two feasible and prudent alternatives analyses set forth in § 324.30311 and provided what seems to be a thoughtful and accurate analysis of how these provisions should be interpreted. As the Kuras analysis of these provisions also was consistent with the section 404(b)(1) Guidelines, EPA recommends it for review by MDEQ's current contested case decision makers.

Unauthorized Discharges being Permitted

Turning to another issue which appears to be problematic, the issue of how to handle the fact that a permit applicant has performed unauthorized discharges, EPA would like to propose a possible resolution to MDEQ as a whole. In reviewing the contested case decisions EPA noticed a number of rulings that rejected MDEQ permitting staff's view that it can include as a permit condition, or as a pre-condition of permit issuance, an applicant's removal of unauthorized fill (that is, fill that was discharged before an applicant had applied for a wetlands permit). As MDEQ permitting staff see this issue, an activity for which a permit is being sought is not "otherwise lawful" under Part 303, section 30311(1), if an applicant performed an unpermitted discharges in connection with the activity. The Office of Administrative Hearings has repeatedly rejected this view on the basis that imposing as a permit condition the removal of unpermitted fill improperly mixes MDEQ's licensing authority with its civil and criminal enforcement authority. In re Marsh, No. 94-12-0220 (Feb. 24, 1998); Baughn, No. 90-11-461 (July 1, 1997). EPA does not express an opinion as to whether these rulings are correct, for they involve an interpretation of Michigan law that is not implicated in this section 404 program review. Yet EPA suggests to MDEQ staff that in considering how to address situations where an unauthorized discharge has occurred and an application has been made for further, related discharges, MDEQ examine the procedures followed by the Corps and EPA in such situations. See 33 C.F.R. § 362.3. For example, the Corps often refuses to accept or process a permit application until the unauthorized discharge is resolved through enforcement or cooperative action.

Conclusions

In conclusion, EPA recognizes that in some contested case decisions the appropriate analysis has been set forth and followed. For example, the Final Decision in RRRT Partnership, No. 95-5-253W (Aug. 18, 1997), endorsed the propriety of the presiding officer's assessing the environmental impacts of a proposed activity by examining not merely the activity's direct impacts, but also its indirect impacts on the environment and aquatic ecosystem (such as disruption of sheet flow into a lake and the likely increase of nutrients in the lake). (But compare the refusal to recognize wetland benefits and rejection of MDEQ testimony on the issue, in In re Stanczak, decided one year earlier.) Detrimental impacts to valuable coastal wetlands also led to the denial of a contested case petition in In re Grant, No. 92-5-91G (March 18, 1996), despite the

fact that the presiding officer found the project to be wetland dependent and without feasible and prudent alternatives. And in another case MDEQ-presented evidence of other wetland filling occurring in the same watershed was considered relevant in deciding that granting the permit at issue would cause unacceptable negative impacts. In re Wagner, No. 96-1-67 (April 14, 1997).

Yet far too often officials of MDEQ's Office of Administrative Hearings have made rulings that undermine the section 404(b)(1) Guidelines.[16] To the extent these rulings spring from flawed statutory and regulatory provisions, EPA expects that the Michigan legislature, the Michigan Attorney General, and MDEQ will see to it that those legal flaws are corrected in a reasonable time period. But to a great extent these rulings reflect a failure by the administrative law judges to appreciate their obligations as part of MDEQ in administering the section 404 permitting program.

During the pendency of this program review MDEQ has taken various actions, and has committed to taking other actions, which should correct questionable interpretations of State law made in the past by MDEQ's ALJs. As one example, MDEQ recently promulgated new rules on the issues of wetland dependency and the feasible and prudent alternatives analysis which will be effective soon in contested case proceedings. MDEQ also plans to promulgate additional administrative rules, including rules incorporating by reference the federal section 404(b)(1) Guidelines into the permitting standards of Part 301 and Part 303. Additionally, if a permit issued after the conclusion of a contested case proceeding is substantially different from the permit application, MDEQ will issue a new public notice for the permit and take comments before that permit is finalized. MDEQ has agreed to implement administrative rules to address these issues and full and proper application of these new rules by the contested case decision makers should prevent future rulings from having the flaws of so many past rulings, particularly in Part 303 contested cases.[17] EPA will be examining future contested case decisions to see if the ALJs and the final decision maker correctly interpret and apply the law, as clarified by these new rules.

In conclusion, EPA stresses that whether or not an issue is addressed by new administrative rules – for example, the recent rulings in Knowles may have been motivated by an attempt to revive the flawed "wetland dependency" test under the guise of the unacceptable disruption provision of Part 303, a provision as to which no new rules have been promulgated -- the permit decision making process of the contested cases must interpret Michigan law in a manner that is consistent with section 404, the section 404(b)(1) Guidelines, and the State Program Regulations. Doing otherwise is inconsistent with Michigan's obligation to administer the section 404 program. If erroneous rulings on significant permitting issues continue, and if other changes to the permit

[16] EPA also notes the variability in the correct application of Michigan law to the proposed and final contested case decisions. There seems to be no reasonable explanation why in one decision the legal standards are appropriately applied to the facts, while in another decision they are not. EPA recommends that the contested case decision makers make an effort to be more consistent in their application of the appropriate legal standards.

[17] Elsewhere EPA notes the need for MDEQ to promulgate additional Part 303 rules addressing certain issues, as well as comparable Part 301 rules.

review procedures are not made to address EPA's concerns, then EPA may conclude that it is not possible for MDEQ to properly administer the permitting portion of the section 404 program. See 62 Fed. Reg. 61173, 61174 (Nov. 14, 1997) (EPA Notice of Approval).

Enforcement and Compliance Review

A central part of EPA's review of the MDEQ section 404 program was to evaluate the enforcement and compliance program. The purpose of the review is to identify and evaluate the strengths and weaknesses of the MDEQ program. Our evaluation also will provide an "informal" determination regarding whether the State 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 in 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 fifty-five 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) referral of the violation for criminal or civil prosecution; and (e) mitigation of the environmental impacts.

The Memorandum of Agreement (MOA) between Michigan and EPA requires the State to take "timely and appropriate" enforcement against persons violating permit conditions and against persons conducting unauthorized discharges of dredged and fill materials into waters of the United States. Although the MOA does not explicitly define the parameters for "timely and appropriate" action, for purposes of our review we have relied upon guidance EPA prepared regarding enforcement management systems authorized under section 402[18] 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 forty-five days. Any violation of an order issued by a State is a serious violation. A violation of a State enforcement order becomes a significant noncompliance issue when the violator fails to provide required reports more than thirty days after the compliance date, fails to initiate construction or attain final compliance within ninety days of the compliance date, or fails to comply with the order for two months during two consecutive quarters.

Besides 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 require the State to:

> (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;

[18] The Enforcement Management System for the National Pollutant Discharge Elimination System, 1989.

(2) Have the legal authority to enter any site to perform an inspection and otherwise to investigate compliance with the EPA-approved program;

(3) Conduct inspections in such a manner that samples may be taken and that other information may be gathered for use in enforcement proceedings;

(4) Maintain a program to receive information from the public and ensure that the information is properly considered;

(5) Have authority to restrain any person engaging in unauthorized activities;

(6) Litigate any threatened or continuing violations and assess civil and criminal penalties;

(7) Investigate and provide written responses to all citizen complaints, and;

(8) Provide at least thirty days for public comment on any proposed settlement of a State enforcement action.

EPA has previously determined that the transfer of all delegated and assumed federal program authority was appropriate when, on October 1, 1995, Michigan created the MDEQ.

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 a draft State procedures 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 number of the complaint. MDEQ tracks the complaint through the docket system. The district field office assigns the complaint to an inspector who decides whether to inspect the site.

In the 327 complaint files EPA reviewed, most citizen complaints were routinely followed-up by inspections. Generally, we found some type of documentation contained in the complaint file, such as handwritten notes, a topographic map or township map of the site, site photos, schematic drawings, or partially completed project review reports (PRRs), showing 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 sixty 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.

Still, our review found that there is a need for MDEQ to modify several of its existing procedures to improve its overall performance in responding to citizen complaints.

On February 4, 1994, before the MDNR reorganization, the State prepared a "working draft" of a Compliance and Enforcement Guidance Manual.[19] In part, this draft procedure manual was prepared to develop standard operating procedures for the district field offices in responding to citizen complaints, for setting inspections priorities, and for responding to violations. Also, the draft procedure manual has been used in many in-service training conferences by MDEQ. Based on our review we recommend that this document be finalized to reflect current procedures for the MDEQ and to standardize the procedures across the State. While this program review was pending the MDEQ did finalize their Compliance and Enforcement Guidance Manual. EPA is currently in the process of reviewing the finalized manual.

As a second area of concern, our review routinely found that file documentation was deficient in recording accurately when MDEQ staff had conducted inspections and the findings of each inspection. The draft procedure manual specifies that upon completion of an inspection a complaint investigation report (CIR) is to be completed. We did not find that inspectors routinely completed the CIR. In too many instances, we found poorly recorded documentation, including photographs (dated and undated, signed and unsigned), and undated field notes accompanied by some partially completed project review reports (PRR) showing that an inspection had been conducted.

According to the draft procedure manual, PRRs are to be completed to summarize information gathered, to evaluate permit applications, and to document the decision-making process for each application reviewed. EPA's review found that inspectors typically used PRRs to document and summarize information obtained during the inspection. In 50% of the citizen complaint files we found that PRRs had been used to document the observations made by the inspector during an inspection. The use of PRRs may have some practicality to document inspections. However, the PRR does not contain information necessary to record the technical and scientific information for wetland delineations or wetland determinations. Conversely, MDEQ has designed the CIR for the inspector's use to record hydrology and hydric soils during the site inspection. The CIR also

[19] The Compliance and Enforcement Guidance Manual will be referred to as "the draft procedure manual" throughout this review.

provides for a detailed site drawing to be completed during the inspection to identify the location of the wetland boundaries. Therefore, our review recommends completing the draft procedure manual, defining standard procedures for documenting site inspections, and using the CIR.

Finally, our review concludes that MDEQ should improve the procedure used when an inspector recommends processing an after-the-fact permit. As we have explained, a PRR should be completed when information shows the activity will not have significant adverse impacts. Our review did not identify any PRRs completed that would closeout the citizen complaint. Generally, our review found that documentation in after-the-fact permit application files most often consisted of checking a box indicating that the project would pose an insignificant impact. The district field office then transfers the citizen complaint file to a permit-processing group without any cross-reference to a permit application number. Thus, the citizen complaint file is closed without any consistent documentation to reflect authorization of an after-the-fact permit. According to minimum federal requirements, MDEQ is to provide written responses to all citizen complaints. Therefore, we recommend that MDEQ revise this procedure to more effectively communicate after-the-fact permit proposals to the public.

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 MDNR before the 1995 reorganization and by MDEQ after the reorganization, from which list 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 a new automated information system, known as the Coastal Inland Waterways Permit Indexing System (CIWPIS). However, using annual reports prepared by MDEQ pursuant to the reporting requirements of the MOA, EPA requested eighty-seven enforcement files be available for our review. During our district field office visits, only twenty-three 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. The State 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 data base, e.g., CIWIPS, to determine whether inspectors have previously investigated a violation at a site. After determining if 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 from 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 thirty 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 MDEQ is taking appropriate enforcement actions within acceptable time frames.

One of our concerns that MDEQ should address pertains to the delegation of authority to issue administrative NOVs and orders to restore wetlands. The drafted enforcement guidance has delegated this authority for duel signature by the Land and Water Management Division 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 newer enforcement cases initiated after 1995, our review found that MDEQ issued NOVs under dual signatures of the site investigator and the District Supervisor. EPA recommends that MDEQ adopt the latter procedure to ensure timely and appropriate enforcement actions are initiated. MDEQ also should finalize the State guidance document which details Michigan's enforcement process.

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 EPA reviewed were active at the time. Due to the sensitive nature of active enforcement cases and MDEQ requests, our review 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 draft procedure manual. It requires that a memorandum be prepared and transmitted to the Law Enforcement Division. The referral package is to contain a chronology of events leading to the referral, is to identify the statutory violations and elements of the violations, is to identify witnesses and exhibits and contain labeled photographs, and is to provide a restoration plan.

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 photo 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.

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 recommend an initial course of action. Now that MDEQ has completed its draft enforcement and compliance procedures manual, in-service training should continue, emphasizing the importance of complaint investigation and follow-up and clearly outlines the process for those investigations. Although some discretion and variation in investigation and enforcement process should be allowed at the district level, depending on the specific circumstances, the majority of actions should follow established procedures.

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., ninety 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.

EPA's review cannot 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 has 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.

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 the MOA between MDEQ and EPA to define "timely and appropriate" enforcement actions by the State and to outline a process of referring to EPA repeat and flagrant violations.

Recommendations:

1. MDEQ should revise and finalize its draft compliance and enforcement manual and include the following provisions to strengthen the overall program: [MDEQ did finalize their Compliance and Enforcement Manual in 2002. EPA recently received the manual and is in the process of reviewing the manual.

> a. Require that complaint investigation reports be routinely completed following an inspection. EPA's review found that inspection reports are not routinely completed and that the inspector had not routinely dated and initialed photographs of the violation site.

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 project review report (PRR) and a copy of the public notice and issued permit. EPA's 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.

c. Include a process that effectively demonstrates to the public whether MDEQ has responded to a citizen complaint. A minimum regulatory requirement for a State-assumed program is that the State agency investigate and provide written responses to all citizen complaints. With approximately 800-plus citizen complaints received annually, providing written responses to each complaint becomes a problematic resource issue for MDEQ.

d. Support expanded use of administrative consent agreements entered into between the 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.

e. 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.

f. 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.

g. Standardize and provide in the manual uniform guidance to district and field office personnel. Because the draft guidance manual has existed since 1994 but still is not final, MDEQ provides the district and field offices significant discretion in its use, and, thus, in MDEQ staff's use of complaint investigation reports and project review reports, as well as discretion in who may issue NOVs, cease and desist orders, etc. As noted above the MDEQ finalized the Compliance and Enforcement and Guidance Manual in 2002.

2. MDEQ should take affirmative steps to strengthen its enforcement program. EPA's recommendations include:

a. Complete the transition from manual reporting of information to an updated and automated information database. (MDEQ completed their compliance Tracking database in 1999)

b. Update and revise the 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.

c. Include provisions to describe environmental impacts and environmental harm from violations that MDEQ refers to State attorneys for criminal or civil enforcement. Presently, the referral procedures are focused upon the extent of wetlands impacted (State wetlands delineation) and the culpability of the noncompliance. Additional documentation of environmental harm should help in getting more cases filed for criminal or civil enforcement.

3. Based upon the interviews EPA conducted at MDEQ district and field offices, our review acknowledges the perception that MDEQ management has not pursued enforcement actions as a priority, and has sometimes discouraged development of enforcement cases. Based upon the enforcement case files that MDEQ provided, our review concludes that MDEQ has pursued enforcement and has achieved satisfactory results. Our review recommends that MDEQ managers address this issue during in-service training.

SECTION 3: SUMMARY OF COMMENTS

Summary of Issues Raised by the Public

On January 28, and again on May 3, 1999, EPA held one-day listening sessions in Lansing, Michigan. The purpose of these sessions was to provide an informal setting in which stakeholders could provide EPA with their experiences and insights regarding the MDEQ wetland permitting program. In addition to the information received in the stakeholder listening sessions, EPA has received a number of written comments from the public relating to Michigan's administration of the section 404 program. The issues raised at both the listening sessions and in correspondence to EPA are summarized below.

Policy/Political Issues

- Many concerns were raised with the decisions made by MDEQ's Administrative Law Judges (ALJs). Of particular concern were ALJ decisions dealing with water dependancy and the alternatives analysis. Commenters also were concerned that ALJ decisions are not subject to public scrutiny or third party intervention.

- The permit process is difficult for the public to understand and public notice time frames are too short to allow for public comment.

- There is insufficient staff, which results in lack of compliance and enforcement actions by MDEQ.

- MDEQ staff cannot keep up with all the violations and often issue after-the-fact permits for unauthorized projects, sending the message that there is no penalty for working in wetlands without a permit.

- Since the creation of MDEQ, there have not been enough enforcement officers to effectively handle wetland violations.

- The timber road exemption is being used for non-timber uses.

- Michigan needs to regulate isolated wetlands in a manner consistent with the federal program.

- There is concern with MDEQ's willingness to alter conservation easements which were associated with wetland permits.

- Takings cases have changed how MDEQ staff make permit decisions -- staff are hesitant to do the "right thing" for the environment due to concerns with potential takings claims. Staff decisions also are affected by political influence and the legislative budgeting process.

- MDEQ has prompt permitting as a priority; enforcement and compliance is de-emphasized.
- Farming exemptions are being applied to non-farming projects.
- MDEQ is not regulating activities by the Drain Commissions that it should be regulating, such as expanding drains in order to drain wetlands and thus avoiding the permit process when those drained areas are developed. The Michigan Drain Code provides too much discretion to Drain Commissioners without allowing for MDEQ or public review.
- MDEQ staff are unable to make environmentally sound decisions due to political influence.
- The administrative appeals process should be open to individuals and groups representing the public interest.
- Elimination of the Natural Resources Commission and other commissions, and actions under Michigan Drain Code, have reduced opportunities for citizen involvement.
- There are concerns about agriculture and other interests having heavy influence on watershed boards and wetland policy formulation.
- Development, sprawl, and agricultural expansion affect wetlands habitat, species, and watershed health before the regulatory program kicks in.
- New executive order may take more wetlands regulatory authority from MDEQ and transfer it to the Michigan Department of Agriculture.
- MDEQ policies regarding use of wetlands for flood control and storm water storage are variable.
- Statewide wetlands inventory was never completed.
- Compliance with existing permits is rarely checked or enforced.
- Wetland consultants need more oversight, perhaps through a certification program.

- Few or no full-time staff positions are dedicated solely to enforcement.
- Organizational and managerial barriers have reduced both the number and the effectiveness of criminal prosecutions.

- Many ALJ decisions in contested case hearings ignore practicable alternatives, allow physical alterations to control jurisdiction, or place onerous survey requirements on MDEQ.

- Untrained political appointees and higher management sometimes ignore professional staff and force the issuance of permits for otherwise unpermittable projects.

- MDEQ routinely grants after-the-fact permits, rather than requiring restoration or assessing fines.

- Mitigation required under permits sometimes is not constructed, and, when it is constructed, fails. Little effort is made by MDEQ to ensure that mitigation is successful.

- Compliance and enforcement is discouraged; field staff that persist in pursuing violations are routinely transferred or reassigned.

- MDEQ field offices are woefully understaffed.

- Work by county Drain Commissions which lengthen or widen declared public drains, create haul roads along declared public drains, and remove large trees and other vegetation in and along declared public drains, is exempted from regulation by MDEQ.

Technical Issues

- Alteration of vegetation on project sites prior to a wetland delineation results in wetland areas being called non-wetland when a delineation is actually performed.

- Concerns were raised with the adequacy, performance, and regional differences in mitigation.

- Compensatory mitigation frequently is not required, and frequently is not adequate.

- Failure to consider cumulative effects of permitted projects, especially in urban settings, increases water pollutant levels. Increased pollution causes lakes and streams to not comply with water quality standards.

- MDEQ field staff rely too readily on information supplied by applicants and others, without field checking to verify the accuracy of information.

- Permits frequently are granted without checking site conditions if a health department permit for on-site sewage systems are granted. If sewage permits are erroneously granted

by health departments and then revoked, applicants can use their MDEQ-issued permit to challenge the health departments.

Administrative Issues

- Lack of timely investigation of complaints.
- MDEQ staff can be very difficult to contact.
- Wetland losses and cumulative wetland impacts are not tracked, and the effectiveness of wetland mitigation is not accounted for.
- Public access to documents is difficult, even through Freedom of Information Act requests.
- MDEQ relies on MDNR for purposes of some environmental data and law enforcement. Since the split of the two agencies, communication and coordination between the two is poor.
- Current system has clearer lines of appeal and more accountability.
- Drain Commissioners find MDEQ easy to work with but understaffed. Drain Commissioners find MDEQ's enforcement is adequate.
- Road permit turnaround time has improved, but some simple permits still take a long time.
- Permitting and enforcement are more consistent, predictable, timely, and responsive than before.
- MDEQ supplemental information requests do not delay permit processing.
- Substantial and inexplicable differences exist in wetlands program performance, both between district offices and between years.
- Public notices and notices of public hearings are not mailed to requesters in a timely fashion and frequently contain errors.
- Comments regarding rare ecosystems, threatened and endangered species, and species of special concern are frequently not adequately addressed.
- Large projects submitted for permitting are piece-mealed, with many minor permits issued instead of one large proposal which would face greater public scrutiny.

- Public notices should be mailed to local public libraries to increase the public availability of critical information for comments.

- Current supervisory and other MDEQ management positions are filled predominantly by individuals who have no practical or programmatic experience or expertise.

Summary and Review of Comments from the U.S. Army Corps of Engineers, Detroit District Office

When in 1984 the State of Michigan assumed the section 404 program, those authorities and responsibilities were transferred to the State from the U.S. Army Corps of Engineers (the Corps). In all other States but one, the Corps has the authority to issue permits under CWA section 404. In Michigan, the Corps through its Detroit District office retains permitting authority over navigable waters and certain wetlands (primarily those adjacent to navigable-in-fact waters), as well as issues permits under section 10 of the Rivers and Harbors Act. Through its day-to-day operations, therefore, personnel at the Corps' Detroit District office have considerable experience with MDEQ's administration of the State section 404 program. EPA requested that the Corps' Detroit District office review the State's program submission and comment on it. In a letter dated November 16, 1999, from the Chief of the Regulatory Branch in the Construction-Operations Division the Corps provided its comments.

The Corps has identified serious concerns about the functioning of the State's program. These concerns cover the areas of the written provisions of State statutory law, the application of the written law by MDEQ permitting staff, the administrative appeals process, and the condition and effectiveness of MDEQ's enforcement program. In this section we summarize the Corps' concerns.

The State's jurisdictional scope over wetlands is narrower than the jurisdictional scope of section 404, primarily because Michigan law does not regulate wetlands that are isolated or above headwaters. The cause, as EPA has explained, is that Part 303 excludes from State jurisdiction wetlands that are not contiguous to lakes and streams if they are less than 5 acres in size or if they are greater than 5 acres but located in a county of less than 100,000 residents, and Part 301 excludes from jurisdiction lakes with surface areas less than 5 acres. A large number of such wetlands would be regulated by the Corps through application of section 404 and its regulations, if on no other basis than that they have an appropriate connection with interstate commerce. The Corps discounts the Michigan Attorney General's claim that wetlands generally excluded from Part 301's and Part 303's jurisdiction may be regulated by two alternate routes. The first route is that Part 31 of NREPA may regulate them. Yet as the Corps points out, even if Part 31's regulation extends to waters of any size in Michigan, Part 31 is a statute concerned with pollution of waters by waste disposal, not a statute designed to address discharges of dredged and fill material. More significantly, perhaps, Part 31 does not mandate the kind of environmental impact review that CWA section 404 requires or even that Part 301 and Part 303 require. The second claimed route for MDEQ to assert jurisdiction is to invoke Part 303's provision for making an individual determination that a particular wetland needs to be protected in order to preserve natural resources. The Corps thinks that this individual determination procedure cannot compensate for lack of jurisdiction over large classes of wetlands, and EPA agrees. Moreover, the Corps adjudges it to be easier for it to extend jurisdiction over an isolated wetland by establishing an interstate commerce tie than it is for MDEQ to show that extending jurisdiction over a particular wetland is essential to ensuring preservation of natural resources of the State. The Corps recommends that

the State of Michigan revise Part 303 so as to extend regulatory jurisdiction over wetlands that have an interstate commerce connection, commensurate with the federal regulatory provisions on interstate commerce connections.

The Corps notes that unlike Michigan law, section 404 and its implementing regulations do not cover wetlands alone, but rather cover described "special aquatic sites". Wetlands are just one type of special aquatic site. Other special aquatic sites are mudflats, vegetated shallows, riffle and pool complexes, and sanctuaries and refuges. 40 C.F.R. part 230, subpart E. The Corps knows of no provisions in Michigan laws or rules constituting the State section 404 program which address these other types of special aquatic sites. In the COE's view, special aquatic sites do not appear to have the same protection under the state program as under the federal 404 program.[20]

The Corps also identifies a number of jurisdictional exemptions in Michigan law that have no equivalent in federal law, rendering the State's section 404 program less stringent. For example, Michigan law fails to expressly limit the agricultural exemption to ongoing farming operations and fails to expressly state that activities that bring an area into agricultural use are not exempted. Section 30305(j)'s exemption for drainage of a wetland (and attendant discharges of dredged material to a wetland) is far too loosely stated in its coverage of all wetlands that are owned by persons "engaged in commercial farming." The Corps reads this Michigan exemption as allowing draining of, and discharges to, wetlands that are not currently part of a farming operation. In other words, it allows unfarmed wetlands to be brought into agricultural use, as well as allowing wetlands to be filled for purposes unrelated to agriculture, as long as the landowner is "engaged in commercial farming." These loopholes do not exist in federal wetlands law. In addition, Michigan law addressing exemptions is weaker than federal law because it does not contain definitions of such terms as "maintenance"; in practice this allows any additional dredging of a ditch, farm pond, sedimentation basin, or other excavated structure that a discharger defines as being "maintenance" to escape regulation. The Corps also has observed significant changes being made to private agricultural drains and legal drains in Michigan that would not be allowed under federal law but which undergo no regulatory review by MDEQ. In certain cases, where the Corps retained River and Harbors Act section 10 jurisdiction over a drain that was being altered without a section 404 permit due to Michigan law's drain exemption, the Corps reports it has pursued federal enforcement against county drain commissioners. (EPA has earlier discussed how Michigan statutory language is largely responsible for these significant and unrestrained changes being made to drainage ditches.) Finally, the Corps believes that Michigan law's exemption for construction of farm, forest, and ranch roads does not exist in federal law.

[20]EPA notes that federal section 404 regulations only extend jurisdiction to these non-wetland "special aquatic sites" (also known as "other waters") if their use, degradation, or destruction would or could affect interstate or foreign commerce. See, e.g., 40 C.F.R. § 232.2. Given the SWANCC decision, discussed previously in this report, defining the extent of federal jurisdiction over non-wetland special aquatic sites is a current project for EPA and the Corps.

The Corps believes that the 90-day permit processing time limit in Part 303 has resulted in permits being issued by MDEQ that violate the prohibitory conditions stated in 40 C.F.R. § 233.20. The Corps strongly recommends that the 90-day time limit be deleted from State law.

The public notice provisions of State law are inadequate in ensuring notification both of interested citizens and of other States as required by 40 C.F.R. §§ 233.31 and 233.32. The Corps has observed that in reality MDEQ does not always coordinate with other States which would be affected by a permit and that even Part 31 -- which Michigan invokes as ensuring such coordination -- does not require that public notices be sent to other States. The Corps recommends that Michigan statutes be revised to require coordination with other States. Regarding public notice being sent to individuals, Michigan law's failure to provide for, and MDEQ's failure to utilize, mailing lists ensuring that public notices are mailed to interested parties means that the federal regulatory requirement that public notice be given to all interested parties may not be satisfied. Likewise, loose requirements in Michigan rules detailing the nature of the notice to be given means that public notices often lack plans, drawings, and other details, effectively preventing meaningful public notice and participation. The Corps recommends statutory amendments to address this problem, too.

According to the Corps, one of the most troubling flaws in Michigan's regulatory program is its inability to consider secondary environmental impacts from discharge activities. Consideration of secondary environmental impacts is required by the section 404(b)(1) Guidelines. Despite the Michigan Attorney General's assertion that State law gives MDEQ the authority to consider secondary and cumulative impacts when deciding whether to grant a permit application, the Corps' experience has been that MDEQ staff do not consider secondary impacts and, indeed, that MDEQ staff do not believe they have the authority to consider secondary impacts.

Written determinations of the reasons why a permit application has been granted or denied are required by 40 C.F.R. § 233.34(c) and are made by the Corps when it rules upon the limited category of section 404 permits over which it retains jurisdiction in Michigan. By contrast, Michigan law does not require that MDEQ make written determinations for applications that are granted, but only for those that are denied. Nor does MDEQ in fact make written determinations when it grants permit applications. The Corps recommends that such written determinations be made in every one of MDEQ's permit reviews and decisions.

MDEQ's enforcement activities are sometimes lacking in the Corps' judgment. The Corps states that it knows of many unpermitted projects that have not been the subject of enforcement actions by MDEQ, and provides some examples. The public often complains to the Corps about MDEQ's failure to take enforcement action on violations that are within MDEQ's regulatory purview, not that of the Corps. The Corps recommends that the State of Michigan enhance the funding and staffing devoted to enforcement.

The practices followed by MDEQ enforcement staff also are lacking, according to the Corps. MDEQ does not have final guidance for its staff to follow when engaging in compliance and

enforcement activities. And when it comes to delineating wetlands, MDEQ does not use the three-parameter test used by the Corps throughout the country. The Corps strongly recommends that MDEQ begin using the three-parameter delineation test so as to maintain consistency throughout the United States and to avoid the possibility that the Corps and Michigan may make conflicting delineations as to the same wetland.

Regarding the involvement of the Office of Administrative Hearings in the issuance of final permit decisions, the Corps identifies two fundamental concerns. First, the wetland dependency test as applied in MDEQ's contested case decisions is wrong and is not the test that the Corps or EPA applies pursuant to 40 C.F.R. § 230.10(a). Second, Michigan's administrative appellate process for permits allows administrative law judges to make final permit decisions on records of a different nature than the records in Corps administrative permit appeals. Whereas permit appeals in the Corps' administrative process are made on the administrative record, permit appeals in MDEQ's administrative process are made on a record that is created during the contested case hearing. This procedure allows new information to be introduced that was not considered by permitting staff when it made the initial permit decision. It also creates the potential that at hearing MDEQ personnel will neglect to introduce into the record certain information that MDEQ permitting staff actually did consider. Thus, a permit decision resulting from a contested case hearing may not be made consistent with the State Program Regulations. The Corps recommends that MDEQ abandon its current administrative review procedures and make decisions based on the administrative record.

Summary and Review of Comments from the U.S. Fish and Wildlife Service, East Lansing Field Office

As part of the EPA review of the MDEQ section 404 regulatory program, EPA requested that the U.S. Fish and Wildlife Service (USFWS) review the State's program submission and provide comment on the submission. In an October 4, 1999 letter, USFWS provided comments on MDEQ's wetland permitting program. Many of the concerns raised by USFWS have been addressed either in the Assessment of Coordination under the Federal Endangered Species Act section or in the Legal Authority Concerns section of this report. The comments provided by USFWS are summarized below.

Overall, USFWS states that it has a good working relationship with MDEQ staff. Based on its review of the MDEQ program materials submitted, USFWS found that the section 404 permitting program remains consistent with the original goal of being as protective of wetland resources as a program administered by the Corps of Engineers would have been. However, USFWS did find some aspects of Michigan's laws and MDEQ's implementation of the section 404 regulatory program which were not as stringent as the protections provided by the federal section 404 program.

The first issue raised by USFWS is the scope of jurisdiction of the Michigan program. It points out that Michigan's program does not regulate isolated wetlands less than five acres in size and does not regulate isolated wetlands of any size in counties of less than 100,000 population. USFWS points out that the Corps of Engineers' regulatory program does regulate activities in isolated wetlands. USFWS recommends that MDEQ take the steps necessary to ensure that the MDEQ's program fully matches the protections provided by the current federal regulatory program.

USFWS expressed concerns with the Michigan law – Part 303 -- which requires MDEQ to make a decision to either issue or deny a permit within 90 days from receipt of a complete application. If a decision is not made within the 90-day time frame, the permit is issued through "operation of law." USFWS points out that the 90-day time frame does not take into account MDEQ staff work load which may vary seasonally or due to other circumstances, such as staffing short falls. USFWS also expressed concern that the 90-day clock often starts before the wetland delineation for the project site is confirmed. Moreover, USFWS expressed concern that this 90-day time frame is not adequate for projects which involve large impacts to wetland resources, issues of first impression, and projects which may impact federally-listed threatened or endangered species. USFWS suggests that the State permitting process provide for an alternative timeline for controversial projects and for projects which may potentially impact federally-listed species.

USFWS also raised several concerns with the threatened and endangered species coordination procedures being used by MDEQ. The first concern USFWS raised relates to projects which are not subject to federal review. USFWS is concerned that a correct determination regarding the effect of a project on federally threatened or endangered species may not be made by MDEQ staff.

USFWS has had extensive discussions with MDNR and MNFI and Lansing MDEQ staff to be sure that Lansing MDEQ staff are identifying projects that should be flagged for review for possible T & E species impacts. However, once a project has been flagged as having the potential to affect a species, USFWS is concerned that, especially for minor permits, MDEQ field staff may not adequately evaluate all the project-related impacts on T & E species, as required under the ESA. USFWS points out that there are no formal guidelines for MDEQ staff to follow when deciding whether or not a project may affect a T & E species.

The second concern raised by USFWS relates to the need to develop a process for appropriate consultation under section 7 of the ESA, when it is required for a project. Currently, MDEQ, MDNR, and USFWS make the determination as to whether a species may be impacted and what permit conditions should be included to avoid impacts to the species. For projects where there is a determination of no impact, EPA does not usually get involved. In cases where there is likely to be an impact, USFWS relies on EPA to provide a federal objection to the issuance of a permit for the project until section 7 consultation is completed and an incidental take is authorized, if necessary, by USFWS. The federal objection is not removed until the MDEQ permit is appropriately conditioned so as to resolve the federal concerns; if the federal objection cannot be resolved, the project is forwarded to the Corps for processing under section 404 of the CWA.

USFWS would like to see the process outlined above modified to ensure that USFWS is not responsible for work normally undertaken by the federal permitting agency in the federal permitting arena. USFWS indicates that permits are being issued without the appropriate safeguards to protect federally-listed species. USFWS, however, did not provide any examples of when this has happened.

It is EPA's position that since Michigan's program is administered by a State agency under State law, there is no federal action when a permit is issued. Therefore, section 7 of the ESA is not applicable to the State's action in issuing a permits issued by the State, and consultation by MDEQ with USFWA is not required. Although consultation is not required, 40 C.F.R. § 233.51(b)(2) prohibits waiver of federal review for any permit with a reasonable potential for affecting endangered or threatened species as determined by USFWS. To carry out this ESA provision, EPA believes that a process should be developed which will ensure that all projects go through a screening process to determine whether or not the project may affect a T & E species. The process should define how MDEQ staff will determine whether or not a project is likely to affect a T & E species. During the development of this process the USFWS's concern related to work load can be addressed. Currently, EPA coordinates with USFWS to make sure that the USFWS's concerns are addressed on a permit-by-permit basis.

USFWS's final concern relates to the 90-day time clock associated with the Part 303 permit process. USFWS raised the concern that for projects likely to impact T & E species, it would be difficult if not impossible to complete the review necessary to develop permit conditions which would ensure that a project does not result in significant adverse impact to a T & E species. USFWS has requested that Michigan consider the possibility of suspending the 90-day clock for

projects in which there are impacts to T & E species. The issue of Part 303's 90-day clock is discussed in more detail in the Assessment of Coordination under the Federal Endangered Species Act section of this report.

Petition for Program Withdrawal and Response

In a letter to the Regional Administrator of EPA Region 5 dated February 4, 1997, the Michigan Environmental Council and the Lone Tree Council identified what they regarded as "serious deficiencies in Michigan's wetland protection program" causing these organizations to "believe they 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. A report entitled "Assault on Michigan's Wetlands" submitted with the letter described the claimed deficiencies in greater detail. In a February 26, 1997, response letter EPA told the two organizations it would conduct an informal review of the petition's allegations and would determine if cause existed to commence program withdrawal proceedings.

We will summarize here the deficiencies described in the organizations' report. Some are items that are beyond EPA's authority to address in conducting this informal review of Michigan's section 404 program. They simply are not matters upon which EPA can base a decision to withdraw a section 404 program. See 40 C.F.R. § 233.53(b). The items that are appropriate for EPA to consider have been addressed in other parts of our program review documentation. As explained elsewhere, although EPA will be requesting that Michigan take corrective actions, at this time we will not, in response to this petition to withdraw and as a result of EPA's comprehensive, informal review of the State section 404 program, begin withdrawal proceedings.

The "Assault on Michigan's Wetlands" report begins by complaining that the total amount of Michigan wetlands lost through various routes since 1978 is unknown because the State does not perform adequate data collection. One reason is that MDEQ has not recorded the wetland acreage destroyed through permitting fills of less than one acre; this subject is not one that can be covered by EPA's informal review. Another reason is MDEQ's failure to detect or prosecute many unauthorized fills. The report calls for improved detection and enforcement, including improved follow-up investigations of citizen complaints. During its enforcement file reviews, EPA found that MDEQ staff generally did a good job of investigating citizen complaints, and did so by actually viewing the sites. Documentation in the files of these investigations and the action taken by MDEQ, however, sometimes was deficient.

The report criticizes the rulings of MDEQ's administrative law judges, which in the twelve cases reviewed by the two organizations overruled MDEQ permitting staff nine times. All of the cases discussed in the report have been reviewed by EPA. EPA agrees with the report that some contested case decisions have improperly shifted to MDEQ staff the burden of proof on whether a permit should be granted, and have interpreted and applied the wetlands dependency test and the feasible and prudent alternatives analysis in incorrect ways.

The report asserts that when, years ago, Michigan's Natural Resources Commission heard appeals from administrative law judge decisions in contested permit cases a public forum existed that no longer does. The report also suggests that the Natural Resources Commission was less likely to

overturn MDEQ permitting staff decisions than was the chief administrative law judge (who until recently heard contested case appeals). Yet removal of the Natural Resources Commission from the administrative appellate decision making role is not a matter which EPA can consider in determining whether Michigan's section 404 program is as stringent as the federal program and complies with the applicable regulations. The specific identity of the administrative appellate body is not a proper subject for EPA review (as long as the conflict of interest provisions of 40 C.F.R. § 233.4 are not violated). Nor can EPA review the elimination of whatever "public forum" the Natural Resources Commission offered. We have, however, commented on the State's apparent failure to provide an opportunity for public involvement in the enforcement process, as outlined by 40 C.F.R. § 233.41(e).

The report claims that a number of MDEQ field staff have confidentially revealed that, increasingly, supervisors are directing them to grant permits for discharge activities that should not be permitted due to the activities' unacceptable environmental impact, and that they are being discouraged from effectively enforcing the law against unpermitted dischargers. The report discusses three particular permitting cases. EPA did not undertake, as part of its informal review, an investigation of any allegations of improper pressures being brought to bear on MDEQ permitting staff. Rather, EPA reviewed a random sampling of permit files and interviewed some MDEQ permit staff members in order to determine whether, in general, the proper permitting procedures were being followed and whether the section 404(b)(1) Guidelines and other environmental criteria were properly being applied. Although EPA found that in certain cases a proper and complete environmental review may not have been performed and/or documented in writing, EPA did not find frequent instances of permits being issued on improper bases. While claims of inappropriate pressures and improper decisions concern EPA, we have not found – barring some isolated permits – that in general MDEQ has failed to appropriately administer the section 404 permit program.

The report's final assertion is that qualified and experienced MDEQ permitting staff and supervisors have been removed and reassigned in order to prevent effective and proper permitting and enforcement decision making and action. This allegation, too, is beyond the scope of EPA's review. EPA is constrained to perform a general review of MDEQ's permitting and enforcement decisions and files in order to determine if MDEQ either has issued permits that do not comply with proper environmental criteria and other federal requirements, or has failed to adequately enforce violations. As long as MDEQ has been adequately implementing the section 404 program, personnel changes and the replacement of experienced staff with inexperienced staff is not a basis for EPA either to require corrective actions or to begin program withdrawal proceedings. The details of MDEQ's day-to-day operation of the section 404 program and staff management are not proper subjects for EPA to review or micro-manage. Yet it should be noted that, in the Enforcement and Compliance Review section of the instant report, EPA recommends that MDEQ management effectively deal with a perception – held by some MDEQ staff members and some members of the public – that enforcement is not a priority and that efforts to effectively enforce violations sometimes can be discouraged or lead to unwelcome personnel decisions.

In conclusion, some of the criticisms made by the Michigan Environmental Council and the Lone Tree Council are valid and appropriate for EPA to consider. EPA has done so, stating our own concerns on those matters. On the whole, though, the claims of deficiency in the petition to withdraw do not provide a basis for EPA to commence program withdrawal proceedings, and the petition is denied.

SECTION 4: FINDINGS

Summary of Findings and Corrective Actions

The program review was divided into two parts: an analysis of the State's legal authority to administer the section 404 program, and an assessment of how MDEQ is actually implementing the program. The review found a number of strengths and weaknesses in the program. This section of the 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 the EPA-approved section 404 program. EPA also has identified several problems with MDEQ's administration of its section 404 program. EPA will continue to work with Michigan to identify actions which must be taken in order to correct identified deficiencies and to develop a schedule for implementing the necessary corrective actions. If the deficiencies are not corrected within the time frame established by EPA and MDEQ, EPA then will initiate withdrawal proceedings.

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 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 EPA's 404(b)(1) Guidelines.

PROGRAM DEFICIENCIES AND CORRECTIVE ACTIONS

This review identified problems with the State's legal authority and with program implementation. These problems and the necessary corrective actions are summarized below. More detailed discussion of the issues presented here can be found in the previous sections of this 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, until a state wide wetland inventory is completed, nor does MDEQ regulate isolated wetlands less than 5 acres. In addition, MDEQ does not regulate filling activities which occur in non-contiguous lakes or ponds with surface areas of less than 5 acres.

Corrective Actions:

Michigan intends to correct the most significant part of the jurisdictional problem posed in Part 303 by performing wetland inventories in all counties of less than 100,000 people over the next five years, satisfying the prerequisite established in § 324.30301(d)

Exemption Issues

1) State exemptions for farming and other activities (horticulture, silviculture, lumbering 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. Also, State regulations relating to agricultural drainage appear to exempt discharges associated with bringing a wetland into farming use. Finally, 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.

Corrective Actions:

In order to resolve EPA's concerns with the farming, silviculture, lumbering and ranching exemptions Michigan must demonstrate that the reference to "horticulture" in Michigan law falls within the federally-contemplated activity of "agriculture," and that "lumbering" falls within the federally-contemplated activity of "silviculture." If Michigan is unable to reference existing rules or procedures which addresses these concerns, then Michigan must develop rules that define these two terms in a manner consistent with the federally-exempted activities.

EPA has determined that MDEQ needs to amend the statute to explicitly state that the § 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 address the issue of change of use, EPA requests that MDEQ seek an appropriate change in the statutory language of § 324.30305(2)(e) to clarify that one cannot perform discharges under this exemption which will allow a change of use.

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:
In order to ensure that Michigan law is as stringent as federal law with regard to drainage exemptions, Michigan needs to delete § 324.30305(2)(j) in order to make Part 303 as stringent as federal law. In addition, Michigan must address the issues related to maintenance, operation or improvement. MDEQ has proposed seeking amendment of § 324.30305(2)(h) to delete that statute's reference to "straightening, widening, or deepening to clarify that the statute's reference to‹maintenance, operation, widening, or deepening' encompasses only true drain maintenance activities, consistent with federal law. 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." 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.

3) The Michigan law exemption 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 exemption in §§ 324.30305(2)(l)and (m) for utility maintenance activities

Corrective Action:
EPA requests 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), and will promulgate new administrative rules requiring advance notice be given to MDEQ of activities taken pursuant to § 324.30305(2)(l) and (m), and requiring compliance with specified best management practices during the performance of those activities.

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 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 required under federal regulations.

Corrective Action:
MDEQ has agreed to implement an administrative rule change insuring that the potential for cumulative adverse effects will be considered before a new minor permit category is established.

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 Action:
MDEQ has agreed to develop administrative rules under Parts 301 and 303 that set a five-year permit term limit.

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.

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 the MDEQ Director.

5) Parts 301 and 303 and their administrative rules do not seem to provide MDEQ with full and express authority to modify and revoke permits, as outlined by the CWA and its regulations.

Corrective Actions:
EPA proposes that MDEQ promulgate a Part 303 administrative rule to add two additional grounds for MDEQ to modify or revoke a permit: the availability of new information, and a change in statutory or regulatory authority. The grounds for modifying or revoking a permit must be added to Part 301 as well. If MDEQ and the Attorney General's Office conclude that § 324.30107 authorizes MDEQ to promulgate a rule that lists additional grounds for permit revocation, EPA may be willing to agree that a rule change (rather than a statutory change) is adequate corrective action. But if MDEQ and the Attorney General's Office concludes that a rule change cannot be promulgated, the problem must be addressed by amending § 324.30107.

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. MDEQ recently has 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 action:

MDEQ must promulgate Part 301 administrative rules comparable to the recently-issued Part 303 administrative rules addressing section 404(b)(1) issues. Earlier in this report, EPA identified other 404(b)(1)-related issues with respect to which EPA requests MDEQ promulgate additional Part 301 and Part 303 rules. During 2002, MDEQ proposed to promulgate new administrative rules, under Part 301 and Part 303, that will incorporate by reference the federal 404(b)(1) Guidelines. Requests for written Attorney General opinions also have been made by EPA. Finally, 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 section 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 either will jeopardize the continued existence of threatened and endangered species and their critical habitats or will result in significant degradation of waters of the United States.

Corrective Actions:

The 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 threatened or endangered 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 threatened or endangered species during the permit review process. 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.

Permitting through Contested Case Proceedings

MDEQ's ALJs and MDEQ's Director, in his role as the final decision maker in contested case proceedings, often have not interpreted and applied Michigan law in a manner consistent with the

mandates of section 404(b), section 404(h), the State Program Regulations, the interagency MOA, and, most critically, the section 404(b)(1) Guidelines. Earlier in this report, EPA reviewed the types of erroneous analyses and legal conclusions made in a significant number of MDEQ's proposed and final contested case decisions.

Corrective Actions:
MDEQ recently has promulgated new rules under Part 303 addressing such issues as proper way to conduct a feasible and prudent alternatives analysis and the proper test for wetland dependency. If fully and accurately applied by the MDEQ ALJs and the Director, these rules should improve the compliance with section 404 of MDEQ-issued permits that result from contested case proceedings. EPA has also requested that MDEQ promulgate additional rules under Part 303, and promulgate comparable rules under Part 301. MDEQ is working on various administrative rules to resolve EPA's concerns. EPA will review contested case decisions made in the future to evaluate the effectiveness of the new rules 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 that the second and third requirements are being met.

Corrective Action:
MDEQ has agreed to revise the 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 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.

2) EPA is concerned that under Michigan law a criminal violation of a wetland permit occurs only if the violation was willfully or recklessly committed, for this is a higher standard of proof than is indicated by 40 C.F.R. § 233.41(b)(2). EPA also is concerned about the amount of certain criminal fines.

Corrective Action:
After discussions between EPA and MDEQ, it is likely that amendments to Part 303 will need to be enacted.

Indian Lands
EPA and MDEQ do not define the term "Indian lands" in a consistent manner. MDEQ does assert 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. 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) forms which serve as the documentation of the permit decision. Since the PRR form does serve 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.

Corrective Action:
Improve the documentation of the basis for each permit decision. Staff must make sure that documentation for the permit decision is included in every permit file, in the form of the PRR.

2) The public notice procedure currently used by MDEQ was found to be problematic. The current system does not always ensure that interested persons will receive the public notice with enough time to provide comment to MDEQ. A second problem with the public noticing process relates to who receives the notices. It is not clear that all adjacent property owners receive copies of the public notice, as the federal regulations require. 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 currently do not recite all such criteria. Finally, the federal regulations require a State agency to 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). Currently MDEQ is not doing this.

Corrective Actions:
MDEQ needs to revise its public notice system to ensure that complete notices are available to interested persons in a timely fashion. All adjacent property owners, not just riparians, must receive copies of public notices. MDEQ has developed an Internet system making public notices available to the public. MDEQ has implemented and internet system for viewing public notices. The Internet system meets the requirement of providing notice in at least one way in addition to mail, however, MDEQ still needs to ensure that all persons who request copies of public notices by mail receive those notices in a timely manner so that they have sufficient time to submit comments.

3) EPA's program review found that coordination under the federal Threatened and Endangered Species Act to be effective for larger projects. The system currently in place to screen projects for potential to impact a federally-listed threatened or endangered (T & E) species is doing a good job of identifying projects which may affect a T & 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. There is a need to develop formal guidelines to help MDEQ staff identify projects needing T & E coordination has been identified in this program review. Finally, it is not clear that permits issued out of the district offices on a walk-in basis are being screened for potential T & E impacts.

Corrective Actions:
MDEQ, USFWS and EPA need to work to develop a procedure and/or memorandum of agreement regarding how coordination on threatened and endangered species issues will proceed when a project may affect a federally-listed threatened or endangered species. MDEQ needs to continue to work with USFWS and EPA to complete development of procedures for screening all permit applications, including minor permits and walk-in permits, for potential impacts to federally-listed species.

4)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 form 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 404(b)(1) Guidelines. In addition, MDEQ has agreed to promulgate administrative rules for Parts 303 and 301 which will incorporate the federal section 404(b)(1) Guidelines by reference. A more detailed discussion of the proposed rule changes to address this issue can be found in the Corrective Actions - Permitting Authority section of this report. 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.

<u>Findings Related to Administration of the Enforcement Program</u>

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.

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. EPA recommends that now that the MDEQ enforcement and compliance procedures manual is finalized that MDEQ staff receive training on the new manual. We believe that MDEQ has not set priorities for

enforcement response or developed clear procedures. 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 project review reports. EPA will review the newly issued Enforcement Manual to determine if the issues listed above are addressed by procedures 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 ninety-day period, as limiting factors.

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. 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. 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. 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.

We recommend that Michigan expand its use of administrative consent agreements – made between the 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. 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. We believe these procedures are critical to sustain appropriate enforcement by MDEQ. Finally, we further recommend that MDEQ develop procedures to refer cases to EPA. The final enforcement procedures need to reflect a commitment to fully utilize the authority provided through the Clean Water Act to pursue timely and appropriate enforcement against significant, flagrant, and repeat violations.