

rules for Michigan's hazardous waste management program.

EPA does not agree that this apparent change in the manner in which administrative rules are developed represents a change in Michigan's hazardous waste management program that is inconsistent with RCRA Section 7004(b). A State's Federally authorized hazardous waste management program consists of the statutes and rules which govern the State's program. EPA has no role to play in overseeing or dictating how those statutes and rules are developed. Instead, EPA's role is to determine whether the statutes and rules which comprise the program comply with minimum Federal requirements for authorized programs (e.g., providing public notice, hearings, and comment periods on permit decisions). If the State desires to change those statutes or rules, EPA has no role in determining the manner in which those statutes or rules are changed, so long as the State submits the proposed changes to EPA for review. Consequently, this change in the manner in which the State develops administrative rules is outside the scope of EPA's review of the State's hazardous waste management program under 40 CFR 271.

The second comment made by NWF is that, pursuant to 40 CFR 271.21(c), whenever a State transfers all or part of the approved hazardous waste management program from the approved State agency to any other State agency, the new agency is not authorized to administer the program until approved by EPA. The commenter claimed that EO 1991-31 consolidated various departments and agencies into a "new" MDNR, since the Director of the MDNR has assumed, under a Type III transfer, all the powers, duties and authorities which were formerly allocated to the Hazardous Waste Management Planning Committee (HWMPC), as well as all powers (including sole power to issue permits), duties and authority formerly allocated to the SRB, under a Type II transfer. The commenter also claimed that this reorganization is a "transfer" within the purview of 40 CFR 271.21(c), because the "old MDNR" and the "new MDNR," as well as the SRB, HWMPC, and the Director of the "new MDNR" are each separate "agencies" within the meaning of 40 CFR 271.21(c). The commenter also claimed that both the State courts and the State of Michigan have indicated that the reorganization constitutes a revision and transfer.

EPA has determined that the revisions to Michigan's program are consistent with the requirements of RCRA and its

implementing regulations. Based on the information available to us, EPA has determined that the reorganization of Michigan's hazardous waste management program resulting from EO 1991-31 constitutes a program revision requiring appropriate EPA review and approval. However, EPA has determined that the reorganization of the MDNR resulting from EO 1991-31 does not constitute a transfer to another agency for the purposes of 40 CFR 271.21(c).

EPA recognizes that the Michigan Supreme Court has held that EO 1991-31 created a "new" MDNR. *Dodak v. Engler*, 443 Mich. 560 (1993). However, the Michigan Attorney General, in a letter dated November 8, 1993, has stated that the Executive Order did not create a new agency. In any event, the question of whether MDNR remained the same agency or whether it became "any other State agency" as a result of 1991-31 is not at issue in this determination. The MDNR, as described above, has been the approved State agency for the implementation of Michigan RCRA hazardous waste management program, both before and after the Executive Order. Whether MDNR is considered to be a "new" agency under State law is not controlling with respect to whether there has been a transfer of authority from an "approved State agency to any other State agency." Instead, it is EPA's regulations which are controlling in this issue.

EPA's regulations at 40 CFR 271.21(c) do not provide clear guidance on whether the reorganization and consolidation of environmental programs accomplished by EO 1991-31 constitutes a "transfer" of authority requiring prior EPA approval. The preamble to the 1986 State hazardous waste program regulations similarly fails to provide any such guidance. (See 51 FR 33712, September 22, 1986). However, the 1980 preamble to the final National Pollutant Discharge Elimination System State program rule, in addressing language at 40 CFR 123.62(c), which is similar to that at 40 CFR 271.21(c), stated:

One commenter requested that there be no formal EPA review of nominal changes in the structure and responsibilities of State agencies administering an approved program. It was not the intent of the proposal nor is it of these final regulations to require EPA review in such cases ["nominal changes" in State agencies]. Only when controlling Federal or State statutory or regulatory authority is modified or supplemented, or when the State proposes to transfer all or part of a program from an approved State agency to another State agency may EPA approval be necessary. Changes solely to the internal structure of an approved State agency, with

no changes to the overall authority of the agency, do not require EPA approval.

45 FR 33290, 33384 (May 19, 1980).

In addition, EPA's guidance to States on developing applications for revisions to their authorized State programs, the State Authorization Manual (SAM) (OSWER Directive 9540.00-9A, October 1990) is also consistent with the above preamble language. The SAM, on page 2-2, states that: "... changes within the internal structure of the approved State agency, with no changes in the overall authority of the agency, do not require EPA approval." EPA interprets the language of 40 CFR 271.21(c) as not applying to changes within the internal structure that do not substantively change the overall authority of the agency. The controlling authorities under State law pertaining to the RCRA hazardous waste management program were not affected by EO 1991-31, nor were the overall functions or structure of the Michigan hazardous waste management program substantially changed. Therefore, EPA does not view the reorganization of the MDNR resulting from EO 1991-31 as a transfer under the purview of 40 CFR 271.21(c).

In regards to the Michigan HWMPC, that department has never been considered to be part of Michigan's authorized State hazardous waste program. The HWMPC was established by Section 8A of Michigan Public Act 64 for the purpose of developing a State hazardous waste management plan. The plan was adopted by the Michigan Natural Resources Commission on January 1, 1992. Abolishment of the HWMPC by EO 1991-31 and transfer of the all of its statutory authority, powers, and duties to the MDNR did not impact the State's hazardous waste management program, since RCRA does not require States to develop such a plan.

In regards to the SRB, EPA does not agree that the transfer of permit decision-making authority from the SRB to the Director of the "new" MDNR constitutes a transfer between agencies under the purview of 40 CFR 271.21(c). As described above, the prior EPA approval requirement in 40 CFR 271.21(c) applies in situations where such restructuring or consolidation impacts the controlling authorities by which a State implements the RCRA hazardous waste management program. EO 1991-31 did not affect the State's controlling authorities by which the State implements the RCRA hazardous waste management program, but rather it transferred decision-making responsibilities within the authorized State hazardous waste management