

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

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

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

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

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

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

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

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

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

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

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

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