

EPA Review of Michigan 404 Program Changes

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Process for Revision of an Existing State 404 Program

Defined in EPA State Program Regulations - 40 CFR Part 233

Basic 404 Consistency Requirement

40CFR Part 233,
§233.1(d)

“Any approved State Program shall, at all times, be conducted in accordance with the requirements of the Act and of this Part. While States may impose more stringent requirements, they may not impose any less stringent requirements for any purpose.”

- At least equal jurisdiction
- No broader exemptions
- Consistent decision criteria (404(b)(1) Guidelines)

Procedures for Revision of a State Program

40 CFR Part 233, §233.16

Approval of proposed revision of a State 404 program shall be accomplished as follows:

- Submittal of revised program description;
- For ***substantial changes***, notice and public hearing;
- Notice of decision by EPA Regional Administrator in *Federal Register*.
- Changes do not become effective part of 404 Program until approved by EPA and published.

Withdrawal of Program Approval

40 CFR Part 233,
§233.53

“The Administrator may withdraw program approval when a State program no longer complies with the requirements of this Part, and the State fails to take corrective action. Such circumstances include the following...

...Action by a State legislature or court striking down or limiting State authorities.”

Sequence of EPA Actions

40 CFR Part 233
§233.53

- Hearing regarding proposed revisions to MI 404 Program (December 11, 2013)
- Decision by EPA **Reg. Administrator** – accept or reject revision - after hearing and close of comment period
- Decision by EPA **Administrator** regarding consistency/initiation of withdrawal of 404 authority
- Withdrawal of State 404 authority – at least 10 – 12 months (or longer). Includes response by state, hearing, EPA review, and opportunity for state to make required corrections.

EPA Concerns

As yet, no final comment.

404 Consistency

EPA memo regarding
SB 163 – May 31,
2013

- Definition of wetlands/streams under jurisdiction inconsistent
 - “contiguous” vs “adjacent”
 - county drains
- Some exemptions not consistent with 404 as proposed
- Implementation of some exemptions delayed until 2014

Possible
additional
consistency
concerns

- Consistency of mitigation requirements, and federal mitigation rule (404(b)(1))
 - Easements
 - Payment into a fund
- New General Permit provisions
 - Blueberry production
 - Drain Commissioner activities

Permit
applicants in
limbo?

40 CFR Part 233
§233.20

“No permit shall be issued by the Director [of the State agency] ...

...When the permit does not comply with the requirements of the [Clean Water] Act or regulations thereunder... “

Lack of state authority would leave applicants without legal permit options until program revised or withdrawn.

State does not have to wait until 404 review process is completed to make corrections.