

**Reviewing Proposed Permit Regulations**  
**A Citizen's Guide**  
August 1978

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# CITIZEN'S GUIDE TO REVIEWING THE PROPOSED PERMIT PROGRAM REGULATIONS

## INTRODUCTION:

On August 21, 1978, the Environmental Protection Agency (EPA) proposed revised regulations to govern the permit programs established under the Federal Water Pollution Control Act of 1972, as amended by the Clean Water Act of 1977 (collectively referred to as the Clean Water Act). The major program addressed by the regulations is the National Pollutant Discharge Elimination System (NPDES) under section 402. Certain provisions also will affect the program for the control of the discharge of dredged or filled material under section 404. Both programs require a permit to be obtained before the discharge of pollutants. Section 402 permits are to be issued by EPA and section 404 permits by the Secretary of the Army (acting through the Corps of Engineers). In both cases, qualified States may assume permitting authority, provided certain conditions are met. These proposed regulations outline the conditions under which an NPDES permit is required, identify the required content of NPDES permits, set forth the procedures for issuance of NPDES permits, and outline the requirements States must meet in order to assume permitting authority under either section 402 or 404.

The proposed regulations were published in the Federal Register (43 FR 37078, August 21, 1978), pages 37078 to 37134. Copies of the proposal may be obtained from Government Printing Office bookstores, EPA Regional Offices,

or EPA headquarters (attention: Edward Kramer, U.S. EPA, EN-336, 401 M St., S.W. Washington, D.C. 20460). Written comments should be submitted to the same address by October 20, 1978. Due to the length of the proposal, please organize your comments by page number and section.

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## I. Background

The EPA is proposing new regulations for the permit programs for three purposes:

- o to clarify and improve existing program regulations and procedures in light of past experience;
- o to fill in significant gaps in coverage under the existing regulations, particularly in response to court decisions and the emerging emphasis on the control of toxic and hazardous pollutants; and
- o to make the regulatory changes which are necessary under the 1977 amendments to the Clean Water Act (P.L. 95-217).

It is important to keep in mind that the language referred to throughout this guide is proposed. The provisions are not final. The purpose of the proposal is to suggest changes and

stimulate comment. Only after comments received from any interested person or group have been reviewed and appropriate changes made will regulations be published in final form.

### Existing Regulations

The existing regulations will continue to govern the operation of the program during the proposal period. There are several revisions to "existing regulations" which will be made while these major revisions are pending. It is necessary to move ahead with certain revisions independent of the major revisions due to time deadlines established by the Clean Water Act Amendments of 1977 (CWA) and recent court decisions.

The following regulations, published in the Federal Register, have been or will be incorporated into existing regulations.

DATE	SUMMARY
43 FR 17484, April 25, 1978 (proposed)	Section 301(h) of CWA variance from secondary standards for qualifying municipalities discharging into marine waters
43 FR 21266, May 16, 1978 (interim final)	Section 301(i) of CWA provides for an extension of com- pliance deadlines for eligible municipalities
43 FR 27736, June 26, 1978 (final)	Sections 307(b) and (c) of CWA require that pretreatment standards be established to control the introduction of non-domestic wastes into publicly owned treatment works

DATE	SUMMARY
43 FR 22160, May 23, 1978 (final in part, proposed in part)	Veto/Modification procedures and criteria EPA will use when (1) objecting to (vetoing) State issued permits and (2) requiring modifi- cation of permits to incorporate Best Available Treatment (BAT) toxic requirements.

### Purpose of This Booklet

This booklet is designed to facilitate your understanding of the proposed revisions. We have tried to identify the major provisions and issues here, and there is a more thorough discussion covering all new aspects of the proposal in the Preamble (pages 37078 to 37088 in the August 21 Federal Register). Your comments are solicited on all aspects of the proposal, and in particular on those issues raised in this guide. Below is a list of the new titles, and a summary of the proposed regulations. For those of you interested in more detail, a description of the major provisions and their location in the proposed regulation (indicated by the number of the Part and paragraph) follows.

Four new Parts of Title 40, incorporating all of existing Parts 122, 123, 124, 125, and 402 will be established as follows:

- o Part 122 National Pollutant Discharge Elimination System
- o Part 123 State Permit Program Requirements
- o Part 124 NPDES Procedures
- o Part 125 NPDES Criteria and Standards

## SUMMARY OF PROPOSED REGULATIONS:

### Part 122 - National Pollutant Discharge Elimination System

Proposed Part 122 establishes the basic "program definition" of the NPDES, whether administered by EPA or an approved State. This part covers the full range of substantive program requirements, spelling out in detail who must apply for a permit; how a permit is issued; what terms, conditions, and schedules of compliance must be incorporated into permits; when and how monitoring and reporting of permit compliance must be performed; when permits may be revised or reissued; and what special requirements apply to certain types of dischargers.

### Part 123 - State Permit Program Requirements

Proposed 40 CFR 123 establishes guidelines specifying what the Administrator will require before approving State permit programs under sections 318 (aquaculture), 402 (NPDES), 404 (dredged or fill material), or 405 (sewage sludge) of the Clean Water Act. In addition, the regulations outline the process of State program approval and revision. Permit programs under sections 318 and 405 may not be approved independent of section 402 permit programs and must be incorporated into all such programs. No partial program approvals will be granted. Particular substantive and procedural requirements of proposed 40 CFR Parts 122, 124, and 125 are incorporated by reference for programs under NPDES (i.e., sections 318, 402, and 405) and



serve as guidance for the section 404 program pending the development of corresponding section 404 regulations (which will be proposed soon as Part 126). Furthermore, the Part 123 regulations describe actions which must be taken to conform to the Clean Water Act amendments of 1977 in States with previously approved NPDES programs.

#### Part 124 - Procedures for NPDES

This part establishes all the procedures to be used by EPA and approved States for receiving permit applications, writing draft permits and soliciting public comment on them. In addition, it establishes procedures to be used by EPA for issuing final permits and holding evidentiary hearings. (NPDES State procedures for issuing final permits and providing appeals of permit terms and conditions are not included in these regulations since State procedures are established in accordance with requirements of State law.)

#### Part 125 - Criteria and Standards for NPDES

Proposed Part 125 contains the particular requirements or standards which must be applied by EPA or approved States in making certain permit determinations. Often these determinations (e.g., concerning variances from or the application of EPA promulgated guidelines) must be made in the course of permit modification or issuance. Most of these items have not been previously incorporated into regulations. Some are still under development and will be proposed at a later date.

DETAIL OF THE PROVISIONS:A. Part 122 - Applicability of the NPDES Program

Any discharge of a pollutant, including discharges from Federal facilities (§122.3), into waters of the U. S. without an NPDES permit is unlawful, unless such discharge is explicitly exempted from coverage of these regulations (§122.2). Exemptions from the NPDES program include: (1) discharge from vessels, except rubbish, trash, or garbage, or discharges from production vessels (such as mining vessels, seafood processing vessels, etc.); (2) discharges of dredged or fill material regulated under section 404, except where the primary purpose of the discharge is the disposal of waste materials rather than the changing of bottom elevation; (3) certain discharges of pollutants into a Publicly Owned Treatment Works (POTW); and (4) discharges from agricultural or silvicultural activities except from animal feeding operations, aquatic animal production facilities, and silvicultural point sources and to aquaculture projects (all of these are further defined at a later point) (§122.4).

The proposed regulations also outline the conditions and requirements an NPDES permit must contain. The permit shall not be issued, if among other things, it: (1) does not comply with requirements of the Clean Water Act; (2) does not comply with State requirements; (3) is objected to by EPA (in the case of State-issued permits); 4) permits a discharge substantially impairing anchorage or navigation; or 5) is inconsistent with a section 208 plan (§122.13).

Permittees are authorized to discharge pollutants for which information was requested in the permit application, only as expressly

authorized by the permit. To implement this requirement, EPA will be developing new application and permit forms which will be available for public comment in the near future. All discharges must be in accordance with permit terms. Permits provide for EPA or State inspection and monitoring and require dischargers to inform EPA or the State in writing of instances of noncompliance with permit requirements. Disposal of sludge, solids, filter, backwash, or other pollutants removed in the course of treatment to prevent entry of the pollutants into the water is to be a condition of the permit. In addition, strict conditions, including notice requirements, are to be included in permits to control bypass or diversion of wastes from treatment requirements and incidents of treatment facility "upset" (§122.14).

Permits are to include all applicable limitations and standards under the Clean Water Act, including effluent standards or prohibitions and pretreatment standards under section 307. Permits for POTWs shall include requirements for a local pretreatment program including notice to EPA of new discharges and identification of all significant sources of pollution. Some of the other permit requirements are: (1) any conditions reasonably necessary for the achievement of effluent limitations, including conditions imposed by EPA as part of a construction grant; (2) any more stringent requirements needed to meet State requirements, State water quality standards, comply with requirements of section 208 plans, comply with variance provisions, or meet downstream quality requirements; (3) conditions for sludge disposal under section 405, and (4) best management practices to control toxic and hazardous pollutants from on-site industrial activities under section 304(e). With limited exceptions, permit conditions are to be at least as stringent as those of previously issued permits (§122.15).

In addition, where applicable, permits should be consistent with other requirements of Federal law, including, but not limited to the following: Executive Order 11990 (Protection of Wetlands), Executive Order 11988 (Preservation of Floodplains), the Wild and Scenic Rivers Act, the National Historic Preservation Act, the Land and Water Conservation Act, the Endangered Species Act, and the Coastal Zone Management Act (§122.49).

Permits are to be written for a term not to exceed five years. (§122.12). They may be modified under certain circumstances, as described in the regulations, but no modification may extend the permits beyond the five-year term (§122.31). Cause of modification includes, among other things: violation of permit requirements (permit may be made more stringent only); failure to disclose fully all relevant information; reduction or elimination of the discharge; information indicating the discharge poses a threat to human health or welfare; failure to allow inspection or monitoring; material and substantive alterations or additions to discharger's operation; certain instances of judicial remand or EPA withdrawal or revision of effluent limitations or standards; modifications specifically allowed by the Clean Water Act; or modifications to implement EPA's toxic pollutant control program (§122.31).

Certain categories of discharge are subject to special provisions and conditions under the NPDES program. Briefly, they include the following:

1. Disposal of Pollutants into Wells and POTW's - States with NPDES authority must control the disposal of pollutants into wells and POTW's to protect human health and welfare and to prevent pollution of ground and surface water.

Permit effluent limitations must be adjusted and made more stringent to reflect disposal of part of a waste stream into a well or POTW (§122.41).

2. Animal Feeding Operations - Individual permits are required for Concentrated Animal Feeding Operations, which are defined as feeding operations (animals confined for at least 45 days out of 12 months and no crops, vegetation, forage growth or post-harvest residues are sustained): (1) supporting more than 1,000 animal units; (2) supporting more than 300 animal units plus either pollutants discharged into a stream thru a man-made ditch or pollutants discharged directly into a stream running through the operation or (3) designated a significant contributor of pollution by EPA or the State after an on-site inspection. All other Animal Feeding Operations will be covered by general permits (§122.42).

3. Aquatic Animal Production Facility - Individual permits are required for Concentrated Aquatic Animal Production Facilities, which are defined as a fish farm, hatchery, or other facility: (1) producing more than 20,000 pounds of aquatic animals per year or (2) designated by EPA or a State as a significant contributor of pollution. All other Aquatic Animal Production Facilities will be covered by general permits (§122.43).

4. Aquaculture Projects - Under section 318, discharges to aquaculture projects require an NPDES permit. They are defined as managed water areas which use the discharge of pollutants for the maintenance of production of harvestable freshwater, estuarine, or marine plants or animals (§122.44).

5. Separate Storm Sewers - Concentrated separate storm sewers are subject to individual permits; all others are subject to general

permits. Concentrated separate storm sewers are those which are designated by EPA or a State, e.g. when effluent guidelines are promulgated for separate storm sewers in a category, section 208 plans contain controls for separate storm sewers; or EPA or a State determines that a separate storm sewer is a significant source of pollution (§122.45).

6. Silvicultural Activities - Silvicultural point sources requiring individual NPDES permits are limited to the following: (1) a discernible, confined, discrete conveyance related to rock crushing, gravel washing, log sorting, or log storage facilities or (2) activities designated by EPA or a State to be a significant contributor to pollution (§122.46).

7. New Sources - New source means any facility or installation from which there may be a discharge of pollutants which commences construction after Performance Standards under section 306 of the Clean Water Act are (1) promulgated, or (2) proposed and promulgated within 120 days of proposal [§122.3(t)]. Construction activities which result in a new source are: (1) construction of a source on a new site or construction of a source totally replacing an older facility or (2) modification of an existing source by changing, replacing, or adding to process or production equipment. Construction means (1) the beginning of a continuous on-site construction program, including the placement, assembly or installation of permanent facilities or equipment for use in the source's operation or significant site preparation work or (2) the entering of a binding contractual obligation for the purchase of permanent facilities or equipment for the source.

The issuance of an NPDES permit to new sources located in a State without NPDES permitting authority may be a major Federal action under

the National Environmental Policy Act (NEPA) requiring an environmental review pursuant to NEPA, including, where appropriate, the preparation of an Environmental Impact Statement (EIS). No on-site construction may begin until after issuance of a final EIS or until 15 days after issuance of a negative declaration unless the construction is approved by EPA and is determined not to cause significant adverse environmental impact. Where an EIS recommends denial of the permit, the permit shall be denied. Where the EIS recommends the imposition of conditions, the permit shall not issue unless the permit applicant agrees as a condition of the permit to take the actions recommended by the EIS.

New sources, as defined by these regulations, which meet applicable New Source Performance Standards (NSPS) are not subject to more stringent technology-based standards for the shortest of the following periods: ten years from completion of construction, ten years from the beginning of a discharge, or the period of depreciation or amortization under the Internal Revenue Code. This protection from more stringent standards does not apply to non-technology-based standards (such as water quality standards) and any effluent limitations controlling a pollutant not covered in the NSPS, including toxics (§122.47).

8. Non-compliance Reporting - The proposed regulations also require that EPA or States with permit-issuing authority compile and make available to the public Quarterly Non-Compliance Reports. This report is to contain narrative information of the following sort for major permittees: (1) failure to complete construction requirements by the date specified in the permit; (2) failure to provide complete compliance schedule reports; (3) noncompliance with discharge requirements where the permittee has not returned to compliance

within 45 days or where a pattern of non-compliance (e.g., violation of the same standard or limitation in two consecutive quarters) is established; (4) failure to report effluent data as required in the permit or (5) submission of a deficient report.

The narrative information is to include: (1) name, location, and permit number of the violator; (2) brief description and date of each instance of noncompliance; (3) brief description, including date, of enforcement action taken; (4) status of the noncompliance; and (5) description of mitigating circumstances. Separate lists are to be provided for municipal, non-municipal and Federal permittees and listings are to be in alphabetical order by the name of the permittee.

Statistical information is to be compiled for all instances of non-compliance by major permittees not reported narratively. Statistical compilation is also required for all minor permittees whose compliance has been reviewed. In addition, a separate list shall be provided annually for minor permittees a year or more behind on their construction schedules (§122.23).

B. Part 123 - Requirements for State Assumption of Permit Authority Under Sections 402 and 404

Part 123 outlines the requirements and procedures for State assumption of permitting and enforcing authority under sections 402 (NPDES program) and 404 (control of the discharge of dredged or fill material), for EPA approval of State programs and for revisions to approved programs. It should be noted that the section 402 NPDES program now includes permit requirements under section 318 (aquaculture projects) and 405 (disposal of sewage sludge) (§123.1). State NPDES



submissions must therefore meet the requirements of sections 318 and 405 for EPA approval under section 402. The requirements and procedures for EPA approval of a State's program under section 404 are, however, separate from although similar to those for approval under section 402.

A State program will not be approved if the State does not have all the necessary authority and resources and does not agree to implement all the requirements of the program. No partial program approvals will be granted. After approval the States are required to conduct their programs at all times in accordance with statutory requirements, guidelines, and regulations (§123.1).

In order to obtain EPA approval, a State must submit to EPA a full and complete description of each program it proposes to administer (§123.3) plus a statement from the State's attorney general that the State's law provides adequate legal authority to carry out and meet the requirements of these regulations (§123.4).

Prior to approval of the States's program, EPA and the State will sign a Memorandum of Agreement describing the manner in which the permit program will be administered by the State and reviewed by EPA. This agreement is to be reviewed and revised as necessary, but at least once every three years. The memorandum is to include a statement concerning EPA's waiver of authority to review permits proposed to be issued by the state. For the NPDES program, no waivers are allowed for the following activities: (1) discharges from publicly owned treatment works (POTW's) exceeding 0.5 million gallons per day (MGD) (2) discharges of unpolluted cooling water exceeding 1 MGD; (3) all other discharges above 0.1 MGD; (4) discharges into the territorial

sea, the contiguous zone or the oceans; (5) discharges of toxic pollutants; (6) discharges of hazardous pollutants; or (7) discharges affecting the waters of a State other than the one proposing the permit. For the section 404 program, no waivers are allowed for the following activities: (1) the discharge of toxic pollutants; (2) the discharges of hazardous pollutants; (3) discharges affecting the waters of a State other than the one proposing the permit; (4) discharges incidental to an activity which has as its purpose the changing of the use of the area, where the flow and circulation of waters may be impaired or reduced; (5) discharges into wetlands; or (6) proposed general permits (§123.5).

Requirements for the processing, issuance, and substance of permits issued by States are laid out in detail in the regulations. In general the requirements are the same as or similar to those which EPA must meet in issuing Federal permits. One of these requirements is that maximum civil penalties and criminal fines be comparable to similar maximum amounts recoverable by EPA under the Clean Water Act. In addition, civil penalties actually assessed should be appropriate to the nature of the violation, taking into consideration the amount of environmental damage and the economic benefit gained from delayed compliance (§123.72).

In addition, the regulations now require that any State permit program have an approved continuing planning process (section 208 and 303 water quality management and planning) at all time consistent with the requirements of the Clean Water Act (§123.82). States must also have measures to protect against conflict of interest in any member of a State board or body which processes permits (§123.83).

The process for EPA approval of both section 402 (§123.91) and 404 (§123.92) programs is laid out in the regulation. This section includes time constraints upon EPA's action and requirements for public notice, comment, and hearings on the State's program. Provision is also made in the regulations for revision of approved State programs (§123.101).

C. Part 124 - Procedures for EPA Decision-Making Regarding NPDES Permits

Part 124 outlines the process for applying for an NPDES permit, seeking a modification of an existing permit, EPA decision-making on the permit application, and administrative hearings and appeals on the terms of the permit. The regulations require all discharges that do not now have a permit, that are expanding or modifying existing facilities in such a way as to be classified as a new source, or that have expiring permits to apply to either EPA or, where appropriate, the State, for an NPDES permit (§124.11). Special procedures are set up for new sources because of the NEPA responsibilities concomitant with the issuance of new source permits by EPA (§124.12).

The Clean Water Act authorizes a number of variances from or modifications to effluent limitation requirements, including, but not limited to: alternative effluent limitations for thermal discharges (§124.14); a variance based on economic capability under section 301(c); a variance based on environmental considerations under section 301(g); and extensions of deadlines under sections 301(i) and 301(k). The regulations require that, to the extent possible, such variances be requested at the time a permit is applied for and lay out the procedures for such requests.

The regulations do not change very much the initial steps in the process of securing a permit, e.g. submittal of an application for a permit, preparation of fact sheets, circulation of fact sheets and other information, and preparation of the draft permit. The regulations, do however, lay out in more detail than previously what information must be contained in the fact sheets (§§124.42 and 124.63) and the requirements for circulation of information on proposed permits to other interested Federal agencies (such as Corps of Engineers and the Fish and Wildlife Service) and State agencies (§§124.21-23 and 124.31-34). The regulations also require that all permit decisions be made only on the basis of a formal administrative record developed during the process of permit formulation and issuance (§124.44). Materials to be included in the administrative record are laid out (§§124.44 and 124.64).

After the initial stages of permit processing (through issuance of a draft permit) the regulations, in new provisions, provide two different sets of procedures for appealing permit terms and conditions: one will be more formal and adversarial in nature; the other less so, in accordance with the terms of the Federal Administrative Procedures Act for cases of "initial licensing." These procedures apply only to EPA issued permits. Appeals on NPDES permits issued by States follow State law.

The more formal appeal procedures are very similar to that outlined in previous regulations. Following opportunity for public notice and comment on the draft permit (§124.51) and the issuance of a proposed permit (§124.61), any interested person has the opportunity to request a full evidentiary hearing to challenge the permit terms. The process of the evidentiary hearing is very similar to that formerly employed,

including requirements for requesting the hearing, grounds for rejecting requests for admission of additional parties, the admission of written evidence, the opportunity to cross-examine witnesses, and the handling of legal issues by EPA's General Counsel.

There are, however, new provisions and requirements in the process. They include: (1) An affirmative obligation on the part of any interested person to raise all arguments and factual grounds supporting their position by the close of the public comment period on the proposed permit (§124.53) and the concomittant provision that issues not raised during the public comment period may not be raised during the evidentiary hearing unless good cause for not raising it previously can be shown (§124.76); (2) The unavailability of an evidentiary hearing to those dischargers subject to a general permit. They should apply for an individual permit, which can then be challenged in an evidentiary hearing (§124.71); (3) Stays of contested terms of permits (as designated by EPA) may be granted, except for cases involving initial permit issuance and permit modification (§124.61); (4) Persons entitled to an evidentiary hearing may appeal issues presenting important policy questions directly to the Administrator or Regional Administrator (§§124.101 et. seq.); (5) The right to cross-examination is recognized, but not automatically granted. The proponent of cross-examination has the burden of justifying its use. Also, EPA employees may be subject to cross-examination, but only on factual issues (§124.85); and (6) All evidence is to be submitted in written form (§124.85).

EPA has taken advantage of a provision of the Federal Administrative Procedures Act which allows appeal decisions on initial licensing to

be made on the basis of procedures much less adversarial than the formal hearings otherwise required. Thus, under the new regulations, the following appeal procedure can be followed for permit issuance to new permittees and "first time" permit determinations: (1) Following notice and an opportunity to submit written comments (§124.112), a less formal panel hearing may be requested on the permit terms (§124.113); (2) Written comments are to be filed prior to the hearing, and in response, EPA is to file written reply comments, the administrative record, etc., (§124.117); and (3) An EPA panel, consisting of EPA employees having special expertise on the permit issues shall participate along with an Administrative Law Judge (the Presiding Officer). The panel may question any person participating in the hearing, including those requested to appear, and a verbatim transcript shall be made of the hearing; (4) Requests for cross-examination on any disputed issue of material fact may be made. It may be granted or alternative methods of clarifying the record may be designated (§124.119).

D. Part 125 - Criteria and Standards for the  
National Pollutant Discharge  
Elimination System

Part 125 lays out the criteria and standards EPA will consider in writing substantive requirements into permits. Many subsections of this part have been reserved for later developments. Part 125 states that the technology-based requirements of the Clean Water Act are the minimum level of control that must be imposed in an NPDES permit (§125.2). The technology-based requirements are to be applied prior to or at the point of discharge and may not be satisfied by non-treatment techniques such as flow augmentation. (Non-treatment

techniques may be applied under limited circumstances to meet water quality standards, however) (§125.2).

Criteria for granting various of the Clean Water Act's variances are also outlined in this Part, such as the "fundamentally different" variance for BPT and BAT (§125.25) and criteria for determinations of alternative thermal effluent limitations under section 316(a) (§125.45). Others are reserved for later treatment.

#### IV. MAJOR ISSUES

Although much of the proposed regulation is new, we expect the majority of comments to be concerned with the following provisions. A brief description of the issue is presented, along with a citation where the applicable provision can be found in the proposal. Your comments on these issues are especially solicited.

1. The definition of new source §122.3(t). Facilities which commence construction after the promulgation of applicable new source performance standards are "new sources." However, as defined, facilities which commence construction after the proposal of applicable new source performance standards would be considered new sources only if those standards were published in final form within 120 days of proposal. New facilities which do not fall within these definitions would be "new dischargers" but not "new sources." These "new dischargers" (1) would not be able to take advantage of the "new source" provision in section 306 of the Clean Water Act which allows a period of time during which no new performance standards could be imposed (toxic controls and technology-based standards could still be applied) and (2) would not be "major federal actions"

requiring the preparation of an Environmental Impact Statement under the National Environmental Policy Act (NEPA), since that requirement applies only to new sources.

2. Signatories to permit program forms  
§122.5.

The proposed regulations have been drafted to require that all corporate permit program forms be signed by an executive officer of at least the level of vice-president. In addition, persons signing permit program forms must state that they have made sufficient inquiries to certify the veracity of the submitted information. These provisions are important to assure accountability on the part of corporate and municipal officials.

3. The permit as a limited authorization to discharge §122.14(a).

In order to clarify the scope of the discharge that is allowed by the NPDES permit, the proposed regulations state the basic principle that permittees may discharge pollutants for which information was requested in the application only as expressly provided in the permit. While certain dischargers may contend that this principle is unreasonable and unduly burdensome, we believe that it is a necessary response to (1) past uncertainties as to the coverage of a permit and (2) recent Congressional criticism. Nevertheless, efforts are now underway to assure that the permit application implements this principle in a fair and practical manner. (A revised permit application will be available for public comment within the next few months). There are two approaches being considered; 1) applicants must characterize the amount and nature of all pollutants in their waste streams or 2) information will be sought for specific pollutants (e.g., conventional, toxic, hazardous, those cited in primary drinking



water standards, etc.). Comments are solicited concerning these approaches, test methods, screening mechanisms and methods for applying these requirements.

4. Bypass and upset provision §122.14(l) and (m).

For the first time in regulations, the proposed revisions specify when and under what conditions bypass and upset incidents are permissible and do not constitute permit violations. Bypass or diversion of wastes from any portion of the treatment facilities is allowed only where necessary to prevent loss of life, serious injury, or severe property damage and when there are no feasible alternatives to bypass. Similarly, upset or exceedance of permit limitations for reasons beyond the control of the permittee is a possible defense to an enforcement action if certain demonstrations can be made by the discharger. Some dischargers may view the limitations on bypass and upset as overly restrictive. Should bypass or upset be allowed under other conditions? Should bypass or upset be further restricted, and if so, how?

5. Retention in reissued permits of existing permit limits more stringent than subsequent guidelines §122.15(j).

Although this provision is limited to circumstances where the more stringent permit limits were actually achieved or achievable and is intended to prevent "back-sliding" in pollution control, it may be subject to objection by affected industrial dischargers. Should the limits established by published effluent guidelines be used uniformly, that is without regard to past pollution control performance?

6. Calculation of effluent limitations §122.16(a).  
Effluent limitations must be calculated for each outfall or discharge point of a permitted facility.

It has been suggested that this requirement be interpreted in such a way that, for a given plant, the sum of effluent limitations on all outfalls could be re-allocated among the outfalls. Thus, some outfalls could receive effluent limitations more stringent, and some less stringent, than would be required if technology based limits were applied to each outfall. Should a facility's discharges be looked at as a whole or on an outfall by outfall basis?

7. Extension of expiring permits under the Administrative Procedure Act (APA) §122.33.

The proposed regulations limit the availability of automatic extensions of expiring permits to circumstances where delay is not caused by the permittee, and authorizes the denial of an extension where the discharger is not in compliance with the expiring permit. These limitations are implicit in the APA, but may be subject to objection by dischargers, particularly those who anticipate delay in permit reissuance due to evidentiary hearings. Under what circumstances should expiring permits be extended automatically?

8. Adjustment of permit limits to reflect disposal in a deep well or to a publicly owned treatment works §122.41.

The proposed regulations would allow permit limits to be tightened to reflect these two kinds of disposal, i.e., effluent limits would be based upon the flow and pollutants actually discharged to waters of the United States. This provision will assure that pollution controls are applied equitably.

9. New source coverage §122.47.

The proposed regulations clarify for the first time: (1) when existing sources may become new sources based upon new construction and (2) that the new source "protection period" under

section 306 applies only to technology-based permit requirements for covered pollutants, and does not apply to more stringent water quality standards or to coverage of additional pollutants. Are these appropriate limitations on the use of new source "protections"?

10. Designation of one State agency to administer the 404 (dredge and fill) program §123.3(b).

Although one agency must be the designated 404 permitting authority, local agencies may be able to play a significant role in the planning and control of activities subject to 404 permits and in the review and consideration of applications for 404 permits. Comments are solicited on the nature of permissible State - local institutional relationships in approvable State 404 programs. For instance, if local agencies want to be delegated State permitting authority, what controls are necessary by the State agency to ensure compliance with program requirements?

11. Memorandum of Agreement between Corps of Engineers and State §123.3(h).

For the 404 (dredge and fill) permit program, such an agreement seems required by the provision for a "full and complete description" of a proposed State program under section 404(g)(1). Without an agreement between the State and the Corps as to those waters for which each has primary permitting responsibility, there will be needless duplication of administrative effort, wasting scarce resources and burdening the public with uncertainties in applying for permits and delays in the processing of permit applications. Comments are solicited.

12. Assurance of continued coordination of State 404 with Federal and State statutes §123.82.  
It is possible that section 404(h)(1)(H) of the

Clean Water Act which requires "continued coordination with Federal and Federal-State water related planning and review processes" may require that States ensure compliance with some or all of the statutes and executive orders listed in the Corps regulations. Comments are solicited.

13. Revision of existing State NPDES programs §123.5(c) and §123.101 - 103.

Under the proposed regulations, revision of existing State NPDES programs would be required, if necessary, to conform to the Clean Water Act Amendments of 1977 and other requirements in these regulations (e.g. the listing of permits for which EPA may not waive review).

14. Permit support documents: fact sheets and administrative record §124.43, .44, .63, and .64.

Under the proposed regulations, a fact sheet describing the legal, technical and policy basis for permit terms and conditions would be required for each permit, and all permit determinations would be required to be based upon a defined administrative record under the supervision of a designated Record Clerk. Currently these permit support documents may not be prepared or may be prepared in different form in both NPDES States and EPA Regions. Will these documents facilitate the participation by interested persons in the formulation of proposed permits?

15. Obligation to raise issues and factual grounds prior to an evidentiary hearing §124.53 and .76.

Under the proposed regulations, new issues and factual grounds not raised during the public comment period could be raised in an evidentiary hearing only where good cause was shown. This is to avoid unnecessary delays in final permit issuance. Although public interest groups are

not always equipped to participate in permit proceedings at an early stage, the "good cause" exception may be interpreted more stringently in the case of the permit applicant than for public interest groups, to compensate for this disparity in relative access to information.

16. Criteria for fundamentally different factors variances §125.25 - .27.

For the first time in regulations factors which may be considered fundamentally different from those used in the development of an effluent limitations guideline are set forth. One or more of these factors may justify the granting of a variance from guideline limitations. Comments on these factors are requested.

Permits Division  
Office of Water Enforcement  
Environmental Protection Agency