ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 123

[FRL–5918–6]

Approval of Modifications to Michigan's Approved Program To Administer the National Pollutant Discharge Elimination System Permitting Program Resulting From the Reorganization of the Michigan Environmental Agencies

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of approval.

SUMMARY: Notice is hereby given that the Environmental Protection Agency (EPA) approves of the modifications of Michigan's approved National Pollutant Discharge Elimination System (NPDES) permitting program which resulted from certain Michigan Executive Orders which reorganized Michigan's environmental agencies.

EFFECTIVE DATE: Consistent with 40 CFR 123.62(b)(4), this action is effective November 14, 1997. In accordance with 40 CFR 23.2, EPA explicitly provides that this action shall be considered issued for the purposes of judicial review November 14, 1997, at 1 p.m. eastern daylight time. Under section 509(b)(1) of the Clean Water Act, judicial review of this action can be obtained only by filing a petition for review in the United States Court of Appeals within 120 days after it is considered issued for the purposes of judicial review.

FOR FURTHER INFORMATION CONTACT: Eugene Chaiken, Chief, NPDES Support and Technical Assistance Branch, Water Division, U.S. Environmental Protection Agency, 77 West Jackson Boulevard, Chicago, Illinois 60604 (312) 886–0120.

SUPPLEMENTARY INFORMATION:

Note: This action is one of four **Federal Register** actions related to reorganization of state environmental agencies in Michigan. All these actions are published together in this **Federal Register**, with the exception of a Clean Air Act State Implementation Plan published on November 6, 1997 at 62 FR 59995.

I. Background

On October 17, 1973, EPA approved the NPDES permitting program submitted by the State of Michigan pursuant to section 402 of the Clean Water Act. Procedures for revision of State programs at 40 CFR 123.62 provide for EPA review of any revisions to federally authorized State NPDES programs to determine whether or not such revisions are substantial and to approve or disapprove any such revisions.

The Michigan Water Resources Commission (MWRC) was the name of the agency authorized to administer the NPDES program in Michigan on October 17, 1973. On November 8, 1991, the Governor of Michigan issued Executive Order 1991–31, which reorganized and consolidated Michigan's environmental agencies. Though initially stayed in the Michigan court system, the Michigan Supreme Court ultimately upheld the validity of Executive Order 1991–31 on September 2, 1993. *Dodak* v. *Engler,* 443 Mich. 560, 506 N.W.2d 190 (1993).

Pursuant to Executive Order 1991–31, all of MWRC's authority, powers, duties, functions and responsibilities pertaining to Michigan's NPDES program were transferred to the Director of the Michigan Department of Natural Resources (MDNR), except that adjudicatory authority and authority to conduct contested case hearings were transferred to the Michigan Natural Resources Commission (MNRC). Executive Order 1995–4 then transferred all MNRC authority to make decisions regarding administrative appeals of surface water permit applications to the MDNR Office of Administrative Hearings. The Attorney General of the State of Michigan, in a statement dated August 2, 1995, certified to the following:

> Executive Order Nos. 1991–31 and 1995–4 and the Governor and Director's letter dated February 3, 1995 do not change the State's statutes or rules which provide adequate authority to the State of Michigan to carry out the program set forth in Governor William G. Milliken's ''Program Description'' dated July 17, 1973. In fact, State statutes and rules are essentially unaffected by these Executive Orders and letter. The only way in which the statutes and rules are affected is by changing the person or entity responsible for carrying out the various functions set forth within these statutes and rules. This type of reorganization of functions is consistent with the Constitution of Michigan of 1963, Article V, Section II.
>
> No authority, power, duties and functions contained within Michigan's statutes or rules applicable to the NPDES program have been eliminated or changed except for the party responsible for carrying out such authority, powers, duties and functions. Accordingly, in my opinion, the laws of the State of Michigan continue to provide adequate authority to carry out the program set forth in the ''Program Description'' submitted by Governor William G. Milliken on July 17, 1973. The adequacy of this legal authority is unaffected by Executive Order Nos. 1991–31, 1995–4 and the Governor and Director's letter dated February 3, 1995.

On July 31, 1995, Michigan's Governor John Engler signed Executive Order 1995–18, which *inter alia,* elevated the former Environmental Protection Bureau of the MDNR to full independent departmental status called the Michigan Department of Environmental Quality (MDEQ). The MDEQ retained all of its responsibilities and virtually all of its personnel assigned to it as a bureau in the MDNR. The Attorney General of the State of Michigan, in a statement dated June 13, 1996, certified to the following:

> It is my opinion that E.O. 1995–18 did not substantively change the State's statutes or rules relating to the administration of federally delegated programs nor was any authority, power, duty or function contained within Michigan's statutes or rules applicable to federally delegated programs diminished by the execution of E.O. 1995–18. Specifically, E.O. 1995–18 did not affect program jurisdiction, the scope of activities regulated, criteria for the review of permits, public participation, enforcement capabilities or the adequacy of Michigan's legal authority to carry out its federally delegated programs.

Based upon a review of this information, as well as a review of the NPDES program documents submitted in support of Michigan's original (1973) request for EPA approval, EPA preliminarily concluded on March 28, 1997, that the Executive Orders did not substantially revise the State of Michigan's Section 402 NPDES permitting program and that any revisions resulting from the executive orders should be approved. This conclusion was based on two factors.

First, none of the statutes or rules upon which EPA authorized Michigan's NPDES permitting program changed as a result of the Executive Orders. Instead, the Executive Orders simply changed the people or entities responsible for carrying out the various functions set forth within these statutes and rules.

Second, as described in the October 24, 1996, letter from MDEQ to EPA, the Director of MDEQ has ''directed that any MDEQ staff not in compliance with the federal requirements [governing conflict of interest set forth at 40 CFR 123.45(c)] are not permitted to approve permits, nor any portion of permits.'' Moreover, this directive will be incorporated into MDEQ's internal delegation letters and department policies. Finally, the Director of MDEQ will require all individuals that he appoints to decide administrative appeals of NPDES permits to certify that they comply with the CWA conflict of interest requirements. Consequently, Michigan's NPDES program assures compliance with conflict of interest requirements for NPDES state programs.

While not required to do so according to the State NPDES program regulations,

EPA chose to invite public comment concerning the Agency's preliminary determinations. Consequently, on March 28, 1997, EPA published a notice in the **Federal Register** of its preliminary determinations that the Executive Orders caused no substantial revisions to Michigan's NPDES program and that any revisions to Michigan's NPDES program that resulted from the Executive Orders should be approved. Additionally, EPA requested specific comment on the impact, if any, the Executive Orders have on EPA approval of the modification to the Michigan NPDES program recognizing the State's authority to issue general permits. EPA also indicated that it could conduct a public hearing, if there was significant public interest based on requests received. Finally, EPA stated that its preliminary decision only addressed, and EPA was only seeking comment on, the impact of the Executive Orders on Michigan's NPDES program.

II. Comments

In response to the March 28, 1997, notice, EPA received comments from the Scio Residents for Safe Water and the Gelman Sciences Site Citizens Review Committee (''Scio Residents''). The Scio Residents allege that the individuals at MDEQ who are now responsible for making permitting decisions have ''compromised independence,'' a ''pro business agenda,'' and are attempting to ''implement[] blatantly anti-environmental policies without substantive public involvement or notice.'' However, as noted above, none of the statutes or rules upon which EPA authorized Michigan's NPDES permitting program changed as a result of the Executive Orders and so Michigan continues to have the legal authority and obligation to issue NPDES permits which are consistent with the Clean Water Act. The fact that there may be different people—with allegedly ''compromised independence'' or different ''agendas'' or ''policies''—who are responsible for exercising that authority and fulfilling that obligation as a result of the Executive Orders is not a basis for disapproving of any revisions resulting from those Executive Orders. Of course, EPA would have the authority to withdraw program approval pursuant to 40 CFR 123.63 if, as a result of any changes caused by the Executive Orders, Michigan repeatedly issues NPDES permits which do not conform with the requirements of the Clean Water Act. However, that is not at issue in this matter.

In addition to the comments from the Scio Residents, EPA also received comments which were jointly submitted by the National Wildlife Federation and the Michigan United Conservation Clubs (NWF and MUCC). NWF and MUCC argue that ''EPA's 1993 approval of Michigan's General Permit Program was illegal'' because, prior to approving of Michigan's General Permit Program, EPA allegedly violated its own regulations and past practices ''(1) by failing to have a complete State program submission before approving Michigan's General Permit Program; (2) by failing to provide public notice of and comment on the proposed approval; and (3) by failing to hold a public hearing.''

EPA believes that allegations about the unlawfulness of previous agency actions are not relevant to a pending agency matter, except to the extent that EPA proposes to take allegedly unlawful actions in the pending agency matter. In response to the first allegation of unlawful action, EPA continues to believe that neither the CWA nor NPDES State program regulations require comprehensive review and ''reapproval'' of the entire underlying NPDES program each time the Agency approves a modification to such a program. EPA regulations establish procedures for identification (both by EPA and interested persons) and review of any allegation of failure by a State to comply with NPDES State program requirements. *See* 40 CFR 123.64(b)(1). In the specific matter currently before the Agency, namely, the effect of the Executive Orders on the Michigan's program, the Agency believes that comprehensive review and ''reapproval'' is unnecessary. *See National Wildlife Federation* v. *Adamkus,* 936 F.Supp. 435, 440–41, 444 (W.D. Mich. 1996) (upholding EPA's decision, in interpreting comparable statutory and regulatory provisions pertaining to EPA's review of revisions to State Section 404 wetland permitting programs, that EPA need not perform a comprehensive review of an entire underlying State program when approving a modification to such program). Instead, as was made clear in the March 28, 1997, notice, the issues in the present matter are: (1) Whether the Executive Orders caused substantial revisions to Michigan's NPDES program; (2) whether any revisions to Michigan's NPDES program that resulted from the Executive Orders should be approved; and (3) whether the Executive Orders have had any impact on EPA approval of the modification to the Michigan NPDES program recognizing the State's authority to issue general permits.

On the other two issues identified by the commentors, the opportunity for public comment and the opportunity for a public hearing, EPA did provide an opportunity for public comment in this matter (and this notice responds to those comments) and an opportunity for the public to request a public hearing (although MWF and MUCC did not specifically request a public hearing in this matter). As described below, EPA does not believe that a public hearing is necessary based upon the comments received.

NWF and MUCC also raised a number of comments in which they claim that EPA has not fulfilled certain commitments it allegedly made in its August 16, 1994 ''Unopposed Motion to Stay Briefing'' and in subsequent status reports filed in *National Wildlife Federation et al.* v. *Browner, et al.,* No. 94–3309, a case which is currently pending in the United States Court of Appeals for the 6th Circuit. NWF and MUCC argue that, because the Agency notified the 6th Circuit that today's notice and comment proceedings might resolve NWF's and MUCC's concerns, and because NWF and MUCC believe the proceedings do not address their concerns, EPA has failed to fulfill a commitment it made to the court. EPA disagrees that it has failed to fulfill its commitment to the 6th Circuit. EPA explained to the court that these proceedings might resolve NWF's and MUCC's concerns. EPA's inability to satisfy NWF's and MUCC's concerns is not ''failure'' of the Agency, but merely continuing disagreement between EPA and the two groups. Based on comprehensive review of Michigan's public participation procedures (a copy of which is included in the administrative record for today's action), as well as review of the conflict of interest provisions applicable to States authorized to administer the NPDES program, the Agency believes that the Michigan program satisfies the applicable public participation and conflict of interest requirements.

NWF's and MUCC's final comment was that EPA should not approve of the revisions resulting from the Executive Orders because ''the primary decision maker in contested case proceedings, the Director of the [MDEQ], has engaged in illegal ex parte communications about a contested case currently pending a decision,'' allegedly in violation of 40 CFR 124.78(b)(1). NWF and MUCC also argue that the Michigan Attorney General had an obligation to certify that the laws of Michigan are adequate to prohibit such *ex parte* communications. However, the prohibition on *ex parte* communications at 40 CFR 124.78(b)(1) applies only to EPA and to proceedings before EPA. Nothing in EPA's NPDES State program

regulations at 40 CFR part 123 requires that States authorized to administer the NPDES program prohibit such *ex parte* communications. Consequently, the allegation that the Director of MDEQ might be engaging in *ex parte* communications about a contested case, or the concern that the Michigan Attorney General has not certified that the laws of Michigan adequately prohibit such *ex parte* communications, are not sufficient bases for disapproving of any revisions to Michigan's NPDES program resulting from the Executive Orders.

The Scio Residents requested that EPA provide a public hearing on this matter. NWF and MUCC did not specifically request a public hearing in this matter (although, as noted above, NWF and MUCC did criticize EPA for not holding a public hearing in 1993 prior to approving of Michigan's General Permit Program). EPA is required to hold a public hearing under 40 CFR 123.62(b)(2) if a proposed revision is substantial and if there is significant public interest in holding a hearing based upon requests for a hearing received by EPA.

As noted above, EPA has determined that none of the statutes or rules upon which EPA authorized Michigan's NPDES permitting program changed as a result of the Executive Orders. Instead, the Executive Orders simply changed the people or entities responsible for carrying out the various functions set forth within these statutes and rules. Consequently, EPA does not believe that the revisions to Michigan's NPDES program resulting from the Executive Orders are substantial. Moreover, EPA only received two sets of comments: one set from the Scio Residents and a second set that was jointly submitted by NWF and MUCC; and only the Scio Residents specifically requested a hearing. Thus, EPA does not believe that there is sufficient public interest in this matter to hold a public hearing. Finally, neither set of comments explained why a public hearing was necessary or would be helpful in resolving the question of whether EPA should approve of any revisions to Michigan's NPDES program resulting from the Executive Orders. Consequently, EPA is not providing for a public hearing.

Finally, EPA notes that the Michigan Environmental Council (MEC), in a letter to EPA dated June 14, 1996, raised questions regarding the impact of Michigan Public Act 132 of 1996 on Michigan's NPDES program. EPA is addressing those questions separately and EPA's approval of the modifications resulting from the Executive Orders in this proceeding does not express any viewpoint on those questions.

III. Regulatory Assessment Requirements

A. Executive Order 12866

Under Executive Order 12866 (58 FR 51735; October 4, 1993), the Agency must determine whether a regulatory action is ''significant'' and therefore subject to OMB review and the requirements of the Executive Order. The Order defines ''significant regulatory action'' as one that is likely to result in a rule that may:

(1) Have an annual effect on the economy of $100 million or more, or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities;

(2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;

(3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or

(4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

The Office of Management and Budget (OMB) has waived review of EPA action on State NPDES programs .

B. Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), P.L. 104–4, establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local, and tribal governments and the private sector. Under section 202 of the UMRA, EPA generally must prepare a written statement, including a cost-benefit analysis, for proposed and final rules with ''Federal mandates'' that may result in expenditures to State, local, and tribal governments, in the aggregate, or to the private sector, of $100 million or more in any one year.

EPA's approval of any revisions to Michigan's NPDES program resulting from the Executive Orders contains no Federal mandates (under the regulatory provisions of Title II of the UMRA) for State, local, or tribal governments or the private sector. Instead, EPA's determination merely recognizes an internal reorganization of an existing approved NPDES State program; and this determination does not contain any Federal mandate that may result in expenditures of $100 million or more for State, local, and tribal governments, in the aggregate, or the private sector in any one year. Therefore, this determination is not subject to the requirements of section 202 of the UMRA.

Before EPA establishes any regulatory requirements that may significantly or uniquely affect small governments, including tribal governments, it must have developed under section 203 of the UMRA a small government agency plan. The plan must provide for notifying potentially affected small governments, enabling officials of affected small governments to have meaningful and timely input in the development of EPA regulatory proposals with significant Federal intergovernmental mandates, and informing, educating, and advising small governments on compliance with the regulatory requirements. Because EPA's determination to approve of any revisions to Michigan's NPDES program resulting from the Executive Orders merely recognizes an internal reorganization of an existing approved NPDES State program, EPA's determination contains no regulatory requirements that might significantly or uniquely affect small governments.

C. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) provides that, whenever an agency promulgates a final rule under 5 U.S.C. 553, after being required to publish a general notice of proposed rulemaking, an agency must prepare a final regulatory flexibility analysis unless the head of the agency certifies that the final rule will not have a significant economic impact on a substantial number of small entities. 5 U.S.C. 604 & 605. The Regional Administrator today certifies, pursuant to section 605(b) of the RFA, that approval of any revisions to Michigan's NPDES program resulting from the Executive Orders will not have a significant impact on a substantial number of small entities.

The basis for the certification is that EPA's approval simply results in an administrative change in the structure of the approved NPDES program, rather than a change in the substantive requirements imposed on any small entity in the State of Michigan. This approval will not affect the substantive regulatory requirements under existing State law to which small entities are already subject. Additionally, approval of the NPDES program modification will not impose any new burdens on small entities.

D. Paperwork Reduction Act

This approval contains no requests for information and consequently is not

subject to the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.*

IV. EPA's Final Determination

EPA, after review and consideration of all the information submitted by Michigan and the comments received, has determined that the revisions to Michigan's NPDES program resulting from the Executive Orders should be approved. Moreover, EPA has determined that the revisions are not substantial.

Dated: October 1, 1997.

David A. Ullrich,

Acting Regional Administrator.

[FR Doc. 97–29622 Filed 11–13–97; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 233

[FRL–5918–7]

Approval of Modifications to Michigan's Assumed Program To Administer the Section 404 Permitting Program Resulting From the Reorganization of the Michigan Environmental Agencies

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of approval.

SUMMARY: Notice is hereby given that the United States Environmental Protection Agency (EPA) approves of the modifications of Michigan's assumed Clean Water Act Section 404 (Section 404) permitting program which resulted from Michigan Executive Order 1995–18 which reorganized Michigan's environmental agencies.

EFFECTIVE DATE: November 14, 1997.

FOR FURTHER INFORMATION CONTACT: Kevin Pierard, Chief, Watersheds and Non-Point Source Programs Branch, Water Division, U.S. Environmental Protection Agency, 77 West Jackson Boulevard, Chicago, Illinois 60604, (312) 886–4448.

SUPPLEMENTARY INFORMATION:

Note: This action is one of four **Federal Register** actions related to reorganization of state environmental agencies in Michigan. All these actions are published together in the **Federal Register**, with the exception of a Clean Air Act State Implementation Plan published on November 6, 1997 at 62 FR 59995.

I. Background

The State of Michigan assumed Federal Clean Water Act Section 404 permitting authority on October 16, 1984. Procedures for revision of State programs at 40 CFR 233.16 require that EPA review any revisions to state assumed Section 404 programs, determine whether such revisions are substantial, and approve or disapprove the revisions.

On November 25, 1994, EPA approved of revisions to Michigan's Section 404 program resulting from Executive Order 1991–31, which transferred the responsibilities and authorities of the Michigan Department of Natural Resources (MDNR) to the Director of a new MDNR. On July 3, 1995, Michigan Governor John Engler signed Executive Order 1995–18 (Executive Order), which elevated the former Environmental Protection Bureau of MDNR to full departmental status as the Michigan Department of Environmental Quality (MDEQ), effective October 1, 1995. MDEQ retained all of its environmental duties, functions and responsibilities and virtually all of the personnel formerly assigned to it as a bureau in the MDNR. In addition, certain other environmental duties, functions and responsibilities of the Law, Geographical Survey and Land and Water Management Divisions were transferred to MDEQ, as was the authority to make decisions regarding administrative appeals in those matters under its purview.

The Attorney General, in a statement dated June 13, 1996, statement, certified to the following:

> It is my opinion that E.O. 1995–18 did not substantively change the state's statutes or rules relating to the administration of federally delegated programs nor was any authority, power, duty or function contained within Michigan's statutes or rules applicable to federally delegated programs diminished by the execution of E.O. 1995–18. Specifically, E.O. 1995–18 did not affect program jurisdiction, the scope of activities regulated, criteria for the review of permits, public participation, enforcement capabilities or the adequacy of Michigan's legal authority to carry out its federally delegated programs.

Based upon a review of this information, as well as a review of the Section 404 program documents submitted in support of Michigan's original (1983) request for EPA approval and the materials submitted by Michigan and considered by EPA in approving of revisions to Michigan's Section 404 program on November 25, 1994, EPA preliminarily concluded that the Executive Order did not substantially revise the State of Michigan's Section 404 program and that any revisions resulting from the Executive Order should be approved. This preliminary determination was based upon the fact that none of the statutes or rules which comprise Michigan's Section 404 program changed as a result of the Executive Order and MDEQ retained virtually all of the personnel formerly assigned to it as a bureau in MDNR.

Although none of the statutes or regulations which comprise Michigan's program changed, there was one additional matter that EPA considered before making its preliminary determination. Specifically, the Executive Order provides that the Director of MDEQ now decides administrative appeals of wetland permitting decisions, rather than the Michigan Natural Resources Commission. However, this change does not affect the Michigan Section 404 program's ''area of jurisdiction, scope of activities regulated, criteria for review of permits, public participation, or enforcement capability.'' 40 CFR 233.16(d)(3). Consequently, EPA did not view this change to be a substantial revision. Moreover, EPA preliminarily concluded that this revision should be approved because it is not inconsistent with anything in the Clean Water Act or its implementing regulations.

While not required to do so according to the State Section 404 program regulations, EPA chose to invite public comment concerning the Agency's preliminary determinations. Consequently, on March 28, 1997, EPA published a notice in the **Federal Register** of its preliminary determinations that the Executive Order caused no substantial revisions to Michigan's Section 404 program and that any revisions to Michigan's Section 404 program that resulted from the Executive Order should be approved. EPA also indicated that it might conduct a public hearing, if there was significant public interest based on requests received. Finally, EPA stated that its preliminary decision only addressed, and EPA was only seeking comment on, the impact of the Executive Order on Michigan's Section 404 program.

II. Comments

In response to the March 28, 1997, notice, EPA received comments from three commenters: the Tip of the Mitt Watershed Council, the East Michigan Environmental Action Council, and the Michigan Environmental Council. The commenters all raised the same two issues. First, the commenters noted that the Executive Order transferred authority to hold hearings and make findings of fact and render decisions on contested Section 404 permits from the Natural Resources Commission, a public body that was subject to Michigan's Open Meetings Act, to the Director of