

US EPA ARCHIVE DOCUMENT

**MEMORANDUM OF AGREEMENT
BETWEEN THE
MICHIGAN DEPARTMENT OF ENVIRONMENTAL QUALITY
AND THE
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, REGION 5**

**ADMINISTRATION OF SECTION 404 OF THE CLEAN WATER ACT
BY THE STATE OF MICHIGAN**

This Memorandum of Agreement (MOA) between the Michigan Department of Environmental Quality, hereinafter referred to as the MDEQ, and the United States Environmental Protection Agency, Region 5, hereinafter referred to as the USEPA, defines the federal and state roles in carrying out the policies, regulations, and procedures necessary to administer the permit program established pursuant to Section 404 of the Clean Water Act (CWA), Title 33 of the United States Code, Section 1251 *et seq.*, hereinafter referred to as the "404 Program," and to facilitate program coordination between the MDEQ and USEPA.

WHEREAS, Section 404(g) of the CWA provides for state administration of the 404 Program regulating discharges of dredged or fill material to waters of the United States; and

WHEREAS, the MDEQ has, since 1984, operated a state program in accordance with the requirements of Section 404(g) of the CWA and Title 40 of the Code of Federal Regulations (CFR) Part 233, 404 State Program Regulations; and

WHEREAS, the USEPA has approved the state program pursuant to Section 404(h),

NOW, THEREFORE, IT IS AGREED THAT:

1) Authorities.

The MDEQ shall administer and enforce the 404 Program in accordance with those state laws and administrative rules that the USEPA has defined as components of the federally authorized 404 Program in the State of Michigan (40 CFR Section 233.70), and in accordance with the Section 404 State Program Regulations (40 CFR Part 233), the CWA, Section 404(b)(1) Guidelines (40 CFR Part 230, Section 404(b)(1)Guidelines for Specification of Disposal Sites for Dredged or Fill Material) (404 Guidelines), and provisions contained in this MOA and the agreement between the MDEQ and the United States Army Corps of Engineers (USACE).

2) Compliance monitoring and enforcement.

- a) The MDEQ has primary responsibility for compliance monitoring and enforcement provisions of the State 404 Program, and shall take timely and appropriate enforcement action against persons in violation of permit conditions for all permits issued under the State 404 Program, and against persons conducting unauthorized discharges of dredge or fill materials into waters of the United States over which the MDEQ has assumed jurisdiction under the State 404 Program.
- b) The MDEQ shall notify the USEPA of the status of compliance and enforcement actions through submission of an annual report as outlined in paragraph 7 of this MOA.

c) When a violation is identified by the MDEQ that meets the criteria in paragraph 3 of this MOA -- such that direct review by the USEPA would be required under MDEQ permit processing procedures -- the MDEQ shall initiate coordination with the USEPA. As part of this coordination, at a minimum, the MDEQ shall provide a summary of the unauthorized activity and inform the USEPA of the status of the file as enforcement actions are taken, as well as any decision to accept an after-the-fact permit application.

In the event that an after-the-fact permit application is accepted, the MDEQ shall forward such application to the USEPA, and the USEPA shall, as appropriate, provide comments to the MDEQ. The MDEQ shall consider, and as appropriate incorporate, the comments of the USEPA in accordance with MDEQ permit processing procedures and the Section 404(b)(1)Guidelines.

d) Under appropriate circumstances, the MDEQ may refer information regarding possible or alleged violations to the USEPA, and may request that the USEPA consider initiating a parallel or independent enforcement action. Such circumstances include but are not limited to:

- i) Violations that have or have a reasonable potential to have direct impact on waters of another state.
- ii) Major or repeat offenses.
- iii) Violations that have or have a reasonable potential to have major adverse resource impact or an impact on special federal resources, such as federally listed threatened or endangered species.

e) The MDEQ shall provide the public notice of and a 30-day public comment period on any proposed settlement of a civil enforcement action that is filed in state court. Notice may be provided to the public via the MDEQ Calendar or other appropriate means.

f) In the event that the MDEQ proposes to resolve a compliance or enforcement issue through a consent agreement (administrative or judicial), and where the impact of the violation is such that federal review would not be waived as described in paragraph 3 of this MOA, the MDEQ shall provide the USEPA with an opportunity to review and comment on the draft consent agreement prior to signature. Once agreement is reached on a consent agreement, the MDEQ shall provide a copy of the executed agreement to the USEPA. If the USEPA objects to authorization of an activity through the consent agreement, any subsequent state authorization shall not provide authorization under Section 404 of the CWA.

g) The USEPA may request the opportunity to review any compliance and enforcement record. The MDEQ shall provide to the USEPA a copy of the file when requested. The USEPA may initiate independent or parallel enforcement action in accordance with Sections 309 and 404(n) of the CWA.

h) Prior to proceeding with federal enforcement action against a possible or alleged State 404 Program permit violator or unauthorized discharger, and for purposes of providing notice only, the USEPA shall inform the MDEQ that federal enforcement action is to be initiated. This notification shall be made to the director of the MDEQ or his/her designee. It is expected that preliminary staff discussions will take place between USEPA and MDEQ representatives before initiation of federal enforcement action.

i) The MDEQ shall not oppose intervention by any citizen in a state civil enforcement action under the 404 Program when permissive intervention in a state enforcement action is authorized by Michigan law.

3) Federal review of permit applications and waiver of review.

The USEPA, USACE, and United States Fish and Wildlife Service (USFWS) shall, pursuant to Section 404(j) of the CWA, review each permit application received by the MDEQ except for those categories of discharges for which such review has been waived in accordance with Section 404(k) of the CWA.¹

The USEPA, after consultation with the USACE and USFWS, shall waive the requirements of Section 404(j) for all but the following classes or categories of discharge:

- a) Draft general permits.
- b) Major discharges. Major discharges are defined as applications for permits that:
 - i) Affect one or more acres of wetland.
 - ii) Include new construction of breakwaters or seawalls with a total length of more than 1,000 feet.
 - iii) Include enclosure of more than 300 feet of a stream in one or more segments.
 - iv) Require relocation or channelization of more than 1000 feet of a stream in one or more segments.
- c) Discharges with reasonable potential for affecting endangered or threatened species as determined by the USFWS.
- d) Discharges with reasonable potential for adverse impacts on waters of another state.
- e) Discharges known or suspected to contain toxic pollutants in toxic amounts (Section 101(a)(3) of the CWA) or hazardous substances in reportable quantities (Section 311 of the CWA).
- f) Discharges located in proximity of a public water supply intake.
- g) Discharges within critical areas established under state or federal law, including national and state parks, fish and wildlife sanctuaries and refuges, national and historical monuments, wilderness areas and preserves, sites identified or proposed under the National Historic Preservation Act, and components of the National Wild and Scenic Rivers System.
- h) Sites identified by the USEPA in advance under provisions of the 404 Guidelines.

The USEPA retains the right to terminate, at any time, in whole or in part, any waiver of the requirements of Section 404(j) by sending written notice of determination to the MDEQ.

This agreement does not limit, diminish, or constitute an expressed or implied waiver of the authority of USEPA to prohibit certain discharges pursuant to Section 404(c).

¹ The National Marine Fisheries Service has waived review of all permit applications.

4) Coordination with other states and tribes.

- a) Whenever the MDEQ receives an application for a permit that has a reasonable potential to impact the waters of the states of Indiana, Ohio, or Wisconsin, or waters that USEPA has identified to the MDEQ as being within the jurisdiction of federally recognized Indian tribes, the MDEQ shall transmit a copy of the public notice to the impacted state or tribe and to the USEPA. The USEPA shall assist in the identification of regulatory contacts in these other states and tribes.
- b) The impacted state or tribe shall be requested to provide comments to the MDEQ and the USEPA within 45 days of the date of the public notice regarding the potential impact of the proposed project on the waters of such state or tribe.
- c) The MDEQ shall consider the comments and concerns of the potentially impacted state or tribe when making a decision on the application, and shall provide a copy of the final permit decision to a state or tribe that provides comments.
- d) The USEPA may object to the issuance of a Section 404 permit by the MDEQ if it finds that the proposed project would fail to comply with the 404 Guidelines due to the impact on waters of another state or tribe. In this instance, the MDEQ shall proceed as specified in Section 404(j) of the CWA and paragraph 5 of this MOA.
- e) Both the U.S. EPA and the MDEQ agree that this MOA does not waive any legal claims, rights, or positions that the U.S. EPA or the MDEQ have over what constitutes "Indian lands" or "Indian country", as the U.S. EPA defines those terms

5) Permit processing and federal comment.

- a) The MDEQ shall promptly submit permit applications in the classes or categories identified in paragraph 3 of this MOA to the regional administrator of the USEPA for review, coordination, and, where applicable, objection in accordance with Section 404(j) of the CWA.
- b) Material submitted to the USEPA shall include:
 - i) A copy of the public notice for any complete permit application received by the MDEQ, except those for which permit review has been waived under this MOA. Any supplemental or additional materials submitted to the MDEQ, including but not limited to information on project alternatives, environmental assessment, or mitigation plans, shall also be forwarded promptly to the USEPA. Whenever requested by the USEPA, the MDEQ shall supply the regional administrator with copies of public notices for permit applications, even for projects for which permit review has been waived.
 - ii) A copy of each draft general permit whenever the state intends to issue a general permit, including minor project categories defined under state law.
 - iii) For permit applications that are subject to direct federal review, notification of when the MDEQ takes a permit action, a copy of every permit issued, and a copy of any denial of a permit.
 - iv) A copy of the MDEQ's response to comments or recommendations made by another state if the MDEQ does not accept such recommendations.

Materials may be forwarded to the USEPA by electronic means.

- c) The regional administrator shall, not later than 30 days from the date of receipt of a permit application from the MDEQ, notify the MDEQ if the USEPA does not intend to review the permit application.

If the regional administrator intends to provide written comment, he/she shall coordinate the region's review with the USACE and the USFWS, and submit comments to the MDEQ in accordance with the requirements of, and in the time frames specified in, Section 404(j) of the CWA. However, the USEPA shall make every attempt to provide comments within the time frame specified in Michigan law. The MDEQ shall notify the USEPA of decision deadlines for each application.

- d) The MDEQ shall respond to any such comments received from the USEPA in the manner specified in Section 404(j) of the CWA and appropriate sections of 40 CFR Part 233. The MDEQ shall provide a copy of a draft permit, with all conditions, to the USEPA to demonstrate that federal comments have been fully addressed.
- e) In the event that the MDEQ does not resolve an objection by the USEPA to issuance of a permit, but must issue a permit in order to comply with requirements of state law, then the permit issued by the State of Michigan shall not provide authorization under Section 404 of the CWA, and the applicant shall be notified of this fact in writing.

6) Coordination of mitigation banking.

- a) The MDEQ and USEPA agree that mitigation banking projects shall be subject to review by an Interagency Review Team (IRT) consistent with the 404 Guidelines, Subpart J. The IRT shall be chaired by the MDEQ, except where the USACE retains Section 404 jurisdiction, in which case the MDEQ and the USACE shall co-chair the IRT.
- b) The USEPA shall participate on the IRT.

7) Reporting.

- a) The MDEQ shall submit to the regional administrator of the USEPA an annual report evaluating the state's administration of its 404 Program, identifying problems the state has encountered in administration of its program, and recommendations for resolving these problems. The report shall include:
 - i) An assessment of the cumulative impact of the state's permit program on the integrity of state regulated waters.
 - ii) A summary of the number and nature of individual and general permits issued, modified, or denied during the year, and permits not yet processed.
 - iii) A summary of the number and nature of violations or suspected violations identified and the nature of enforcement actions taken.
 - iv) An estimate of the extent of total impact to state regulated waters from individual and general permits.
 - v) The number of acres of each of the categories of state regulated waters (lakes, streams, and wetlands) that were impacted by dredge or fill material during the year (by either authorized or known unauthorized activities) in excess of one surface acre per project.
 - vi) A summary of any significant changes in program operations or procedures.
 - vii) Other information of particular concern or interest.

- b) Within 60 days of receipt of the annual report, the USEPA will complete review of the report and transmit comments, questions, or requests for additional information to the MDEQ.
- c) The MDEQ may modify the report to address the comments of the USEPA. The final report shall be made available to the public.
- d) The period for the annual report shall be the state fiscal year ending September 30, and the report shall be submitted to the USEPA by December 31 of each year.

8) Program review and oversight.

- a) The USEPA may, in accordance with Section 404(i) of the CWA, conduct periodic evaluations of Michigan's 404 Program.

9) Modifications.

- a) The MDEQ shall promptly notify the USEPA of any proposed or actual change in its legal authority that may alter its ability to administer the 404 Program, including:
 - i) An action by the State Legislature to strike down or limit state authorities, or that contemplates cessation of the administration of the Section 404 Program by the State of Michigan.
 - ii) An action by a state court striking down or limiting state authorities.
 - iii) Revision of the state's legal authorities needed to maintain consistency with changes to applicable federal regulations.
 - iv) Proposed transfer of the program in whole or in part to another state agency.
- b) In response to notification of a change in the state program, the USEPA shall inform the MDEQ in writing of specific concerns regarding state authority, and shall provide the state an opportunity to make any necessary program corrections in accordance with 40 CFR Part 233.
- c) In the event that the MDEQ determines that it will no longer administer a 404 Program at the state level, the MDEQ shall provide notice to the USEPA and the USACE not less than 180 days prior to cessation of program operation, and shall arrange for transfer of all program materials to the USACE.

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d) Amendments to this MOA shall be in writing. They may be proposed by either party, and shall be effective upon the signature of both parties.

This MOA shall become effective upon approval by the regional administrator of the USEPA.

United States Environmental Protection Agency:

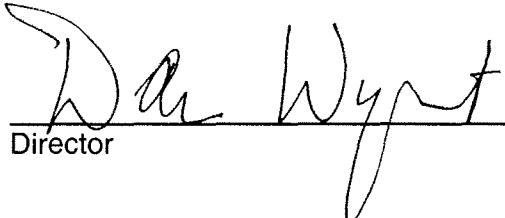


Regional Administrator, Region 5

10-17-11

Date

Michigan Department of Environmental Quality:



Director

11-9-11

Date