NPDES ADMINISTRATIVE PROCEDURES MANUAL

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CONTENTS

	Page
FOREWORD	viii
CHAPTER I. PART 124 IN PERSPECTIVE	I-1
OVERVIEW	I-1
THE STATUTE	I-2
HISTORY OF NPDES REGULATIONS	I-3
SIGNIFICANT CHANGES IN PART 124	I-5
FREQUENTLY ASKED QUESTIONS	I-8
ADDITIONAL QUESTIONS	I-12
CHAPTER II. SUBPARTS A-C - APPLICABILITY, APPLICATION PROCESS, STATE CERTIFICATION	II-1
OVERVIEW	II-1
DEFINITION OF THE SEVEN PROCEDURAL STAGES	II-2
The Application Process	II-2
State Certification	II-2
Draft Permit or Denial	II-2
Public Comment and Hearings	II-3
Final Permits	II-3
Evidentiary Hearings or Nonadversary Hearings	II-4
Appeal to the Administrator	II-5
SEQUENCE OF THE APPLICATION PROCESS	II-7
Application for Permit	II-7
Special Provisions for Applications from New Sources	II-8
Requests for Modification, Revocation and Reissuance, or Termination	II-9
Permits Required on Case-By-Case Basis	II-10
Procedure for Handling Application After Deciding to Deny or Terminate	II-11
PROCEDURES ON STATE CERTIFICATION	II-12
Introduction	II-12
State Certification	II-12
Change in State Law	II-13

CONTENTS (CONTINUED)

	Page
CHAPTER III. SUBPART D - PREPARATION OF A DRAFT PERMIT	III-1
OVERVIEW	III-1
CHAPTER IV. SUBPART E - PUBLIC NOTICE, COMMENT AND HEARINGS	IV-1
OVERVIEW	IV-1
METHODS FOR CIRCULATING NOTICE	IV-2
PROCEDURES FOR THE COMMENT PERIOD AND PUBLIC HEARINGS	IV-3
Public Comments and Hearings	IV-3
Raising Objections and Providing Information During Comment Period	IV-3
Terms Requested by Corps of Engineers and Other Governmental Agencies	IV-3
Re-opening of Comment Period	IV-4
CHAPTER V. SUBPART F - SPECIAL PROVISIONS FOR VARIANCES AND STATUTORY MODIFICATIONS	V-1
OVERVIEW	V-1
GENERAL PROCEDURES FOR PROCESSING VARIANCES AND STATUTORY MODIFICATIONS	V-2
Application	V-2
Effect on Permit	V-3
Appeals	V-4
SPECIAL PROCEDURES	V-5
CHAPTER VI. SUBPART G - ISSUANCE AND EFFECTIVE DATE OF PERMIT	VI-1
OVERVIEW	VI-1
ADMINISTRATIVE RECORD FOR FINAL PERMIT	VI-3
CHAPTER VII. SUBPART H - EVIDENTIARY HEARING PROCESS	VII-1
OVERVIEW	VII-1
PROCEDURES FOR INTERLOCUTORY APPEAL	VII-3
EXPEDITING THE PROCESS	VII-5

CONTENTS (CONTINUED)

	Page
CHAPTER VIII. SUBPART I - NONADVERSARY PROCEDURES	VIII-1
OVERVIEW	VIII-1
EXPEDITING THE PROCESS	VIII-4
CHAPTER IX. GENERAL ISSUES	IX-1
OVERVIEW	IX-1
GENERAL PROVISIONS	IX-3
Public Access to Information	IX-3
Delegation of Authority; Time Limitations	IX-4
Service	IX-5
Settlements	IX-5
General Permits	IX-6
Grouping Parties	IX-8
Production or Exchange of Documents and Data	IX-8
Ex Parte Communications	IX-8
New Sources	IX-11
CHAPTER X. RESOURCE DOCUMENTS AND BIBLIOGRAPHY	X-1
OVERVIEW	X-1
TOPICAL INDEX TO DECISIONS OF THE GENERAL COUNSEL AND THE NPDES REGULATIONS	X-2
BIBLIOGRAPHY	X-8
INDEX TO NPDES REGULATIONS	X-11
PARTS 122-125	X-14
APPENDIX - DECISION LOGIC	A-1
OVERVIEW	A-1
INDEX	1

LIST OF FIGURES

Figure		Page
VI-1	Decision Logic to Determine "Uncontested Provisions" Final Permit	VI-6
VII-1	Subpart H - Evidentiary Hearing Procedures	VII-29
A-1	NPDES Permit Process	A-2
A-2	Subpart H - Evidentiary Hearing Procedures	A-3
A-3	Subpart I - Nonadversary Procedures for Initial Licensing	A-4

LIST OF TABLES

Table		
VI-1	Enforceable Permit Provisions	VI-7

LIST OF FORMS

	Page
Statement of Basis	III-3
Fact Sheet	III-5
Designation of Record Clerk	III-11
Administrative Record for Draft Permit	III-12
Notice of Public Hearing	IV-5
Public Notice of Draft Permit	IV-8
Public Notice of Draft General Permit	IV-11
Administrative Record for Final Permit	VI-5
Checklist of Documents to Include in Administrative Record for Final Permit	VI-8
Designation of Trial Staff and Decisional Body	VII-9
RA's Order Granting/Denying Evidentiary Hearing and Notice of Contested/Uncontested Conditions	VII-10
Referral to Chief ALJ	VII-12
Public Notice of Evidentiary Hearing	VII-13
Proposed Prehearing Order	VII-20
Order on Request for Intervention	VII-24
Motion	VII-25
Stipulation	VII-27
Public Notice of Panel Hearings	VIII-6
RA's Order Granting Nonadversary Hearing	VIII-13
Designation of Trial Staff and Decisional Body	VIII-15

FOREWORD

This manual has been designed for use by attorneys, permit writers, and regional hearing and record clerks in applying the procedures for NPDES permit issuance and review as codified in 40 CFR 124. The manual is divided into 10 chapters and an appendix.

The first nine chapters track the individual Subparts contained in Part 124. Chapter IX also contains miscellaneous provisions of the regulations that pertain to more than one Subpart. Chapter X provides resources that will be helpful in preparing draft and final permits, and in implementing both evidentiary and non-adversary initial licensing hearing provisions.

Each chapter contains an overview of the Subpart being addressed. These overviews summarize the critical elements of the Subparts. The remainder of each chapter contains sample forms, checklists, and diagrams designed to expedite your work in complying with the procedures in Part 124.

The appendix contains a three-part decision logic diagram, which graphically illustrates the steps of the entire NPDES process in a condensed manner for easy reference.

An index has also been provided for easy reference to chapter materials. Information particularly relevant to the attorneys, permit writers, and regional hearing and record clerks has been indexed under the heading "Information."

CHAPTER I
PART 124 IN PERSPECTIVE

CHAPTER I—PART 124 IN PERSPECTIVE

OVERVIEW

The National Pollutant Discharge Elimination System (NPDES) permit program was established by the Federal Water Pollution Control Act Amendments of 1972. The NPDES program is designed to protect the environment, specifically the Nation's waters, from the effects of pollution. It does this by requiring a permit for all owners or operators of point sources discharging pollutants into the Nation's waters. The permit regulates the type and amount of pollutants that may be discharged.

The 1979 regulations extensively revise the former regulations governing the NPDES permit program. This chapter will give an overview and a brief history of the NPDES regulations. Significant changes in Part 124 of the regulations dealing with the procedures for decisionmaking regarding NPDES permits are the principal focus of this manual. A listing of frequently asked questions with references to specific sections in the manual is also included. In addition, a decision logic diagram for Part 124 decisions has been included in the appendix, detailing relationships of persons involved, time schedules, and decisions.

The Environmental Protection Agency (EPA) has also proposed regulations that would consolidate five of its permit programs. The five programs are the NPDES permit program (Clean Water Act), Underground Injection Control (Safe Drinking Water Act), Hazardous Waste Management (Resource Conservation and Recovery Act), Prevention of Significant Deterioration (Clean Air Act), and the Dredge and Fill program (Section 404, Clean Water Act). This chapter will briefly discuss the anticipated impact of the proposed Consolidated Permit Regulations.

THE STATUTE

The Federal Water Pollution Control Act Amendments of 1972 replaced the Refuse Act permit program under which the Army Corps of Engineers regulated the discharge of pollution into navigable waterways. The 1972 Amendments placed responsibility for water pollution control with EPA and, for the first time, created a Federal-State partnership for regulating water quality.

The Statute specifies the basic aspects of water pollution control requirements. EPA is to establish effluent limitations and performance standards for various sources, limiting the amounts of pollutants that may be discharged. Industrial sources were required to meet limitations reflecting best practicable control technology (BPT) to control water pollution by July 1, 1977 and best available control technology (BAT) by July 1, 1983. Publicly owned waste treatment plants were to provide at least secondary treatment by July 1, 1977, and best practicable wastewater technology by July 1, 1983. The Clean Water Act of 1977 has refined and adjusted BAT requirements, specifially with reference to treatment for toxic chemicals and providing additional time to meet BAT requirements in some cases.

For new industrial plants, EPA is to issue new source performance standards based on best available demonstrated control technology. If the guidelines and performance standards are insufficient to achieve water quality standards or other requirements of state law, additional, more stringent requirements may be imposed. To ensure that effluent guidelines are met, a system to control individual dischargers through permits was established.

HISTORY OF NPDES REGULATIONS

In December 1972 and May 1973, the EPA promulgated regulations outlining the NPDES program. The regulations for Hearings were promulgated in July of 1974. On August 21, 1978, the EPA proposed extensive revisions of the existing regulations for the purposes of:

- Clarifying and improving existing program regulations and procedures in light of past experience;
- Filling significant gaps in coverage under the existing regulations, particularly in response to court decisions, and the emphasis on controlling toxic and hazardous substances; and
- Making the regulatory changes which are necessary under the Clean Water Act of 1977.

The final regulations were published on June 7, 1979, and revised the proposed regulations based on the comments received during the subsequent comment period. Under Title 40 of the Code of Federal Regulations (40 CFR), the new regulations have been established in the following five Parts:

-Part 121- State Certification of Activities Requiring a Federal License or Permit

Establishes the procedures and requirements for State certification of licenses or permits issued by Federal agencies. (Unchanged from provisions formerly found in 40 CFR 123.)

-Part 122- National Pollution Discharge Elimination System

Specifies who must apply for permits; how permits are issued; what terms and conditions must go into permits; methods for revising or re-issuing permits; and other basic program requirements.

-Part 123- State Permit Program Requirements

Establishes guidelines for submitting an NPDES permit program to the EPA and EPA's procedures for reviewing and approving such programs.

-Part 124- Procedures for Decisionmaking Regarding National Pollutant Discharge Elimination System

Provides the procedures for processing and issuing NPDES permits.

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

Establishes the criteria and standards which the EPA and approved States apply in making certain permit determinations which become the basis for the initial permit terms and conditions or modifications.

A copy of the regulations, Parts 122 through 125, is provided in Chapter X of this manual.

The proposed Consolidated Permit Regulations, published for comment on June 14, 1979, incorporate Parts 122 through 124 of the NPDES regulations with significant changes. The principal impact of the proposed Consolidated Regulations upon NPDES decisionmaking procedures in Part 124 (if the regulations are promulgated in a similar manner as proposed) will result in cases where public, nonadversary, or evidentiary hearings are to be held on portions of a consolidated permit that relate to programs other than NPDES. In these cases, careful coordination of the differing elements of the permit will be necessary to prevent delays.

SIGNIFICANT CHANGES IN PART 124

In most cases, the general framework of the former regulations covering procedures for making permit determinations has not been changed. However, significant changes have been made in the following areas:

- The procedures for variances, modifications, and permit actions other than the basic issuance of a permit
- The degree to which permit decisions are documented before an evidentiary hearing begins
- The hearing procedures for "initial licensing"
- The relationship of prior administrative proceedings to any evidentiary hearing.

The former regulations did not specify how modification requests, variance applications, and other permit actions beyond the basic issuance of a permit should be handled. The new regulations specify the procedures for such actions and put them on the same procedural "track" as other permit applications.

The new regulations have also consolidated procedures for variances in a single Subpart, whereas in the former regulations, they were scattered through various Subparts of 40 Code of Federal Regulations. In addition, the new regulations provide that variance applications should be submitted, whenever possible, before the close of comments on a draft permit. This provision insures that there will be an opportunity to consider all the relevant issues before the formulation of the final permit terms, and that the issues will not be raised at a later date for purposes of delay.

There has also been a significant change in the degree to which permit decisions are documented before an evidentiary hearing. Under the new regulations, the contents of fact sheets are expanded and specified in more detail to assure that the explanation on how and why the Agency arrived at specific permit

conditions is adequate. However, the final regulations did not go as far as the proposed regulations, in that each permit need not be accompanied by a fact sheet. The fact sheet requirement has been limited to major or controversial discharges, as well as variances, modifications (such as Section 301(i) modifications), and general permits.

The new regulations also provide that the draft and final permit terms must be based on an administrative record, which could simply be an adequately organized file drawer containing the relevant information. This provision ensures that the information considered in drawing up a permit is identified and publicly available for comment.

The Administrative Procedures Act (APA) allows decisions in cases involving initial licensing to be made by procedures that are much less formal than strict courtroom procedures. The new regulations use this provision of the APA to implement nonadversary hearing procedures for initial licensing and for Section 301(h) modified permits. Under the new procedures, a panel of EPA employees (or if appropriate, the panel may include persons not employed by EPA) having special expertise in areas related to hearing issues will be present at the hearing and may question the parties. The proceeding will be subject to the overall control of the Presiding Officer, usually an Administrative Law Judge unless all parties waive their right to have an ALJ preside. Because of the non-accusatory nature of the new panel hearings, there is an increased reliance on fact-finding procedures other than cross-examination.

There has also been a significant change in the relationship of prior administrative proceedings to any evidentiary hearing. So that the Presiding Officer will know what happened regarding the permit before the hearing began and so that he or she will have the benefit of the earlier stages of consideration of the issues, the new regulations provide that the administrative record on which the final permit was based will automatically be admitted into evidence at any evidentiary hearing. In addition, no issue may be raised at an evidentiary hearing if it was not first raised during the comment period on the draft permit (including any public hearing period), unless good cause is shown for

the failure to do so. The purpose of this provision is to encourage resolution of the issues at a less burdensome, less expensive, and more open stage of the permit issuance process.

There have also been less extensive changes in the evidentiary hearing procedures with respect to the cross-examination of EPA staff members, the right of cross-examination, the ultimate burden of persuasion, and the submission of direct testimony.

FREQUENTLY ASKED QUESTIONS

The following list of questions provides a "shopping list" of items that are answered in this and subsequent chapters of the manual. A blank sheet has been provided at the end of these questions for you to note any other questions which you may frequently need to answer.

1. What are the major changes in the new regulations?

   Chapter 1

2. What procedures are to be followed if a request for modification is denied?

   Chapter 2

3. What procedures are to be followed for permit denial or termination?

   Chapter 2

4. What must be included in a state certification?

   Chapter 2

5. Can the EPA modify a permit if a state changes its certification?

   Chapter 2

6. What must be included in a draft permit?

   Chapter 3

7. What are some of the common problems in preparing a draft permit?

   Chapter 3

8. When is a statement of basis prepared?

   Chapter 3

9. When are fact sheets required?

   Chapter 3

10. What must be included in a fact sheet?

    Chapter 3

11. What are the methods for circulating public notice?

    Chapter 4

12. What must be included in the various public notices?

    Chapter 4

13. When may a public hearing be held?

    Chapter 4

14. What may the Director do if substantial new questions concerning a permit are raised during the comment period?

    Chapter 4

15. For what types of discharge may a variance be obtained?

    Chapter 5

16. Can a variance be obtained at any point in time by a permittee?

    Chapter 5

17. What must be included in an application for a variance?

    Chapter 5

18. What status does a permit have when the potential permittee is seeking a variance?

    Chapter 5

19. For what reasons may a variance be granted?

Chapter 5

20. Who may grant a variance?

Chapter 5

21. When does a permit finally become effective?

Chapter 6

22. When only part of a permit is made the subject of a hearing, what effect does the uncontested part have?

Chapter 6

23. What must be included in the administrative record for a final permit?

Chapter 6

24. What status does a permit have when it is contested pending a hearing?

Chapter 6

25. What status does a permit have when it is being appealed to the Administrator?

Chapter 6

26. What must be included in a request for an evidentiary hearing?

Chapter 7

27. What are some ways to expedite the evidentiary hearing process?

Chapter 7

28. What authority does the Presiding Officer have to control the hearing?

Chapter 7

29. When may the Presiding Officer certify an order or ruling for interlocutory appeal?

Chapter 7

30. What cases may proceed under the nonadversary procedures?

Chapter 8

31. What are some ways to expedite the nonadversary process?

Chapter 8

32. Is "separation of functions" followed in the nonadversary process?

Chapter 9

33. Is the exchange of documents and data permitted for evidentiary and nonadversary hearings?

Chapter 9

34. When does a stipulation or consent agreement need EPA headquarters approval?

Chapter 9

ADDITIONAL QUESTIONS

CHAPTER II
APPLICATION, STATE CERTIFICATION

CHAPTER II
SUBPARTS A-C — APPLICABILITY, APPLICATION PROCESS, STATE CERTIFICATION

OVERVIEW

This chapter briefly summarizes and defines the seven procedural stages of the permit decision and then, in greater detail, describes the requirements for two of the stages: the application process and state certification (Subparts B and C).

The procedures for processing and issuing NPDES permits are covered in Part 124 of the new regulations. This Part organizes permit decisions into seven stages.

The new regulations provide that a permit denial, modification, revocation and reissuance, or termination will be subject to the same procedure of notice-and-comment and potential hearings as other permit actions.

The regulations allow the EPA to modify a permit during the permit review process in response to changes in state certification resulting from a court decision or changes in state law. The extent of modification will depend on whether the modified certification is received prior to or after final agency action.

A description of the essential elements of the procedures follows below. For a complete analysis of the procedures, reference should be made to the Subpart in question.

DEFINITION OF THE SEVEN PROCEDURAL STAGES

1. The Application Process [Subpart B]

Any person who discharges pollutants into the waters of the United States must have a permit. No permit other than a general permit will be issued until the discharger has submitted a complete application that complies with the filing requirements specified in Part 124, Subpart B.

2. State Certification [Subpart C]

Section 401(a)(1) of the Clean Water Act prohibits the EPA from issuing a permit until certification is granted or waived by the state in which the discharge originates. Therefore, when an application is received which does not include a state certification (as is often the case), the EPA must forward the application to the appropriate state. If certification is not received by the time a draft permit is prepared, the EPA will send the state another request that certification be granted or denied. Included in this request will be notice to the state that its failure to respond within a specified reasonable time, not to exceed 60 days, will result in a waiver of the right to certify, rather than denial of certification.

3. Draft Permit or Denial [Subpart D]

After receiving a properly submitted application and considering all relevant data, the EPA must tentatively decide whether to issue or deny a permit. If the EPA tentatively decides to issue a permit, a draft permit will be prepared and will be made available for public review. The draft permit will specify all the limitations, requirements, and conditions to be placed on the discharges. The EPA must also prepare either a fact sheet or a statement of basis explaining in simple language how each draft permit was prepared.

4. Public Comment and Hearings [Subpart E or I]

The regulations require the EPA to notify the public regarding permits and permit hearings. The public notice must provide interested persons with a minimum of 30 days to comment on the draft permit or 30 days notice before a hearing. A longer comment period may always be provided.

The regulations allow public hearings to be held whenever there is significant public interest. It should be noted, however, that in the case of initial licensing, the public hearing is completely discretionary (see Section 124.41(i)(1)).

Public participation in the NPDES permit decisionmaking process takes on added significance under the new regulations. All parties, including applicants, must now raise all objections and submit all relevant evidence by the close of the public comment period or at the public hearings on the draft permit. Parties can no longer raise issues or present evidence for the first time at either an evidentiary or a panel hearing, unless good cause for the failure to do so earlier is shown.

5. Final Permits [Subpart G or I]

After the close of the public comment period, including any public hearing period on a draft permit, the EPA will prepare and issue a final permit. Public notice of this action will be served on the applicant and interested parties. The notice will inform them of their right to contest the permit by filing a request for an evidentiary or panel hearing within 30 days. Uncontested terms and conditions become effective 30 days after the date of such notice.

At the time the final permit is issued, the EPA will also issue a response to the significant public comments received, which will also indicate any provisions of the draft permit that have been changed and the reasons for the change.

6. Evidentiary Hearings or Nonadversary Hearings for Initial Licensing [Subpart H or I]

An evidentiary hearing is available to challenge final individual permits. The hearing is a formal proceeding under the control of a Presiding Officer, an Administrative Law Judge. The Presiding Officer may hold prehearing conferences with the parties for the purposes of obtaining stipulations, admissions, identifying matters not in issue, and those matters in dispute. Time schedules may also be specified for the hearing and for exchanging documents and data. The Presiding Officer also has wide authority to examine witnesses, exclude or limit evidence, and allow cross-examination on factual questions.

Following the hearing, the parties will be given an opportunity to submit proposed findings of fact and conclusions. The Presiding Officer will evaluate and review these, as well as the record and any interlocutory decisions in preparing the initial decision. The initial decision automatically will become effective 30 days after service, unless a petition for review is filed by a party, or the Administrator, on his own motion, decides to review the decision.

Cases involving initial licensing, or other cases where all the parties elect to do so, may proceed under the new, less formal nonadversary procedure. A panel (usually of three or more EPA employees with expert knowledge on the hearing issues but occasionally including persons not employed by EPA) will be present at the hearing and may question the parties, subject to the overall control of the proceeding by a Presiding Officer. One purpose of the new panel hearings is to avoid being "accusatory in form." There will be increased reliance on fact gathering procedures other than cross-examination.

The primary purposes of the nonadversary panel hearing are to obtain facts about why the permit is objectionable to the party requesting the hearing, to receive evidence and/or testimony to support suggested alternative conditions, and to aid the panel and the Presiding Officer or Regional Administrator in preparing a recommended decision. The panel, particularly the technical panel members will probably ask the most questions of the witnesses. Counsel for the parties and for the EPA staff (if Agency Trial Staff is designated) will have a far less visible role in the proceedings, compared with their role in formal evidentiary hearings.

Cross-examination is not likely to be necessary in most non-adversary panel hearings because the panel and Presiding Officer will have the authority to question each witness informally and to satisfy themselves as to whether the record contains facts sufficient to support the recommended decision to be prepared.

The emphasis in these proceedings will be on informality rather than traditional courtroom or adjudicatory procedures.

The subject of the nonadversary hearings for cases involving initial licensing will be the EPA's draft permit. A final permit will not have been issued yet. In other cases, the hearings may be held after a final permit has been issued. In addition, where EPA grants or denies a variance such as a fundamentally different factors variance, in an NPDES state, that variance decision would be subject to an EPA nonadversary hearing (if properly requested). After the hearing, the person named to prepare the decision (either the Presiding Officer or the Regional Administrator) will prepare and file a recommended decision. The recommended decision will become the final decision of the EPA within 30 days after service, unless a petition for review is filed by a party with the Administrator, or the Administrator elects to review it.

7. Appeal to the Administrator [124.101] [124.125]

Any party or requester, as the case may be, will have 30 days after service of an initial or recommended decision, or the denial in whole or part of an evidentiary or panel hearing, to file a notice of appeal and a petition for review with the Administrator. The Administrator will then grant or deny the petition within a reasonable time. If the Administrator decides to accept review, the parties will be given the opportunity to file briefs in support of their position.

Within the 30 day period, the Administrator may also, on his own motion, decide to review the decision or the denial of a hearing. The Administrator will then notify the parties and set up a briefing schedule.

On review, the Administrator may summarily affirm without opinion, modify, set aside, or remand for further proceedings the initial or recommended decision or the denial of an evidentiary or panel hearing. This petition for review by the Administrator is a prerequisite for judicial review of the final decision of the Administrator.

Application for Permit [124.11]

Any person who discharges pollutants into the Nation's waters must have a permit. However, certain sources are not required to obtain an NPDES permit, i.e.:

- Irrigation return flows [122.4]
- Vessels being used for transportation
- Discharges of dredged or fill material which are regulated by Section 404 of the Clean Water Act
- Agriculture and silviculture operations producing pollutants through runoff.

Other than general permits or permits otherwise initiated by the EPA under §124.32, no NPDES permits will be issued until the applicant has properly completed and submitted an appropriate application form.

All permits will be issued for a fixed period of time, but not for more than five years. [122.12] Permits may be modified, revoked and reissued, or terminated. However, except for continuation of expiring permits under the APA, as codified by the regulations, the terms of a permit will not be extended beyond the five-year limit by modification, extension, or other means. The continuation provision automatically continues the [122.12(b)(1)] terms of an expired federally issued permit pending the issuance of a new permit if the permittee has submitted a timely and sufficient application, and through no fault of the permittee, the Regional Administrator is unable to issue a new permit before the expiration date of the previous permit.

Any permit issued to dischargers in primary industries (see the industrial categories listed in Appendix A of Part 122) must incorporate applicable effluent limitations standards, or a "reopener clause" and specified effluent limitations. The following language is an acceptable "reopener clause" for the purposes of this regulation: [122.12(c)(1) and (2)] [122.15(b)(1)]

"This permit shall be modified, or alternatively, revoked and reissued, to comply with any applicable standard or limitation promulgated or approved under Sections 301(b)(2)(C) and (D), 304(b)(2), and 307(a)(2) of the Clean Water Act, if the effluent standard or limitation so issued or approved:

(i) Contains different conditions or is otherwise more stringent than any effluent limitation in the permit; or

(ii) Controls any pollutant not limited in the permit.

The permit as modified or reissued under this paragraph shall also contain any other requirements of the Act then applicable.

Special Provisions for Applications from New Sources

[124.12] [122.47(c)(4)]

The regulations also include special provisions for applications from new sources. Before beginning any on-site construction, the EPA requires potential new sources to submit information to the Regional Administrator, so that he or she can make a determination on whether the facility is in fact a new source. Within 30 days of the receipt of all such information, the Regional Administrator will make an initial

termination. Public notice of the determination will be sued. If determined to be a new source, the notice will ate that the applicant must comply with the environmental view requirements of 40 CFR §6.900 et seq., which may clude a requirement that an Environmental Impact Statement IS) be prepared. If an EIS is required, no on-site con- ruction may begin until a final permit is issued containing S-related requirements or the applicant enters into a itten agreement which will assure compliance with all such quirements, unless construction is found not to cause gnificant adverse environmental impact. This "preconstruc- on ban" provision of Section 122.47(c)(4) does not apply projects under construction as of the August 13, 1979, fective date of the regulations.

Any interested person may challenge the determination requesting an evidentiary hearing within 30 days of issu- ce of the notice. The Regional Administrator may delay a aring on a new source determination until the hearing on e final permit and consolidate the two hearings.

quests for Modification, Revocation and Reissuance, or Termination [124.13]

The requests can be made by any interested person, including discharger with a permit. The Director may also initiate dification, revocation and reissuance, or termination, see ction 122.31(c). Formal requests must be in writing and must ate all the relevant facts and reasons underlying the request.

If the request for modification is granted: [124.13(b)(1); 124.32(a)(1)]

- the Director will formulate a new draft permit incorporating the changes (modification may be based on the initial request itself, unless more information is needed, in which case the Director may require a new permit application).
- only those terms requested to be modified will be re-opened. (All other aspects of the permit will remain in force.)

- If the request for revocation and reissuance is granted: [124.13(b)(1); 124.32(a)(1)]
  - the Director will formulate a new draft permit incorporating the changes and shall issue a notice of intent to revoke the existing permit.
  - the same procedures would be followed as if the permit had expired and was being reissued.

- If the request for termination is granted: [124.13(b)(2); 124.32(a)(1)]
  - the Director shall issue a notice of intent to terminate.
  - see also Procedure for Handling Application After Deciding to Deny or Terminate (page II-11).

- If the modification request is denied: [124.13(b)(2)]
  - the Director will make a written reply to the discharger (and to the requester, if different) briefly explaining his reasons for that decision.
  - there is no automatic right to a hearing on this determination.

(Note: the procedure for the grant of a request for termination is covered later on in this chapter.)

- Any such draft permit or notice of intent to revoke and reissue or terminate must, as with all permit decisions, be based on the administrative record. [124.32(b)]

Permits Required on Case-by-Case Basis [124.14]

The Director, on a case-by-case basis, may determine that the following facilities or operations are significant contributors of pollution to waters of the United States and must obtain individual permits:

- Concentrated animal feeding facilities; [122.42]
- Concentrated aquatic animal production facilities; [122.43]
- Separate storm sewers; and [122.45]
- Certain facilities other than separate storm sewers, which may also be covered by general permits. [122.48]

If the Regional Administrator decides that an individual permit is required, he or she will give written notice to the discharger. Notice will:

- Explain the reasons for the decision;
- Include a permit application;
- State that the application must be properly submitted within 60 days; and
- In the case of general permits, state that the general permit no longer authorizes the owner or operator to discharge pollutants (provided that there has already been an on-site inspection of the facility and a determination made that the facility should be regulated by a general permit). [122.48(e)(2)]

No evidentiary hearing is provided before requiring individual permit applications. The question as to whether the case-by-case designation is proper and, thus, an individual permit should be required can be raised by the potential individual permittee (or other interested person) during the public comment period and any subsequent hearings.

Procedure for Handling Application After Deciding to Deny or Terminate [124.15; 124.32]

If a permit is denied or terminated, the same basic procedures would be followed as apply to permit issuance:

- A notice of intent to deny or terminate will be issued
- Notice will be accompanied by a fact sheet or statement of basis
- Notice will be made available for public comment
- A response to comments will be prepared
- A final decision will be prepared
- An evidentiary hearing with a right of appeal to the Administrator may be requested on the issues raised.

Introduction [124.21]

Section 401(a)(1) of the Clean Water Act prohibits the EPA from issuing a permit until certification is granted or waived by the state in which the discharge originates. All applications without state certification must, therefore, be forwarded to the appropriate state agency, along with a request for certification. If the draft permit is prepared, and state certification is still not received, the Regional Administrator must send the state the following:

- A copy of the draft permit, and
- Notice that the
  - — EPA cannot take further action until the state either grants or denies certification, or waives the right to certify; and
  - — right to certify will be deemed waived unless exercised within a specified reasonable time (not to exceed 60 days) from the date the draft permit is sent, unless unusual circumstances require a longer time.

State Certification [124.22]

If the state decides to grant or deny certification, it will provide notice, including a copy of any certification to the applicant and the Regional Administrator.

A state certification must be in writing and must include:

(1) The terms or conditions which will result in compliance with applicable state or Federal law

(2) If the state is certifying a draft permit, it must identify:

a. any conditions in the draft permit which should be made more stringent to comply with applicable state and Federal law (the Clean Water Act) as well as the applicable provisions of the Act or state law upon which each condition is based. Ordinarily states will probably limit their certifications to the requirements of their own state laws, rather than the Clean Water Act.

b. the extent to which each term or condition can be made less stringent without violating the requirements of state law, a "ceiling".

Note that the following conditions apply to state certification procedures for EPA-issued permits:

- No final permit will be issued unless it incorporates the requirements specified by the state in (1) and (2)a above. [124.23(a)]

- Failure of the state to specify as required in (2)a and (2)b above will be deemed a waiver of the right to certify with respect to such condition or term.

- Forcing the states to set as a ceiling the minimum terms and conditions which will be necessary to comply with applicable state law will alleviate the need for continual resubmission each time a draft permit is made less stringent as a result of public review during the permit issuance process.

- The states, however, may not require the EPA to adopt less stringent conditions, nor condition or deny dertification on the grounds that state law requires less stringent conditions than Federal law. [124.23(c)]

Change in State Law [124.23(b)]

If, after state certification has been granted, there is a change in state law, or certain provisions of the state law are found invalid by a state court, the state may issue a modified certification or notice of waiver, and forward it to the EPA.

If the modified certification is received by the EPA prior to final agency action, the permit will be issued consistent with any more stringent requirements of state law as specified by conditions identified in the certification (unless change in certification is based on a relaxation of state law).

After final agency action, the Regional Administrator may modify the permit only to the extent necessary to delete any conditions found invalid by a state court. No EPA appeal proceedings are available to contest conditions specified by the state in its certification; relief is only available through state procedure.

CHAPTER III
PREPARATION OF
DRAFT PERMIT

CHAPTER III
SUBPART D—PREPARATION OF A DRAFT PERMIT

OVERVIEW

When the EPA or approved states receive an application that meets NPDES requirements, they must tentatively decide whether to issue or deny the permit. If they tentatively decide to issue the permit, a draft permit will be prepared and it will be made available for public review. The *draft permit* will specify all the compliance schedules, limitations, requirements and conditions to be placed on the discharger.

The EPA and the states are also required to prepare a fact sheet or statement of basis for each draft permit. A *fact sheet* is required for draft permits covering major dischargers, general permits, those arousing widespread public interest or raising major issues, and those incorporating a variance or modification. It is not intended that a fact sheet be required whenever there is any permit modification; rather, it is required only when the entire permit or significant terms or conditions are being modified, or the permit contains modified terms or conditions specifically authorized by the Act (such as Section 301(i) or 301(h)). The fact sheet will set forth the major facts and the significant questions considered in setting the terms of the draft permit.

A *statement of basis* is required for all other permits. It presents, in less detail, the derivation of the terms and conditions of the permit and the reasons for them.

Any permit terms and conditions formulated by the EPA will be based on an official agency file, called the administrative record. The *administrative record* will typically consist of the application, draft permit, statement of basis or fact sheet, supporting documents and data. The record will be made available to the public for inspection and copying.

This chapter includes examples of a statement of basis, a fact sheet, and an administrative record. For a complete analysis of the procedures, refer to the appropriate section of the regulations.

The following forms are included:

- Model formats for a statement of basis and a fact sheet, with helpful hints for preparing the documents.
- Suggested formats for an index to the administrative record for both draft and final permits, including the text of the rules governing preparation and contests of the record. Also included is a sample index to documents, listing some of the specific documents that would be found in a typical administrative record.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION A

402 Permit Street
Discharge, OH 95217

STATEMENT OF BASIS
DRAFT NPDES PERMIT TO
DISCHARGE INTO THE WATERS OF
THE UNITED STATES

NPDES Permit No. _____
Application No. _____
[Optional, State Permit No. _____,
if available]

Name and Address of Applicant

Name and Address of Facility
where Discharge Occurs

Receiving Water: _____
Classification: _____

I. LOCATION OF DISCHARGE

The above named applicant has applied for an NPDES permit, which will be issued by the U.S. Environmental Protection Agency to discharge into the designated receiving water. A description and/or sketch of the location of the discharge is appended as Attachment I. [Generally, a description alone should be sufficient for the statement of basis.]

II. DESCRIPTION OF APPLICANT'S FACILITY AND DISCHARGE

[Provide a brief factual description of the kind of facility, parameters discharged and concentrations (from permit application), and the processes and sources which contribute to each discharge.]

III. DESCRIPTION OF LIMITATIONS AND CONDITIONS [124.33]

Discharge 001

- Briefly refer to each effluent parameter - explain how how each limitation was denied - identifying technologies applied and degree of production or control

expected from such treatment technologies. Reference any calculations made in determining that a particular parameter did not need to be limited. Cite sources of limitations (e.g., Guidelines/Development Document/ Guidance).

- Briefly describe the basis for selection of monitoring requirements.

Discharge 002

[Follow Same Procedure]

General Conditions

- Briefly describe any important or case-specific general conditions. Explain the reasons and basis for the conditions.

Compliance Schedules

- Briefly describe reasons for Compliance Schedules — highlight important issues.

N.B. The "STATEMENT OF BASIS" is intended to be brief, concise but complete. The Preamble at 44 FR 32881 states:

> In many cases the 'statement of basis' could consist of the internal memorandum prepared within the Agency which informs the person signing the permit of the guidelines or other source of the effluent limits and any issues which the permit raises. By utilizing such an approach, EPA believes we are maximizing the utilization of the permit issuing authority's limited resources without denying the public or permittee basic information upon which to judge the adequacy of the permit.
>
> THEREFORE
>
> Existing Regional practices, unchanged, may be sufficient in many cases to serve as a statement of basis. Such a determination of existing sufficiency must be made by each Region.

[Fact Sheet for: (1) Major Dischargers; (2) Permits Incorporating a Variance or Modification; (3) Permits which Raise Major Public Issues or with Widespread Public Interest. Fact Sheet for General Permits would be similar but would not identify applicants and would justify general permit program area, etc.]

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION A

402 Permit Street
Discharge, OH 95217

FACT SHEET
DRAFT NPDES PERMIT TO DISCHARGE INTO
THE WATERS OF THE UNITED STATES

NPDES Permit No. _____
Application No. _____
[Optional, State Permit No. _____,
if available]

Name and Address of Applicant

Name and Address of Facility where
Discharge Occurs

Receiving Water: _____
Classification: _____

I. LOCATION OF DISCHARGE

The above named applicant has applied for an NPDES permit, which will be issued by the U.S. Environmental Protection Agency to discharge into the designated receiving water. A description and/or sketch of the location of the discharge is appended as Attachment I. Enclose location map if submitted as part of application.

II. DESCRIPTION OF DISCHARGE

A quantitative description of the existing discharge in terms of significant effluent parameters is appended as Attachment II.

III. DESCRIPTION OF LIMITATIONS AND CONDITIONS

The effluent limitations in the draft Permit as well as monitoring requirements, schedules of compliance and special conditions are described in Attachment III. Also included in Attachment III is an explanation of the basis for each limitation or condition in the draft Permit.

IV. STATE CERTIFICATION REQUIREMENTS [Subpart C] [124.21 et seq.]

[State whether there is a 401 Certification for this permit - if not - why not. Describe specific state certified limitations (as opposed to EPA-developed permit limitations).]

Review and appeals of conditions specified by the State shall be made through the applicable procedures of the State and may not be made through EPA procedures. [124.23(e)]

V. VARIANCE OR MODIFICATION (if applicable)

[A brief statement of reasons why a requested variance modification is or is not justified.] [124.34(b)(5)]

VI. EPA CONTACT

Additional information concerning the draft Permit may be obtained between the hours of _____a.m. and _____p.m., Monday through Friday from:

Name
Address
Room Number
Telephone

_____ Dated

_____ Regional Administrator

ATTACHMENT I [124.34(b)(31)]

- Attach a sketch or a detailed description of the location of the discharge point(s).

  e.g., Use location map or sketch from application

  or prepare sketch from USGS maps

  NOTE: Sketch or detailed description is only required "where appropriate". This should mean in any case where use of a sketch or detailed description will make the fact sheet clearer and more easily understandable.

ATTACHMENT II

DESCRIPTION OF DISCHARGE:

Discharge 001 (Describe processes and other sources which contribute to the discharge)

Effluent Parameter	Maximum lb/day (mg/l)	Average lb/day (mg/l)

Discharge 002 (Describe sources, etc.)

Effluent Parameter	Maximum lb/day (mg/l)	Average lb/day (mg/l)

Discharge 003

ATTACHMENT III

DESCRIPTION OF LIMITATION AND CONDITIONS:

Discharge 001

Effluent Parameter	Discharge Limitations		Monitoring Requirements	
	Daily Avg.	Daily Max.	Frequency	Type

- Parameter #1

  — Citation to Statutory/Regulatory Provisions on which limitations are based.

  — Description of technologies selected and effluent reduction or control expected from such treatment technologies. Refer to Guidelines/Development Document/ Guidance, Treatability Manuals, BMP Guidance Documents, etc.

  — Any calculations or other necessary explanation of derivation of limitations/monitoring requirements. Include all calculations necessary to convert effluent guideline limitations to permit limitations, all 402(a)(1) Best Engineering Judgment calculations, etc. Include any calculations used to determine that an effluent limitation for a parameter was not necessary.

  — Reference any EPA national policy guidance relied on such as the National Municipal Policy, the Second Round Permits Policy, etc.

- Parameter #2:

Discharge 002

Discharge 003

General Conditions

- Reference 122.14
- 316(a) or 316(b) or other study requirements

Compliance Schedules

- List any compliance schedules with statutory/regulatory, or other justification for the dates selected.

  Attain BCT or BAT limitations on _____.
  Attain interim limitations of _____on _____.

[Designation of Record Clerk]

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION A

402 Permit Street
Discharge, OH 95217

Re: Ajax Manufacturing Company
NPDES Permit Application No. _____
Designation of Record Clerk

In accordance with the requirements of 40 C.F.R. 124.35(e), the following person is designated Record Clerk with responsibility for maintaining the Administrative Record for the above identified draft Permit:

Name
Address
Telephone

_____ _____
Dated Regional Administrator

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION A

402 Permit Street
Discharge, OH 95217

ADMINISTRATIVE RECORD
FOR DRAFT PERMIT

APPLICATION NO: _____

PERMIT NO: _____

PERMITTEE: _____

_____

_____

_____

§ 124.35 Administrative record for EPA draft permits.

(a) Decisions by the Regional Adminstrator to formulate a draft permit under § 124.31 or § 124.32 shall be made on the basis of the administrative record defined in this section.

(b) The record for a draft permit under § 124.31 shall consist of:

(1) The initial application and any supporting data furnished by the applicant;

(2) The draft permit;

(3) The statement of basis required by § 124.33 or fact sheet prepared under § 124.34;

(4) All documents cited in the fact sheet or the statement of basis;

(5) Other documents contained in the supporting file for the permit, including correspondence, telephone and meeting memoranda, compliance reports, etc;

(6) All comments submitted on a new source determination under § 124.12, and any other documents EPA considers relevant to the determination; and

(7) Any environmental assessment, Environmental Impact Statement, negative declaration, or environmental impact appraisal that may have been prepared.

(c) The record for formulating a draft permit under § 124.32 shall consist of the draft permit, the statement of basis required by § 124.33 or fact sheet prepared under § 124.34 and all documents cited in the fact sheet or the statement of basis.

(d) Material readily available at the issuing Regional Office or published material which is generally available, and which is included in the administrative record under the standards of paragraphs (b) and (c), does not need to be physically included in the same file as the rest of the record as long as it is specifically referenced in the statement of basis or the fact sheet.

(e) No later than the time a draft permit is issued, a Record Clerk shall be designated with responsibility for maintaining the records established under this section. Copying of any documents in the record shall be allowed under appropriate arrangements to prevent their loss. The charge for such copies shall be made in accordance with the written schedule contained in 40 CFR Part 2.

[*Comment:* The administrative record for draft permits under this section will comprise the bulk of the material for the final administrative record. See § 124.64.]

CHAPTER IV
PUBLIC NOTICE

CHAPTER IV
SUBPART E—PUBLIC NOTICE, COMMENT AND HEARINGS

OVERVIEW

Part 124 ensures public notice and participation in permit proceedings. This chapter will cover the methods for circulating notice, the contents of the notice, and the procedures to be followed during the comment period.

Public notice must provide interested persons with a minimum of 30 days to comment on the draft permit and 30 days notice before a hearing. Notice must be mailed to certain Federal and state agencies, persons on mailing lists, applicants, and other persons specified in the regulations. Notice may also be published, posted at municipal buildings, or provided in any other manner that is designed to inform interested persons.

The regulations also allow public hearings concerning draft permits to be held whenever there is significant public interest. The EPA may also schedule such a hearing on its own initiative.

Public comment takes on added significance under the new regulations. Unless good cause for the failure to do so earlier is shown, parties cannot raise issues for the first time at an evidentiary hearing. All parties, including applicants, must now raise all objections and submit all relevant evidence at the public hearings on the draft permit or by the close of the public comment period. The purpose of the change is to encourage resolution of issues at the time of public comment on the draft permit, rather than in the more cumbersome and expensive evidentiary hearing.

The regulations also specify the information to be contained in the public notice. In accordance with these requirements, particular notice forms have been prepared and appear at the end of this chapter.

METHODS FOR CIRCULATING NOTICE [124.41]

The Director must give notice of formulation of a draft permit and notice of all hearings by two methods:

- A detailed mailed public notice sent to
  - — the applicant
  - — the U.S. Corps of Engineers
  - — the appropriate Federal and state agencies, including affected state
  - — any persons requesting information
  - — all persons on a mailing list

- One of the following less detailed public notices
  - — newspaper publication within area affected by the discharge; or
  - — posting notice at the Post Office and principal office of the municipality affected by the discharge.

PROCEDURES FOR THE COMMENT PERIOD AND PUBLIC HEARINGS

Public Comments and Hearings [124.42]

Public notice must provide interested persons with a minimum of 30 days to submit written comments on the draft permit and administrative record. During this period, any interested person may also make a written request for a public hearing, stating the nature of the issues to be raised. The Director may hold such a hearing if there is significant public interest or in any other such appropriate case. Public notice must be given 30 days before the hearing, and any interested person may submit oral or written statements and data concerning the permit. At the hearing, reasonable time limits may be set for oral statements and all statements may be required to be submitted in writing.

Raising Objections and Providing Information During Comment Period [124.43]

This public comment period takes on added significance under the new regulations. All parties, including applicants, must now raise all objections and submit all relevant evidence at the public hearings or by the close of the public comment period.

Terms Requested by Corps of Engineers and Other Governmental Agencies [124.44]

Government agencies, both Federal and State, will be expected to comment during the public comment period. In appropriate cases, however, they may still be consulted informally before the draft permit is formulated.

If, during the comment period, the District Engineer of the Corps of Engineers advises the Director in writing that specified conditions should be included in the permit or that the permit should be denied so as to avoid substantial impairment of anchorage or navigation of U.S. waters, the Director must follow such advice. Any review on such action will proceed through the applicable procedures of the Corps of Engineers.

Specified conditions submitted by any state or federal agency with jurisdiction over fish, wildlife, or public health may also be included in the permit to the extent necessary to carry out the provisions of the Clean Water Act.

Re-opening of Comment Period [124.45]

The new regulations do not provide for an automatic "reply comment" period, in which interested parties could respond to points made during the main comment period. However, when substantial new questions are raised during the public comment period, the Director may

- re-open the comment period
- prepare a fact sheet or revised fact sheet, and re-open the comment period, or
- prepare a new draft permit appropriately modified.

[Notice of Public Hearing]

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION A

402 Permit Street
Discharge, OH 95217

NOTICE OF PUBLIC HEARING ON
DRAFT NPDES PERMIT TO
DISCHARGE INTO THE WATERS
OF THE UNITED STATES

[124.41(g)]

Permit No. _____ Date of Notice _____

Application No. _____

Name and Address of Applicant

Name and Address of Facility
Where Discharge Occurs

[124.41(c)(2)]

Receiving Water: _____
Classification: _____

This is to give notice that on _____ [124.41(g)(2)]
date
the Regional Administrator or a Presiding Officer designated by him/her will conduct a Public Hearing on the above identified Draft Permit. The hearing will be held at _____
name and address of place of hearing
and will begin at _____ and continue until all interested persons
time
have been heard.

EPA's contact person for information regarding the draft permit and from whom copies of the permit and the Statement of Basis or Fact Sheet may be obtained is: [124.41(c)(3)]

Name

Address

Telephone

The administrative record containing all documents relating to the permit is located at _____ (room number and address) and is available for public inspection between _____ a.m. and _____ p.m. Monday through Friday, except holidays. [124.41(c)(4)]

[Section 316(a) information if applicable.] [124.41(c)(5)] [124.41(e)]

Public notice of the draft permit was dated _____. [124.41(g)(1)]

LOCATION OF DISCHARGE [124.41(c)(2)]

A description and/or sketch of the location of the discharge is appended as Attachment I.

* THE REMAINDER OF THIS INFORMATION IS ONLY NECESSARY*
* FOR THE MORE DETAILED MAILED PUBLIC NOTICE* [124.41(d)]

DESCRIPTION OF APPLICANT'S FACILITY AND DISCHARGE

[Provide a brief factual description of the kind of facility, and the processes and sources which contribute to each discharge.]

[New Source Information if applicable including EIS information.] [124.41(d)(3)]

The purpose of this Public Hearing is to receive comments from interested persons and the public on the Draft Permit proposed by EPA for this facility. The following is a summary of the procedures which will be followed at the hearing: [124.41(g)(3)] [124.41(d)(2)] [124.42]

1. The Presiding Officer shall have authority to open and conclude the hearing and to maintain order.

2. Any person appearing at the Hearing may submit oral or written statements and data concerning the draft permit.

3. The Presiding Officer may set reasonable limits on the time allowed for oral statements. [124.42(b)(2)]

[OPTION: The notice may prescribe time limits (i.e., number of minutes allowed for each person or group)

OR

The notice may require submission of statements in writing.]

[Public Notice of Draft Permit
Except General Permits]

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION A

402 Permit Street
Discharge, OH 95217

PUBLIC NOTICE OF DRAFT NPDES PERMIT TO DISCHARGE INTO THE WATERS OF THE UNITED STATES [124.41(c)]

Permit No. _____ Date of Notice _____

Application No. _____

Name and Address of Applicant

Name and Address of Facility Where Discharge Occurs [124.41(c)(2)]

Receiving Water: _____
Classification: _____

This is to give notice that the U.S. Environmental Protection Agency has formulated a Draft Permit for the above-identified facility under the National Pollutant Discharge Elimination System.

EPA's contact person for information regarding the draft permit and from whom copies of the permit and the Statement of Basis or Fact Sheet may be obtained is: [124.41(c)(3)]

Name

Address

Telephone

The administrative record containing all documents [124.41(c)(4)]

relating to the draft permit is located at _____
room number and address

and is available for public inspection between _____ a.m. and _____ p.m.

Monday through Friday, except holidays.

[Section 316(a) information if applicable.] [124.41(c)(5)] [124.41(e)]

LOCATION OF DISCHARGE

A description and/or sketch of the location of the discharge [124.41(c)(2)]

is appended as Attachment I.

DESCRIPTION OF APPLICANT'S FACILITY AND DISCHARGE [124.41(d)]

[Provide a brief factual description of the kind of facility, and the processes and sources which contribute to each discharge.]

[New Source Information if applicable including EIS information.] [124.41(d)(3)]

COMMENT PROCEDURES

EPA's comment and public hearing procedures may be found

at 40 C.F.R. §124.42. The following is a summary of those

procedures:

1. The comment period during which written comments on the draft permit may be submitted extends for 30 days from the date of this Notice. The comment period for this permit closes on _____.
date

2. During the comment period, any interested person may request a Public Hearing by filing a written request which must state the issues to be raised. The last day for filing a request for public hearing is _____.
date

3. In appropriate cases, including cases where there is significant public interest, the EPA Director may hold a public hearing. A decision has not yet been made as to whether a public hearing will be held for this permit.

OR: If a decision to hold a hearing has already been made, state DATE, TIME AND PLACE of hearing.

NOTE: In cases of Permits which will follow the Nonadversary Procedures of Subpart I, include the information required by §124.41(i).

For example:

Further action on this draft permit will be governed by Subpart I of Part 124 of EPA's regulations (Nonadversary Procedures for Initial Licensing). These procedures are conducted informally but, in order to participate, interested persons must submit a written request for a hearing. In this case, written requests for hearings must be submitted to the Regional Hearing Clerk no later than _____.
date

While such hearings are informal, the issues presented in the hearing must have been raised in the comment period on the draft permit, and testimony of witnesses must ordinarily be submitted in writing before the hearing.

For a form of Notice of Panel Hearing, see page VIII-6.

[Public Notice of Draft General Permit to be published both in a daily or weekly newspaper within the area of the discharge and in the Federal Register]

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION A

402 Permit Street
Discharge, OH 95217

PUBLIC NOTICE OF DRAFT GENERAL PERMIT

This is to give notice that the U.S. Environmental Protection Agency has formulated a Draft General Permit for the General Permit Program Area (GPPA) described in Attachment I to this notice.

[Prepare a map or narrative description of the GPPA for attachment.] [124.41(f)(2)(ii)]

EPA's contact person for information regarding the draft permit and from whom copies of the permit and the Statement of Basis or Fact Sheet may be obtained is:

Name

Address

Telephone

The administrative record containing all documents relating to the permit is located at _____ [124.41(c)(4)]
room number and address
and is available for public inspection between _____a.m. and _____p.m. Monday through Friday, except holidays.

DESCRIPTION OF ACTIVITIES TO BE COVERED [124.41(f)(2)(i)]

[Briefly describe the activities or operations to be covered by the General Permit.]

BASIS FOR CHOOSING GPPA [124.41(f)(2)(iii)]

[Explain reasons and basis for selection of the GPPA.]

[New Source Information if applicable.] [124.41(d)(3)]

COMMENT PROCEDURES

EPA's comment and public hearing procedures may be found at 40 C.F.R. §124.42. The following is a summary of those procedures:

1. The comment period during which written comments on the Draft General Permit may be submitted extends for 30 days from the date of this Notice. The comment period for this permit closes on _____ (date).

2. During the comment period, any interested person may request a Public Hearing by filing a written request which must state the issues to be raised. The last day for filing a request for public hearing is _____ (date).

3. In appropriate cases, including cases where there is significant public interest, the EPA Director may hold a public hearing. A decision has not yet been made as to whether a public hearing will be held for this permit.

[OR: If a decision to hold a hearing has already been made, state DATE, TIME, AND PLACE of hearing.]

CHAPTER V
SUBPART F—SPECIAL PROVISIONS FOR VARIANCES AND STATUTORY MODIFICATIONS

OVERVIEW

The Clean Water Act provides for certain variances, modifications, and extensions of its statutory requirements. The procedures regarding application for, processing of, and decision on requests for variances are covered in Subpart F of 40 CFR 124. However, to properly understand variance procedures, reference must be made to the Act itself and the substantive criteria for granting such variances, modifications, and extensions set out (in the cases where regulations have been promulgated) in Subparts C, D, E, F, G, H, I, and J of 40 CFR 125.

The obligation to request variances, modifications, or extensions is on the discharger. Requests must be filed by certain deadlines and be accompanied by applications substantiating that certain conditions were met. The deadlines and the conditions vary according to the type of variance, extension, or modification requested. The procedures for processing variance requests are similar for all but 301(h) secondary treatment modifications and 316(a) thermal variances. If a variance request is granted, a draft permit will be prepared to reflect the variance. Denials of requests will be supported in the record of the relevant permit. Grants and denials of variance requests are also subject to appeal.

This chapter describes the general procedures for handling variance requests. Specific procedures, with reference to applicable sections of the Act and regulations, are listed for the various types of variance requests.

GENERAL PROCEDURES FOR PROCESSING
VARIANCES AND STATUTORY MODIFICATIONS

Application

In order for a discharger to obtain a permit containing provisions that vary from statutory requirements, a written application must be submitted. The actual contents of the application and the deadline for its submittal depend on the type of variance, modification, or extension being requested.

In the case of a Section 301(c) economic variance or a Section 301(g) water quality variance the discharger may initially apply for a variance before the permit application is submitted by submitting an "initial" application.* If the Director anticipates such a potential variance or if, for example, a fundamentally different factors variance is still pending from the first permit, he or she may require the discharger to submit a variance application to aid in writing a draft permit. [124.51(d)(1); 124.51(b)(2)(i)]

A discharger lacking necessary information to complete an application for a variance under 301(c) or 301(g) may request an extension of the deadline for submitting the application. The Director may grant such an extension for up to six months.

One other factor which may affect the manner of and deadline for applying is the status of applicable regulations. Certain Subparts of 40 CFR 125 covering criteria for granting variances had not been promulgated as of August, 1979.

*Because there was also a statutory deadline for submitting requests for Section 301(h) secondary treatment waivers, Section 301(h) applicants also submitted "initial" applications; this section does not apply to those situations.

Effect on Permit

Any modification, extension, or other variance must be accommodated in a draft permit. The manner in which this occurs depends on the status of the permit at the time the variance request is received.

If the permit application has been received, but the draft permit has not yet been formulated, a determination on the variance request shall be made and reflected in the draft permit. An exception would be made if the request would unduly delay the permit; in such a case, the handling of the variance request may be separated from the permit process. [124.53(a)(1)]

If the draft permit has been formulated, but a final permit has not yet been issued, the permit may be stayed and a determination on the variance request incorporated into it. As above, an exception would be made to separate the variance request from the permit process if the permit were threatened with undue delay. [124.53(a)(2)]

If a final permit has already been issued, or if the permit process has been separated from the action on the variance request, a new draft permit may be formulated to accommodate any variance granted. [124.53(a)(3)]

Where appropriate, the fact sheet or administrative record shall reflect the bases for any variances.

Appeals

Generally, permit provisions that represent a modification, extension, or variance from statutory requirements are subject to the same hearings and appeals as any other provisions. For state-issued NPDES permits, any Federal determination on a variance request may be appealed by filing for a Subpart I hearing. Contested variance provisions of federally issued permits would be heard under Subpart I or Subpart H, at the discretion of the Regional Administrator.

Final appeal within the EPA would be to the Administrator. [124.101]

SPECIAL PROCEDURES:

APPLICATION PROCEDURES AS COVERED BY 124.51

AND

DECISION PROCEDURES AS COVERED BY 124.52

Request: Non-POTW variance based on the presence of "fundamentally different factors" from those forming basis for effluent limitations guideline.

Authority: 124.51(b)(1)

Deadline: Close of public comment period on draft permit.

Application Content: Part 125, Subpart D

Processing: Normal procedures under 124.52-.54.

State Director or Regional Administrator may deny or recommend approval.

EPA DAAWE may deny or approve.

Request: Non-POTW variance from BAT requirements, based on effluent limitations guidelines for 301(b)(2)(F) pollutants because of economic capability of owner or operator.

Authority: 124.51(b)(2)

301(c)

Deadlines:

- Initial "post card" application by:
  (1) September 25, 1978 for pollutants controlled by BAT effluent limitation guideline promulgated before December 27, 1977; or
  (2) 270 days after promulgation of an applicable effluent guideline for guidelines promulgated after December 27, 1977.
- Completed request by close of public comment period on draft permit. Extension of up to six months may be granted upon request (Section 124.51(d)(2)).

Application Content: Substantive content not available (to be published in Part 125, Subpart E).

Processing: Normal procedures under 124.52-.54.

State Director or Regional Administrator may deny or recommend approval.

EPA DAAWE may deny or approve.

Request: Non-POTW variance from BAT requirements based on effluent limitation guidelines for 301(b)(2)(F) pollutants because of certain environmental considerations.

Authority: 124.51(b)(2)

301(g)

Deadlines:

- Initial "post card" application by:
  (1) September 25, 1978, where applicable effluent limitation guideline promulgated before December 27, 1977; or
  (2) 270 days after promulgation of applicable effluent guideline promulgated after December 27, 1977.
- Completed request by close of public comment period on draft permit. Extension of up to six months may be granted upon request (Section 124.51(d)(2)).

Application Content: Substantive content not available (to be published in Part 125, Subpart F).

Processing: Normal Procedures under 124.52-.54.

State Director or Regional Administrator may deny or recommend approval.

DAAWE may deny or approve.

Request: Non-POTW variance of effluent limitations based on other than promulgated effluent limitation guidelines.

Authority: 124.51(b)(2)
301(c) or 301(g)

Deadline: Close of public comment period on draft permit. Extension of up to six months may be granted upon request (Section 124.51(d)(2)).

Application Content: Substantive content not available (to be published in Part 125, Subparts E and F).

Processing: Normal procedures under 124.52-.54.
State Director or Regional Administrator may deny or recommend approval.
DAAWE may deny or approve.

Request: Non-POTW extension of statutory deadlines in 301(b)(1)(A) and 301(b)(1)(C) based on delay in completion of a POTW into which the source is to discharge.

Authority: 124.51(b)(3)
301(i)(2)

Deadlines: (1) June 26, 1978; or
(2) 180 days after the relevant POTW requests an extension under 124.51(c)(2).

Application Content: Part 125, Subpart J

Processing: Normal procedures under 124.52-.54.
Director may grant or deny.

Request: Non-POTW extension of statutory deadline in 301(b)(2)(A) for best available control technology based on use of innovative technology.

Authority: 124.51(b)(4)
301(k)

Deadline: Close of public comment period on dischargers first draft permit requiring BAT.

Application Content: Substantive content not available (to be published in Part 125, Subpart C).

Processing: Normal procedures under 124.52-.54.
Regional Administrator may grant or deny.
State Director may grant or deny after consultation with the Regional Administrator.

Request: Modification of requirements under 302(a) for achieving water quality-related effluent limitations.

Authority: 124.51(b)(5) for non-POTWs; 124.51(c)(3) for POTWs
302(b)(2)

Deadline: Close of public comment period on draft permit.

Application Content: Explain why requirements of 302 have been met.

Processing: Normal procedures under 124.52-.54.
State Director or Regional Administrator may deny or recommend approval.
DAAWE may deny or approve.

Request: Non-POTW variance for thermal component of a discharge.

Authority: 124.51(b)(6)
316(a)

Deadlines: (1) Close of public comment period on draft permit if thermal effluent limitations are established under 402(a)(1) or are based on water quality standards.

(2) With application for permit under 124.11.

N.B. Initial application may be filed and additional studies filed later (see Section 124.56).

Application Content: Part 125, Subpart H

Processing: Special procedures under 124.56.
Director may grant or deny.

Request: POTW modification of secondary treatment requirements of 301(b)(1)(B) for discharges into marine waters.

Authority: 124.51(c)(1)
301(h)

Deadlines: (1) Initial application by September 25, 1978
(2) Completed application by September 13, 1979.

Application Content: Part 125, Subpart G

Processing: Special procedures under 124.55. For further information contact 301(h) Task Force, Office of Water Program Operations (WH-546), EPA, 202/426-8972.

Request: POTW extension from statutory deadlines in 301(b)(1)(B) and 301(b)(1)(C) based on delay in receipt of Federal funding for construction of the POTW.

Authority: 124.51(c)(2)
301(i)(1)

Deadline: June 26, 1978

Application Content: Part 125, Subpart J

Processing: Normal procedures under 124.52-.54.
Director may grant or deny.

CHAPTER VI
ISSUANCE OF PERMIT

CHAPTER VI
SUBPART G—ISSUANCE AND EFFECTIVE DATE OF PERMIT

OVERVIEW

Subpart G covers the issuance of final permits. It describes the procedures necessary to finalize a draft permit and the circumstances under which provisions of a final permit become enforceable.

The steps in issuing a final permit are included in the decision logic, located in the Appendix. A final, complete permit is issued only after certain procedural requirements have been satisfied. Also, a permit may be issued in part and stayed in part, pending resolution of its contested provisions. While the decision logic (illustrating the overall NPDES permit process) covers permit issuance procedures, a more detailed logic in this chapter (Figure VI-1) provides a method to segregate contested permit conditions from those which are uncontested and therefore immediately enforceable. A chart (Table VI-1) is also provided in this chapter that summarizes when a permit, in part or otherwise, becomes effective.

Certain steps are necessary for every permit. There must be a public comment period of at least 30 days. Before issuing a permit, all significant comments must be answered in writing. If the final permit differs from the draft permit, all changes must be highlighted and the reasons for the changes explained. The responses to comments, and the explanation and justifications of changes, must be made in writing and made part of the administrative record.

The administrative record, established for the draft permit, must be updated for the final permit. Included in the update are all comments received during the public comment period, responses to the comments, records of any hearings held, and any supporting documentation such as correspondence, compliance reports, and meeting memoranda.

Certain final issuance procedures vary, depending on the nature of the final permit being issued. For instance, permits for some new sources require preparation of a final EIS, which must be issued at least 30 days before the subject final permit can be issued.

The provisions of a final permit contested in a hearing must be identified and separated from the uncontested provisions. This process is somewhat difficult, but its significance lies in the rule that uncontested provisions of final permits become effective and enforceable 30 days after the notice of a hearing is given. The determination of uncontested provisions must be made when a hearing is granted or an appeal is made to the Administrator. Contested provisions are stayed pending the outcome of the hearing or appeal.

The procedures covered in Subpart G involve some significant decision-making by Agency officials. The comments in this subpart aid in understanding the subtle distinctions of these decisions.

ADMINISTRATIVE RECORD FOR FINAL PERMIT

Any final permit issued under 124.61 for which the draft permit was subject to the administrative record requirements of 124.35 requires an administrative record. Included in the administrative record for the final permit are:

- The Administrative Record for the Draft Permit

  The required contents for that record are listed in 124.35(b) for draft permits initiated by discharger applications and in 124.35(c) for draft permits initiated by the Director.

- All Comments Received During the Comment Period

  A comment period of at least 30 days is required for a draft permit, under 124.42(a). Note that the comment period may be re-opened under 125.45(c). All written comments from the complete period must be included in the record.

- Tape(s) or Transcript(s) of Hearing(s)

  Public hearings on the draft permit may be held pursuant to 124.42(b). The record of the hearing shall include all written materials submitted and all oral statements, reduced to written or taped form.

- Response to Comments

  The Director is required under 124.63(a) to respond in writing to comments submitted during the comment

period and during any hearing. The response shall include:

— Permit Changes. Each provision in the final permit that differs from or is in addition to those in the draft permit shall be specifically identified. The reasons for the changes shall be stated.

— Response to Comments. All significant comments shall be briefly described. A response to each of the significant comments shall be made.

— Cited documents. Any documents cited in the response to comments shall also be included.

- Environmental Impact Statement

If required under 40 CFR §6.916, a final environmental impact statement shall be prepared before the final permit for a new source is issued. [124.62]

- The Final Permit

- Other Supporting Documents

Any documents contained in the file supporting the permit shall be included. Examples are: copies of notices, correspondence, logs of telephone conversations, meeting memoranda, compliance reports, etc.

Any materials readily available at the issuing Regional Office or published material which is generally available, and which is included in the administrative record under 124.61 or 124.63, does not need to be physically included in the same file as the rest of the record as long as it is specifically referenced in the fact sheet, statement of basis or in the response to comments.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION A

402 Permit Street
Discharge, OH 95217

ADMINISTRATIVE RECORD
FOR FINAL PERMIT

APPLICATION NO: _____

PERMIT NO: _____

PERMITTEE: _____

_____

_____

_____

§ 124.64 Administrative record for final permit issued by EPA.

(a) Decisions to issue a final permit under § 124.61 shall be made on the basis of the administrative record defined in this section.

(b) The administrative record for any final permit shall consist of the administrative record for the draft permit and

(1) All comments received during the public comment period required by § 124.42;

(2) The tape or transcript of any hearing(s) held under § 124.42;

(3) The response to comments required by § 124.63;

(4) Any final Environmental Impact Statement;

(5) Other documents contained in the supporting file for the permit, including correspondence, telephone and meeting memoranda, compliance reports, etc.; and

(6) The final permit.

These documents shall be added to the record as soon as feasible after their receipt or publication by the Agency.

(c)(1) This section applies to all final permits where the draft permit was subject to the administrative record requirements of § 124.35.

(2) Whether or not a draft permit was formulated or final permit was issued subject to this Subpart, the Regional Administrator, at any time prior to the rendering of an initial decision in an evidentiary hearing on that permit, may withdraw the permit in whole or in part and formulate a new draft permit under § 124.31 addressing the portions so withdrawn. The new draft permit shall proceed through the same process of public comment and opportunity for a public hearing, etc. as would apply to any other draft permit subject to this Part. Any portions of the permit which are not withdrawn and which are not stayed under § 124.61 shall remain in effect.

(d) Material readily available at the issuing Regional Office or published material which is generally available, and which is included in the administrative record under the standards of this section or of § 124.63 ("Response to Comments"), does not need to be physically included in the same file as the rest of the record as long as it is specifically referenced in the fact sheet or statement of basis or in the response to comments.

PAGE NOT

AVAILABLE

DIGITALLY

TABLE VI-1

ENFORCEABLE PERMIT PROVISIONS

Existing Sources	
Evidentiary hearing granted on application for renewal of existing permit §124.61(f)	—All conditions of existing permit remain in full force and effect although the Regional Administrator, on request of applicant, can modify the existing permit to delete requirements which unnecessarily duplicate uncontested provisions of the new permit —Contested provisions stayed pending final Agency action —Uncontested provisions continue in full force and effect
Evidentiary hearing granted in whole or in part regarding permit for existing source §124.61(e)	—All contested provisions stayed pending final Agency action —Uncontested provisions become effective 30 days unless denial of evidentiary hearing appealed (124.61(e)(5)
Petition for review of denial of request for evidentiary hearing §124.61(e)	—All contested provisions stayed pending final Agency action
New Sources or New Discharges	
Evidentiary hearing granted regarding permit for initial permit §124.61(c) Petition for review of the denial of an evidentiary hearing §124.60(c)	All contested provisions of stayed pending final Agency action and since there is no existing permit, the source is considered to be WITHOUT A PERMIT PENDING FINAL AGENCY ACTION

CHECKLIST OF DOCUMENTS TO INCLUDE
IN ADMINISTRATIVE RECORD

- ☐ Permit Application
- ☐ Designation of Record Clerk
- ☐ Draft Permit
- ☐ Statement of Basis/Fact Sheet
- ☐ Public Notice/Draft
- ☐ Notice of Public Hearing
- ☐ Comments
- ☐ Response to Comments
- ☐ Final Permit
- ☐ Statement of Basis/Fact Sheet - Final
- ☐ Request for Evidentiary Hearing
- ☐ Order and Specifications of Regional Administrator
- ☐ Designation of Trial Staff and Decisional Body [124.77]
- ☐ Notice of Grant of Hearing
- ☐ Request to be Party
- ☐ Referral to Chief Administrative Law Judge
- ☐ Notice of Pre-Hearing Conference
- ☐ Appearances
- ☐ Pre-Hearing Conference Order
- ☐ Request for Intervention
- ☐ Order of Administrative Law Judge on Request for Intervention
- ☐ Stipulation

CHAPTER VII
EVIDENTIARY HEARINGS

CHAPTER VII
SUBPART H—EVIDENTIARY HEARING PROCESS

OVERVIEW

An evidentiary hearing provides permittees a mechanism for challenging final individual permits. The hearing is to be conducted by a Presiding Officer, an Administrative Law Judge. Prehearing conferences may be held for the purposes of obtaining stipulations, admissions, identifying matters not in issue, and matters in dispute. Time schedules may also be specified for the hearing and for exchanging documents and data. The Presiding Officer will also have wide authority during the hearing, including the authority to examine witnesses, exclude or limit evidence, and rule on motions and other procedural matters pending before him or her, e.g., motions for summary judgment.

The limited right of cross-examination in evidentiary hearings is also explicitly recognized in the new regulations. There is no automatic right of cross-examination and the proponent of cross-examination has the burden of justifying its use. In addition, all direct and rebuttal testimony must be submitted in written form unless it can be affirmatively shown that the testimony can only be effectively presented orally.

An essential change in the new procedures is the prohibition against raising issues at an evidentiary hearing that were not first raised during the comment period on the draft permit. An exemption from this requirement is provided if good cause can be shown for the failure to raise the issues earlier.

The regulations also provide for an interlocutory appeal process. This process allows a party to appeal an order or ruling prior to the issuance of the

initial decision by the Presiding Officer. It is permitted only if the Presiding Officer, upon motion of a party, certifies the orders or rulings for appeal. Requests for certification must be filed in writing within 10 days of service of notice of the order or ruling and must briefly state the grounds for such request. Certification may be granted only if certain threshold conditions are met.

After the hearing, the parties will have an opportunity to submit proposed findings of fact, conclusions, and a supporting brief. The Presiding Officer may allow reply briefs. The Presiding Officer will then review and evaluate these, together with the hearing record and any interlocutory decisions, in issuing the initial decision. The initial decision will automatically become effective 30 days after its service, unless there is a petition for review, or the Administrator on his or her own motion decides to review the decision.

The decision logic included in this chapter (Figure VII-1) illustrates the key events in the evidentiary hearing process. Helpful hints for expediting the process will also be provided, as well as checklists for evaluating requests for an evidentiary hearing, sample forms for a proposed prehearing conference order and a stipulation. Reference should be made to the section in question for a complete analysis of the procedures.

The former practice of deciding legal issues separately through referral to the Office of General Counsel has been stopped. These issues will now be subject to normal interlocutory appeals (an appeal during the hearing). The interlocutory appeal process allows a party to appeal an order or ruling prior to the issuance of the initial decision by the Presiding Officer. To invoke this procedure, a party must, within 10 days of service of notice of the ruling or order, file a written request to the Presiding Officer for certification of the orders or rulings for appeal on the record. The request must briefly state the grounds relied upon. It should be noted that the Office of General Counsel will continue to play a major role in deciding issues of law.

The Presiding Officer may certify an order or ruling for appeal to the Administrator only if all 3 of the following requirements are satisfied:

(1) The appeal involves an important question on which there is substantial ground for difference of opinion;

(2) The appeal is necessary to prevent exceptional delay, expense, or prejudice to the parties; and

(3) Either an immediate appeal will materially advance the ultimate completion of the proceeding or the review after the final order is issued will be inadequate or ineffective.

The Administrator will decline to hear the appeal if he or she determines that certification was improperly granted.

Within 30 days of their submission, the Administrator will accept or decline all interlocutory appeals. If the Administrator takes no action within this time, the appeal will be considered dismissed.

If the Presiding Officer declines to certify an order or ruling for appeal, it may be reviewed by the Administrator only upon appeal from the initial decision, unless in exceptional circumstances the Administrator determines upon motion of a party that to delay review would not be in the public interest. Such motion must be made within 5 days after notification of the Presiding Officer's refusal to certify.

Only in exceptional circumstances may the Presiding Officer stay the proceeding pending a decision by the Administrator upon the Presiding Officer's grant or denial of certification.

Ordinarily, the interlocutory appeal will be decided on the basis of the submissions made to the Presiding Officer. The Administrator may, however, allow briefs and oral arguments. Issues of law will be referred to the General Counsel for determination, subject to the Administrator's approval.

HELPFUL HINTS FOR EXPEDITING EVIDENTIARY HEARINGS

> "There are no inherently protracted cases, only cases which are unnecessarily protracted by inefficient procedures and management."
>
> (Foreword to Manual for Complex Litigation, Fourth Edition)

This is a brief compilation of some ideas for managing contested cases.

Every participant in litigation has his or her own ideas about how to handle the case, and extensive literature has been produced that discusses the problems of delayed action, particularly in the administrative processes of government. In the final analysis, however, it is attention to the case by all participants, including lawyers, witnesses, technical and para-professional assistants, and staff support people, that is most likely to lead to efficiency.

Checklists serve no function or purpose—in fact, a person's good ideas about how to staff a case are valueless—unless the checklists are used in ways that are suited to the individual case and the objectives of the litigation. Therefore, the following list is nothing more than several ideas that may help participants to plan the management of cases that are likely to be contested.

- THE MULTIDISCIPLINARY TEAM APPROACH to contested cases is essential to a successful NPDES matter.

  This means that technical professionals who review applications and prepare draft permits, consultants, technical and scientific support staff, lawyers, and clerical support and administrative staffs must all be brought together EARLY and OFTEN when a particular permit is identified as controversial or is otherwise likely to lead to a request for hearing. The roles and responsibilities of each member of the team need to be worked out and agreed

upon early in the process. One case manager should be designated as the person through whom all information about the case is filtered. This case manager may be any qualified team member, until the time a request for hearing is granted. From this point on, the lead staff lawyer should ordinarily assume the responsibilities of the case manager. When a lawyer serves as case manager, a qualified technical staff member should be designated to head up the technical/scientific effort and should have the necessary authority to direct and coordinate all work done by the technical members of the team.

- FACT SHEETS/STATEMENTS OF BASIS are useful tools for assuring that all team members have contributed to permit preparation at an early stage.

  Because the Regulations call for a determination as to whether an extensive Fact Sheet or a more simple Statement of Basis will be prepared for every permit, the person responsible for the determination should call in the entire team to participate both in the determination and in the preparation of the appropriate supporting document. Obviously, less time will be required of the team if a Statement of Basis is to be prepared. However, it is no less important that the team participate in and agree upon the determination that the Statement of Basis will be appropriate rather than a more detailed Fact Sheet. Determinations about which document will be prepared for a large number of permits being issued at the same time may be made by a small committee of qualified staff members.

- WRITTEN TESTIMONY of scientific/technical witnesses, which will later be required for cases that go to hearing, can be outlined at the time the Statement of Basis or Fact Sheet is prepared.

  If outlines are prepared early, the team will be able to focus its attention on the issues and on the support necessary for the case to progress efficiently.

- THE ADMINISTRATIVE RECORD, now required for every permit, is a practical and useful vehicle for ensuring that all documentary support for the permit is (a) identified and (b) readily available, before the draft permit is publicly noticed.

  The Administrative Record will be assembled "as-you-go," using a checklist, to ensure that the file contains support or citations for each of the conditions or limitations contained in the permit.

- PREHEARING CONFERENCES are an integral and essential part of the hearing process.

  At the time a request for hearing is granted, agency staff should be prepared to go forward promptly with a request for a prehearing conference addressed to the Presiding Officer. If the agency staff is properly prepared, the early prehearing conference will allow the main issues in the case to become clear and will permit a schedule of work to be arranged to move the case to an early decision. (For additional suggestions, see "Proposed Prehearing Order" on p. VII-20.)

- PREPARED TESTIMONY can be assembled far more easily if (a) it has been outlined early in the process and (b) the entire team is fully conversant with the issues in the case.

  To prepare written testimony for filing before a hearing is one of the most difficult tasks facing a participant in a contested case. There simply are no shortcuts. The task will be simplified if the team has been assembled early and has identified the issues for which testimony needs to be prepared. To circulate draft testimony "for comment" is not a pleasing notion. But not having testimony checked (a) to ensure that the witness has prepared COMPLETE testimony, i.e., without inadvertent gaps or omissions, or (b) to "tie in" the testimony with other dependent witnesses, i.e., as in the case of hypothetical questions or different aspects of a single issue, is unthinkable. It should be the function of the case manager to ensure that prepared testimony is as complete and accurate as possible. NOTE: The point being made here is the importance of the accuracy and completeness of what the witness has to say. The witness and only the witness has the final word in what testimony he or she presents, based upon his or her own personal knowledge, experience, or expertise.

- DOCUMENTATION for the permit conditions and limitations must be identified and cited before the draft permit is issued.

  The regulations no longer allow lately discovered justification for permit conditions. Consequently, any document that will assist in explaining or justifying a permit condition must be identified at the time that the condition is proposed, prepared, or drafted.

[Designation of Trial Staff
and Decisional Body]

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION A

402 Permit Street
Discharge, OH 95217

IN THE MATTER OF: NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM EVIDENTIARY HEARING Permit No. _____ Ajax Manufacturing Company Permittee	REGIONAL ADMINISTRATOR'S DESIGNATION OF AGENCY TRIAL STAFF AND DECISIONAL BODY

In accordance with the provisions of 40 C.F.R. Sections 124.77 and 124.78, I hereby designate the following persons as members of the Agency Trial Staff and Decisional Body, respectively, for the above identified proceeding:

Agency Trial Staff

[Names
Organizational Affiliations
Addresses]

Decisional Body

[Names
Organizational Affiliations
Addresses]

_____ _____
Dated Regional Administrator

[RA's Order Granting
Evidentiary Hearing and
Notice of Contested/
Uncontested Conditions]

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION A

402 Permit Street
Discharge, OH 95217

Re: Permit No. _____
Regional Administrator's Order [124.75]
Granting Evidentiary Hearing; and
Notice of Contested and Uncontested [124.75(b)]
Permit Terms and Conditions [124.61(e)]

Dear

This will acknowledge your Request for an Evidentiary Hearing dated _____, on the above identified permit.
date

This Order constitutes my decision to _____
grant/ grant in part/
_____ your Request in accordance with EPA Rules at
deny in part
40 C.F.R. 124.75 and will serve as the specification and notice of terms and conditions which are contested (and therefore stayed) and uncontested (and therefore effective) which is required by 40 C.F.R. 124.61(e).

Referring to your Request for Hearing, I have determined to grant your request as to the following issues:

[State issues in language used by requester] [124.75(a)]

I have determined to deny your request as to the following issues for the reasons stated:

[State issues in language used by requester — briefly stating reasons] [124.75(d)]

The following terms and conditions of the above identified permit are contested and the force and effect of these terms and conditions is stayed pending final Agency action in accordance with 40 C.F.R. 124.61(e)(1):

[Specify terms and conditions — referring to the final permit]

The following terms and conditions of the permit are uncontested and therefore are enforceable obligations of the discharger. (40 C.F.R. 124.61(e))

[Specify terms and conditions — referring to the final permit]

Public Notice of this Order granting an Evidentiary Hearing and designation of Agency Trial Staff and members of the decisional body will be issued in the near future. [124.77]

_____ Dated

_____ Regional Administrator

[Referral to Chief ALJ]

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION A

402 Permit Street
Discharge, OH 95217

Honorable_____
Chief Administrative Law Judge
U.S. Environmental Protection Agency
Washington, D.C. 20460

Re: Evidentiary Hearing
NPDES Permit No. _____
Ajax Manufacturing Company

Dear Judge_____:

In accordance with the requirements of 40 C.F.R. Section 124.81, I am referring the above identified proceeding to you with the request that you assign an Administrative Law Judge to serve as Presiding Officer.

A copy of the notice of grant of an Evidentiary Hearing is enclosed. The notice was _____ on _____, 19 .

_____ _____

Dated Regional Administrator

[Public Notice of Evidentiary Hearing]

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION A

402 Permit Street
Discharge, OH 95217

PUBLIC NOTICE OF EVIDENTIARY HEARING [124.41(h)] [124.77]

Permit No. Date of Notice _____
Name of Permittee
Address of Permittee

This is to give notice that on _____ (date) the Regional Administrator _____ (granted/granted in part) a request for an Evidentiary Hearing under EPA rules for the above identified National Pollutant Discharge Elimination System (NPDES) Permit. The request for hearing, dated _____ (date), was filed by _____ (name of party requesting), _____ (address of party requesting).

Further proceedings involving this Permit will be governed by EPA's Rules for Decisionmaking which are found at 40 C.F.R. Part 124 (published in the Federal Register at 44 F.R. 32854 on June 7, 1979). Copies of these rules are available for inspection and copying at the Regional Office.

EPA's contact person for information regarding this permit [124.41 (c)(3)] and from whom copies of the permit, the statement of basis or fact sheet and the Regional Administrator's order granting the hearing may be obtained is:

Name
Address
Telephone

The administrative record containing all documents relating to the permit is located at _____ (room number and address) [124.41 (c)(4)]

and is available for public inspection between _____ a.m. and _____ p.m., Monday through Friday, except holidays.

[Section 316(a) information if applicable] [124.41(c)(5)]

Public notice of the draft permit was dated _____ (date). [124.41(g)(1)] A public hearing on this permit was/was not, held on _____ (date).

The purpose of this Evidentiary Hearing is to determine whether the permit, as it was issued by EPA, should be changed in the manner suggested by the Request for Hearing. The case will be assigned to an EPA Administrative Law Judge for hearing and preparation of an initial decision. The following is a summary of rules with regard to the Evidentiary Hearing process: [124.41(g)(3)]

1. Any person seeking to be a party must file a request to be admitted as a party to the hearing within 15 days of the date of publication of this notice, that is, no later than _____ (date). [124.41(h)(4)(i)] [124.79]

2. Any person seeking to be party may propose additional material issues of law or fact not already raised by the original requester or another party. [124.41(h)(4)(ii)]
   HOWEVER, under EPA Rules no evidence shall be submitted and no issue shall be raised by any party to a hearing that was not submitted to or raised in the administrative record unless good cause is shown for the failure to submit them. [124.76]

3. The terms and conditions of the permit at issue may be amended after the evidentiary hearing and any person interested in the permit must request to be a party in order to preserve any right to appeal or otherwise contest the final administrative determination. [124.41(h)(4)(iii)]

4. Parties may be represented by counsel or other authorized agent or representative. [124.73(b)]

5. The Agency trial staff for this proceeding is composed of the following persons: [124.41(h)(5)] [124.77] [124.78]

Names

6. The Decisional Body for this proceeding is composed of the following persons: [124.41(h)(5)] [124.77] [124.78]

Names

7. The Regional Hearing Clerk is: [124.41(h)(6)]

Name
Address
Telephone

8. A request to become a party to these proceedings must meet the following requirements: [124.79]

a) Such requests shall state each legal or factual question alleged to be at issue, and their relevance to the permit decision, together with a designation of the specific factual areas to be adjudicated and the hearing time estimated to be necessary for that adjudication. [124.74]
Information supporting the request or other written document relied upon to support the request shall be submitted unless it is already in the administrative record.

b) The name, mailing address and telephone number of the person making such request;

c) A clear and concise factual statement of the nature and scope of the interest of the requester;

d) The names and addresses of all persons whom the requester represents; and

e) A statement by the requester that upon motion of any party or sua sponte by the Presiding Officer and without cost or expense to any other party, the requester shall make available to appear and testify, the following:

i) The requester;
ii) All persons represented by the requester, and
iii) All officers, directors, employees consultants and agents of the requester and the persons represented by the requester.

f) Specific references to the contested permit terms and conditions, as well as suggested revised or alternative permit terms and conditions (not excluding permit denial) which in the judgement of the requester, would be required to implement the purposes and policies of the Act.

g) In the case of challenges to the application of control or treatment technologies identified in the statement of basis or fact sheet, identification of the basis for the objection, and the alternative technologies or combination of technologies which the requester believes are necessary to meet the requirements of the Act.

h) Specific identification of each of the discharger's obligations which should be stayed if the request is granted. If the request contests more than one permit term or condition then each obligation which is proposed to be stayed must be referenced to the particular contested term warranting the stay.

The following is a general description of the receiving water and the location of each existing or proposed discharge point and of the permittee's activities: [124.41 (c)(2)]

The following is a brief description of the permit terms and conditions which have been contested and for which the Evidentiary Hearing has been granted: [124.41 (h)(3)]

EX PARTE COMMUNICATIONS: [124.78]

No interested person outside the EPA or member of the EPA trial staff shall make or knowingly cause to be made to any members of the decisional body an ex parte communication relevant to the merits of the proceedings. Nor shall the members of the decisional body initiate such communications themselves.

"Ex parte communication" means any communication, whether written or oral, relating to the merits of the proceeding between the decisional body and an interested person outside the EPA or the EPA trial staff where such communication was not originally filed or stated in the administrative record or in the hearing. Ex parte communications do not include:

i) Communications between EPA employees other than between the EPA trial staff and the members of the decisional body
ii) Discussions between the decisional body and either
    a) Interested persons outside the EPA; or
    b) The EPA trial staff;

If all parties have received prior written notice of such proposed communications and have been given the opportunity to be present and participate therein.

iii) Communications between EPA employees including trial staff but not the decisional body and any persons outside the EPA including interested persons outside the EPA.

"Interested person outside the EPA" includes the permit applicant, any person who filed written comments in the proceedings, any person who requested the hearing, any

person who requested to participate or intervene in the hearing, any participant or party in the hearing and the attorney of record for such persons.

FILING AND SERVICE:

An original and one (1) copy of all written submissions relating to an evidentiary hearing filed after the notice of hearing is published shall be filed with the Regional Hearing Clerk. The party filing any submission shall serve a copy of such submission upon the Presiding Officer and each party of record. Service shall be by mail or personal delivery.

Every submission shall be accompanied by an acknowledgement of service by the person served or proof of service in the form of a statement of the date, place, time, and manner of service and the names of the persons served, certified by the person who made service. (A signed statement that an attached list of persons were mailed the submission is sufficient to meet the requirements of this paragraph. Certified mail is not required).

[Proposed Prehearing Order]

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION A

402 Permit Street
Discharge, OH 95217

IN THE MATTER OF:	)	
	)	
	)	
NATIONAL POLLUTANT DISCHARGE	)	
ELIMINATION SYSTEM EVIDENTIARY	)	
HEARING	)	PROPOSED
	)	PREHEARING ORDER
	)	

Permit No. _____

Ajax Manufacturing Company
Permittee

[This form is intended to be used by the Agency Trial Staff as a checklist of those procedural matters which, if followed, will greatly expedite the hearing. It applies equally in both Evidentiary and Nonadversary Hearing cases (the latter where a Trial Staff is designated). This checklist should be consulted as soon as a Request for Hearing has been granted and should be reviewed regularly during preparations for the Hearing.

It is appropriate to draft a Proposed Prehearing Order for consideration by the Presiding Officer at the Prehearing Conference. Where this is done, the Proposed Order should be accompanied by a "Motion to Adopt Proposed Prehearing Order" and should be filed and served before the Prehearing Conference. Such a Motion should state that the Proposed Order represents the position of the Agency Trial Staff on the matters contained in the Order which position will be asserted at the Prehearing Conference.

Obviously, Prehearing Conferences can be streamlined and expedited if the Presiding Officer and other parties to the Hearing are informed of the Trial Staff's position prior to the Conference.

A commendable alternative to this recommended practice is the submission of a "Proposed Agenda for Prehearing Conference" prior to the Conference. However, the Proposed Order approach has the additional benefit of enabling the Trial Staff to come to grips with its position on the appropriate issues at an early stage and to articulate the position in a form which may be used conveniently by the Presiding Officer in preparing the Order required by 124.83(e).]

(e) The Presiding Officer shall prepare a written prehearing order reciting the actions taken at the prehearing conference and setting forth the schedule for the hearing, unless a transcript has been taken and accurately reflects these matters. The order shall include a written statement of the areas of factual agreement and disagreement and of the methods and procedures to be used in developing the evidence and the respective duties of the parties in connection therewith. This order shall control the subsequent course of the hearing unless modified by the Presiding Officer for good cause shown. [124.83(e)]

§ 124.83 Prehearing conferences.

(a) The Presiding Officer, *sua sponte*, or at the request of any party, may direct the parties or their attorneys or duly authorized representatives to appear at a specified time and place for one or more conferences before or during a hearing, or to submit written proposals or correspond for the purpose of considering any of the matters set forth in paragraph (c) of this section.

[NOTE: The Proposed Order format is a convenient method for submitting the "written proposals" called for by 124.83(a).]

(b) The Presiding Officer shall allow a reasonable period before the hearing begins for the orderly completion of all prehearing procedures and for the submission and disposition of all prehearing motions. Where the circumstances warrant, the Presiding Officer shall call a prehearing conference to inquire into the use of available procedures contemplated by the parties and the time required for their completion, to establish a schedule for their completion, and to set a tentative date for beginning the hearing.

(c) In conferences held, or in suggestions submitted, under paragraph (a), the following matters may be considered:

(1) The necessity or desirability of simplification, clarification, amplification or limitation of the issues.

(2) The admission of facts and of the genuineness of documents, and the possibility of stipulations with respect to facts.

(3) The consideration of and ruling upon objections to the introduction into evidence at the hearing of any written testimony, documents, papers, exhibits, or other submissions proposed by a party, except that the administrative record required by § 124.64 shall be received in evidence subject to the provisions of § 124.85(d)(2). Notwithstanding the foregoing, at any time before the end of the hearing any party may make, and the Presiding Officer shall consider and rule upon, motions to strike testimony or other evidence other than the administrative record on the grounds of relevance, competency or materiality.

(4) The identification of matters of which official notice may be taken.

(5) The establishment of a schedule which includes definite or tentative times for as many of the following as are deemed necessary and proper by the Presiding Officer:

(i) The submission of narrative statements of position on each factual issue in controversy;

(ii) The submission of written testimony and documentary evidence (e.g., affidavits, data, studies, reports and any other type of written material) in support of such statements; or

(iii) Written requests to any party for the production of additional documentation, data, or other information relevant and material to the facts in issue.

(6) The grouping of participants with substantially like interests for purposes of eliminating duplicative or repetitive development of the evidence and making and arguing motions and objections.

(7) Such other matters as may expedite the hearing or aid in the disposition of the matter.

[NOTE: Each of the above mentioned 7 items may be addressed appropriately in a Proposed Prehearing Order. In any event, Counsel ought to be prepared to address each of these issues (i.e., state a position) at the Prehearing Conference.]

(d) At a prehearing conference or within some reasonable time set by the Presiding Officer, each party shall make available to all other parties the names of experts and other witnesses it expects to call. At its discretion or at the request of the Presiding Officer, a party may include a brief narrative summary of any witness's anticipated testimony. Copies of any written testimony, documents, papers, exhibits, or materials which a party expects to introduce into evidence, and the administrative record required by § 124.64, shall be marked for identification as ordered by the Presiding Officer. Witnesses, proposed written testimony and other evidence may be added or amended only upon a finding by the Presiding Officer that good cause existed for failure to introduce the additional or amended material within the time specified by the Presiding Officer. Agency employees and consultants shall be made available as witnesses by the Agency to the same extent that production of such witnesses is required of other parties under § 124.74(c)(4). (See also § 124.65(b)(16)).

[NOTE: Preparation and exchange of witness and exhibit lists (i.e., lists of exhibits marked for identification) before the Hearing begins invariably saves hours (and sometimes days) of valuable hearing time.]

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION A

402 Permit Street
Discharge, OH 95217

IN THE MATTER OF:)
)
NATIONAL POLLUTANT DISCHARGE)
ELIMINATION SYSTEM EVIDENTIARY)
HEARING)
)
)
)
Permit No. _____)
Ajax Manufacturing Company)
Permittee)
)

ORDER ON REQUEST
FOR INTERVENTION

[Text should recite facts about the request - an analysis as to whether the request meets the requirements of 124.79 (b) (including the requirements of 124.74 and 124.76) and an order granting/denying the request.]

_____ _____
Dated Administrative Law Judge

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION A

402 Permit Street
Discharge, OH 95217

IN THE MATTER OF:

NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM EVIDENTIARY HEARING

MOTION FOR

Permit No. ___ _____

Ajax Manufacturing Company
Permittee

_____

§ 124.86 Motions.

(a) Any party may make a motion, (including a motion to dismiss a particular claim or a contested issue), to the Presiding Officer about any matter relating to the proceeding. All motions shall be filed and served as provided in § 124.80 except those made on the record during an oral hearing before the Presiding Officer.

(b) Within 10 days after service of any written motion, any party to the proceeding may file a response to the motion. The time for response may be shortened to three days or extended for an additional ten days by the Presiding Officer for good cause shown.

(c) Notwithstanding § 122.15, any party may file with the Presiding Officer a motion seeking to apply to the permit any regulatory or statutory requirement issued or made available after the issuance of the permit under § 124.61. The Presiding Officer shall grant any motion to apply a new statutory requirement unless he or she finds it contrary to legislative intent. The Presiding Officer may grant a motion to apply a new regulatory requirement where appropriate to carry out the purposes of the Act, and where no party would be unduly prejudiced thereby.

[NOTE: Properly drawn Motions, when based upon carefully considered points and authorities, may serve key functions.

Motions provide a convenient vehicle for focusing the attention of the Presiding Officer and the other parties on one or many issues which arise before the Hearing begins and which, if decided upon beforehand, will save hearing time. Motions during the Hearing which involve important issues often occupy time for parties to prepare responses and to be heard orally. For important controversial issues which can be identified early (e.g., grouping of parties, consolidation and severance, summary determination, production of documents) identification of issues through Motions will save time at the Hearing for the presentation of facts.]

[NOTE: Memoranda of Points and Authorities in support of a Motion may be incorporated into the body of the Motion or into a separate Memorandum. If included in the body of the Motion, Points and Authorities should be so labeled. If included in a separate Memorandum, the Memorandum should be filed and served with the Motion. The Motion itself should then refer to the "attached Memorandum."]

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION A

402 Permit Street
Discharge, OH 95217

IN THE MATTER OF:	)	
	)	
NATIONAL POLLUTANT DISCHARGE	)	
ELIMINATION SYSTEM EVIDENTIARY	)	
HEARING	)	
	)	
	)	
Permit No. _____	)	STIPULATION
Ajax Manufacturing Company	)	
Permittee	)	
	)	

It is hereby stipulated by and between the Permittee and the Agency Trial Staff in the above identified proceeding that:

1. Permittee hereby withdraws its request for evidentiary hearing.

2. The permit involved in this proceeding shall be modified as follows:

a.

b.

c.

[Specify changes by using carefully drawn amending language — (e.g., Delete... Substitute ...) referring to specific conditions of the permit.]

3. This Stipulation shall not bind the Environmental Protection Agency or have any force or effect or be filed in this proceeding until approved and signed by the Deputy Assistant Administrator for Water Enforcement.

Dated by the last signatory hereto: _____
Date

Ajax Manufacturing Company

By _____

Title _____

U.S. Environmental Protection Agency

By _____
Counsel for Agency Trial Staff

Approved: _____
Deputy Assistant Administrator
for Water Enforcement

PAGE NOT

AVAILABLE

DIGITALLY

CHAPTER VIII
NONADVERSARY HEARINGS

CHAPTER VIII
SUBPART I—NONADVERSARY PROCEDURES

OVERVIEW

Procedures that are much less adversarial than strict courtroom procedures will be utilized for cases involving initial licensing and Section 301(h) modified permits. In other cases, the regulations allow permit applications to be processed under the nonadversary procedure if a party submits a proper request, no objection is received, and the EPA agrees with the request.

The nonadversary hearings move away from traditional format hearings in which the EPA and other parties present opposing cases before a single hearing officer. Instead, a panel of EPA employees, at least two of whom have not taken part in preparing the draft permit, will be present at the hearing. The panel members will have special expertise on the hearing issues and they will question the parties, subject to the overall control of the proceedings by the Presiding Officer. Panel membership may, if appropriate, include persons not employed by EPA.

An Agency Trial Staff will not be designated for all panel hearings, though the regulations allow one to be named if necessary. Instead, the Agency will prepare a draft response to the permit application. The information contained in the application and the draft response will be the focus of attention at the hearing in cases involving initial licensing. In other cases, a panel hearing may be held after a final permit has been issued.

While nonadversary procedure is designed to be nonaccusatory, there are nevertheless some strict formal requirements which must be met. Just as in the case of an evidentiary hearing, the Request for Panel Hearing must meet the

requirements of Section 124.74 as to contents of the request. In addition, issues not raised in the Request for Hearing may not be first raised at the panel hearing itself; written "comments" (less formal than prepared testimony) must be filed in advance of the hearing unless a "Motion to Permit Oral Comments" is filed and granted two weeks prior to the hearing. All parties should be made aware of these formal requirements lest the formal rules for panel hearings become confused with the quite informal rules governing public hearings.

The hearing itself will be divided into two stages. In the first stage, the parties can present their views and arguments to the panel and be questioned by it. Cross-examination will not be permitted at this stage of the proceeding unless it is determined that such cross-examination would expedite resolution of the issues. However, the parties may submit written questions for the Presiding Officer or a panel member to ask the participants.

Since nonadversary hearings are designed to provide the technical panel and Presiding Officer (Decisional Body) with facts sufficient for a recommended decision, it is likely that the panel rather than the parties will conduct most of the examination or inquiry of witnesses. Should an important area of inquiry be overlooked, it is likely that the panel will only need to be reminded of the area of inquiry. It is not likely that cross-examination by a party will be necessary to draw out the facts in a case where the panel needs to be satisfied on the spot that the facts are in the record and are adequate to support the issue they are intended to bear upon.

In the second stage of the proceeding, formal cross-examination may be allowed if a proper request is submitted. The request must be in writing and must specify the disputed issues of material fact, whom the party desires to cross-examine, and an estimate of the time necessary. The Presiding Officer may, instead of granting cross-examination, require alternative means of clarifying the record to be used. Once again, the main thrust of the panel hearing is to allow the panel, as decisional body, the greatest flexibility to obtain the facts in the form most useful to the panel. Should the panel believe, for example, that a written

supplemental report from a witness will be more useful than further oral questioning, the report should be called for. The panel may find that the parties can submit written questions to a witness to elicit information desired. Because reconvening the hearing for cross-examination will be expensive and time consuming, there is good reason for the panel to seek imaginative methods for ensuring completeness of the record.

After the hearing, a recommended decision will be prepared. The recommended decision will become the final decision of the EPA within 30 days after service, unless there is a petition for review or the Administrator elects to review it. If the Administrator does review the decision, he or she may consult with the Presiding Officer, the panel members, or any other EPA employee in preparing the final decision.

The decision logic included in this chapter illustrates the key events in the nonadversary process. Helpful hints for expediting the process and sample forms are included.

HELPFUL HINTS FOR EXPEDITING

NONADVERSARY HEARINGS

- THE NONADVERSARY HEARING PROCEDURE has been adopted expressly for its simplicity. The Agency staff — permit writers, technical support staff, lawyers, and clerical support staff — and the administrative record are the keys to keeping the procedure simple.

  A good administrative record, carefully prepared by the staff, will ensure efficiency and simplicity in the case. Though the nonadversary procedure is new to the EPA permit program, informal hearing procedures are not new to Agency decision-making. The single most important distinction between more formal and less formal procedures is the method used for making a record to support the final decision. In simplest terms, the nonadversary procedure relies primarily upon written or documentary support for the permit or for alternatives suggested by a party to the hearing. The "hearing" portion of the proceeding is designed exclusively to allow the decisionmakers (Presiding Officer and Panel) to ask questions of the Agency staff or other parties, which will clarify the written record or aid the decisionmakers to better understand the facts. The hearing then is designed to assist the decisional body rather than to provide a forum for argument or debate over positions of the parties.

  Simplicity will be ensured; in most cases, there will be no need for Agency Trial Staff to appear at the hearing if a thoroughly documented administrative record and a well-reasoned Fact Sheet or Statement of Basis accompanies the permit file to the hearing room.

- HELPFUL HINTS FOR EVIDENTIARY HEARINGS apply also to NONADVERSARY PROCEEDINGS.

  While not repeated here, the principles set out in Chapter VII for evidentiary hearings should be followed for informal proceedings as well.

- STAFF WITNESSES who appear before panel hearings should be thoroughly familiar with those portions of the record for which they have responsibility.

  In many cases, one person will not be able to testify about every term and condition of the permit. In such cases, each witness should become acquainted with the entire range of issues in the case and understand where his or her testimony fits in. The panel's work will be considerably lessened by this practice.

- PANELS OF WITNESS can be used very effectively in nonadversary hearings.

  The hearing panel, i.e., Decisional Body, will be able more readily to have its questions answered by the best qualified witness if all witnesses on a particular issue are called and sworn in at the same time. In this way, a witness who can furnish the answer to a question will be allowed to answer it immediately rather than having to wait his or her turn to take the witness stand. The hearing panel should find such a practice more satisfactory because they will know in advance that someone will be available at the witness table to promptly answer any question on an issue under instruction. This procedure may become all the more important in cases where no Agency Trail Staff are present.

[Public Notice of Panel Hearing]

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION A

402 Permit Street
Discharge, OH 95217

PUBLIC NOTICE OF PANEL HEARING [124.116]
[124.41(j)]
[124.41(i)]
[124.41(c)]

Permit No. _____ Date of Notice: _____

Name and Address of Permittee:

_____

_____

_____

This is to give notice that on _____ (date) the Regional Administrator granted a Request for a Panel Hearing under EPA's rules for Nonadversary Procedures in connection with the above-identified National Pollutant Discharge Elimination System (NPDES) Permit. The request for hearing dated _____ (date) was filed by _____ (name and address of party requesting).

[Or: The hearing in this case is being held by direction of the Regional Administrator.] [124.114(b)] [124.41(j)(1)]

Further proceedings involving this Permit will be governed by EPA's Rules for Decisionmaking which are found at 40 C.F.R. Part 124 (published in the Federal Register at 44 F.R. 32854 on June 7, 1979). Copies of these rules are available for inspection and copying at the Regional Office.

EPA's contact person for information regarding this Permit [124.41(c)(3)] and from whom copies of the draft Permit, the statement of basis or fact sheet, and the Regional Administrator's Order granting the hearing may be obtained is:

Name

Address

Telephone

The administrative record containing all documents relating [124.41(c)(4)] to the Permit is located at _____ (room no. and address) and is available for public inspection between ____ a.m. and _____ p.m., Monday through Friday, except holidays.

[Section 316(a) information if applicable.] [124.4.(c)(5)]

The purpose of the Panel Hearing is to determine whether the draft Permit, as prepared by the EPA Staff, should be changed in the manner suggested by the Request for Hearing.

[OR: Specify the issues identified sua sponte by the R.A.] [124.114(b)(2)]

An EPA Administrative Law Judge will serve as Presiding [124.119(a)(1)] Officer for this proceeding and I have determined that the Presiding Officer will prepare the Recommended Decision in this case.

[OR: The Regional Administrator will prepare the Recommended Decision in this case.] [124.116]

[OR: The parties have waived their right to have an Administrative Law Judge serve as Presiding Officer and _____ a lawyer employed by the EPA and without prior connection with this proceeding will serve as Presiding Officer.] [124.119(a)(2)]

The following persons will serve as members of the technical panel (Decisional Body). [124.78]

Name [124.120(b)]

Address

Area of Expertise

The following EPA employees will provide staff support to the panel but may not sit as panel members: [124.120(b)]

Name

Address

[I have determined to designate an Agency Trial Staff for this case. The following persons will serve as Agency Trial Staff: [124.120(b)] [124.78]

Name

Address]

[OR: I have determined not to designate an Agency Trial Staff for this case.]

Your attention is directed to the following Rule on Ex Parte Communications:

No interested person outside the EPA or member of the EPA Trial Staff shall make or knowingly cause to be made to any members of the decisional body an ex parte communication relevant to the merits of the proceedings. Nor shall members of the decisional body initiate such communications themselves. [124.78]

"Ex parte communications" means any communication written or oral relating to the merits of the proceeding between the decisional body and an interested person outside the Agency or the Agency Trial Staff where such sommunication was not originally filed or stated in the administrative record or in the hearing. Ex parte communications do not include:

(i) Communications between Agency employees other than between the Agency Trial Staff and the members of the decisional body;

(ii) Discussions between the decisional body and either

(A) Interested persons outside the Agency; or

(B) The Agency Trial Staff;

If all parties have received prior written notice of such proposed communications and have been given the opportunity to be present and participate therein.

(iii) Communications between Agency employees including Trial Staff but not the decisional body and any persons outside the Agency including interested persons outside the Agency.

"Interested person outside the Agency" includes the permit applicant, any person who filed written comments in the proceeding, any person who requested the hearing, any person who requested to participate or intervene in the hearing, any participant or party in the hearing and the attorney of record for such persons.

The following is a summary of EPA's rules which will apply to this nonadversary proceeding:

(a) Each person desiring to participate shall file a motion to participate with the Regional Hearing Clerk no later than _____. [124.117(a)] [124.41(j)(4)]
date

[Suggest 15 days from notice.]

(b) Each request shall include:

(1) A brief statement of the interest of the person in the proceeding; [124.117(a)]

(2) A brief outline of the points to be addressed;

(3) An estimate of the time required;

(4) The name, mailing address and telephone number of the person making such request; [124.74(c)(5)]

(5) A clear and concise factual statement of the nature and scope of the interest of the requester;

(6) The names and addresses of all persons whom the requester represents; and

(7) A statement by the requester that, upon motion of any party, or sua sponte by the Presiding Officer and without cost or expense to any other party, the requester shall make available to appear and testify, the following:

(i) The requester;

(ii) All persons represented by the requester; and

(iii) All officers, directors, employees, consultants and agents of the requester and the persons represented by the requester.

(8) Specific references to the contested permit terms and conditions, as well as suggested revised or alternative permit terms and conditions (not excluding permit denial) which, in the judgment of the requester, would be required to implement the purposes and policies of the Act.

(9) If the request is submitted by an organization, a non-binding list of the persons to take part in the presentation.

(c) At least two weeks before the scheduled date of the hearing, the Presiding Officer will make a hearing schedule available and will mail it to each person who has requested to participate.

(d) All comments on the Draft Permit must be presented as follows: [124.118]

(1) No later than 30 days before the scheduled start of the hearing, that is, no later than _____ , each party shall
date
file all of its comments on the draft permit, based on information in the administrative record and any other information which is or reasonably could have been available to that person. All comments shall include any affidavits, studies, data, tests, or other materials relied upon for making any factual statements in the comments.

(2)(a) Written comments filed under paragraph (1) of this section shall constitute the bulk of the evidence submitted at the hearing. Oral statements at the hearing should be brief and in the nature of argument. They should be restricted either to points that could not have been made in written comments, or to emphasizing points which are made in the comments, but which the participant believes can be more effectively argued in the hearing context.

(b) Notwithstanding the foregoing, within two weeks prior to the deadline specified in paragraph (a) of this section for the filing of comments, any party who has filed a request to participate in the hearing may move to submit all or part of its comments orally at the hearing in lieu of submitting written comments and the Presiding Officer shall, within one week, grant such motion if the Presiding Officer finds that such person will be prejudiced if required to submit such comments in written form.

(3) Parties to any hearing may submit written material in response to the comments filed by other participants under paragraph (1) of this section at the time they appear at the panel stage of the hearing.

The Regional Hearing Clerk is: [124.41(j)(6)]

Name

Address

Telephone

Filing and Service: An original and one (1) copy of all written submissions relating to an evidentiary hearing filed after the notice of hearing is published shall be filed with the Regional Hearing Clerk. The party filing any submission shall serve a copy of such submission upon the Presiding Officer and each party of record. Service shall be by mail or personal delivery.

Every submission shall be accompanied by an acknowledgement of service by the person served or proof of service in the form of a statement of the date, place, time, and manner of service and the names of the persons served, certified by the person who made service.

A signed statement that an attached list of persons were mailed the submission is sufficient to meet the requirements of this paragraph. Certified mail is not required.

The following is a general description of the applicant's activities and operations which result in the discharge described in the Permit Application: [124.41(d)(1)]

[Description]

The following is a general description of the receiving water and of the location of each existing or proposed discharge point:

[Description]

_____ Dated

_____ Regional Administrator

[RA's Order Granting Nonadversary Hearing]

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION A

402 Permit Street
Discharge, OH 95217

Re: Permit No. _____ [124.114]
Regional Administrator's Order
Granting Nonadversary Hearing

Dear

This will acknowledge your Request for a Panel Hearing dated _____, on the above identified permit.
date

This Order constitutes my decision to _____
grant/grant in part/
_____ your Request in accordance with EPA Rules
deny in part
at 40 C.F.R. 124.114.

Referring to your Request for Hearing, I have determined to grant your request as to the following issues:

[State issues in language used by requester] [124.114(b)]

I have determined to deny your request as to the following issues for the reasons stated:

[State issues in language used by requester — Briefly stating reasons] [124.114(b)]

Public Notice of this Order Granting a Panel Hearing and of designation of Agency Trial Staff and members of the decisional body and a statement of the person who will issue the recommended decision will be issued in the near future. [124.116] [124.120(b)]

_____ Dated

_____ Regional Administrator

[Designation of Trial Staff and Decisional Body if so designated by the Regional Administrator, see Section 124.120(b)]

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION A

402 Permit Street
Discharge, OH 95217

IN THE MATTER OF: NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM NONADVERSARY HEARING [Draft] Permit No. _____ Ajax Manufacturing Company Permittee	REGIONAL ADMINISTRATOR'S DESIGNATION OF AGENCY TRIAL STAFF AND DECISIONAL BODY

In accordance with the provisions of 40 C.F.R. Sections 124.77 and 124.78, I hereby designate the following persons as members of the Agency Trial Staff and Decisional Body, respectively, for the above identified proceeding:

Agency Trial Staff

[Names
Organizational Affiliations
Addresses]

Decisional Body

[Names
Organizational Affiliations
Addresses]

_____ Dated

_____ Regional Administrator

CHAPTER IX
GENERAL ISSUES

CHAPTER IX—GENERAL ISSUES

OVERVIEW

This chapter will cover a number of miscellaneous provisions of the regulations that may apply to more than one subpart of Part 124:

- Public access to information
- Delegation of authority
- Time limitations
- Service
- Settlements
- General permits
- Grouping parties
- Production or exchange of documents and data
- Ex parte communications
- New sources.

The new regulations contain provisions for exchange of documents and data and grouping of parties in evidentiary and panel hearings. An exchange of documents and data will be permitted if it is deemed necessary and proper by the Presiding Officer. To avoid duplicative arguments, evidence, and motions during the hearings, the Presiding Officer also has the authority to group parties with substantially similar interests.

Where service of notice or other pleadings is required, submission shall be by mail or personal delivery. In addition, if service is by mail, the time limit specified therein for the person served to do some act will be extended for 3 days.

To encourage expeditious resolution of the issues, the regulations allow the parties to a hearing to stipulate to those facts in which they are in agreement. However, approval by the Deputy Assistant Administrator for Water Enforcement is required for those stipulations which settle the case or a major portion of it.

Any communication between the decisional body and the Agency Trial Staff or interested persons outside the Agency which is relevant to the merits of the case and not originally filed or stated in the administrative record or in the hearing is prohibited by the ex parte communications rule, unless all the parties were given notice and the opportunity to participate therein.

This ex parte prohibition also applies to the nonadversary initial licensing hearings. However, formal "separation of functions" has been eliminated in this new procedure. Persons involved in the draft permit may sit on the panel, and members of the panel may advise the Administrator on appeal.

The new regulations also contain many special provisions for new sources. Before beginning any on-site construction, potential new sources are required to submit relevant information to the Regional Administrator, so that he or she can make a determination on whether the facility is in fact a new source. If the facility is determined to be a new source, the applicant must also comply with the environmental review requirements of 40 CFR Section 6.900 et seq. Any Environmental Impact Statement prepared and any other applicable factors will be considered by the Regional Administrator in deciding whether to issue a permit for a new source and what conditions to put in any such permit.

Public Access to Information [Subpart J] [124.131]

The following shall be made available to the public without restriction:

- NPDES permits
- Permit application forms and any attachments that are used to supply information requested by the application form
- Effluent data
- State certifications
- Comments of governmental agencies and anyone else
- Draft permits
- Fact sheets/Statements of basis.

It should be noted that in the past, because of inconsistencies in the language of Sections 402(j) and 308, there has been some confusion as to the confidentiality of information contained in NPDES permits and permit applications. However, in March of 1978, the General Counsel issued Class Determination 1-78, entitled Confidentiality of Information in National Pollution Discharge Elimination System Permits and Permit Applications Under Section 402(j) of the Federal Water Pollution Control Act. This determination states, among other things, that

> The NPDES permit application is a standard form specified by EPA. It asks the applicant to supply certain specific information. In some cases, there is insufficient space for the applicant to supply all of the requested information. In those cases the applicant attaches additional sheets with the further information. For purposes of Section 402(j), the NPDES permit application required to be made

public is the application form itself and any attachments that are used to supply information requested by the application form. Any information obtained by EPA that goes beyond that asked for in the application, whether submitted by the applicant or obtained by EPA under authority such as 40 CFR 125.13 [of the former regulations], is not considered part of the permit application as contemplated by Section 402(j). This additional information will be treated in accordance with the procedures of 40 CFR 2.302.

If an applicant has claimed as confidential any information contained in the NPDES permit application or the NPDES permit, confidential treatment will be denied in accordance with this Determination and notice given to the applicant in accordance with 40 CFR 2.205(f).

Delegation of Authority; Time Limitations [Subpart J] [124.132]

Under Subpart J the Administrator may delegate any of his or her authority to act to a judicial officer. (This provision requires clarification because the Administrator is not compelled to take any action "under this Subpart.")

If the Agency misses deadlines imposed by these regulations, procedural relief, including deadline extensions, may be granted to a party who shows that it has been prejudiced by that failure.

Service (manner of; additional time)

[Subpart J]
[124.80]
[124.134]

Service shall be by mail or personal delivery. Every submission must be accompanied by an acknowledgment of service by the person served, or proof of service in the form of a statement of the date, place, time, and manner of service and the names of persons served, certified by the person who made service. A signed statement that an attached list of persons were mailed the submission is sufficient to meet the requirements of this regulation. Certifed mail is not required.

In addition, if service is by mail, the time limit specified therein for the person served to do some act will be extended 3 days. [124.134]

Settlements

[Subpart J]
[124.85(d)(6)(e)]
[124.133]

At any time, the parties to a hearing may stipulate to relevant facts or to settlement. However, all stipulations which settle an evidentiary or panel hearing in whole or substantial part will not bind the EPA or have any force or effect, unless and until such stipulations are approved and signed by the Deputy Assistant Administrator for Water Enforcement. This provision obviates the need for approval of stipulations settling minor issues and facts, while also recognizing that a case which has been set down for a hearing is apt to involve major issues of significance to the NPDES program. Hence, approval should be required for those stipulations which settle the case or a major portion of it. Stipulations sent in to the Deputy Assistant Administrator for Water Envorcement for review and signature should be addressed: Att: Adjudicatory Hearing Clerk (EN-336), Permits Division, Chief of Water Enforcement, EPA, 401 M St., S.W., Washington, D.C. 20460.

General Permits [122.48]

The EPA or approved states may issue general permits to control the discharge of pollutants from certain substantially similar activities located in the same geographic area. The program is intended to deal with numerous minor discharges subject to the same limitations and conditions.

The new regulations require the permit-issuing agencies to designate general permit program areas (GPPA's). The GPPA's will correspond with existing geographic or political boundaries, such as Section 208 planning areas, state highway systems, and sewer districts. General permits may then be issued to cover all owners or operators of separate storm sewers or other categories of point sources within a designated GPPA, other than those covered by individual NPDES permits.

General permits will be issued directly by the EPA or approved states without any preceding applications from individual owners or operators. They will then be subject to public notice, comment, and opportunity for a public hearing under Part 124. No evidentiary or nonadversary panel hearings will be held to consider the terms and conditions of these permits. However, any individual source subject to a general permit may instead apply for an individual permit, and then request an evidentiary hearing on the issuance or denial of an individual permit. Such applications for an individual permit must be submitted no later than 90 days after the publication of the general permit. [124.71] [122.48(e)(3)]

The procedures also provide that sources excluded from general permit coverage solely because they already have an individual NPDES permit, may request that the individual permit be revoked, and that they be covered by the general permit. [122.48(d)(2)(ii)]

The Director may, on his or her own motion, or upon petition from interested persons, revoke a general permit and require an individual permit if: [122.48(e)]

- The discharge is a significant contributor of pollution.
- The discharger has not complied with the terms and conditions of the general permit
- There has been a change in the availability of technology or practices for the control of pollutants from the particular source
- Effluent limitation guidelines are subsequently promulgated for point sources covered by the general permit
- A Water Quality Management plan containing requirements applicable to such source is approved; or
- With respect to other minor sources operating in the area, this source does not: [122.48(b)(2)(i)]

  —involve the same or substantially similar type of operation

  —discharge the same type of wastes

  —require the same effluent limitations or operating conditions, or

  —require the same similar monitoring requirements.

The Regional Administrator (but not the State Director) may require such an individual permit only if there has been an on-site inspection of the facility which demonstrated that the source would be more appropriately regulated under such a permit. Notice should be given to the discharger as specified in Chapter II of this manual. A national general permit policy document is presently being drafted to provide more in-depth guidance for this new approach in permitting.

Grouping Parties [124.83(c)(6)]

The new regulations authorize the Presiding Officer to group parties with substantially like interests for purposes of avoiding duplicative evidence, arguments, and motions during an evidentiary or panel hearing.

Production or Exchange of Documents and Data [124.83(c)(5)(iii)] [124.83(e)] [124.119(b)(1)]

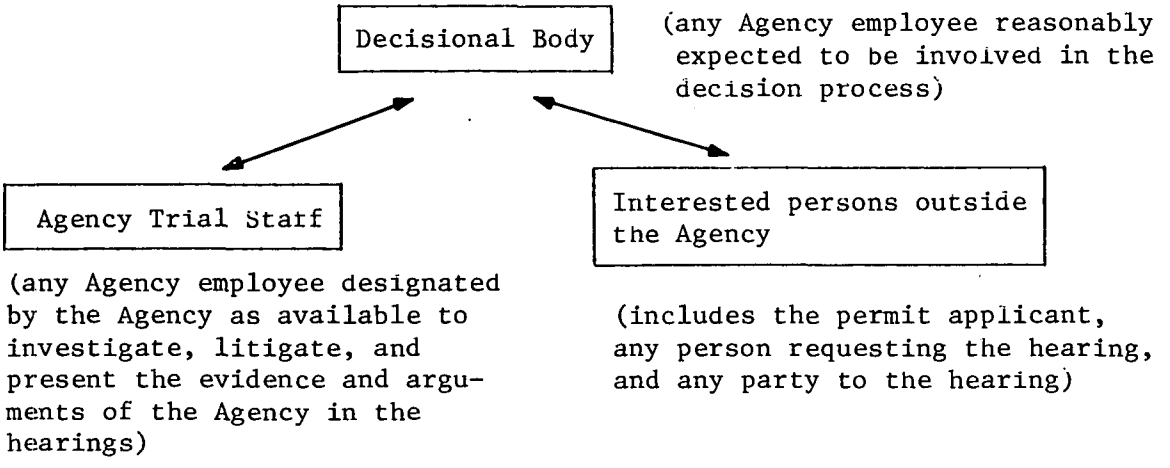
Exchange of documents and information may be ordered if it is deemed necessary and proper by the Presiding Officer. A party may then make a written request to any other party for the production of additional data or other information relevant to the facts in issue. Generally speaking, Section 308 provides the EPA with adequate authority to compel production of information if necessary. The Freedom of Information Act ordinarily provides adequate authority for parties to obtain information from the EPA.

Ex Parte Communications [124.78]

From the time of notice of the grant of an evidentiary or panel hearing to the date of final Agency action, any communication between the decisional body and interested persons outside the Agency, or between the decisional body and the Agency Trial Staff is prohibited as an ex parte communication if:

- Relevant to the merits of the case
- Not originally filed or stated in the administrative record or in the hearing; and
- All parties did not receive prior written notice of such proposed communication or they were not given the opportunity to be present at and participate in the discussion.

The diagram below illustrates and defines the relationships involved in an ex parte communication:



A June 16, 1978 memorandum from the Administrator entitled Ex Parte Contacts in NPDES Adjudicatory Hearing Decision, states

> The term "interested person outside the agency" appears in the Sunshine Act, and refers generally to anyone who has a stake in the outcome of the proceedings greater than a member of the general public. The term includes, for instance, all parties to the hearing and their competitors, public officials (including elected representatives such as mayors, Senators, and Congressmen), environmental and other interest groups, and companies, organizations or associations with some special interest in the issues (for example, the Chamber of Commerce or industry trade associations).

Ex parte communications do not include:

- Communications between Agency employees, other than those in the decisional body, and interested persons outside the Agency;
- Communications between Agency employees, other than between the Agency Trial Staff and members of the decisional body.

A member of the decisional body who receives or makes an ex parte communication must file for the public record of the [124.78(a)(3)]

hearing, a memorandum stating the substance of such communication, as well as submit any written communications. In addition, upon receipt of such a communication by any member of the decisional body, the person presiding at the hearing may require the party who knowingly made the communication to show cause as to why its claim or interest in the proceeding should not be dismissed, denied, or otherwise adversely affected. [124.78(b)]

The rule governing ex parte communications also applies to nonadversary initial licensing hearings. Therefore, whenever an Agency Trial Staff is designated, "separation of functions" in the strict sense will apply. In addition, for purposes of the rule, the decisional body includes the panel members whether or not permanently employed by the Agency. The Regional Administrator may also designate EPA employees who will provide staff support to the panel, but who may or may not serve as panel members. Such persons will also be subject to the ex parte rules. [124.120(b)]

However, because the decisions involved are complex and policy-dominated, and because the purpose of the panel hearings is to avoid being accusatory in form or substance, formal "separation of functions" has been eliminated. The initial licensing procedure allows persons who were involved in the preparation of the draft permit to sit on the panel, and allows panel members, the Presiding Officer, or other EPA employees to advise the Administrator on appeal. This does not mean that the objective of independent review of a permit during successive levels of Agency decisionmaking has been discarded. The regulations have met this objective by requiring any hearing panel to include at least 2 persons who have not taken part in preparing the draft permit, and that when the Administrator reviews a permit, any person assisting him or her directly in preparing the final decision must be without substantial prior connection with the matter. [124.120] [124.126]

New Sources

A new source is defined in 122.3(v) as "any building, structure, facility, or installation from which there is or may be a discharge of pollutants the construction of which commences:

- After promulgation of standards of performance and Section 306 of the Clean Water Act which are applicable to such source; or
- After proposal of standards of performance under Section 306 which are applicable to such source, but only if the standards are promulgated within 120 days of their proposal."

The regulations contain many special provisions for new sources. For instance, before beginning any on-site construction, potential new sources are required to submit relevant information to the Regional Administrator so that he or she can make a determination on whether the facility is in fact a new source. Any interested person may challenge the Regional Administrator's initial determination by requesting an evidentiary hearing. (For more details on this provision (124.12), see Chapter II of this manual.)

The criteria and standards for new source determinations are specified in 122.47(b). A new source will result from construction of a source on a site:

- Where another source is not located; or
- Where another source is located, provided that the:
  - —process which causes the discharge from the other source is totally replaced; or
  - —construction results in a new or additional discharge.

If the facility is determined to be a new source, the applicant must comply with the environmental review requirements of 40 CFR §6.900 et seq. The Regional Administrator will determine whether an Environmental Impact Statement (EIS) is required. If it is determined that an EIS will be prepared, the public notice of the draft permit will occur at the same time or after a draft EIS is issued. The EIS will include a [124.31] recommendation on whether the permit is to be issued or denied. Any EIS prepared and any other applicable factors listed in 40 CFR §6.920 will be considered by the Regional Administrator in deciding whether to issue a permit for a new source.

No final permit for a new source will be issued until at least 30 days after the date of issuance of a final EIS if one is required under 40 CFR §6.916. If an EIS is required, [124.62] no on-site construction may begin before issuance of a final permit incorporating appropriate EIS-related requirements, or before the applicant executes a binding written agreement calling for compliance with all such requirements, unless the Regional Administrator determines that construction will not cause a significant adverse environmental impact. If an EIS is not required, no on-site construction may begin before 15 days following issuance of a finding of no significant impact, unless upon a request to begin construction, the Regional Administrator determines that a finding of no significant impact will probably be made. If any on-site construction begins in violation of the above requirements, the Regional Administrator will advise the owner that it is proceeding with construction at its own risk, and that such construction activities constitute grounds for denial of a permit. The Regional Administrator may also seek a court order to enjoin the construction. [122.47(c)(4)]

In addition, no permit will be issued to a facility which is a new source if its discharge will:

- Cause or contribute to the violation of water quality standards if the point of discharge is located in a segment that was an effluent limitation segment prior to this discharge; or

- Exceed the total pollutant load allocation if the discharge is into a water quality segment. [122.13(i)]

CHAPTER X
RESOURCE DOCUMENTS AND BIBLIOGRAPHY

OVERVIEW

The materials provided in this chapter are research aids and tools designed to assist participants in preparing for and conducting hearings.

The complete text of Parts 122, 123, 124, and 125 is provided as a handy reference in using this manual.

An index to common NPDES issues and problems is provided with reference to past decisions of the General Counsel and to the current regulations.

In addition, an annotated bibliography of useful references is provided which includes such topics as pleading and practice in hearings, evidence, legal forms, and past decisions and opinions from the EPA General Counsel.

TOPICAL INDEX TO DECISIONS OF THE
GENERAL COUNSEL AND THE NPDES REGULATIONS

[This index to common and frequently occurring issues in NPDES permit proceedings will aid the user in locating, by number, relevant decisions of the General Counsel in Adjudicatory Proceedings under the 1974 Regulations.]

Issue: Amendments to Permits reflect guideline changes

— OGC #10,23,27

— Section 122.31(e)(3) and (4)

Issue: "Backsliding"

— Section 122.15(i)

Issue: Best Engineering Judgment [Section 402(a)(1)]

— Case by Case Regulation - limitations not included in guidelines
OGC #54

— Factors for Defining BPT - case by case
OGC #38,40

— Information Requests
Section 308/402(a)(1)
OGC #21,27,32,35,39,43

— Issuance of Permits Prior to Promulgation of NSPS Guidelines
OGC #1,4,9,21,23,32,38,43

— Sections 125.3(c)(2) and 122.15(f)(10)

Issue: Burden of Proof

— OGC #5,23,51

— Section 124.85(a) (see also Section 122.14(1)(4) for burden of proof in upset proceedings)

Issue: *Certification by State [Section 401]*

— Conditions/Limitations due to State Certification
OGC #14,17,25

— Section 124.21 (Subpart C)

Issue: *Confidentiality of Section 308 data*

— OGC #50

— Section 124.131

Issue: *Compliance*

— Compliance Dates and Schedules
BPT--OGC #11,23,27.42

— Compliance Steps toward Statutory Goals to be Achieved after Expiration of Permit
OGC #2

— Enforcement Compliance Status Letters (ECSL's)
OGC #45,47

Issue: *Cooling System*

— Section 316(b)
OGC #32,41

Issue: *Corps of Engineers Requirements*

— OGC #17,22,27,28

— Section 124.44

Issue: *Deadlines -- permit extension beyond 7/1/77*

— OGC #11,26,40,45,47,49

— Part 125, Subpart J

Issue: *Discovery/subpoenas*

— OGC #23

Issue: Effluent Guidelines

— Application of Guidelines Promulgated Subsequent to Request for Evidentiary Hearing
OGC #36,39
U.S. Pipe and Foundry Company

— Use of Promulgated Regulations during Judicial Review
Permit Conditions; Adjudicatory Hearings
OGC #3,23,27,32

— Section 124.86(c) and introductory paragraph to Section 122.15

Issue: Ex Parte Communications

— Section 124.78

Issue: Force Majeur -- Conditions beyond control of permittee

— OGC #8,15,32

Issue: Indirect Discharges

— OGC #43 at 200

— Section 122.3(k) and (p)

Issue: Internal Waste Streams (up the pipe)

— OGC #18,27,33,43

— Section 122.16(h)

Issue: Irrigation Return Flow

— OGC #21

— Section 122.3(y) (excluded)

Issue: Issues in Proceedings

— Raising additional issues (discretion) Appeal 75-7 p. 93

Issue: Liability for Violations

— Joint and several liability
OGC #43

Issue: Malfunctions

— OGC #1

Issue: Mixing Zones

— OGC #31

Issue: Monitoring

— Frequency, Analytical Methods, Studies
OGC #27,29,39

— (Research Samples), OGC #43 at 212

— Section 122.20

Issue: Navigable Waters

— OGC #7,30,53

— Section 122.3(t)

Issue: New Source Determinations

— OGC #36,51,52

— Section 122.3(v) and 122.47

Issue: Operator Requirements

— OGC #19

Issue: Parties to Proceedings

— Consolidation and Severance
Section 124.82

— Additional parties/issues
Section 124.79/Appeal #75-7

Issues: Privately Owned Treatment Works

— OGC #43

— Section 122.3(k)

Issues: Removal of In-Place Pollutants

— OGC #40

Issue: Sewers

— Combined Sewers
OGC #48

Issue: Sludge Disposal Requirements in Permits

— OGC #33

— Section 122.15(h)

Issue: Standby Emergency Facilities

— OGC #40

— Section 122.14(k) and (l) upset/bypass

Issue: Stays/Extensions for Adjudication

— OGC #43; Section 124.61

Issue: Stipulations - Consent decrees

— Binding Effect
OGC #2,22,41

— Section 124.133

Issue: Studies

— BAT Studies - Section 308 Authority
OGC #39

Issue: Summary Determination

— Section 124.84

Issue: Water Quality Standards

— Cost benefitting requirements to meet State water quality standards
OGC #37

— More stringent than BAT or Guidelines
OGC #2,13,14,16,17,44

Issue: Wells

— Injection Wells
OGC #6,8,18,27,43

— Section 122.41

ANNOTATED BIBLIOGRAPHY

I. Hearing Procedure

Ruhlen, M., Manual for Administrative Law Judges. Washington, D.C.: The Administrative Conference of the United States. Superintendent of Documents, U.S. Government Printing Office, Stock No. 052-044-00007-5, 1974. A brief but useful guide to authority, duties, and responsibilities of Administrative Law Judges. Contains a compendium of suggested forms for orders. Counsel should refer to this pamphlet as an authoritative guide to hearing procedures.

Manual for Complex Litigation with Amendments to June 3, 1977, ed. 4. Chicago: Commerce Clearing House, Inc., 1977. This reference, a successor to the Handbook of Recommended Procedures for the Trial of Protracted Cases, is a comprehensive collection of recommended practices and suggested forms useful for administering the "big case". While directed mainly toward complex and multidistrict litigation in the Federal courts, the forms section of the book contains a number of useful checklists for prehearing orders, which have been used successfully in the district courts. Many of the suggestions can be applied fully to complicated administrative litigation.

Frumer, L., Bender's Federal Practice Forms. New York: Matthew Bender and Company Incorporated, 1951. This 16-volume treatise with annual supplement, which is a companion to Moore's treatise on Federal Practice, is a very complete reference to recommended forms used in the Federal courts. The sections on pleadings and motions are particularly well suited for use in administrative litigation.

Pedersen, W., The Decline of Separation of Functions in Regulatory Agencies, 64 Virginia Law Review 991 (1978). A law review article by the principal author of the nonadversary procedures. Provides legal philosophies behind his approach.

II. Witnesses

Handbook for the Businessman as a Witness. New York: The United States Trademark Association, 1974. A highly readable practical bread and butter pamphlet for both witnesses and counsel. The title should not detract from the book's value as a tool for technical or scientific expert witnesses.

III. Evidence

Cleary, E., ed., McCormick's Handbook of the Law of Evidence, 2nd ed. St. Paul: West Publishing Co., 1972. A widely used authoritative reference on the law of evidence. Most useful as a "counsel table" tool. This edition is not annotated to the Federal Rules of Evidence.

"Federal Rules of Evidence," in Federal Rules, 1979 edition. St. Paul: West Publishing Co., 1979. A handy counsel table reference to the text of the Federal Rules of Evidence. While the Federal Rules are not directly applicable in NPDES hearings, Agency Counsel have, in the past, found reference to the Rules to be a very convenient and authoritative way of focusing evidentiary objections and arguments on some concrete statement of evidentiary principles. Because the Federal Rules of Evidence have liberalized and modernized many of the old formalistic principles of evidence, the Rules often offer a completely satisfactory result in debates on evidence at administrative hearings.

Saltzburg, S. and Redden, K., Federal Rules of Evidence Manual, 2nd ed. Charlottesville, Virginia: The Michie Company, 1977. This is a thoroughly annotated and annually supplemented reference to the Federal Rules of Evidence. It is especially useful as a counsel table guide because it incorporates editorial comments, Advisory Committee notes, and legislative history in the annotation to each of the rules. Case citations also contribute to the usefulness of the manual for research and memorandum writing.

Gelpe and Tarlock, The Uses of Scientific Information in Environmetnal Decision Making. 48 S. Cal. L. Rev., 371 (1974).

IV. Substantive NPDES Issues

U.S. Environmental Protection Agency, National Pollutant Discharge Elimination System Adjudicatory Hearing Proceedings, Decisions of the Administrator and Decisions of the General Counsel. Washington, D.C.: U.S. Environmental Protection Agency, 1976-77. The compendium of OGC Decisions Nos. 1-36 (Volume 1) and 37-54 (Volume 2) issued in connection with Adjudicatory Proceedings from 1974 through December 1976. Individual copies of Decisions Nos. 55-74, through January 1979, may be obtained from EPA Headquarters.

Environmental Protection Agency General Counsel Opinions. Chatsworth, California: NILS Publishing Company, 1979. A two-volume compendium of EPA General Counsel Opinions, supplemented periodically. These are written opinions from OGC on legal interpretations of EPA-administered legislation and programs. They should not be confused with NPDES decisions of the General Counsel in adjudicatory proceedings.

Doglin, E. and Guilbent, T., eds., Federal Environmental Law. St. Paul: Environmental Law Institute, West Publishing Co., 1974. The chapter on "The Federal Law of Water Pollution Control" authored by Robert Zener, former EPA General Counsel, is still an often-cited and definitive reference to the history of the Federal Water Pollution Control Act Amendments of 1972 and the early efforts of EPA to implement the statute.

V. General

A Uniform System of Citation, Twelfth Edition. Cambridge, Massachusetts: The Harvard Law Review Association, 1976. This is the so-called "Blue Book". The most frequently used reference to forms for citation in legal documents such as briefs, memoranda, correspondence, etc.

Wiener, F., Briefing and Arguing Federal Appeals. Washington, D.C.: The Bureau of National Affairs, Inc., 1967. This is a widely used text on brief writing, which is a "must" skill for any trial lawyer. While devoted primarily to Federal court appellate advocacy, the methods and approaches recommended for brief writing are quite appropriate for use in preparing trial briefs and memoranda of law, even at the trial level.

PART 121—STATE CERTIFICATION OF ACTIVITIES REQUIRING A FEDERAL LICENSE OR PERMIT

3. 40 CFR Part 121 is redesignated from 40 CFR Part 123.

4. Part 122 is revised to read as follows:

PART 122—NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM

Subpart A—General

Sec.
122.1 Purpose and scope.
122.2 Law authorizing NPDES permits.
122.3 Definitions.
122.4 Exclusions.
122.5 Signatories.

Subpart B—NPDES Permit Application and Issuance

122.10 Application for a permit.
122.11 Permit issuance; effect of permit.
122.12 Duration of permits and continuation of expiring permits; Transferability of permits.
122.13 Prohibitions.
122.14 Conditions applicable to all permits.
122.15 Applicable limitations, standards, prohibitions, and conditions.
122.16 Calculation and specification of effluent limitations and standards.
122.17 Schedules of compliance.

Subpart C—Permit Compliance

122.20 Monitoring.
122.21 Recording of monitoring results.
122.22 Reporting of monitoring results and compliance by permittees.
122.23 Noncompliance reporting.

Subpart D—Permit Modification, Revocation and Reissuance, and Termination

122.30 General.
122.31 Modification, revocation and reissuance, and termination.

Subpart E—Special NPDES Programs

122.40 General.
122.41 Disposal of pollutants into wells, into publicly owned treatment works or by land application.
122.42 Concentrated animal feeding operations.
122.43 Concentrated aquatic animal production facilities.
122.44 Aquaculture projects.
122.45 Separate storm sewers.
122.46 Silvicultural activities.
122.47 New sources and new dischargers.
122.48 General permit program.
122.49 Special considerations under Federal law.

Subpart F—Miscellaneous

122.60 Delegation of authority.

Appendix A.—Point Source Categories and Permit Expiration Dates.

Authority.—Clean Water Act, as amended by the Clean Water Act of 1977, 33 U.S.C. 1251 et seq; Administrative Procedure Act, 5 U.S.C. 551 et seq.

PART 123—STATE PERMIT PROGRAM REQUIREMENTS

Subpart A—General

Sec.
123.1 Purpose and scope.
123.2 Definitions.
123.3 Elements of a program submission.
123.4 Program description.
123.5 Memorandum of Agreement with the Secretary for section 404 programs.
123.6 Attorney General's Statement.
123.7 Memorandum of Agreement with the Regional Administrator.
123.8 Sharing of information.

Subpart B—Requirements of State Programs

123.11 Requirement to obtain a permit.
123.12 Operational requirements.
123.13 Control of disposal of pollutants into wells.
123.14 Inspections, monitoring, entry, and reporting.

Subpart C—Transfer of Information, Objections to Permits

123.21 Receipt and use of Federal information.
123.22 Transmission of information to EPA.
123.23 Objections to proposed NPDES permits.
123.24 Prohibitions.

Subpart D—Enforcement Provisions

123.31 Compliance evaluation programs.
123.32 Enforcement.

Subpart E—Planning and Conflict of Interest Requirements

123.41 Continuing planning process.
123.42 Agency board membership.

Subpart F—Procedures for Approval of State Permit Programs

123.51 Section 402 approval process.
123.52 Section 404 approval process.

Subpart G—Revisions to Approved Programs

123.61 Procedure for revision of State permit programs.
123.62 NPDES program revisions under the Clean Water Act of 1977.

Authority: Clean Water Act, as amended by the Clean Water Act of 1977, 33 U.S.C. 1251 et seq.

PART 124—PROCEDURES FOR DECISIONMAKING REGARDING NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM PERMITS

Subpart A—Applicability

Sec.

124.1 Purpose and scope.
124.2 Definitions.

Subpart B—The Application Process

124.11 Application for a permit.
124.12 Special provisions for applications from new sources.
124.13 Requests for modification, revocation and reissuance, or termination.
124.14 Permits required on a use-by-case basis.
124.15 Decisions on permit denials and terminations.

Subpart C—State Certification

124.21 Circulation of applications and draft permits to certifying States.
124.22 State certification.
124.23 Effect of State certification.
124.24 Special provisions for State certification and concurrence in applications for section 301(h) modifications.

Subpart D—Preparation of a Draft Permit

124.31 Draft permit after application.
124.32 Other draft permits.
124.33 Statement of basis.
124.34 Fact sheet.
124.35 Administrative record for EPA draft permits.
124.36 Applicability of Subpart D to draft permits incorporating section 301(h) modifications.

Subpart E—Public Comment and Hearings

124.41 Public notice regarding permits and permit hearings.
124.42 Public comments and hearings.
124.43 Obligation to raise points and provide information during the comment period.
124.44 Terms requested by the Corps of Engineers and other governmental agencies.
124.45 Reopening of comment period.

Subpart F—Special Provisions for Variances and Statutory Modifications

124.51 Time deadlines for applications for variances from and modifications of effluent limitations.
124.52 Decisions on variances and modifications.
124.53 Procedures for variances and modifications where EPA is the permit issuing authority.
124.54 Appeals of modifications and variances.
124.55 Special provisions for modifying the secondary treatment requirements under section 301(h).
124.56 Special procedures for decisions on thermal variances (section 316(a)).

Subpart G—Issuance and Effective Date of Permit

124.61 Issuance and effective date of permit; stays.
124.62 Final Environmental Impact Statement.
124.63 Response to comments.
124.64 Administrative record for final permit issued by EPA.

Subpart H—Evidentiary Hearings for EPA-Issued Permits

124.71 Applicability.
124.72 Definitions.
124.73 Filing and submission of documents.
124.74 Requests for evidentiary hearing.
124.75 Decision on request for a hearing.
124.76 Obligation to raise issues and submit evidence before a final permit is issued.
124.77 Notice of the grant of a hearing.
124.78 Ex parte communications.
124.79 Additional parties and issues.
124.80 Filing and service.
124.81 Assignment of Administrative Law Judge.
124.82 Consolidation and severance.
124.83 Prehearing conferences.
124.84 Summary determination.
124.85 Hearing procedure.
124.86 Motions.
124.87 Record of hearings.
124.88 Proposed findings of fact and conclusions; brief.
124.89 Decisions.
124.90 Interlocutory appeal.
124.101 Appeal to the Administrator.

Subpart I—Non-Adversary Procedures for Initial Licensing

124.111 Applicability.
124.112 Relation of other Subparts.
124.113 Public notice regarding draft permits and permit conditions.
124.114 Hearings.
124.115 Effect of denial or absence of request for hearing.
124.116 Notice of hearing.
124.117 Request to participate in hearing.
124.118 Submission of written comments on draft permit.
124.119 Presiding Officer.
124.120 Panel hearing.
124.121 Opportunity for cross-examination.
124.122 Record for final permit.
124.123 Filing of brief, proposed findings of fact and conclusions of law and proposed modified permit.
124.124 Recommended decision.
124.125 Appeal from or review of recommended decision.
124.126 Final decision.
124.127 Final decision if there is no review.

Subpart J—Miscellaneous

124.131 Public access to information.
124.132 Delegation of authority; time limitations.
124.133 EPA Headquarters' approval of stipulation or consent agreement.
124.134 Additional time after service by mail.
124.135 Effective date of Part 124.

Authority.—Clean Water Act, as amended by the Clean Water Act of 1977, 33 U.S.C. 1251 et seq; Administrative Procedure Act, 5 U.S.C. 551 et seq.

PART 125—CRITERIA AND STANDARDS FOR THE NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM

Subpart A—Criteria and Standards for Imposing Technology-Based Treatment Requirements Under Section 301(b) of the Act

Sec.
125.1 Purpose and scope.
125.2 Definitions.
125.3 Technology-based treatment requirements in permits.

Subpart B—Criteria for Issuance of Permits to Aquaculture Projects

125.10 Purpose and scope.
125.11 Criteria.

Subpart C—Criteria for Extending Compliance Dates for Facilities Installing Innovative Technology Under Section 301(k) of the Act [Reserved]

Subpart D—Criteria and Standards for Determining Fundamentally Different Factors Under Sections 301(b)(1)(A), 301(b)(2) (A) and (E), and 307(b) of the Act

125.30 Purpose and scope.
125.31 Criteria.
125.32 Method of application.

Subpart E—Criteria for Granting Economic Variances From Best Available Technology Economically Achievable Under Section 301(c) of the Act [Reserved]

Subpart F—Criteria for Granting Water Quality Related Variances Under Section 301(g) of the Act [Reserved]

Subpart G—Criteria for Modifying the Secondary Treatment Requirement Under Section 301(h) of the Act [Reserved]

Subpart H—Criteria for Determining Alternative Effluent Limitations Under Section 316(a) of the Act.

125.70 Purpose and scope.
125.71 Definitions.
125.72 Early screening of applications for section 316(a) variances.
125.73 Criteria and standards for the determination of alternative effluent limitations under section 316(a).

Subpart I—Criteria Applicable To Cooling Water Intake Structures Under Section 316(b) of the Act [Reserved]

Subpart J—Criteria for Extending Compliance Dates Under Section 301(l) of the Act

125.90 Purpose and scope.
125.91 Definition.
125.92 Requests for permit modification and issuance under section 301(i)(1) of the Act.
125.93 Criteria for permit modification and issuance under section 301(i)(1) of the Act.
125.94 Permit terms and conditions under section 301(i)(1) of the Act.
125.95 Requests for permit modification or issuance under section 301(i)(2) of the Act.
125.96 Criteria for permit modification or issuance under section 301(i)(2) of the Act.
125.97 Permit terms and conditions under section 301(i)(2) of the Act.

Subpart K—Criteria and Standards for Best Management Practices Under Section 304(e) of the Act

125.100 Purpose and scope.
125.101 Definition.
125.102 Applicability of best management practices.
125.103 Permit terms and conditions.
125.104 Best management practices programs.

Subpart L—Criteria and Standards for Imposing Conditions for the Disposal of Sewage Sludge Under Section 405 of the Act [Reserved]

Subpart M—Ocean Dumping Criteria Under Section 403 of the Act [Reserved]

Authority: Clean Water Act, as amended by the Clean Water Act of 1977, 33 U.S.C. 1251 et seq.

federal register

Thursday
June 7, 1979

Part II

Environmental Protection Agency

National Pollutant Discharge Elimination System; Revision of Regulations

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 9, 115, 121, 122, 123, 124, 125, 402, and 403

[FRL 1201-2]

National Pollutant Discharge Elimination System; Revision of Regulations

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This rule extensively revises the existing regulations governing the National Pollutant Discharge Elimination System (NPDES) program for three purposes:

(1) To clarify and improve existing program regulations and procedures in light of past experience;

(2) To fill 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

(3) To make the regulatory changes which are necessary under the 1977 amendments to the Clean Water Act.

DATES: These regulations will be considered issued for purposes of judicial review at 1:00 p.m. eastern time on June 14, 1979. If such date is a Federal holiday, the issuance date will be considered to be 1:00 p.m. eastern time on the next day after the seventh day which is not a Federal holiday. Parts 121, 122, 123, 125 and 403 of this regulation shall be effective August 13, 1979. Part 124 is effective as provided in § 124.135. In order to assist EPA to correct typographical errors, incorrect cross-references, and similar technical errors, comments of a technical and nonsubstantive nature on this final regulation may be submitted not later than August 13, 1979. However, the effective dates will not be delayed by consideration of such comments.

FOR FURTHER INFORMATION CONTACT: Edward A. Kramer (EN-336), Office of Water Enforcement, Environmental Protection Agency, Washington, DC 20460 (202-755-0750).

SUPPLEMENTARY INFORMATION:

Background

The Federal Water Pollution Control Act Amendments of 1972 established the National Pollutant Discharge Elimination System (NPDES) permit program. Shortly after, in December 1972 and May 1973, EPA promulgated regulations outling the NPDES program in two Parts. 40 CFR Part 124 established substantive requirements for approved State NPDES programs, while Part 125 established the similar requirements of the EPA permit program. These two Parts, revised several times, are the existing NPDES regulations which remain in force until the effective date of these regulations published today.

In 1977, a new phase of the NPDES program began, prompted by several developments. First, five years of experience with dischargers, approved NPDES States, and the courts had been gained. Second, the "first round" of NPDES permits, issued for a term of five years, were beginning to expire. Third, a major statutory deadline (July 1, 1977) had passed, and the 1983 deadline for achievement of more stringent treatment requirements became the new program goal, along with an increased emphasis on the control of toxic and hazardous pollutants. In late 1977, Congress enacted the Clean Water Act of 1977, making several significant changes in the scope and direction of the NPDES program. These changes include: revisions of the 1983 treatment requirements for industrial dischargers; extensions of the 1977 treatment deadline for certain municipal and industrial dischargers; provisions for certain variances from technology-based treatment requirements; recognition of the Consent Decree in *NRDC* v. *Train*, 8 ERC 2120 (D.D.C. 1976); requirements for best management practices in certain industrial permits; provision for control of sewage sludge disposal in NPDES permits; provision for EPA to issue permits if it objects to a State NPDES permit; and authorization of State assumption of the permit programs under sections 318, 404, and 405.

In addition to the need for regulatory revisions to address these major developments, the former regulations had to be amended and reorganized because they had become unwieldy. On one hand, much needless duplication of the basic substantive and procedural requirements between the former State and Federal NPDES program regulations can be eliminated. Under the regulations published today, the basic substantive and procedural requirements applicable to all permits are set forth in Parts 122 and 124. Part 123, which establishes State Permit Program Requirements, cross-references provisions from those Parts which are applicable to State programs. EPA believes that this new structure will help to simplify the regulations for use by permittees, the States, and the public, and will avoid inconsistencies between State and Federal programs.

Parts of the former NPDES regulations were either too terse to provide meaningful guidance or left significant permit-related issues unaddressed. For example, in many situations the former regulations governing adjudicatory hearings provided inadequate assistance or direction to Presiding Officers or the parties. Based upon several years of experience accumulated by EPA in conducting these hearings, the regulations published today for Part 124 provide more detailed procedures better tailored to result in responsible, informed permit issuance decisions. Similarly, and for the same purpose, the regulations published today for Parts 122 and 125 provide guidance on substantive questions formerly unaddressed in regulations.

Accordingly, five new Parts of Title 40, incorporating all of existing Parts 115, 122, 123, 124, 125 and 402, as well as portions of § 6.900, are established as follows:

- **PART 121—STATE CERTIFICATION OF ACTIVITIES REQUIRING A FEDERAL LICENSE OR PERMIT**
- **PART 122—NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM**
- **PART 123—STATE PERMIT PROGRAM REQUIREMENTS**
- **PART 124—PROCEDURES FOR DECISIONMAKING REGARDING NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM PERMITS**
- **PART 125—CRITERIA AND STANDARDS FOR THE NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM**

A "Guide to the NPDES Regulations" which describes the regulations has been prepared and is available by writing the Environmental Protection Agency, Public Information Center (PM-215), 401 M Street, S.W., Washington, D.C. 20460.

These regulations were proposed on August 21, 1978, (43 FR 37078). Originally, the comment period on the proposed regulations was to have ended on October 20, 1978. However, based on many requests from the public, the comment period was extended to November 20, 1978 (43 FR 47213, October 13, 1978). During the comment period, two public meetings were held: one in Washington, D.C. and one in San Francisco. Over 100 people attended each meeting and over 500 letters were

submitted containing thousands of comments. Comments were catalogued and summarized for each section of the proposal. These final regulations revise the proposed regulations based on comments received. A summary of comments received and the bases for revisions are discussed later in this preamble.

In addition to the August 21, 1978 proposal, EPA published other regulations governing specific portions of the NPDES program. These regulations were promulgated separately from the August 21, 1978 core package because of statutory deadlines for application by permittees for certain extensions and modifications or because of other pressing needs. The following table summarizes all regulations recently published by EPA concerning the NPDES program. Except as noted in the table, these separately published regulations have been incorporated into this final rule.

Table I

Federal Register Date	Summary of regulation	Status of regulations as of last publication	Comments
Feb. 4, 1977 (42 FR 6846)	*General Permit Program.* Proposed establishment of a new general program covering point source discharges.	Proposed Rule.	Incorporated in final rule, primarily at § 122.48.
Apr. 25, 1978 (43 FR 17484)	*301(h) Modifications.* Proposed establishment of criteria, standards and procedures for granting 301(h) permit modifications to the secondary treatment requirements for certain ocean discharges.	Proposed Rule.	Procedures incorporated into Part 124. Subpart G, of Part 125 reserved for standards and criteria.
May 16, 1978 (43 FR 21266)	*301(i) Extensions.* Establishes criteria for granting extensions for compliance with 1977 statutory deadline for municipal treatment requirements and industries planning to connect to these treatment systems and a method for incorporating these extensions in the NPDES program.	Interim Final Rule.	Incorporated in final rule as Subpart J of Part 125.
May 23, 1978 (43 FR 22160)	*Veto/Modification.* Revised Parts 124 and 125 of EPA regulations to clarify the procedures and criteria which EPA will use in exercising its authority to object to (veto) the issuance of State NPDES permits and to require modification of permits to incorporate BAT/Toxic requirements in accordance with NRDC Consent Decree of June 8, 1976.	Final Rule	Veto regulations incorporated in final rule at § 123.23. Modification regulations incorporated in final rule at § 122.15(b).
June 26, 1978 (43 FR 27736)	*Pretreatment.* Pretreatment regulations to control the introduction of non-domestic wastes into municipal treatment plants.	Final Rule	Technical conforming amendments made by this final rule.
Aug. 21, 1978 (43 FR 37078)	*NPDES Regulations* Proposed revision to the NPDES regulations	Proposed Rule.	Incorporated in final rule as Parts 122, 123, 124, and 125.
Sept. 1, 1978 (43 FR 39282)	*Best Management Practices.* Proposed establishment of new controls on toxic and hazardous pollutants by imposing in NPDES permits Best Management Practices for ancillary industrial activities.	Proposed Rule.	Incorporated, in part, in Part 125, Subpart K.
Sept. 1, 1978 (43 FR 39276)	*Spill Prevention Control and Countermeasures (SPCC).* Requirements for SPCC Plans to prevent discharges of hazardous substances from facilities subject to NPDES permits.	Proposed Rule.	Not part of final rule.
Sept. 13, 1978 (43 FR 40859)	*Best Available Technology (BAT) Modifications.* Establishes requirements for application for modifications of BAT non-conventionals under 301(c) and/or 301(g).	Interim Final Rule.	Incorporated in final rule at § 124.51(b).
Dec. 11, 1978 (43 FR 58066)	*Second Round Permits.* Established strategy to ensure NPDES permit will reflect 1983 treatment requirements by issuing short-term permits set to expire 18 months after the scheduled date of promulgation of BAT guidelines for industries affected by the NRDC Consent Decree.	Final Rule	Incorporated in final rule at § 122.12(c) and § 122.15(b).

The incorporated regulations have been renumbered to conform with the codification of this final rule. Any additional changes (i.e., based on public comments) are discussed later in this preamble.

These final NPDES regulations set the framework for EPA's consolidated permit regulations, which will soon be proposed in the **Federal Register.** The proposed consolidated permit regulations will cover the NPDES and section 404 (discharge of dredged or fill material) programs under the Clean Water Act, the hazardous waste management program under the Resource Conservation and Recovery Act, and the underground injection control program under the Safe Drinking Water Act. When promulgated, the consolidated regulations will occupy Parts 122–124 of Title 40 of the Code of Federal Regulations. The final NPDES regulations will be incorporated into the proposed consolidated regulations without significant change. The Preamble to the consolidated regulations will highlight the changes made during the process of program consolidation that affect the NPDES program, and will invite comments on the proposed changes. The final NPDES regulations will remain effective until the consolidated regulations are published in final form.

Judicial Review of the Regulations

The issue has arisen as to where and when judicial review will be available on these regulations. For the benefit of those who might be affected by these regulations, and to avoid, if possible, premature attempts to seek review for protective reasons based on concern that EPA will oppose review when it is proper, a brief outline of the Agency's views on reviewability of these regulations follows.

Judicial review of most regulatory actions under the Clean Water Act is available under section 509(b). That section identifies specific actions which are reviewable in the Courts of Appeals. Judicial review of two permit-related actions is available under section 509(b): "issuing or denying any permit" (section 509(b)(1)(F)) and "making any determination as to a State permit program" (section 509(b)(1)(D)). However, review is not provided for actions in issuing general regulations governing the issuance of NPDES permits. NPDES regulations have been in force since 1973, and no court has held that they are independently reviewable. They have, however, been reviewed in the context of individual permit issuance actions, for which review in the Courts of Appeals is explicitly provided. See, e.g., *Marathon Oil Company* v. *EPA,* 564 F.2d 1253 (9th Cir. 1977), *Seacoast Anti-Pollution League* v. *Costle,* 572 F.2d 872 (1st Cir. 1978).

The alternative to direct review of NPDES regulations under section 509(b) has been rejected by the Court of

Appeals for the Third Circuit. In *American Iron and Steel Institute* v. *EPA (AISI II)*, 543 F.2d 521 (3rd Cir. 1976), the court held that "net/gross" provisions of NPDES regulations (which currently appear, in amended form, as § 122.16 (f) and (g) of these regulations) are not reviewable in the abstract, but become reviewable either in the context of individual effluent limitations guidelines or NPDES permit issuance. *AISI II* at 528.

EPA agrees with the Court's analysis in *AISI II*. Today's regulations will be reviewable when NPDES permits are issued. A very few, such as net/gross provisions, may also become reviewable when effluent limitations guidelines are promulgated. None are reviewable now in the Courts of Appeals.

There remains a question not addressed by the *AISI II* decision: Is review of these regulations available in District Courts? EPA believes that District Court review is not available now. Two of the reasons cited in *AISI II* for the unavailability of Court of Appeals review similarly militate against District Court review: The absence of a factual context to focus review, and the absence of a concrete record to aid the reviewing court; *AISI II* at 528. Moreover, the absence of immediate effect on the discharger and other parties points persuasively to a conclusion that today's regulations are not ripe for review in either the District Courts or the Courts of Appeals. As the Supreme Court stated in *Toilet Goods Ass'n.* v. *Gardner*, 387 U.S. 158, 165 (1967) the challenged regulations:

> would at most lead only to . . . a determination that can then be promptly challenged through an administrative procedure, which in turn is reviewable by a court. Such review will provide an adequate forum for testing the regulation in a concrete situation. [Footnotes omitted.]

EPA believes, for the same reasons, that the NPDES regulations should be reviewed in the concrete context of permit issuance proceedings. See *Diamond Shamrock Corp.* v. *Costle*, 580 F. 2d 670 (D.C. Cir. 1978).

Issuance Date of the Regulations

EPA further wishes to point out that the NPDES regulations will not be considered issued for the purpose of judicial review (if available at this time) until 1:00 p.m. eastern time, 7 days after publication in the **Federal Register** (June 14, 1979). EPA published notice of this intent to have a delayed issuance date on May 1, 1979, 44 FR 25475. The regulations will not become effective until 60 days from that issuance date (August 13, 1979) except for Part 124 which will be 120 days (October 12, 1979). In addition, due to the length of NPDES regulations and the number of cross-references, EPA will accept nonsubstantitive comments (e.g., typographical errors, incorrect cross-references, missing lines, etc.) during this same 60-day period. This nonsubstantive comment period will not affect the effective date of the NPDES regulations.

Overview of These Regulations

I. Part 121—State Certification of Activities Requiring a Federal License or Permit

A. *What Does This Part Do?* Part 121 contains State certification procedures and requirements applicable to all Federal Licenses and permits other than NPDES.

B. *How Does This Part Relate to Existing Regulations?* The existing State certification regulations predate the Federal Water Pollution Control Act Amendments of 1972 and have never been updated. However, because of the impact of State certification of non-NPDES permits on a myriad of Federal programs, it will be necessary to consult with the affected agencies in some detail before changes are made. State certification of Federal licenses or permits other than NPDES will continue unchanged. This Part merely redesignates the existing regulations, formerly 40 CFR 123, as Part 121. State Certification of NPDES permits is discussed in the overview of Part 124.

C. *How Does This Part Relate to the August 21, 1978 Proposed Regulations?* The August 21, 1978 proposal inadvertently deleted existing State certification regulations. This deletion was noted in a comment from the public. In response to the comment, this Part has been retained.

II. Part 122—National Pollutant Discharge Elimination System

A. *What Does This Part Do?* 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.

B. *How Does This Part Relate To Existing Regulations?* The former regulations contain separate NPDES program requirements for approved States (40 CFR Part 124) and for EPA (40 CFR Part 125). The majority of provisions under former Parts 124 and 125 are duplicative. To eliminate this duplication, the NPDES program requirements applicable to both EPA and approved States have now been consolidated into one set of regulations in Part 122. The process for approval of a State program to administer the NPDES is in a separate Part (see Part 123 below), which cross-references the applicable substantive requirements of Part 122.

Part 122 regulations reflect significant developments which have occurred since the NPDES program began. Furthermore, provisions of the former regulations have been reorganized and rewritten. New regulations have been included where the former regulations do not adequately address the requirements of the Act (i.e., where court decisions have altered aspects of the NPDES program, where EPA guidance for administration of the NPDES program was not previously incorporated into regulations, and where experience in administering the program has highlighted gaps in effective implementation of the Act). Finally, certain revisions have been made to conform the NPDES program to provisions of the 1977 amendments to the Clean Water Act.

C. *How Does This Part Relate to the August 21, 1978 Proposed Regulations?* The following is a discussion of the significant comments received and the basis for revisions made to Part 122 of the proposed regulations. Minor editorial changes have been made in all sections.

§ 122.3 Definitions.

§ 122.3(f) Definition of "best management practices".

Many commenters indicated confusion as to the relationship between best management practices mandated under section 304(e) of the Act and best management practices which might be required under other authorities (e.g., through section 401 State certification; pursuant to section 208(e) for water quality management plan requirements; where effluent limitations are inappropriate or infeasible to control plant source discharges in accordance with *NRDC* v. *Costle* (Runoff Point Sources) 568 F.2d 1369 (D.C. Cir. 1977)). To clarify this point, it should be noted that the definition of best management

practices in paragraph (f), while adapted from section 304(e) language and legislative history, applies to uses of the term "under any or all authorities." Thus, the term has been used to reflect section 304(e) as well as requirements imposed under section 402(a)(1) in accordance with the Runoff Point Sources decision in *NRDC* v. *Costle*.

Several commenters also noted that the legislative history of section 304(e) specifically excludes actual plant process design and related operating decisions from the definition of best management practices. EPA agrees, and has revised the definition to include this limitation authority under section 304(e).

§ 122.3(k) (proposed § 122.3(j)) Definition of "discharge of a pollutant".

Many commenters disagreed with one or more of the types of activities included within the definition of a "discharge of a pollutant" in proposed paragraph (j). In response, the following revisions and clarifications have been incorporated into the final regulations.

First, the regulations have been clarified to indicate that a discharge to a pipe is not, in and of itself, a discharge of pollutants subject to the permit program. A discharge to a pipe must ultimately reach navigable waters in order to fall within the purview of the NPDES requirements.

Second, a number of comments questioned the statutory authority for the requirement in the proposed § 122.3(j) that classified a discharge through a State or municipally owned treatment system as a direct discharge, if that treatment system was not designed and constructed to meet the "applicable requirements of section 301(b) of the Act." These commenters argued that this provision placed an undue burden on industrial users of State/municipal treatment systems and that this method of control was beyond authority granted EPA by the Act.

EPA has changed this requirement in response to these comments, although the Agency believes that the proposed regulations were within its authority. This provision in revised § 122.3(k) now defines as a "discharge of a pollutant" only those discharges into pipes which do not lead to a treatment system, but rather into waters of the United States.

On the other hand, a discharger discharging into a storm sewer or other publicly owned conveyance which does not lead to a publicly owned treatment works, but directly to navigable waters, is clearly subject to the permit requirement. See *United States* v. *Granite State Packing Co.*, 343 F. Supp. 57 (D.N.H. 1972), *aff'd.*, 470 F.2d 303 (1st Cir. 1972). The final regulations continue to reflect this requirement.

Third, the provision in the proposed definition of "discharge of pollutant," which stated that discharges through State or municipal systems handling primarily industrial wastes be considered direct discharges has been deleted in response to comments. Many commenters considered the proposed approach to be unwieldly and inconsistent with the language of the Act regarding publicly owned treatment works (POTWs). This provision was intended to allow a more equitable control of compatible wastes (biochemical oxygen demand (BOD) and suspended solids (SS)) which are discharged into POTWs by industries (incompatible industrial wastes are controlled through the pretreatment regulations, 40 CFR Part 403). At present, POTWs are required by the Act to achieve, at a minimum, the effluent quality attainable through the application of secondary treatment. The secondary treatment information regulation (40 CFR Part 133) controls concentration and percent removal of BOD and SS, pollutant parameters normally associated with domestic wastes. However, many POTWs receive and treat large amounts of industrial waste. The secondary treatment information regulation does not completely address compatible industrial waste; 40 CFR § 133.103(b) only allows an upward adjustment of the concentration limits where the effluent limitation guidelines, which would be applicable to the industry if it were a direct discharger, are *less* stringent than secondary treatment. 40 CFR 133 does not allow for *more* stringent concentration limits where industrial effluent limitations guidelines are more stringent. Nor does the secondary treatment regulation allow for any adjustment of the 85% removal requirement. The proposed provision would have allowed EPA to address these two areas and we continue to believe that it is supportable under the Act. However, we do agree with those commenters who said that such a provision would be very unwieldly and would make permit writing under these circumstances a very difficult task. Therefore, we have deleted this provision and intend to deal with these issues by revising the definition of secondary treatment or alternatively, covering these areas in a revision to the definition of best practicable waste treatment technology.

Further, a number of commenters objected to the provision which included discharges through pipes, sewers or other conveyances owned by third parties other than a State or municipality as direct discharges. These commenters argued that such discharges, at a minimum, should be considered to be discharges through treatment systems. In addition, many commenters questioned the statutory authority and practicability of such a provision.

EPA has revised this provision to indicate that discharges through privately owned treatment systems are direct discharges. Moreover, EPA continues to believe that adequate authority exists for such a provision. This provision reflects EPA's interpretation of the Act in the Decision of the General Counsel No. 43 (Friendwood Development Company). Nevertheless, EPA does not intend for this requirement to result in many permits for a single discharge point. To avoid the administrative problems caused by multiple permits, EPA recommends the issuance of a single permit to all users as well as the control or treatment facility, with all parties listed as permittees and with joint and several liability for obligations under the permit.

Finally, a number of commenters argued that the inclusion of surface runoff channelized into point sources in the proposed definition of "discharge of a pollutant" was overreaching in light of the statutory exclusion of irrigation return flows. Many commenters also argued that the definition was confusing when read in conjunction with proposed § 122.4 (Exclusions), § 122.45 (Separate storm sewers), and § 122.46 (Silvicultural activities). This definition has not been changed. The concerns of the commenters have been addressed through revisions to § 122.4, § 122.45, and § 122.46. For further details see discussion on these sections later in this preamble.

§ 122.3(1) (proposed § 122.3(K)) Definition of "discharge monitoring report".

A number of comments were received on the proposed definition of "discharge monitoring report." Some argued that the definition should allow more flexibility to States in development of a form for reporting of self-monitoring results by permittees. Other commenters argued that EPA standard national forms for Discharge Monitoring Reports should be used both by EPA and by approved States. EPA was persuaded by the latter arguments and has changed the definition to require the use of standard national forms by both EPA and approved NPDES States. This will

facilitate the use of computer systems designed to directly read and analyze the reported information. It will also increase the ability of all program offices within EPA to share such information. EPA will provide the States with preprinted standard forms (States may substitute their name, logo, etc. on these forms) and will also provide necessary computer software.

§ 122.3(t) (Proposed § 122.3(s)) Definition of "navigable waters".

The definition of "navigable waters" has been slightly revised to clarify its intent and scope, but the basic thrust and coverage remain the same as in the proposed rules.

Some commenters suggested that EPA exclude certain types of impoundments of navigable waters from the definition, such as holding ponds, cooling ponds, and closed cycle lagoons. Under some circumstances, it is appropriate to impound navigable streams in order to create a cooling pond or lake. EPA does not mean to prohibit this practice and applicable regulations specifically recognize this use and specify where it is allowable to comply with technology-based regulations. For example, in 40 CFR § 423.11 (m) and (n), the terms "cooling pond" and "cooling lake" are distinguished. A "cooling pond" may under some circumstances be navigable waters, but usually is not. A "cooling lake" is always a navigable water. Yet in either case affluent guidelines explicitly recognize some circumstances in which it is appropriate to use such impoundments for treatment. (Compare 40 CFR § 423.13(1)(3) with 40 CFR § 423.15(1)(2)). These are exceptional cases, however. In general, the Act's requirements must be met at the point of discharge into navigable waters.

Some commenters suggested that waste treatment systems be excluded from the definition of navigable waters. EPA disagrees with this comment where cooling ponds are involved. Such ponds are frequently extremely large in size and some harbor fish populations which invite recreational uses. If such ponds are opened for recreational use, recreational users of the previously non-navigable waters could be exposed to potentially harmful effects where, for example, fish are contaminated and consumed by such users. EPA believes this use should remain subject to control under the Act's regulatory provisions, and that such broad jurisdiction is consistent with the thrust of the Act and its legislative history.

Use by industries in interstate commerce. Some controversy has centered around the question of what waters are defined as "waters of the United States" because of use by industries in interstate commerce for industrial purposes. The Decision of the General Counsel No. 73 concluded that the definition in the previous regulations required actual use by an industrial user downstream from the discharger. Since there were no users downstream from the discharging industry, the stream in question was found not to be waters of the United States. The opinion explicitly stated, however, that it was based upon the regulations, not the Act, and left open the question whether EPA was free to adopt a broader definition tied to the susceptibility of the stream of use by industries in interstate commerce.

These regulations are intended to broaden the definition of waters of the United States in the manner suggested by Decision No. 73. Waters will be considered to be waters of the United States not only if they are actually used, but also if they may be susceptible to use, for industrial purposes by industries in interstate commerce. Thus the regulations now focus, not on the nature of the stream's users, but on the characteristics of the stream itself, and it will no longer be necessary to show actual industrial use for a stream to fall within the definition.

On the other hand, except for cooling ponds which meet the criteria for "waters of the United States" (such as, for example, those which are used for fishing or other recreational purposes by interstate travelers), EPA agrees with a frequently encountered comment that waste treatment lagoons or other waste treatment systems should not be considered waters of the United States. Accordingly, the definition has been revised to exclude such treatment systems.

Moreover, if any portion of a stream is used or susceptible to use by industries in commerce, the entire stream is waters of the United States. As an example, assume that three industries in interstate commerce (A, B and C), lie along a stream which flows into a small lake contained entirely on the property of Industry C, and from which there is no outflow. Industries A and B are upstream of Industry C. All three use the stream for industrial purposes and discharge effluent into the stream. The stream is waters of the United States because it is used by industries in interstate commerce. All three industries require NPDES permits, including Industry C, even though there is no user downstream from Industry C. The question of actual or potential use downstream from the discharger (Industry C) is not relevant to the determination, since the character of the stream as a whole is clearly such as to be susceptible to use by an industry in interstate commerce.

§§ 122.3 (u) and (v) (proposed § 122.3(t)) Definition of "new sources and new dischargers".

Some commenters objected to the definition of new source in the proposed regulations, particularly the 120-day limit in paragraph (t)(1)(ii) for the promulgation of proposed standards. These commenters pointed out that the 120-day limit for promulgation of standards was not part of the statutory definition of new sources in section 306 of the Act and so went beyond proper EPA authority. EPA believes that the definition of new source in section 306 of the Act must be read in the context of section 306 in its entirety. Section 306(b)(1)(B) contemplates the promulgation of new source performance standards within 120 days of proposal. See Decision of the General Counsel No. 71. Read together with the definition in section 306(a)(2), this section supports the language of both the proposed and final regulation. Further, there is also an overriding policy in support of the 120-day limitation; since construction of a source to meet new source performance standards can only proceed in a meaningful way if final standards are available, any inequities which may result from EPA failure to promulgate standards within 120 days of proposal are resolved by the language of section 306(d). A source which falls outside the new source definition but is a new discharger and commences construction after October 18, 1972, may gain the benefit of the new source protection period by satisfying the requirements of section 306(d). See preamble discussion of § 122.47(d).

A number of commenters objected to the use of the definition of "new discharger" in proposed § 122.3(t)(2) (now § 122.3(v)). They argued the definition would automatically require a new permit when a discharger ceased operation during the term of the permit. They also suggested the definition could be read to impose new source performance standards on a discharger which recommences operation after terminating a discharge. EPA has revised the definition of "new discharger" in response to these comments. The term now applies only to a genuinely new source of discharge but which is not a "new source" as defined in section 306 of the Act because applicable performance standards have not been issued. The final regulations

continue to require that new dischargers meet applicable standards and limitations upon commencement of discharge, and identify most of these sources as eligible under section 306(d) of the Act and § 122.47(d) for the ten year protection from more stringent standards of performance.

EPA does not intend to require a new permit automatically when a discharge ceases. Many permits cover facilities which in the normal course of their operations cease and recommence discharge. Their permits do not lapse when they cease discharging. However, the proposed rules were intended to require a source which shuts down (including those which do so in order to escape a statutory deadline or other requirement) to meet all applicable standards and limitations upon recommencement of discharge. This requirement is now contained in § 122.17(c)(3).

Definitions of Application, Discharge Monitoring Report, New Source/ Environmental Questionnaire and Permit. Proposed § 122.3 referenced Appendices A, B, C and D which were to contain copies of the application form, permit format, new source/ environmental questionnaire and discharge monitoring reports, respectively. These Appendices have been deleted from the final regulations pending completion of these forms. They will be published at a later date.

A new Appendix A has been added which is a redesignation and redivision of the industrial categories appendix contained in former regulations promulgated on May 23, 1978 and December 11, 1978 (see Table I of this preamble). The Appendix has been revised to conform to the modified settlement agreement approved by the District Court and issued on March 9, 1979, in *NRDC* v. *Costle* (which modifies the *NRDC* v. *Train* 8 ERC 2120 (D.D.C. 1976), settlement agreement of June 8, 1976). Additional time after the issuance date for effluent limitations guidelines under the consent decree has been added to allow for processing of permits. This Appendix will be updated from time to time if further modifications are made.

New Definitions. In response to comments requesting definitions for additional terms, EPA has included several new definitions in the final regulations.

A definition of "publicly owned treatment works" ("POTWs") (§ 122.3(bb)) has been added which is consistent with the definition of POTW found in other EPA regulations, e.g., 40 CFR § 403.3(m).

A definition of "Direct discharge" (§ 122.3(h)) has been added which states that this term means the discharge of pollutants.

The term "Director" (§ 122.3(i)) has been changed to include both the Regional Administrator and the State Director, as appropriate. Generally, the use of the term Director means that the regulation is applicable to both EPA and approved States. The terms "Regional Administrator" (§ 122.3(cc)), "Enforcement Division Director" (§ 122.3(n)) and "State Director" (§ 122.3(ii)) are now used only where the regulation addresses an action that is unique to one of those people. This change in the use of the term "Director" necessitated the addition of a new term, "State Director" which is the same definition as was found for "Director" in proposed § 122.3(h).

A definition of "process waste water" (§ 122.3(aa)) has been added which restates the definition found in 40 CFR § 401.11(q).

§ *122.4 Exclusions.*

Some commenters thought proposed § 122.4(a)(1) over-stepped EPA's statutory authority to control vessels when "operating in a capacity other than a vessel." Commenters felt that the language in section 502(12)(B) of the Act which defines "discharge of a pollutant" as "any addition of any pollutant to the *waters of the contiguous zone or the* ocean from any point source *other than a vessel or other floating craft,"* (emphasis added) precluded regulating mining vessels as point sources. The Act does not define "vessels or other floating craft", but it appears that those terms refer to transportation vessels. The legislative history of the Federal Water Pollution Control Act Amendments of 1972 (FWPCA) and the Marine Protection Research and Sanctuaries Act (MPRSA) of the same year, indicated that all ocean discharges within the jurisdiction of the United States were to be regulated by EPA under one Act or the other. As the Senate Public Works Committee noted on the FWPCA:

> Coupled with the provisions in the bill reported by the Committee on Public Works, the bill to be reported from the Commerce Committee [i.e., the MPRSA] should enable the United States to have complete and integrated regulation of the disposal of pollutants *into all waters and over all sources of pollutants subject to its jurisdiction (emphasis added).* See A *Legislative History of the Water Pollution Control Act Amendments of 1972, Senate Committee on Public Works,* 93d Cong., 1st sess. (1973) at 1492 (hereafter FWPCA Legis. Hist.).

Hence, if the commenters are right, the MPRSA or Ocean Dumping Act would require permits for temporarily *fixed drilling vessels, ocean mining* dredge ships or processing vessels.

We believe the greater weight of authority points to the fact that similar structures should be treated similarly, i.e., an oil platform at sea and an oil platform that is temporarily anchored to the bottom of the sea should have to meet the same requirements under the same Act. Similarly a deepsea mining processing ship should have the same requirements as an onshore processing plant discharging into the ocean. It appears the exception in section 502(12)(B) was intended solely to exclude redundant authority over ocean dumping under NPDES and the Ocean Dumping Act.

The Clean Water Act clearly is better designed to regulate routine industrial discharges. The industry-by-industry approach required for effluent limitation guidelines under the Act is more attuned to handling discharges from these two industries than the Ocean Dumping Act since the Ocean Dumping Act requires extensive studies aimed at finding alternatives to ocean discharges.

Regular sewage discharges from vessels are still regulated by the Coast Guard under section 312 of the Act. Paragraph 122.4(a)(1) is aimed at industrial processes that occur at sea.

Many commenters objected to the comment after § 122.4(a)(2) in the proposed regulations regarding the relationship of section 402 and 404 permits, which incorporated the "primary purpose" test presently stated in Corps of Engineers regulations for section 404 permits, 33 CFR § 323.2(m). These commenters objected to the vagueness of the comment and to the implication that both a section 402 and a section 404 permit could be required for the same activity. This comment has been deleted because the Agency is currently reviewing its position on the overlap between section 402 and 404 permits. Part of this Agency review involves a draft policy document concerning the applicability of the NPDES program to the disposal of solid waste in waters of the United States. Since Agency policy was not resolved at the time of publication of these final regulations, no resolution or further clarification is now appropriate.

Many commenters objected to the restriction contained in § 122.4(a)(3) of the proposed regulations that limited that exclusion to indirect dischargers as defined in § 122.3(o) of the proposed regulations. Although § 122.4(a)(3) has been retained without change, these

comments have been reviewed in conjunction with comments submitted on proposed § 122.3(j) (definition of "discharge of pollutant"). For further details, see preamble discussion on proposed § 122.3(j).

Many commenters objected to the comment after § 122.4(a)(4), pertaining to the exclusion of irrigation return flows, as being beyond EPA authority. Comments under this section were considered in conjunction with those received under proposed § 122.3(j) (discharge of pollutant), § 122.45 (separate storm sewers), and § 122.46 (silvicultural activities). The comment has been deleted and changes have been made in § 122.46 which address many of the concerns raised by commenters.

§ *122.5 Signatories.*

Many commenters objected to the proposed revision of § 122.5, which required that all permit program forms be signed by a principal executive officer of a level of at least vice president for a corporation, or by an equivalent level official for partnerships or for public facilities. This section has been changed to require that only permit applications must be signed by a principal executive officer or equivalent official. Other permit program forms may be signed by a duly authorized representative of the appropriate official so long as the authorized representative is responsible for the overall operation of the discharging facility, and the authorization is made in writing. Further, the signatory may rely on the representations of the person immediately responsible for obtaining the information in the document when certifying to its accuracy, etc. This change will ease the paperwork burden upon the regulated community, while at the same time providing an equal degree of legal accountability on the part of the principal executive officer or equivalent level official. By authorizing a representative to sign other permit program forms, the responsible official does not lose legal accountability for the accuracy of the information that is submitted.

§ *122.10 Application for a permit.*

A number of commenters were concerned about the intent of proposed § 122.10(b) regarding enforcement against persons currently discharging without a permit who have applied for, but have not yet received, an NPDES permit. In response, EPA has deleted this section. However, EPA wishes to clarify its enforcement policy with regard to existing dischargers who have submitted timely and sufficient applications for an initial NPDES permit, and have otherwise proceeded in good faith, but have not yet received a permit through no fault of their own. In those cases, these dischargers will not be subject to enforcement action by EPA for discharging without a permit.

EPA has also placed the requirements of proposed § 124.11(b) and (c) into § 122.10 so that all the requirements relating to permit application will be contained in one section.

Many commenters objected to the requirement in proposed § 124.11(b)(3) and (c) for submitting applications 180 days before the present permit expired (180 days before the discharge) when there is no concomitant requirement on the issuing authority to issue a permit in a resonable time. Because of the significant resource restraints on States and EPA, it may not be possible to issue permits to all applicants, especially minor dischargers, in a set time period. Although the statute requires a permit for a lawful discharge of pollutants, the fact a discharger is without a permit due to the lack of action by the issuing authority will weigh heavily against the instituting of enforcement actions.

§ *122.12 Duration and transferability.*

Some commenters suggested that the five year limit for permit terms be extended to ten years for new sources. While new sources and certain new dischargers may qualify for a "protection period" from any more stringent standards of performance under section 306(d) of the Act, the five year permit term is an express statutory requirement and cannot be altered through these regulations. However, permits may be continued under the Administrative Procedure Act (APA) where the applicant has submitted a timely application for renewal and EPA has been unable to process the application. See § 122.12(b).

Several comments were also received on proposed § 122.12(c) (now § 122.12(d)), which established requirements for transfer of permits. Many of these comments objected to the required approval by the permitting authority prior to transfer, arguing (1) restraint of trade and (2) increase of paperwork. EPA does not agree with the first argument but does agree with the second. Accordingly, paragraph (d) has been revised to make transfer approval automatic within 30 days unless action is taken by the Director. The Director's option to require a new application for permit reissuance or modification, as well as the requirement for a written agreement between the transferor and transferee specifying transfer of liability has been retained.

A new section, § 122.12(c) has been added which substantially incorporates the requirements of former § 124.46 (Compliance with 1984 Treatment Deadlines for Discharges of Toxic Pollutants 43 FR 58066). Some of the requirements originally in former § 124.46, (e.g., the permit must incorporate "[a]ny other terms and conditions necessary to carry out the provisions of the Act") have not been repeated in new § 124.12(c) because they are elsewhere in Part 122.

EPA has moved proposed § 122.33 to § 122.12(b) because "extension of expiring permits" is more logically dealt with in this section on permit duration. In porposed § 122.33, EPA indicated that expiring permits could be "extended" under 5 U.S.C. section 558(c) (section 9(c) of the APA. For clarity EPA has substituted the terms "continuation" or "continued" for "extension" or "extended," since the APA does not use the terms "extension" or extended."

Proposed § 122.33(a)—Many commenters objected to the restrictions in proposed § 122.33(a) for automatic continuations, arguing that the only restriction provided by the APA for automatic continuation is "timely and sufficient application for a renewal." Some commenters suggested deletion of the requirement that the delay in permit issuance not be caused by actions of the permittee (proposed § 122.33(a)(2)). Other commenters suggested revising the requirement to provide that requests for evidentiary hearings do not constitute a delay caused by the permittee.

In response to these comments, EPA has deleted proposed § 122.33(a)(2) from the final regulations, but believes that delays caused by the permittee may in some cases render a permit application "untimely." Proposed § 122.33(a)(3) (now § 122.12(b)(1)(ii)) restricts permit continuation to instances where the Regional Administrator is unable to issue a new permit before the expiration date of the old permit. This provision has been retained but it is intended only to implement the requirement of section 558(c) that there be no final Agency determination on an application, and not to restrict the applicability of section 558(c).

§ *122.33(c)*—Proposed § 122.33(c)(2) (now § 122.12(b)(3)) indicated that a permit continuation could be denied by the Enforcement Division Director when the permittee was not in compliance with the expiring permit. Many commenters contended that such a denial is not authorized by the APA.

EPA agrees and has redrafted § 122.12(b)(3)(iii) accordingly. However, if the Regional Administrator makes a final determination to deny an application for permit reissuance, section 558(c) is by its terms no longer applicable, and the discharger is subject to enforcement action for discharging without a permit.

Several commenters questioned the applicability of this section to permits issues by EPA in NPDES States before the State program was approved. In response to this question, § 122.12(b)(4) clarifies that although § 122.12(b) does not apply where EPA originally issued the permit but an NPDES State is now the permit issuing authority, States may continue the State-issued permit if so authorized under State law.

§ *122.13 Prohibitions.*

§ *122.13(b)*—Several commenters expressed concern over the role of State certification in the permit issuance process. This issue is addressed more directly in the preamble discussion of Part 124, Subpart C.

§ *122.13(c)*—See the preamble discussion to § 123.23 for a discussion of EPA's authority to object to the issuance of State-issued permits under section 402(d) of the Act.

§ *122.13(i)*—In response to a number of comments, § 122.13(i) has been modified. This section has been changed to clarify that only a new source or a new discharger into a water quality segment (as defined in 40 CFR § 130.20(o)(1)) must demonstrate that there are sufficient pollutant load allocations to allow the discharge and that the facility is entitled to these allocations. The proposal applied to all new sources or new dischargers, including those to an effluent limitation segment (as defined in 40 CFR § 130.20(a)(2)). However, upon review of the comments, the Agency determined that the requirement was appropriate only in water quality segments.

§ *122.14 Conditions applicable to all permits.*

§ *122.14(a)*—This section in the proposed regulations (the permit as a limited authorization to discharge) received the greatest number of comments. Many of these comments pointed out the difficulty of analyzing the effect of paragraph (a) without the benefit of reviewing the application form to which it is tied. The Agency agrees with these comments. As a result, the substantive requirements of paragraph (a) are reserved in these final regulations and will be reproposed, together with publication of a draft application form, in the summer of 1979. In conjunction with the application form revision, the Agency is also examining the overall permit scheme, including use of the application data, monitoring requirements, enforcement, the relationship of the application to section 311 and other such considerations.

Although paragraph (a) is withdrawn and reserved for reproposal, a comment has been inserted in its place to reemphasize the Agency's commitment to moving towards the national goal of the elimination of the discharge of pollutants as stated by section 101(a)(1) of the Act. It is no longer acceptable for a discharger to disclaim responsibility for being aware of the impact of its discharges upon human health and upon the environment. The Agency, therefore, expects each applicant to discharge pollutants only in accordance with its application and permit.

Many comments on this paragraph discussed the difficulty of its implementation. In its ongoing development of a new application form, the Agency is addressing many of the major concerns expressed, and commenters will have an opportunity to raise these issues when the Agency proposes its revised approach this summer.

§ *122.14(b)*—The language of § 122.14(b) has been shortened to eliminate superfluous language. The substance remains unchanged.

§ *122.14(d)*—Several commenters argued that permits should only be modified to incorporate section 307(a) standards or prohibitions where the pollutant has been found to be injurious to health. However, the Agency is not empowered to ignore the criteria of section 307(a), which include toxicity, persistence, degradability, and the effect on organisms in waters. When a standard is promulgated under section 307(a) to establish these criteria, it should be incorporated into the permit. However, where a standard under section 307(a) controls a pollutant identified as injurious to health, it is effective and enforceable *whether or not* incorporated into permits and must be complied with by the time set forth in the promulgated standard.

Many commenters were concerned that modification proceedings to conform the permit to a toxic effluent standard or prohibition might also open other permit conditions to modification. Such a result is contrary to this paragraph's express language. Other terms and conditions may be modified only in accordance with § 122.31.

The comment to § 122.14(d) has been expanded to indicate that when the new NPDES application form becomes available, this paragraph will be reproposed to require submission of a new application or partial application as part of the modification proceedings of this paragraph.

§ *122.14(e)*—Many commenters objected to the requirement that permittees notify the Director of process changes or other modifications which do not result in permit violations. In response, this paragraph has been revised to require only notification of activities which would constitute cause for permit modification or revocation and reissuance. This requirement, as revised, is necessary because process or other changes may result in significant discharges of pollutants which are not limited by the permit. Upon receipt of notification under this paragraph, the Director can require further information on a new application which may either justify permit modification or indicate that no modification is necessary.

Several other commenters expressed concern that this paragraph would require daily notifications as a result of variability in their discharges. As noted in the above discussion, this paragraph has been revised and should, therefore, minimize any potential problems presented by waste stream variability.

§ *122.14(f)*—In response to comments, § 122.14(f) has been revised. As revised, EPA believes this provision is consistent with the Supreme Court's decision in *Marshall* v. *Barlow's Inc.*, 436 U.S. 307, (1978).

§ *122.14(g)*—Several commenters expressed doubts whether EPA is legally authorized to require proper operation and maintenance of facilities and systems, including requirements such as effective management of treatment facilities and adequate staffing and training. Such requirements are clearly authorized by section 402(a)(2) of the Act, which requires the Administrator to prescribe conditions in permits which will assure compliance with the requirements of section 402(a)(1).

§ *122.14(h)*—A number of commenters questioned the need to report "minor" noncompliance under § 122.14(h) within 24 hours of becoming aware of the noncompliance. They felt that the Discharge Monitoring Reports (DMR) under § 122.22 provide a sufficiently prompt method of notification. EPA agrees that in instances of "minor" noncompliance the DMR does provide a sufficiently prompt method of notification and has revised § 122.14(h)(2)(iii) to reflect this. In response to comments, we have also revised § 122.14(h)(2)(i) to require 24 hour reporting only for violations of

discharges containing the toxic pollutants limited by toxic pollutant effluent standards under section 307(a) (e.g., Aldrin/dieldrin, Endrin, Toxaphene, Benzidene, Polychlorinated Biphenyls and DDT/DDD and DDE). In addition a new § 122.14(h)(2)(ii) has been added which gives the Director the discretion to require 24-hour and/or five-day reporting in a permit for other noncomplying discharges which may pose health problems (e.g., section 311 substances). The purpose of such prompt reporting is to enable the permitting authority to use the information to make a case-specific determination of the severity of the violation, its possible environmental effects and mitigation possibilities.

The majority of the commenters were concerned with the difficulty in providing the required noncompliance information within 24 hours. Several commenters stated that the determination of corrective measures may in some cases take longer than 24 hours to develop. As stated earlier, this 24-hour requirement is now mandatory for only certain instances of noncompliance. While EPA expects these dischargers to formulate a plan of action for correcting the situation within 24 hours of a violation, such plan may indicate various options for corrective action. It is necessary, however, that the best possible information, including notice of the noncompliance, be provided to the permitting authority within 24 hours of the time that the permittee was aware of the noncompliance so as to enable any action necessary to prevent a crisis, such as contamination of a downstream drinking supply.

Many commenters requested that the term "becoming aware" be more precisely defined. This language has not been changed because it was intended to cover "awareness" based on any or all sources of information such as analysis, measurement or observation.

Some commenters felt that the five-day requirement for submission for written information might not be long enough if a corporate vice president must sign a letter, under the requirements of § 122.5. This situation has been addressed in changes to § 122.5, which now allows for the delegation of such responsibilities and through changes to § 122.14(h)(iii) discussed earlier.

§ *122.14(i)*—The language of § 122.14(i) has been shortened to eliminate superfluous language but the substance remains unchanged.

Proposed § *122.14(j)*—The substance of this section has been moved to Part 125, Subpart A. The requirement that permits to POTWs include sewage sludge disposal conditions under section 405 has been moved to § 122.15(h). Many commenters objected to the prohibition against discharge of solids, sludges, filter backwash or pollutants removed in the course of treatment or control of wastewaters. However, to allow discharge of substances which have been removed by treatment systems would result in circumvention of the Act's requirements for limiting discharge of those substances which can be removed by the treatment.

§ *122.14(j)*—Some commenters argued that halting or reducing production as required in proposed § 122.14(k) (now § 122.14(j)) may cause greater environmental harm than continuation of production. The Agency believes that the pollution problems which may occur as a result of shutdown and startup will generally be less severe than those characteristic of situations of continual noncompliance. Rather than require the Director to decide immediately in each case whether the environmental harm caused by shutdown or reduction might be greater than that caused by continual noncompliance, the requirements of this subsection have been retained. It should also be noted that paragraph (j) is not as harsh as some commenters have indicated, since it is modified somewhat by the upset and bypass provisions.

§ *122.14(k)*—In response to comments, the bypass provision (proposed § 122.14(l)) has been redrafted for clarity. Many commenters stated that the bypass notification requirements were impractical and internally inconsistent. The provision has been modified to require permittees to submit notice within 24 hours of becoming aware of the bypass in those circumstances where the necessity for a bypass cannot be anticipated. Where the need for a bypass is known in advance, the permittee must now submit a request for approval at least 10 days before the anticipated event.

Several commenters stated that it was inappropriate for the Agency to limit bypasses to situations where there is a risk of "serious" injury. This provision has been modified to apply where there is a risk of "personal" injury.

Commenters objected to the statement that treatment facilities should generally be constructed with redundant or backup equipment. This comment was merely intended to note that proper engineering practices often involve the use of redundant or backup systems for equipment such as pumps or power supplies. Such practice can eliminate any noncompliance during periods of equipment malfunction or maintenance. This comment has been modified to clarify that the pemitting authority will take into account whether the bypass involved regular preventive maintenance for which backup equipment should have been available.

Several commenters stated that bypasses should be authorized during periods of preventive or corrective maintenance. However, in most cases waste treatment facilities should be designed with redundant equipment and with sufficient storage capacity such that bypassing is not necessary during periods of maintenance. The bypass provision is intended to provide relief from permit limitations during unusual circumstances; it is not intended to allow limitations to be routinely exceeded.

Some commenters objected to the requirement that the public be afforded an opportunity to comment on requests for bypasses. However, the Agency believes that the critical review offered by the public is a useful element of the system.

Many commenters argued that economic loss caused by delays in production should be included in the definition of severe property damage. After serious consideration, the Agency has rejected this position. Except in limited cases, the Clean Water Act does not authorize noncompliance with effluent limitations because of the cost to an individual facility. Where effluent limitations, which include consideration of the cost of operation of waste treatment facilities, have been properly established, a source must either comply or close. Nonetheless, this section provides for the authorization of intentional bypass where failure to bypass would result in severe property damage. In most cases this damage would be to the treatment facility itself; thus, failure to allow bypass would jeopardize future adequate treatment. In the oil and gas production industry, severe property damage includes permanent loss of oil which might result if a well were to be shut in. For electric generating facilities, curtailing production might risk substantial property loss to users of the electricity. In all of these cases consideration beyond the economic loss to the permittee warrant a bypass.

Further, although permittees may be required to limit production rather than exceed limitations, this risk can be minimized by the prudent use of back-up equipment and the capacity to store untreated wastes during periods of maintenance. The Agency will consider

the reasons for noncompliance in exercising its discretion to enforce.

§ *122.14(l)*—In response to comments, the upset provision (proposed § 122.14(m)) has been redrafted for clarity. Many commenters also noted that proposed subparagraph (m)(2) provided only that an upset "may" constitute an affirmative defense. However, it is the Agency's intention that a defense of upset is available if the applicable conditions are satisfied. The provision has been amended to reflect this.

The comment following this section relating to judicial review of Agency determinations was confusing to several commenters. In response to these concerns, the comment has been revised to indicate that the initial Agency *determination on a claim* of upset constitutes an exercise of prosecutorial discretion, not final Agency action subject to judicial review. Since upset is an affirmative defense, the permittee's opportunity for review of a claim of upset will be in the context of any enforcement action for noncompliance.

Many commenters stated that an upset should not be treated as a permit violation in the first place and that it was improper to require permittees to prove an upset as an affirmative defense in a court action. Commenters relied on *Marathon Oil Co.* v. *EPA*, 564 F.2d 1253 (9th Cir. 1977) in support of this position.

The Agency believes that this upset provision is fully consistent with all legal opinions dealing with this issue. Most Courts have concluded that no upset provisions need be provided. In *Weyerhouser Co.* v. *Costle*, 590 F.2d 1011, 1056–58 (D.D. Cir. 1978) and *Corn Refiners Ass'n* v. *Costle*, (No. 78–1069, 8th Cir. April 2, 1979) the District of Columbia and the Eighth Circuits recently held that EPA's exercise of its enforcement discretion would adequately deal with any possible problem. *See also United States Steel* v. *Train*, 556 F.2d 822, 842, n.3 (7th Cir. 1977); *American Petroleum Institute* v. *EPA*, 540 F. 2d 1023, 1035–36 (10th Cir. 1976). Although the Agency will continue to exercise its enforcement discretion, EPA believes that all parties will benefit from allowing permittees an opportunity to present their claims in a formal judicial proceeding. This provision also meets the requirements set out in those decisions which required some form of upset relief. See *Marathon Oil Co.* v. *EPA, supra; FMC Corp.* v. *Train*, 539 F.2d 973, 986 (4th Cir. 1976). In *Marathon*, the Court of Appeals for the Ninth Circuit clearly indicated that the burden of proof and the obligation to provide relevant evidence establishing that the noncompliance could not have been prevented could be placed on the permittee. The requirement that an upset be established as an affirmative defense is an efficient and effective method of implementing this obligation. The only alternative approach would be to require an administrative determination with respect to upsets. However, Congress has indicated, *in reference to section* 309(a)(5)(B) of the Act, that enforcement actions should not be bogged down in administrative determinations or showing of fault. See *A Legislative History of the Clean Water Act of 1977*, Senate Committee on Environment and Public Works, 95th Cong., 2d sess. (1978) at 464–65 (hereafter *CWA Legis. Hist.*). Although the upset provision does authorize permittees a limited opportunity to make such showings, it is properly placed in the context of judicial determinations in an enforcement action.

Commenters have not been able to identify significant impacts from this approach. The Act contains no provision for administrative penalties, and sanctions can only be imposed after a judicial determination of a violation. Further, noncompliance reporting requirements exist independently of whether the noncompliance was caused by an upset. One commenter did note that under § 122.31, a permit may be withdrawn by administrative action for previous violations. It is agreed that an opportunity to prove upset must be afforded in such cases.

While the Agency will, of course, consider the possibility of upset where relevant, it must be stressed that upsets are exceptional events which should occur infrequently. The upset provision should not be construed as providing relief where there is a pattern of permit violation.

In response to comments, § 122.14(l)(1) has been revised to indicate that noncompliance due to operational error or lack of preventive maintenance does *not constitute an upset.* EPA believes these revisions clarify the situations listed in the original proposal.

Commenters objected to the requirement that a specific cause be identified in establishing an upset. They claimed that even properly run facilities may have upsets for which no particular cause can be found. However, requiring permittees to identify the cause of noncompliance is an essential aspect of placing the burden of proof on the permittee to show that an upset was beyond its control. If upsets could be proved merely by asserting that a facility was being properly run at the time of noncompliance, *the burden of* proof would be reversed and the prosecution would be required to establish the cause of the upset to rebut this showing. Such an approach would make enforcement extraordinarily difficult. Congress intended that prosecution for permit violation be swift and simple, and this provision implements that objective while allowing permittees to demonstrate that noncompliance could not be avoided. Further, the requirement that a cause be identified will encourage permittees to examine the operation of their treatment system and will help ensure that noncompliance is not repeated. Finally, where a cause of noncompliance cannot be identified, the Agency may still exercise prosecutorial discretion not to enforce in situations where it is not warranted.

Some commenters asserted that the upset provision would undercut the States' authority to impose stricter effluent limitations. In response to this concern, EPA has revised this section to make clear what was originally intended—the upset provision applies only to violations of technology-based effluent limitations established pursuant to sections 304 and 306 of the Act. This change is consistent with the *Marathon* decision, and necessary to achieve the goals of the Act. Violations of stricter State standards or water quality based effluent limitations are not subject to a defense of upset.

§ *122.15 Applicable limitations, standards, prohibitions and conditions.*

§ *122.15(f)*—Paragraph (f) listed *situations where limitations more* stringent than those required by sections 301(b)(1)(A), 301(b)(1)(B), 301(b)(2)(B), and 306 of the Act would be required. Some commenters suggested an additional situation, where necessary to conform to applicable water quality requirements under section 402(a)(2) of the Act, when the discharge affects a State other than the certifying State. EPA agrees and has added § 122.15(f)(4) to cover this situation.

Some commenters were concerned that paragraph (f)(8), which indicated that additional or more stringent permit limits could be established based on "fundamentally different factors," might be misinterpreted to mean that fundamentally different factors variances could only result in additional or more stringent limits. To address their concerns, EPA has added a comment indicating that less stringent permit limits may also be requested based on fundamentally different factors. Further details as to fundamentally different

factors variances are found in Part 125, Subpart D, and related preamble discussion.

Paragraph (f)(9), which provides for incorporation of additional requirements, conditions or limitations into a new source permit based on the National Environmental Policy Act or section 511 of the Clean Water Act, provides the basis for the incorporation into NPDES permits of conditions related to an Environmental Impact Statement (EIS). Some commenters suggested nonwater related EIS condition cannot be placed in permits. However, EPA believes that EIS-related conditions may be imposed in NPDES permits in order to minimize any adverse impacts on the environment identified in the EIS, regardless of their relation to water pollution or water quality problems. (See September 23, 1976, Memorandum of the General Counsel, entitled *EIS Regulations for NPDES Permits* and former 40 CFR § 6.918). To do otherwise would negate the purpose and intent behind the requirement that an environmental impact statement be prepared.

Commenters also argued that the Act does not authorize the case-by-case establishment of technology-based permit limitations as contemplated by paragraph (f)(10). This argument is unpersuasive in light of section 402(a)(1) of the Act, which authorizes the establishment of "necessary" conditions in the absence of effluent limitations guidelines. Moreover, this argument has been rejected in the courts and by long-standing EPA policy (see preamble discussion to Part 125, Subpart A). Thus, this section has not been changed.

A new paragraph § 122.15(f)(11) has been added to assure consistency with the pretreatment regulations (40 CFR Part 403) which may, in some cases, require more stringent limitations.

§ *122.15(g)*—A number of commenters questioned the relationship between "best management practices," under proposed § 122.3(f) and § 122.15(g); and "operating practices" under proposed § 122.15(i). Since best management practices include operating practices, the two sections have been combined.

Thus, paragraph (g), has been revised to clarify that "best management practices" (BMPs) may be required in permits where numeric effluent limitations are infeasible, or where reasonably necessary to achieve effluent limitations and standards. These BMPs are similar to those authorized pursuant to section 304(e) of the Act (which is covered in detail in Part 125, Subpart K); however, they are authorized by section 402 and EPA's authority has been so recognized in *NRDC* v. *Costle*, (Runoff Point Sources). In addition, a comment has been added which provides examples of BMPs which could be required under paragraph (g). See also preamble discussion under proposed § 122.3.

§ *122.15(i)*—Proposed paragraph (j) (now paragraph (i)) which prohibited "backsliding" in permit levels of control with limited exceptions, has been retained. The concerns of some commenters about the effect of paragraph (j), where permits are based on interim final effluent guidelines which are more stringent than final effluent guidelines, have been addressed in § 122.31. Paragraph (j) is superseded in these cases by § 122.31(e)(4), which allows limitations based on more stringent interim final limitations to be modified based on less stringent final guidelines if a modification request is made in a timely manner. In addition, § 122.15(i)(3) now indicates that there is a third instance where "backsliding" will be allowed, i.e., for conventional pollutants. Congress directed EPA to shift its pollution control technology to toxics. (See *CWA Legis. Hist.*, Statement of Managers, at 269). The 1977 amendments to the Act (sections 301(b)(2)(E) and 304(b)(4)) set out a completely new test for conventional pollutants. The new requirement, known as best conventional technology (BCT), is based on a comparison to the cost of secondary treatment and a cost/benefit test. The test sets best practicable technology (BPT) effluent guidelines as a floor and best available technology (BAT) as a ceiling. In a small number of cases, where no promulgated guidelines were in effect at the time of initial permit issuance, (i.e., where a section 402(a)(1) limit is very stringent) the test may result in effluent limits for BCT less stringent than limitations in the original permit for BPT. In these cases, EPA believes that, consistent with Congressional intent, backsliding to BCT should be allowed.

§ 122.16 Calculation and specifications effluent limitations and standards.

§ *122.16(a)*—A number of commenters suggested that "actual production," as used in proposed § 122.16(a) as the basis for calculating permit limitations, standards or prohibitions, should be defined or clarified.

In response to these suggestions, a comment to § 122.16(a) has been added, which explains that permit limitations will be calculated based upon a reasonable measure of production, taking into account historical data in the case of existing facilities, or market data for new or significantly modified facilities or processes. In the case of new or modified facilities or processes, permit limitations are subject to subsequent modification once a pattern of production figures become available.

Other commenters questioned whether proposed § 122.16(a) was intended to apply to POTWs, and if so, how? In response to these comments, EPA has added a new § 122.16(a)(3) which states that POTW permit limitations are to based on design flow. Basing POTW permit limitations on design flow will allow growth, while at the same time maintain the proper level of treatment due to the 85% removal requirement in 40 CFR Part 133. Since the percentage removal requirement is not applicable to industries, their limits must be based on actual production.

In response to a specific invitation for comments in the August 21, 1978, preamble discussion on proposed § 122.16 some commenters favored the use of an alternative effluent limitation approach for calculating permit limits. The approach described in that preamble was: (1) Determine a total technology-based effluent limitation for the entire plant and (2) relocate this total discharge among the outfalls, as long as the plant continues to meet the overall technology-based requirement. EPA is still evaluating this proposal. Should it prove appropriate within the constraints of the Act, EPA may adopt this alternative approach in future rulemaking. This portion of § 122.16(a) is promulgated as proposed.

§ *122.16(c)*—A number of commenters suggested that certain terms in § 122.16(c) (Proposed § 122.16(b)) such as "maximum daily discharge", "average monthly discharge" and "average seven consecutive day discharge" be defined. These definitions have been added to § 122.16(c) and for clarity the term "average seven consecutive day discharge" has been replaced by "average weekly discharge".

Several commenters questioned the distinction between the terms used in § 122.16(c) for the calculation of permit limitations of POTWs and discharges other than POTWs. The distinction between these two general types of discharges is based upon existing requirements in effluent guidelines and its secondary treatment information (40 CFR Part 133). In order to maintain consistency with effluent guideline and secondary treatment requirements, § 122.16(c) has not been changed, except as discussed earlier.

A number of commenters urged that the permitting authority should have the

discretion to require either mass- or concentration-based limitations, depending on the nature of the process and the receiving waters. This approach has not been adopted, except as provided in § 122.16(d), because the Agency continues to believe that most permit limitations standards and prohibitions must be expressed quantitatively in terms of mass in order to preclude the use of dilution as a substitute for treatment. Paragraph (d) of § 122.16 allows the use of concentration limits under circumstances in which administrative or technical problems make the use of mass limits impracticable or inconsistent with other requirements such as promulgated effluent guidelines or pretreatment standards. (EPA has decided to state pretreatment standards in terms of concentration and wherever possible to provide an equivalent mass per unit of production, see preamble discussion to 40 CFR Part 403, June 26, 1978, 43 FR 27743–27744).

§ *122.16 (f) and (g)*—Paragraph 122.16(g) (proposed § 122.16(f)) provides for issuance of permits based on net terms rather than gross terms. Dischargers may receive a credit, under specific conditions, for pollutants present in their intake waters. Numerous commenters objected to the conditions under which a credit would be granted and suggested that the various conditions be deleted. EPA has not deleted any of the conditions necessary for achieving a credit allowance and, therefore, receiving a permit calculated on a net basis. EPA considers these conditions as reasonable and consistent with court decisions and also believes they are necessary for achieving the goals of the Act.

The limitations upon the net/gross provision in these final regulations grow out of the technical basis on which effluent limitations guidelines are established. Without exception, EPA has developed effluent limitations guidelines on a gross, not a net, basis. The guidelines assume that a treatment technology will achieve a final effluent concentration which is independent of fluctuations in influent concentration, within a very broad range. (For a discussion of the independence of effluent concentration from raw waste concentration in the petroleum refining industry, for example, see 40 FR 21939–21949 (May 20, 1975).) The effluent levels achieved by good treatment may be close to background levels in some receiving waters. This fact underlines the mischief which can result from an indiscriminate application of net limitations. A plant may have a treatment system which, properly operated, achieves a suspended solids limit of 15 mg/l with a raw waste between 150–600 or more mg/l. If the intake concentration is 15 mg/l, this will have no effect upon the achievable final effluent concentration. Yet indiscriminate application of the "net" requirement would allow the discharger to discharge 30 mg/l, or twice the concentration which a well-run treatment system should achieve. For this reason, EPA has restricted the application of the "net" allowance to those cases where the treatment required by the Act will not remove the pollutants in the intake water (such as, for example, where cooling water is discharged without settling).

Many commenters suggested that proposed § 122.16(f) (now § 122.16(g)(1)) be revised to read that permits "shall" be written on a net basis rather than the discretionary "may" in the proposed regulation. EPA has accepted these comments in part. EPA does not believe every permit should automatically be written on a net basis (assuming the conditions of § 122.16(g) are met) because some dischargers may not want to do the sampling, etc., necessary to develop a net permit. Therefore, the discharger must actually request calculation on a net basis at the time of permit application. However, EPA does believe, if calculation on a net basis *is* requested, and all the conditions of § 122.16(g) are met, the permit should be written on a net basis. To this extent, EPA has accepted the suggestion of these commenters.

Several commenters objected to the requirement in § 122.16(g)(1) (proposed § 122.16(f)) that limits the availability of credit to those dischargers who discharge their effluent into the same body of water from which they received their influent. While a discharger should not be held responsible for pollutants already existing in its water supply if the discharge is into the same body of water from which the discharger took water, the same reasoning cannot support allowance of a credit where the discharge is into another body of water. The grant of a credit in the latter case would allow a discharger to transfer pollutants from one body of water to another, thus, adding pollutants to receiving waters for the first time. An exception to this rule is where the discharge is made into a tributary of the stream from which the influent was taken. In such a case a credit may be allowed since the tributary will be considered to be the same body of water as the downstream lake or river for the purpose of § 122.16(g).

A number of commenters objected to proposed § 122.16(f)(2) (now § 122.16(g)(2)) as being vague. The intent of this section was to deny calculation of effluent limitations on a net basis if the discharger's influent treatment system (to clean water for the manufacturing process) or the wastewater treatment system entirely removes specific pollutants which had been present in the intake waters and are limited by the dischargers permit. This intent has been clarified in § 122.16(g)(1)(i)(B).

The provision that a credit shall only be allowed for pollutants present after any treatment steps have been performed on the intake water is also repeated in § 122.16(g)(2) (proposed § 122.16(f)(4)). Some commenters objected to this requirement suggesting that EPA has no jurisdiction to regulate intake pollutants but may only regulate pollutants added by the discharger. See *Appalachian Power Co.* v. *Train*, 545 F.2d 1351, 1377 (4th Cir. 1976). In *Appalachian Power* the court said that EPA only had jurisdiction over pollutants added by the discharger. EPA believes that when a source changes the character or concentration of an intake pollutant and then discharges it, the source is, in effect, adding a pollutant to the water. For example, one step in the pretreatment of intake water in many industries is chlorination to protect pipes and process equipment from algae formation. This treatment will result in chlorination of the intake pollutants thereby rendering them more toxic. When this occurs, the discharger should not be allowed to pass through those pollutants in its waste stream without some responsibility for treatment. If the discharger can demonstrate that the character or concentration of the pollutants has not changed after pretreatment, then a credit for those pollutants will be allowed. These determinations will have to be made on a case-by-case basis.

A credit may be allowed for the amount of pollutant remaining in a discharger's intake water after any treatment of the intake waters and wastewater treatment. Thus, if a discharger treats its intake water and removes 90 percent of a pollutant, the discharger may be entitled to a credit for the remaining ten percent left in the water used in the plant process. If the discharger's waste treatment system also removes 90 percent of the pollutant, the discharger's credit of ten percent shall be reduced by 90 percent because the pollutant remaining in the influent is being treated a second time, thereby, reducing the pollutant by an additional

90 percent. Therefore, the discharger's total credit following both treatments would be one percent of the pollutant in the original influent. To clarify this result, the word "incidentally" was deleted from § 122.16(g)(2) (proposed § 122.16(f)(4)).

Some commenters objected to the requirement in § 122.16(g)(2) (proposed § 122.15(f)(4)) that a credit could not be granted where the pollutants in the intake waters were "chemically or biologically" different from the discharge water. This requirement was considered vague and overly broad. EPA disagrees. Generic pollutant parameters such as biochemical oxygen demand (BOD), chemical oxygen demand (COD), total organic carbon (TOC) or total suspended solids (TSS) are broad measurements of a number of specific chemicals or materials. TSS, as measured at an intake point, may consist mostly of river silt; but after being used in a process the TSS, as measured at the outfall, may include substantial quantities of metals or other materials with toxic characteristics. EPA considers it essential to avoid allowance of credit when the pollutants in the discharge water vary significantly in toxicity from the pollutants in the intake water. Dischargers should not be allowed an unrestricted right to add more toxic pollutants to their discharge waters.

Finally, a new sentence has been added to § 122.16(g)(2) stating that a credit not be allowed for the discharge of pollutants which have been made more concentrated by a discharger (the third sentence has been similarly revised to state that the pollutants discharged cannot vary physically, e.g., in concentration from the pollutants in the intake water). For example, when waters are taken from a stream and used in a cooling pond, this use may result in the loss (through evaporation or otherwise) of significant amounts of the water thereby concentrating the remaining pollutants. This action by the discharger—causing the character of the water to change by increasing the amount of pollutants per volume of water—constitutes an addition of pollutants to the stream. Therefore, a source will not be allowed to discharge this water without treatment.

§ 122.16(h)—A number of comments were received on the subject of batch discharges, under § 122.16(h), suggesting that definitions of terms used in § 122.16(h) be provided, and that restrictions on batch discharges be relaxed.

Paragraph 122.16(h) has been redrafted. The Agency's intent is unchanged, however, the terminology has been clarified. As proposed, the paragraph used the terms "continuous," "batch" and "intermittent" discharges but did not define them. In final form, paragraph (c) now defines "continuous discharge" and paragraph (h) now deals with "noncontinuous discharges." In addition, paragraph (h) now clearly indicates that the requirements of § 122.16 (c) and (d) (proposed paragraphs (b) and (d)) are applicable to the discharges described in this paragraph. Subparagraph (h)(2) has been revised to clarify that limits refer to specific pollutants.

Several commenters argued that batch discharges should be limited only in cases where water quality standards would be violated. Such a provision would be inconsistent with the Act's technology-based treatment requirements which apply regardless of water quality impacts.

§ 122.16(i)—Many commenters urged that the Agency should not impose limitations and standards upon internal waste streams under § 122.16(i) and questioned the Agency's authority to do so. Other commenters urged that the Agency should broaden the circumstances under which internal waste stream limitations would be imposed. EPA continues to believe that the Act provides authority to regulate internal waste streams in appropriate circumstances. The Agency's intent regarding the imposition of limitations upon internal waste streams has been clarified by means of a comment to § 122.16(i) which states that limitations on internal waste streams will not be imposed routinely, but only under exceptional circumstances which make monitoring of the final discharge point impractical or infeasible. The comment also provides examples of where internal waste stream limitations might be necessary.

§ 122.17 Schedules of compliance.

Several commenters thought that proposed § 122.17(e) (now § 122.17(d)) provided for a schedule of compliance which allowed compliance after the statutory deadline. This was not EPA's intent, so to avoid any possible confusion this paragraph has been revised to clarify that compliance with statutory treatment requirements must be as soon as possible, but no later than the applicable deadline imposed by the Act.

In response to comments, § 122.17(c) has been redrafted to explain in greater detail the use of two alternative schedules of compliance in cases of planned or contemplated plant "shut-down" or discharge to a publicly owned treatment works. These two schedules, when read together will indicate a critical date for the decision to cease discharge rather than proceed toward compliance—and irreversible date on which steps toward compliance must be taken. No later than this date, if the permittee does not intend to construct the required treatment technology, it must make a firm public commitment to cease discharge. Examples of firm public commitment have been provided in the Comment to § 122.17(c).

Some commenters also thought that the requirements of § 122.17(c) should not apply where a discharge to a POTW is planned, but should apply where Federal funding problems, beyond the control of the permittee, delay the planned "tie-in" to the POTW. In cases of this sort, paragraph (c) must be considered in conjunction with sections 301(i)(2) and 309(a) of the Act, which authorize limited extensions of statutory compliance dates. EPA has no intention of negating these provisions of the Act through the operation of paragraph (c).

A new paragraph, § 122.17(e) has been added to deal with the situation where a POTW received a section 202(a)(2) innovative and alternative wastewater technology grant. POTWs constructing facilities with this grant money may not achieve the statutory treatment limitations because the innovative technology, as applied, may not work as planned when the facility is completed. Section 202(a)(3) of the Act recognizes that the facilities may have to be modified or replaced and thus, to encourage innovative and alternative technologies, authorizes grants of 100 percent of these costs if the Administrator determines that certain conditions are met. EPA believes that in order for the Permits Program and the Construction Grants Program to work in concert, the permit schedule of compliance should be modified if this unique type of construction grant is awarded. Thus, this new paragraph provides that the permit may be modified to extend the schedule to account for the amount of time lost in building the first treatment plant. This new paragraph does not, however, authorize EPA to extend the statutory date for compliance. If the POTW cannot achieve compliance in time, the schedule will not be extended. However EPA, in it exercise of prosecutorial discretion, may consider the grant under section 202(a)(3) when assessing the POTWs efforts to comply with statutory treatment requirements.

§ 122.20 Monitoring.

Several commenters suggested that § 122.20(b), which requires the Director to specify monitoring requirements in permits, should be deleted. No change has been made in this paragraph. EPA believes that there is an important need to tie permit limits to specific monitoring equipment or methods, such as biomonitoring, in complex situations involving toxic pollutants.

§ 122.20 (c) and (d)—Section 122.20 has been amended to provide guidance for establishing sampling and measuring requirements in NPDES permits. The section also requires that once monitoring requirements are established for an NPDES permit such requirements cannot be changed unless the permit is modified in accordance with § 122.31.

In establishing monitoring requirements there are several considerations. Many effluent limitation guidelines have been determined by statistical analysis of the pollutant levels found in a large number of composite samples or in grab samples. Consequently, a permitting authority may require that sampling for compliance monitoring be done in a manner consistent with the data base used in setting the limitation guideline. The development documents for effluent limitation guidelines often indicate the general method of sampling used to accumulate the data for guidelines setting. The revisions to § 122.20(c) indicate that less detailed monitoring may be appropriate in some cases, but once a permittee has accepted a given set of monitoring requirements, the permittee is bound by that approach unless the permit is modified for other reasons, in which case monitoring requirements may be reexamined.

§ 122.22 Reporting of monitoring results and compliance by permittees.

Several commenters objected to § 122.22(a) because it could be read to require permittees to submit monitoring results to both EPA and where appropriate the NPDES State. In response to these comments, EPA has substituted the term "Director" for the proposed terms "Enforcement Division Director and . . . Director" to indicate that only one report must be submitted to the appropriate permit issuing authority (unless otherwise specifically required).

Several commenters objected to the requirements for reporting of monitoring results for pollutants not limited in the permit. However, section 308 of the Act clearly authorizes such a requirement. Even in those situations where monitoring is not required, it is clear that if the permittee has conducted monitoring activities, they should be reported to provide as complete and accurate a picture of the discharge as possible.

Other commenters suggested that § 122.22(a) should be limited to monitoring done at the monitoring points specified in the permit. EPA has not accepted this suggestion since it would allow circumvention of this requirement by sampling at a point other than that specified in the permit.

Several commenters suggested that the imposition of a maximum $10,000 fine per violation (e.g., false statement) (§ 122.22(d)) is inconsistent with section 309(c)(2) of the Act. This is a misreading of the Act, which states that any person who knowingly makes "any" false statement should be liable up to $10,000. If this section is violated several times as a result of several false statements, each violation is separately subject to the statutory fine.

§ 122.23 Quarterly noncompliance reporting.

Many comments were received indicating that definitions of "major" and "minor" permittees should be provided in the regulations. However, "major" and "minor" are not permanent classifications. Rather, these classifications are intended to provide EPA and the States with flexibility to establish priorities for permitting and compliance activities so as to best utilize existing resources. Thus, it is more appropriate that information on "major" and "minor" classifications be provided in annual guidance, rather than fixed in these regulations. However, in order to emphasize that the "major" or "minor" classification relates to the nature of the discharge and not the nature (or size) of the facility, the regulations have been revised to read major [or] minor "discharger" rather than "permittee" (see, e.g., § 122.23(a)).

Several commenters objected that the quarterly reporting requirements were too frequent, too resource-intensive, and not useful. However, the regulation were designed to minimize the amount of reporting and to focus on the most significant instances of noncompliance by major dischargers in the narrative portion of the report. In fact, the proposed (and final) regulations change the existing requirement by adding narrative information on noncompliance with effluent limitations by major dischargers, continuing the existing narrative reporting requirements on schedule violations by major dischargers, and reducing the required reporting on noncompliance by minor dischargers to annual statistical reporting. EPA believes that these changes will result in less resources devoted to preparing reports while providing the most useful, up-to-date information to interested members of the public.

Many comments were received concerning § 122.23(b)(3). Specifically, concern was expressed that serious effluent limitation violations of short duration would not be reported. Other commenters stated that the definition of a pattern of noncompliance did not adequately handle noncompliance for parameters requiring continuous monitoring. The concern was expressed by many that our definition would result in almost continuous reporting of many minor violations. In response to these comments, two changes have been made. First, the definition of a pattern of noncompliance has been changed by adding the sentence: "This pattern of noncompliance is based on violation of monthly averages and excludes parameters where there is continuous monitoring, such as pH". Second, a paragraph has been added that provides for the reporting of a significant discharge of a pollutant that otherwise would not be reported.

Many other comments were received requesting clarification of requirements for format, copying and distribution. We do not believe such specific details are appropriate for regulation. These concerns will be addressed in guidance issued by the Office of Enforcement on report preparation.

§ 122.31 Modification, revocation and reissuance, and termination.

The majority of the comments on proposed § 122.31 dealt with two general areas. First, many commenters thought that permit modification or revocation was inconsistent with a fixed term permit and the concept of finality as expressed in section 402(k) of the Act. However, the protection provided by section 402(k) is expressly limited by section 402(b)(1)(C) of the Act, which states that permits may be modified or terminated (revoked) for cause, "including but not limited to" three specified situations which are representative examples, not an exhaustive list. Other situations may also constitute good and valid cause for permit modification or revocation. EPA believes that "cause," as defined in § 122.31, falls well within the authority of section 402(b)(1)(C) of the Act, notwithstanding section 402(k).

Second, a large number of commenters, while recognizing EPA's

authority to modify or revoke permits, suggested that causes for revocation and causes for modification should be listed separately since absolute revocation is a more "severe" measure. EPA agrees with these commenters and has separated and reduced the causes for absoulte revocation. For clarity in distinguishing between the methods used for changing or terminating a permit, three terms are used in § 122.31 and throughout these final regulations: "modification," "revocation and reissuance" and "termination." "Modification" is used where existing permit conditions are changed but the permit expiration date remains the same. "Revocation and reissuance" is used to describe the action to revoke an existing permit and reissue a new permit which provides the permittee the protection of a new five-year permit. Finally, "termination" means the revocation of an existing permit, where a new permit is not reissued.

Proposed § 122.31(d) listed thirteen situations which constituted "cause" for permit modification or termination. In accordance with EPA's decision to separate cause for "termination" from cause for permit "modification" or "revocation and reissuance," a new paragraph (e) has been added to supplement paragraph (d). In the final regulations paragraph (d) contains five situations where a permit can be either "modified," "revoked and reissued" or "terminated." These include the three situations listed in the Act plus two other situations. The first situation is where information indicates that the discharge poses a threat to human health or welfare (see discussion of paragraph (d)(4)). The second situation, a change in ownership, was added in response to comments (see discussion of paragraph (d)(5)).Paragraph (e) lists all other situations which are cause only for permit "modification" or "revocation and reissuance."

Several commenters suggested additional situations that should constitute "cause" for permit modification. The suggested causes included: revisions to the best practicable waste treatment technology standards; promulgation of regulations governing the disposal of sewage sludge under section 405(d) of the Act; and the inability of a permittee to meet permit limitations despite installation of technology contemplated by the permit. EPA does not believe that these situations constitute "cause" for modification or revocation and reissuance. However, in response to comments, two additional "causes" have been added: (1) § 122.31(d)(5), a change in ownership or control of a source which has a permit, consistent with § 122.12(d) (where no changes in the permit are necessary, the permit may be modified but is not subject to public notice or an opportunity for a hearing in accordance with § 122.31(f)(4)), and (2) § 122.31(e)(7), failure of an NPDES State to notify an affected State of a discharge that originates in the NPDES State as required by section 402(b)(3) of the Act.

One commenter also felt that procedural safeguards surrounding the revocation and reissuance, and termination of a permit were inadequate and did not meet the requirements of 5 U.S.C. section 558(c). In response to this concern, it should be noted that §§ 122.1(b)(2) and 122.30 specifically state that all actions will be taken in accordance with the procedural requirements of 40 CFR Part 124, thus providing adequate procedural safeguards.

§ *122.31(d)*—Section 122.31(d)(1) states that "violation of any term or condition of the permit" constitutes cause for permit modification, revocation and reissuance, or termination. Many commenters objected to this and specifically to the use of the word "any" since it did not distinguish between serious, repeated, or willful violations and minor, single, or inadvertent violations. EPA understands that these commenters fear that under the proposed regulations, a single, minor permit violation could result in permit termination and subject the discharger to action for discharging without a permit. While this is an unlikely case, the Act specifically states that violation of any condition of the permit constitutes cause for permit modification or termination. Consequently, EPA has not revised this paragraph; however, the permitting authority will normally consider the seriousness of the violation and the use of other enforcement actions before deciding to terminate a permit under this paragraph.

Paragraph 122.31(d)(2) states that "failure of the permittee to disclose fully all relevant facts or misrepresentation of any relevant facts by the permittee" constituted cause for permit modification, revocation and reissuance, or termination. Many commenters felt that this subsection should require knowing or willful failure to disclose facts. As with proposed § 122.31(d)(1), EPA has not made the suggested change because this paragraph mirrors the language in the Act. In response to comments, however, EPA has clarified the final clause in this paragraph to indicate that misrepresentation of any "relevant" fact is intended to be subject to this paragraph.

The last sentence to both proposed §§ 122.31 (d)(1) and (d)(2) stated that the two situations, violation of any term or condition of a permit or failure of a permittee to disclose all relevant facts, constituted cause for termination, revocation and reissuance, or modification only when such changes would make the permit more stringent. Many commenters strenuously objected to the more stringent requirement in the last sentence and gave examples of when a permit should be made less stringent. Although EPA believes that circumstances justifying a less stringent permit will be extremely rare, comments suggesting such circumstances were persuasive. Accordingly, EPA has deleted the more stringent modification restriction in paragraph (d) (1) and (2) to allow less stringent modifications if justified.

In response to comments which pointed out that proposed § 122.31(d)(3) did not properly paraphrase the statutory definition of "cause" found in section 402(b)(1)(C)(iii) of the Act, EPA has revised this paragraph to be consistent with the Act.

Proposed § 122.31(d)(4) stated that "information indicating the permitted discharge poses a threat to human health or welfare" constituted cause for permit modification or revocation. While some commenters thought this paragraph exceeded EPA's statutory authority, other commenters stated that this provision was consistent with EPA's authority under section 402(k) of the Act. Because EPA concurs with the latter comments and believes that such a provision is consistent with the Act, paragraph (d)(4) is retained as a final regulation. In response to comments suggesting that the "human health or welfare" provision should be "cause" only to modify a permit to make it more stringent, and in keeping with EPA's decision to allow permit termination only in certain limited circumstances, EPA has placed this "cause" under the section which authorizes termination of the permit in addition to modification or revocation and reissuance. Many commenters also felt that this paragraph should be limited to situations where there was a "substantial showing" or "verification" as to the likelihood of an adverse impact on human health. EPA has not adopted these suggestions but points out that the permittee remains free to challenge the existence of a threat to human health or welfare in any proceeding to modify, revoke and reissue, or terminate a permit.

Proposed § 122.31(d)(5) indicated that a discharger's failure or refusal to allow authorized representatives of the permit issuing authority to enter, inspect, or copy materials on the premises as provided in proposed § 122.14(f) constituted cause for permit modification or revocation. Many commenters suggested deletion of this provision because failure to allow such entry, inspection, or copying was a cause for enforcement action under sections 308 and 309 of the Act. Other commenters stated that the provision was inconsistent with the Supreme Court's decision in *Marshall* v. *Barlow's Inc.*, 436 U.S. 307, (1978). In response, EPA has deleted proposed § 122.31(d)(5). Proposed § 122.14(f) was also revised in response to comments. See discussion of § 122.14(f).

§ *122.31(e)*—Proposed § 122.31(d)(6) (now § 122.31(e)(1)) indicated that material and substantial alterations or additions to the discharger's operation constituted cause for permit modification or revocation. In response to comments requesting clarification as to what constitutes "material and substantial alterations or additions," a parenthetical cause has been added to indicate that such change includes situations covered by § 122.14(e) which requires a new permit application.

Some commenters asked under what circumstances would proposed § 122.31(d)(7), now § 122.31(e)(2), be used? Section 122.31(e)(2) might be appropriate if a permit misapplied State water quality standards (in effect at the time of permit issuance) and only secondary treatment was necessary. This section could be used to modify the permit to reflect the proper level of treatment. In addition, § 122.31(e)(2) has been revised to indicate that it can be used for revising more than effluent limitations, e.g., monitoring requirements.

Proposed § 122.31(d)(8) (now § 122.31(e)(3)) indicated circumstances under which revision or withdrawal of EPA promulgated effluent limitations guidelines constituted cause of permit modification or revocation. Many commenters objected that the requirement to file a modification request within ninety (90) days after the Federal Register notice of withdrawal or revision was unreasonable, particularly since the scope of the relaxed guideline or standard may not be known. EPA continues to believe that Federal Register notice is appropriate and adequate and that 90 days is sufficient time for a discharger to determine the scope of the revision or withdrawal.

Several commenters suggested that withdrawal or revision of Water Quality Standards of EPA promulgated interim final effluent limitation guidelines should also constitute cause for permit modification. EPA agrees with these commenters and has revised § 122.31(e)(3) accordingly.

Other commenters suggested modifications should be allowed to make a permit less stringent, when the permit was issued based upon section 402(a)(1) of the Act and the pemit limitations are more stringent than subsequently promulgated effluent guidelines. EPA cannot allow modification to make a permit less stringent under these circumstances since a less stringent modification would constitute unwarranted "backsliding" in pollution control. See *U.S. Steel* v. *Train*, 556 F.2d 822, 846 (7th Cir. 1977). Paragraphs 122.15(i)(1), (2) and (3) lists the only exceptions to this principle.

A few commenters thought there was no need to modify a permit when EPA-promulgated effluent guidelines limitations were withdrawn, revised, or judicially remanded (see proposed § 122.31(d)(8) and (9), now § 122.31(e)(3) and (4)) since the guidelines were no longer applicable or enforceable. These comments indicate a fundamental misconception as to the enforceability of individual permit terms and conditions; permit terms and conditions remain enforceable unless and until they are modified, revoked, or judicially or administratively stayed.

Several commenters objected to proposed § 122.31(d)(11), (now § 122.(e)(6)) which indicated by reference to proposed § 122.14(d) and § 122.15(b) that promulgation of effluent standards limitations or prohibitions under sections 307(a), 301(b)(2)(C) and (D) and 304(b)(2) of the Act constituted cause for permit modification or revocation. Since that paragraph incorporated the requirements of former 40 CFR § 124.46, that requirement has not been changed. However, two additional cross references to § 122.17 (causes for modifications to schedules of compliance) have been added for completeness.

Proposed § 122.31(d)(12), stated that failure of the permit "to apply any applicable standards or limitations" constituted cause for permit modification or revocation. Many commenters objected to that paragraph as unfairly penalizing the permittee for failure of the permit issuing authority to write the permit properly. Other commenters indicated that any attempt to apply limitations or standards which were not in effect at the time of permit issuance constitutes unauthorized overreaching by the permit issuing authority. EPA has carefully considered these comments in light of section 402(k) of the Act and has concluded that, except as provided in § 122.31(e)(7), a permit should not be modified to incorporate new standards or limitations. Accordingly, EPA has deleted that paragraph.

Proposed § 122.31(d)(13), defined cause to include "other circumstances . . . [which] have materially and substantially changed since the permit was issued." Several commenters suggested that this subsection was either too vague or too expansive and should, therefore, be deleted. Although it was not intended that this paragraph be used as a carte blanche to allow permit modifications, EPA understands and partially agrees with the fears of some commenters that this paragraph could be so used. Accordingly, that paragraph has been deleted.

§ *122.31(f)*—Proposed § 122.31(e) (now § 122.31(f)) listed six uncontested actions amending minor provisions of an effective permit that were not subject to the usual procedures of notice and opportunity for hearing unless the modification would render the permit less stringent. Several commenters thought that it was inconsistent to allow only more stringent modification without public notice and an opportunity for hearing and not to allow less stringent modifications in that same manner. EPA believes that a requirement for public notice and opportunity for a hearing for less stringent modifications is necessary, since the public has a right to know of any permit modifications which would render a permit less stringent and could, therefore, adversely affect the environment. The only person who would be affected by a more stringent modification is the permittee and the permittee receives notice of and retains the right to contest any more stringent modifications. If the permittee contests the modification, § 122.31(f), by its terms, is not applicable and the requirements of Part 124 come into effect.

Several commenters suggested that a permit modification to require less frequent monitoring or reporting should be an insignificant modification under § 122.31(f). Since less frequent monitoring or reporting would render a permit less stringent, EPA, for the reasons stated above, believes public notice and an opportunity for a hearing is required.

Other commenters suggested various changes to proposed § 122.31(e)(3) (now § 122.31(f)(3)) to allow more than the proposed 120 days slippage not only for interim compliance dates but also for final compliance dates. An extension of the final compliance date clearly renders the permit less stringent and therefore EPA has not made the suggested changes. EPA further believes that a slippage of more than 120 days in an interim compliance date would, in most cases, interfere with the attainment of a final compliance date. In the development of the *Interim National Municipal Policy and Strategy* EPA carefully considered the effect of the Construction Grants process on the achievement of interim compliance dates by municipal permittees. EPA concluded that 120 days slippage in interim compliance date is sufficient to accommodate the Construction Grants process and that, with careful grants management, EPA is hopeful that even slippages of 120 days will not occur in the future.

§ 122.41 Disposal of pollutants into wells, into publicly owned treatment works, or by land application.

Proposed § 122.41(a) requiring State permits for the disposal of pollutants into wells has been moved from Part 122 to Part 123 because it is applicable solely to NPDES States.

§ 122.41(a)—One commenter recommended that disposal of wastes by land application, as well as by well injection or routing to a POTW should be included in § 122.41. EPA agrees, and this change has been made.

A number of commenters objected to the provision in proposed § 122.41(b) (now § 122.41(a)) requiring adjustment of effluent limitations for discharges into surface waters where a portion of raw waste is injected into a well. These commenters argued that the adjustment provision is inconsistent with *Exxon Corp.* v. *Train*, 554 F.2d 1310 (5th Cir. 1977), and further that EPA should defer to Subpart C of the Safe Drinking Water Act, which establishes controls over well injection.

EPA believes that these commenters have misconstrued the purpose and scope of proposed § 122.41(b) (now § 122.41(a)). The provision does not regulate well injection, directly or indirectly, nor does it place any limit on the amounts which may be injected, the rates of injection, or the design and operation of injected wells. Instead, §122.41 focuses on the remaining wastes which are being discharged into waters of the United States. The purpose of the regulation is to ensure that the Act's treatment requirements are met for discharges into surface waters. Unless adjustment is made in calculating effluent limitations, dischargers using wells, POTWs, or land application for part of their wastes would get treatment "credit" for pollutants so disposed and thus escape application of technology-based requirements to the portions of the wastes disposed to waters of the United States.

Several comments noted that the formula as published in the proposed rules is incorrect and inconsistent with EPA's examples in the preamble. EPA agrees, and has modified the final rules to incorporate the correct method of calculation. This method may be algebraically expressed as:

$$P = E \times \frac{N}{T}$$

where P is the permit effluent limitation, E is the limitation derived by applying effluent guidelines to the total waste stream, N is the wastewater flow to be treated and discharged to waters of the United States, and T is the total wastewater flow.

Several commenters noted that strict application of the formula would allow a discharger to inject concentracted wastes into a well and discharge relatively dilute wastes to surface water with little or no treatment. The last sentence in proposed § 122.41(b) was intended to cover this situation. That sentence allows adjustment of the effluent limitations derived from the formula as necessary to account for changes in "character or treatability" of the wastes disposed into navigable waters. Permit issuing authorities should devise appropriate methods of adjustment in each case, based upon a finding that the wastes being discharged into surface waters are "fundamentally different" from those considered in issuing effluent guidelines. These variances will be controlled by Subpart D of Part 125.

A new paragraph (§ 122.41(a)(1)) has also been added to cover the situation where EPA-promulgated effluent guidelines provide separate standards for a discharge of wastes from a particular process and all wastes from that process go to wells, land application, or POTWs. Such separate process standards would not be used to calculate permit limits.

§ 122.42 Concentrated animal feeding operations.

Proposed § 122.42 subjected concentrated animal feeding operations to individual permits coverage and all other animal feeding operations to general permit coverage. Many commenters objected to EPA's blanket coverage of all animal feeding operations, arguing that many smaller animal feeding operations are not point sources. These commenters also added that such operations were adequately covered by the section 208 planning process. EPA has reconsidered its position and agrees that not all animal feeding operations are point sources and thus subject to permit requirements.

EPA is, therefore, withdrawing the proposed revision; and the final regulations reflect the requirements found in former § 124.82 and § 125.51. Thus, only concentrated animal feeding operations will be subject to individual permits and general permits will not apply to other animal feeding operations.

§ 122.43 Concentrated aquatic animal production facilities.

Many commenters objected to this proposal which subjected concentrated aquatic animal production facilities to individual permit coverage and all other aquatic animal production facilities to general permit coverage. In addition, commenters objected to the provisions for case-by-case designation of certain aquatic animal production facilities as concentrated aquatic animal production facilities, and therefore, subject to individual permits.

As discussed in § 122.42, EPA is withdrawing the proposed revision regarding general permits. The final regulation concerning permit coverage is similar to former 40 CFR § 124.1(u) and § 125.1(ii) requiring only individual permits of concentrated aquatic animal production facilities. However, EPA believes that some aquatic animal production facilities that may not be classified as concentrated under the formula, nevertheless, may be significant contributors of pollution. Because of this, EPA is retaining the provision for case-by-case designation of concentrated aquatic animal production facilities. EPA is revising this to include the following language suggested by one commenter: "In no case shall a permit application be required from a concentrated aquatic animal production facility designated under (the case-by-case provision) until there has been an on-site inspection of the facility and a determination that the facility should and could be regulated under a permit program."

Commenters also objected to combining warm and cold water aquatic animal production facilities and the 9,090 kilograms (approximately 20,000 pounds) of aquatic animals per year cut-

off. In response to these comments, aquatic animal production facilities are now differentiated in the regulations based on whether they produce warm or cold water species and the characteristics of the method of confinement. Warm and cold water production facilities are separated because of basic operational characteristics differences. Cold water aquatic animal production facilities, where concentrated feeding and continuous flow occur, discharge organic pollutants at a rate related to the amount of food fed and the total weight of the animals produced. Small facilities of this type, however, (such as "fishout" ponds and farm ponds) produce negligible amounts of pollution. For this reason a facility which produces less than 9,090 harvest weight kilograms (approximately 20,000 harvest weight pounds) of aquatic animals per year and feeds less than 2,272 kilograms (approximately 5,000 pounds) of food during the month of maximum feeding, is not required to have an NPDES permit unless so required on a case-by-case basis (see § 122.43(c)).

In most cases warm water aquatic animal production facilities differ in construction and operation from cold water facilities. If the discharge from a warm water operation takes place for less than 30 days per year or only during periods of excess runoff, no NPDES permit is required. Facilities which produce less than 45,454 harvest weight kilograms (approximately 100,000 harvest weight pounds) of warm water aquatic animals per year are also exempted. The 45,454 kilogram figure will apply to warm water aquatic animal production facilities. If sufficient information is submitted to EPA to substantiate a higher figure, EPA will consider amending this section.

Finally, EPA has deleted the non-native fish restriction found in proposed § 122.43(b)(1). Although this restriction was taken from the former regulations, an overwhelming number of commenters objected to the restriction because of its indirect effect on research, sport fishing, and fish management and, generally, because it exceeded EPA's statutory authority. Since EPA agrees that a native/non-native fish distinction bears little relation to the quality of the discharge, this distinction was deleted.

§ 122.45 Separate storm sewers.

On February 4, 1977, the EPA published a proposed rule to establish an NPDES general permit program for irrigation return flows and separate storm sewers (see preamble discussion of § 122.48 *General Permit Program).* The February 4, 1977 proposed definition of "separate storm sewer" was the same as defined in former 40 CFR § 125.52. In the August 21, 1978 proposal, EPA redefined "separate storm sewer" to mean "a conveyance or system of conveyances (including but not limited to pipes, conduits, ditches and channels) primarily used for collecting and conveying storm water runoff." This definition differed from the February 4, 1977 definition, in that the February 4, 1977 proposal required the sewer to be located in an "urbanized area" or otherwise be found to be a significant contributor of pollution. The August 21, 1978 proposal also introduced the concept of case-by-case designations of "concentrated" storm sewers and indicated that concentrated storm sewers require individual permits.

In response to comments objecting to the case-by-case designation of concentrated separate storm sewers and the deletion of the "urbanized area" requirement for separate storm sewers, EPA has returned to the definition of separate storm sewer proposed in February 4, 1977, i.e., the sewer must be located in an urbanized area to be a separate storm sewer and there will be no case-by-case designations of a different category of sewers known as "*Concentrated" storm sewers.* A conveyance or system of conveyances not located in an urbanized area, can, as proposed in the February 4, 1977 rule, be designated a significant contributor of pollution and be considered a "separate storm sewer" subject to permit requirements. Likewise, under § 122.48(e) concerning general permits, the permit issuing authority can require that sources otherwise subject to a general permit obtain an individual permit. This case-by-case designation is similar to the February 4, 1977 proposal.

A comment has also been added which indicates that the designation of separate storm sewer under this section has no bearing on whether the source is or is not a separate storm sewer for purposes of funding under Title II of the Act. This comment was added to prevent any possible confusion between these regulations and the Title II regulations.

§ 122.46 Silvicultural activities.

Proposed § 122.46 restated the former definition of "silvicultural point source" (40 CFR § 124.85(a) and § 125.54(a)) and introduced the concept of case-by-case designations of silvicultural activities as point sources. Many commenters objected to the case-by-case designation of point sources arguing, among other things, that such designations would negate the section 208 planning process, that the criteria for designations were too vague and that the designation of any additional silvicultural point sources should be through rulemaking procedures. EPA has considered these comments and determined that the four silvicultural point source activities defined under § 122.46(a) (rock crushing, gravel washing, log sorting, and log storage) are sufficient under NPDES because most water pollution from forest management areas is non-point in nature and hence not subject to NPDES. EPA accordingly has deleted all reference to case-by-case designation of silvicultural point sources.

§ 122.47 New sources and new dischargers.

§ 122.47 (a) and (b)—Two commenters pointed out that proposed § 122.47 (a) and (b) did not address the question of whether a mobile drilling rig which relocates requires an EIS upon relocation. The final regulations continue to track the language of section 306(a)(5) of the Act which defines construction to include "any placement, assembly or installation of facilities and equipment . . . at the premises where such equipment will be used," without interpreting this language in the context of mobile drilling rigs. It should be noted that, at present, no new source performance standards have been promulgated for mobile drilling rigs; thus, no mobile drilling rig may be considered a new source at present. The Agency intends to examine the EIS issue at the time that it promulgates new source performance standards for these sources.

§ 122.47(c)—Several commenters remarked that State-issued permits to new sources should require EIS's under proposed § 122.47(c)(1)(ii). Other commenters disagreed. It is clear, however, that the issuance of a permit by a State is not a major Federal Action. *Chesapeake Bay Foundation* v. *United States* (E.D. Va. June 28, 1978). Therefore, EPA has not changed this statement.

Several commenters objected to the requirement in proposed § 122.47(c) (2) and (3) that the Regional Administrator must accept the EIS recommendations and deny or condition permits in accordance with such recommendations. They argued that the EIS is only a recommendation and that it is the Regional Administrator's duty to evaluate the recommendation and make permit-related decision accordingly. EPA agrees with the thrust of these comments, and the regulation has been redrafted to reflect them.

Many commenters disagreed with the provision of proposed § 122.47(c) (4) and (5) which would bar construction prior to issuance of a permit or negative declaration. However, EPA believes that it is implicit in the requirement of section 511(c) of the Act and of the National Environmental Policy Act (NEPA) that the expected environmental impacts studied in the environmental impact assessment should not be allowed to proceed until that assessment has been concluded. This has consistently been the Agency's position (see former 40 CFR § 6.906, published in 42 FR 2454 (January 11, 1977)) and has recently been reinforced in NEPA regulations published by the Council on Environmental Quality (43 FR 55478, November 29, 1978). Therefore, the position is retained in these final regulations. It should be noted that subparagraph (c)(4) allows the Regional Administrator to approve construction prior to issuance of a permit or finding of no significant impact (i.e., a negative declaration) if he or she determines that such a finding will probably be made.

§ *122.47(d)*—Several commenters pointed out under proposed § 122.47(d)(1)(ii) that construction often creates construction-related discharge and that the 10-year protection period for new source performance standards should not begin at the time of such discharges. Accordingly, the regulations have been modified to trigger the period at the time of discharge only in the case of process or other non-construction related discharges.

The interpretation of section 306(d) has been a vexing legal problem for EPA since the enactment of the 1972 Amendments to the Clean Water Act. That provision grants to a qualifying source meeting "all applicable standards of performance" a ten-year immunity (or immunity during the period of amortization of pollution control facilities, if shorter) from "any more stringent standard of performance." The term "standard of performance" is defined in section 306(a)(1) in such a way as to make it clear that it refers only to new source performance standards issued by the Administrator. Thus the literal effect of section 306(d) is to give a new source a ten-year protection only from more stringent new source performance standards, and not from more stringent BAT, BPT, or BCT effluent limitations.

Reading this provision of the statute literally would make it meaningless, a result Congress could not have intended. New source performance standards are periodically revised to incorporate new designs and in-process changes which can only be incorporated into a new plant when it is first built. If the statute is applied literally, after the protection period expires a new source would have to comply with any revised new source performance standards, some of which might be achievable only by a plant which was designed and constructed from the ground up so as to meet them.

On the other hand, reading the term "standard of performance" (in its second use in section 306(d)) to refer to all technology-based standards not only does violence to the language of the Act (by requiring the same statutory term to have two different meanings in the same sentence and by failing to track the definition in section 306(a)(1)), but also seriously interferes with Congress' command in the 1977 Amendments that technology-based standards for toxic pollutants be expeditiously achieved.

In the proposed regulations EPA sought to deal with these problems of interpretation by construing the protection afforded by section 306(d) to apply only to "more stringent" technology-based effluent limitations controlling the same pollutants as are controlled by the applicable standards of performance. In other words, if the NSPS only limited pollutants A and B, EPA could later impose technology-based effluent limitations for pollutants D and E, but could not impose more stringent technology-based limitations on A and B.

A number of commenters objected to this proposal, arguing that section 306(d) should be read to afford new sources protection against any additional requirements during the protection period. EPA agrees that the protection provided by the proposed regulations should be broadened, although not to the extent suggested by the commenters. Accordingly, the Agency has invoked its rule-making authority under section 501(a) of the Act to fashion an interpretation of section 306(d) that gives the greatest effect possible to the language of the statute in light of congressional purposes. This construction has two principal features. First, it extends the protection afforded by section 306(d) not only to new source performance standards, but to all technology-based requirements under section 301 (BPT, BCT, and BAT). Second, the protection is not extended to toxic pollutants controlled by applicable BAT regulations, but not by the new source performance standards. (The proposed regulations would have exempted from 10-year protection conditions controlling any pollutants not controlled by the applicable new source performance standards.)

In this way, EPA has sought to implement two conflicting congressional goals. On the one hand, new sources must be given some meaningful protection for ten years after construction. Section 306(d) should not be ignored. On the other hand, the purpose of the new provisions of the Act controlling toxic pollutants must not be frustrated by allowing new sources which meet old new source performance standards based on traditional pollutants such as BOD and suspended solids to escape application of BAT controls on toxic pollutants.

A number of commenters suggested that the section 306(d) protection period apply to State water quality standards and other requirements not based on technology. EPA has not adopted these proposals because the term "standard of performance" clearly refers to a technology-based standard. (See section 306(a)(1) of the Act.) Moreover, an earlier version of section 306(d) adopted by the House would have provided protection from any effluent limitation, whether technology-based or water-quality-based. (See FWPCA Legis. Hist. at 965–66.) But the version adopted by the conferees and ultimately enacted provided protection only from "standards of performance." The shift clearly indicated an intent to narrow the type of "standards" from which protection is granted.

In response to comments objecting to the limitation of the protection period to pollutants actually controlled by the standard of performance, § 122.57(d)(2)(ii) allows imposition of a more stringent technology-based effluent limitation during the protection period only if it controls a toxic pollutant. This revision will allow the imposition of additional controls over pollutants which are neither hazardous nor toxic where such control has been specifically identified as necessary to indirectly control toxic pollutants. EPA's present strategy for controlling toxics will involve such indirect regulation in many instances. This best accommodates the purposes of the 1977 Clean Water Act amendments. Congress intended for EPA to shift its focus from the regulation of conventional pollutants to a new program for applying technology-based requirements to toxic pollutants. Under the Act as amended, toxic pollutants are treated separately from less hazardous materials. Section 307(a), as amended in 1977, requires EPA to establish for toxic chemicals either effluent limitations based on the 301(b) criterion of best available

technology economically achievable, or a national standard under section 307(a) itself based on the toxicity of the substance and designed to provide an "ample margin of safety."

The policy of Congress was clearly to control toxic chemical pollution as quickly and as effectively as possible. See *CWA Legis. Hist.* 427–29 (remarks of Senator Muskie). The addition of the new BAT standard for toxic pollutants was intended not to make toxic controls less effective than they would have been under section 307(a), but to allow EPA to use the regulatory mechanisms of section 301(b) when they would be more efficient than those under section 307(a). In light of the expressed intent of Congress to expedite the control of toxic pollutants, EPA believes that the intent of the Act would be ill served by a policy of exempting classes of sources from compliance with toxic controls for ten years, where the Act can be interpreted not to provide such an exemption.

Finally, the protection period will not extend to permit conditions controlling hazardous substances under section 311 of the Act. This exception is intended to carry out the purposes of the 1978 amendments to section 311 of the Act. Those amendments excluded from control under section 311 discharges which are controlled by the permit system under section 402. The legislative history of that provision, though brief, shows that Congress intended for any exemption from section 311 to depend upon the availability of effective control under section 402 of the hazardous substance discharges. Thus, for example, Congressman Breaux, one of the sponsors of the 1978 amendments, said:

> At the present time many industrial point sources have section 402 permits which do not identify or provide for the regulation of designated hazardous substances. Section 311(a)(2) would be amended to provide these sources a reasonable opportunity to identify the constituent elements of their effluent, to develop treatment and management procedures and to apply for a new permit without being liable for section 311 penalties. *Cong. Rec.* (daily ed.) at 13599, October 14, 1978.

New sources should have this same opportunity to apply for a permit that reflects consideration of hazardous substance discharges, and these regulations now accord that opportunity.

Several commenters pointed out that under proposed § 122.47(d)(4) the maximum of a 60-day "start-up" period was insufficient for new sources to meet all permit conditions. One example given was the case of biological oxidation ponds in cold weather. As a result, the time limit has been extended to 90 days.

§ 122.48 General permit program.

On February 4, 1977, EPA published a proposed rule (42 FR 5846) to establish an NPDES general permit program for irrigation return flows and separate storm sewers. The proposed rule arose out of the decision in *NRDC* v. *Costle* (Runoff Point Source), which denied EPA's authority to exclude certain point sources from the permit program. The general permit program outlined a system whereby similar activities in a given geographic area would be covered by a single general permit. The program was intended to provide administrative flexibility in dealing with numerous minor discharges subject to the same limitations.

Approximately 40 comments were received on the proposed regulations during the overall comment period, ending April 1977. Many of these comments addressed problems associated with irrigation return flows. However, after the proposal Congress excluded irrigation return flows from the permit requirements (see section 502(14) of the Act). Accordingly, EPA has exempted those discharges from both individual and general permit coverage, see § 122.4(a)(4).

The August 21, 1978 proposal reserved § 122.48 for the general permit program. Based on comments on the original general permit proposal and the August 21, 1978 proposal, EPA has made several revisions as noted below.

First, as indicated in § 122.48(b), the general permit program is limited to certain types of point sources. While the original general permit proposal covered only separate storm sewers and irrigation return flows (now exempted), comments addressing the administrative flexibility of the approach have prompted us to authorize the use of general permits for other categories of points sources with minor discharges located in the same geographic area. All draft general permits for other categories of points sources must be sent to the EPA Deputy Assistant Administrator for Water Enforcement for a 90-day review (see §§ 123.22, 124.32(a) and the Comment to § 122.48(a)(2)).

Some commenters misinterpreted the proposed regulations and though that EPA was requiring States to use general permits. It should be noted that the general permit program is optional. States (and EPA) retain the right to require individual permits for any and all point sources.

A few commenters were confused as to the proposed timetable for establishment of a general permit program for separate storm sewers which varied depending on whether the permitting authority is a State or EPA. In response, EPA has decided to drop the deadline requirement for submitting a separate storm sewer general permit program. Since the requirements for State general permit programs have been placed in § 123.12, a more in-depth discussion of State requirement can be found in the preamble discussion of that section.

The proposed general permit regulations listed geographic areas which may be appropriate for the issuance of general permits to storm sewers, including political or geographical boundaries. Based on several comments, the final regulations have been revised to include boundaries designated by roads in a State highway system as a geographical area.

Several commenters addresed the procedural aspects of general permit issuance established in the proposed regulations, particularly, public notice. These issues are now covered under Part 124 and have been subject to renewed opportunity to comment in the August 21, 1978 proposal. Although commenters felt the Agency should individually send notice to permittees covered by a general permit, EPA believes that such system would be unwieldy and that Federal Register notice, or other appropriate notice in the case of State issued general permits, is sufficient (see § 124.41(f)).

The original February 4, 1977 proposed general permit terms and conditions have been deleted because they would be duplicative of the provisions in § 122.14 and § 122.15 (permit terms and conditions). Since these sections are more detailed than the general permit proposal, they address the concerns of commenters that proposed general permit terms and conditions were vague and overbroad. Any concerns about unreasonable permit conditions are adequately addressed by a discharger's right to request an individual permit and then request a hearing under Part 124.

Some commenters were confused about the use of best management practices (BMPs) as general permit terms and conditions, including questions on how best management practices would be developed. The use of BMPs for separate storm sewers is of particular importance since "end-of-pipe" effluent limitations may not be the most appropriate means of control. As indicated in the preamble discussion of

BMPs, they may be imposed in general permits under a variety of authorities. To summarize briefly, BMPs may be imposed in general (or individual) NPDES permits, where: uniform numeric effluent limitations are infeasible, in accordance with *NRDC* v. *Costle* (Runoff Point Sources); BMPs are mandated under section 304(e) of the Act to control toxic and hazardous pollutants from ancillary industrial activities; BMPs are "appropriate requirements" related to the achievement of effluent limitations, pursuant to section 402(a)(2) of the Act; BMPs are a condition of State certification for an EPA-issued permit under section 401(d) of the Act; BMPs constitute a more stringent limitation established pursuant to State law or regulations under section 301(b)(1)(C) of the Act; BMPs are required pursuant to the National Environmental Policy Act, where an Environmental Impact Statement (EIS) has been prepared; and BMPs are necessary to assure consistency with a State water quality management plan pursuant to section 208(e) of the Act. (See § 122.15(g).)

A number of commenters noted some problems with the provisions related to revocation of a general permit and issuance of an individual permit to a particular discharger. As a result, the provisions have been redrafted, with several major changes in the final regulations. First, interested persons can request that a general permit be revoked and an individual permit required for a particular permittee. A permittee is adequately protected against arbitrary action in this regard under the procedural safeguards of Part 124. Second, rather than requiring general permit modification, the revocation of a general permit and the issuance of an individual permit now automatically modifies the general permit's applicability to the individual permittee. Public notice and opportunity for comment on the modification of the general permit for this purpose (i.e., solely reflecting a change in covered permittees) is not necessary because public notice will be given of the new individual permit for the permittee. Third, individual permittees can request to be covered by the general permit, and vice versa. In a related vein, a few commenters suggested that a person covered by a general permit should be excluded from general permit coverage where an individual permit is requested, and left unpermitted pending a decision on the individual permit request. This suggestion has not been taken, since it runs contrary to the pollution control goals of the Act and EPA's policy on permit modification and revocation and reissuance.

Finally, EPA has rejected some changes recommended by commenters as inconsistent with the Act's requirements, e.g., general permits may not be issued for terms which exceed five years, and section 208 water quality management agencies may not be designated as permitting authorities for general permits.

III. Part 123—State Permit Program Requirements

A. *What Does This Part Do?* Section 304(i)* of the Act directs the Administrator to promulgate guidelines for State programs setting minimum requirements for State participation in the National Pollutant Discharge Elimination System (NPDES) permit program under sections 402, 318 and 405. Section 101(e) of the Act directs the Administrator to promulgate guidelines setting minimum requirements for public participation in the development, revision and enforcement of State programs approved pursuant to sections 402 or 404. This Part contains the guidelines required by section 304(i) and 101(e). In addition, this Part sets guidelines for State section 404 permit programs regulating discharges of dredged or fill material. The decision to include section 404 permit programs in this Part is based on the very close parallel between the statutory requirements for the NPDES and section 404 permit programs (e.g., compare section 402(b) with section 404(h)).

This Part also specifies the process for EPA approval of State programs and for revision of State programs (including any revisions to existing State programs necessary to conform to the Clean Water Act of 1977). Guidelines for EPA overview of State programs, including the requirement for a Memorandum of Agreement between the State and EPA, and the process for objection to proposed State NPDES permits are also incorporated into this Part.

Many of the substantive requirements for the operation of the NPDES program, whether administered by a State or EPA, are contained in Parts 122, 124 and 125. The provisions of those Parts are applicable to State programs only to the extent they are incorporated by reference into Part 123 (e.g., see § 123.12). Thus, if a provision of Part 122, 124 or 125 is not cross-referenced in Part 123 it is not directly applicable to State NPDES programs. For example, most of the requirements of Part 124 do not apply to States.

A person reading Part 122, 124 or 125 should be able to determine from the context whether the particular provision is applicable to State administered programs. Nonetheless, if any doubt exists Part 123 should be consulted to determine whether or not States must conform to the particular requirement in question. Where an applicable provision of Part 122 incorporates requirements from elsewhere in this Chapter it becomes a State program requirement. For example, § 122.20 is made applicable to State programs under § 123.12 and requires that NPDES permits include monitoring requirements. Under § 122.20(c) the testing done by permittees is required to conform to 40 CFR Part 136. Therefore, these Part 136 requirements are applicable to State programs.

Additional operational requirements of State section 404 programs will be proposed in the near future as part of the "consolidated regulations". These will closely parallel the requirements of Parts 122 and 124 which are applicable to State NPDES programs. Until the remaining requirements to State section 404 programs are proposed, States should seek guidance from Parts 122 and 124, from regulations promulgated by the Corps of Engineers and directly from EPA.

The provisions of Part 123 (including the applicable sections of Parts 122, 124 and 125) are *minimum* requirements and the States are free to impose more stringent requirements at any time. Thus, in the final example of the preceding paragraph, the State is free to ignore the EPA-promulgated effluent guideline if it chooses to impose more stringent effluent limitations than EPA requires under 40 CFR Subchapter N.

B. *How Does This Part Relate to Existing Regulations?* Prior to the promulgation of these regulations the operational requirements for State NPDES programs were contained in former Part 124 and former Part 105 (Public Participation). The process for approval and revision of State programs was developed and contained in EPA policy memoranda and informational communications. The approval and revision process contained in this Part is merely a codification of existing requirements and does not represent any change in these processes.

The public participation guidelines of Part 105 were recently replaced with a revised set of guidelines under Part 25. In doing this EPA decided to remove

*The provisions of section 304 were redesignated as a result of the Clear Water Act of 1977. What is now designated section 304(i) was formerly section 304(h). Congress failed to make corresponding changes to section 402. Cross references in section 402 to section 304(h) should, therefore, be read to mean section 304(i).

State permit programs from the coverage of Part 25 and to incorporate the applicable public participation requirements for State programs into Part 123. This was done so all the major requirements for State programs are contained in one Part. In doing this EPA has incorporated most of the substantive provisions of Part 25 into Part 123 (in certain instances this is done by incorporation of applicable requirements of Part 124).

Public participation in the permit issuance process, pursuant to the requirements of section 101(e) of the Act, is fostered by the public notice requirement (§ 124.41), the statement of basis and fact sheet requirements (§§ 124.33 and 124.34), the public comment period and opportunity for hearing requirements (§ 124.42), and the response to comments section (§ 124.63), all of which are applicable to State NPDES programs.

A basic element of Congress' concern for public participation is to make use of a concerned public in identifying possible noncompliance with permit requirements. To this end Part 123 requires that all permit applications and all effluent data be made available to the public without restriction. All other information must be made available to the public unless shown to be confidential. (See § 124.131.) In addition, "quarterly noncompliance reports" and annual reports prepared under § 122.23 must be made available to the public. The availability of this data ensures that the public can monitor the performance of permittees.

Additionally, the regulations attempt to assure that possible violations identified by the public will be acted upon by the State. Section 123.31 requires that States establish programs to receive and review all evidence submitted by the public.

Finally, citizens have a right to directly initiate enforcement actions in Federal court pursuant to section 505 of the Act. That section also provides that citizens may intervene as a matter of right in any action in Federal court and, in many cases, recover attorney's fees.

C. *How Does This Part Relate to the August 21, 1978 Proposal?* The following is a discussion of the significant comments received and changes made to the August 21, 1978 proposal. Editorial changes have been made to all sections and are not discussed. There has also been a renumbering of the Part 123 sections. There are now fewer sections in Part 123 because a large number of the proposed sections were condensed into § 123.12.

§ 123.1 Purpose and scope.

Many comments suggested EPA should be allowed to complete the permit issuance process, after approving a State program, for those permits "in the pipeline" at the time of program approval. While this approach has merit it cannot be adopted because section 402(c) of the act precludes permit issuance by EPA after the date of approval of a State program. See *Central Hudson Gas and Electric Corp. v. EPA*, 587 F.2d 549 (2nd Cir. 1978). However, EPA will endeavor to avoid these problems, to the extent possible, whenever the transfer of program authority is pending.

In an effort to clarify the status of Federally issued permits after program approval a new paragraph has been added, §123.1(d). It provides that EPA or the Corps (in the case of section 404 programs) retains jurisdiction over Federally issued permits for all purposes until they expire, unless arrangements are made with the State for the State to assume responsibility for administering permits issued by the Federal Government. This retention of jurisdiction may be extended beyond the expiration date of the permit, with the agreement of the State, for the purpose of resolving an ongoing issue, such as an adjudicatory hearing or permit modification request.

Many commenters opposed the provisions in § 123.1 and § 123.62 (proposed § 123.102) which link the permit programs under sections 318 (aquaculture) and 405(a) (disposal of sewage sludge) to the section 402 permit program. These comments suggested that such a linkage is not authorized by law and would impose an additional burden on NPDES States. However, the Clean Water Act of 1977 specifically amended section 318 and 405 to provide that permits issued under these sections are NPDES permits. In light of the prohibition against partial program approval requiring that all elements of the NPDES program be administered by the State, State programs must now include the activities specified in sections 405 and 318.

To avoid any confusion, the language in § 123.1 and § 123.62 has been clarified. A preliminary review of State programs indicates that most existing NPDES States have adequate authority to control the discharges specified in sections 318 and 405(a). Therefore, the requirement that States have authority for controlling these discharges should not impose an additional burden. EPA will assume that existing State programs have the necessary authority and are authorized to implement sections 318 and 405(a). Any State which lacks authority should contact EPA and take whatever action is necessary to modify its program to conform.

Another new provision has been added to this section (§ 123.1(f)) which specifies that the public participation guidelines of section 101(e) are now incorporated into Part 123.

§ 123.2 Definitions.

Four new definitions have been added, i.e., "draft permit," "proposed permit," "Memorandum of Agreement," and "State/EPA Agreement." These definitions conform to existing practice and do not represent any new or changed requirement.

A draft permit is the document prepared by the Director after tentatively determining to issue a permit to an applicant. This draft permit is then put on public notice and circulated in accordance with the applicable sections of Part 124. A fact sheet on the draft permit may be required. A statement of basis is required whenever a fact sheet is not prepared.

After the close of the comment period, the Director analyzes all the information submitted on the draft permit and arrives at a final determination to issue a specific document as a final permit. Where EPA has not waived the right to review the permit, this final determination is subject to EPA review in accordance with § 123.23 before it can become finally effective. The State Director's final determination is sent to EPA as a "proposed permit" in accordance with the Memorandum of Agreement. The State Director may issue the proposed permit as soon as EPA concurs with the proposed permit, or the time for EPA review expires. No proposed permit is required under these regulations whenever EPA has waived its right to review (See §§ 123.23 and 123.7).

The definitions of Memorandum of Agreement and State/EPA Agreement were added to provide clarity. There were several comments questioning the relationship between these two documents. See the preamble discussion of § 123.7 for a discussion of this relationship.

§ 123.3 Elements of a program submission.

A new section (§ 123.3) has been added to clarify and identify all requirements of a program submission in one section. With respect to State program forms, EPA is now more specific as to which State forms it will review (i.e., the permit form and the

permit application form(s)). States will be required to use a standard Discharge Monitoring Report (DMR) form developed by EPA. These forms will be printed by EPA and supplied to States on request. States may, however, substitute their State Agency's name, address, logo, and other similar material for EPA's on the forms. They are designed to be read and analyzed by computer. EPA will supply the computer software associated with the standardized DMR to States as requested.

The use of standard national forms is specifically provided for in the Act (section 304(i)) and enhances EPA's ability to assure a degree of national uniformity of the program. Many comments were received from national companies requesting EPA to standardize all forms. However, the Agency believes that DMRs are the only forms which should be standardized now.

§ 123.4 Program description.

Several comments were received on proposed § 123.3 objecting to the prohibition against allowing more than one State agency to issue section 404 permits. Most of these comments suggested that this is inconsistent with the efforts of several States to provide "one-stop" permitting authorities covering certain activities (e.g., power plant siting councils). EPA disagrees with these comments and believes that it is important to have this permitting authority in one State Agency.

§ 123.5 Memorandum of Agreement with Secretary for section 404 programs.

This requirement was proposed as § 123.3(b) (the program description section) but has been made into a separate section for clarity. Some of the proposed requirements of this section have been eliminated or modified in response to comments. For example, joint processing agreements, while encouraged, are not required. Likewise, the State need not await the completion of a environmental impact statement by the Corps before permit issuance. The most important feature of this Memorandum of Agreement (MOA) is in paragraph (a) and remains unchanged. This requires a delineation of section 404 permitting responsibilities for waters of the State consistent with section 404(g)(1) of the Act.

§ 123.6 Attorney General's Statement.

Section 402(b) of the Act requires that the State Attorney General certify that the State have adequate legal authority to implement the requirements of the NPDES program. Where the State program has independent legal counsel, such counsel may submit the statement in lieu of the State Attorney General. To qualify as "independent legal counsel" the attorney representing the State agency must have authority to independently represent the State agency in court on all matters pertaining to the State program.

Many comments indicated that the requirements of proposed § 123.4(c) were confusing insofar as that paragraph listed a number of sections of Part 123 which, in turn, cross-referenced sections of Parts 122 and 124 as being applicable to State programs. In order to eliminate this confusion, the sections of Part 123 which merely served to cross-reference sections of Part 122 and 124 have been consolidated in a new § 123.12 (see discussion below). Section 123.6(c) is now phrased to require a certification that the State has authority to implement the requirements of Part 123. EPA will continue its past practice of supplying States with a model Attorney General's Statement format.

While EPA has a legal duty to independently review State authorities, the Attorney General's Statement is given great weight in interpreting the requirements of State law.

§ 123.7 Memorandum of Agreement with the Regional Administrator (MOA).

The provision on scope of EPA waiver of review (proposed § 123.5.(b)) drew the most comments on this section and has be modified. The language in the regulations as proposed was based on existing Agency policy on waiver and, therefore, reflected what is presently found in MOA's with the NPDES States. As written, the provision on waivers broadens the scope of waivers available. This waiver of review is now very broad for non-process wastewater discharges; however, in some instances such a waiver is possible only with the prior approval of the EPA Deputy Assistant Administrator for Water Enforcement. On the other hand, EPA will not waive review of any general permits proposed by the State. The waiver provisions of this section only specify the maximum waiver available, and in some instances EPA may choose not to extend this maximum waiver to a State. This is particularly true for a State with a new program where EPA oversight is critical until the program becomes established and experienced.

The entire paragraph on the contents of the MOA (proposed § 123.5(c)) has been reorganized to reflect a more functional arrangement. The requirement that the agreement be reviewed and revised every three years (proposed § 123.5(b)) has been deleted on the basis of many comments suggesting that it was unnecessarily mechanical. Instead, MOA's should be reviewed and revised as necessary to reflect programmatic changes.

Relationship between Memorandum of Agreement and State/EPA Agreement. The State/EPA Agreement is an overall management tool which provides a way for the Regional Administrator and the State to coordinate and, to the maximum extent feasible, integrate programs administered by EPA and the State, emphasizing problem-solving approaches to specific environmental problems. The State/EPA Agreement reflects important decisions on environmental priorities, administrative problems, timing, responsibilities and allocation of resources. In FY 1980, the State/EPA agreement is to cover programs under the Clean Water Act, Safe Drinking Water Act, and Resource Conservation and Recovery Act. Other environmental programs will be added to the process in following years.

The Memorandum of Agreement is a document signed by the Administrator and the State which formally sets forth the relationship between EPA and the State in the administration of an approved State permit program and details specific procedures that must be followed by both parties in the development, issuance, review, and enforcement of permits. The Memorandum of Agreement is the legal basis upon which EPA predicates its continuing decision that State issued permits are consistent with the requirements of the Clean Water Act and implementing regulations. Because of this, any proposed change to an MOA must be reviewed and approved by the Administrator to assure it is consistent with the requirements of Part 123.

The Memorandum of Agreement and the State/EPA Agreement should be consistent. This should not present a problem since they generally address different areas of the State/EPA NPDES relationship. The State/EPA Agreement should include the MOA. However, it may not override it in the instance of any inconsistency. If the State/EPA Agreement indicates that a change is needed in the MOA, the proposed change must be reviewed and decided by the Administrator.

§ 123.8 Sharing of information.

Many commenters raised concerns about the treatment of confidential information submitted to EPA or an NPDES State, particularly when the two

agencies share information. For example, when a State NPDES program is approved EPA gives the State the information in its files. A new § 123.8 has been added to specify how confidential information is treated under these circumstances. Persons interested in this area should consult 40 CFR Part 2 which is also applicable.

§ 123.11 Requirement to obtain a permit.

Proposed § 123.11(c), which specified which State has permit issuing authority for discharges into waters which form the boundary line between States, has been dropped.

§ 123.12 Operational requirements.

This is a new section which combines the requirements of proposed §§ 123.24, 123.21, 123.41, 123.42, 123.43, 123.44, 123.51, 123.52, and 123.61. Each of the proposed sections cross-referenced provisions of Parts 122, 124 and 125 as being applicable to State programs. Comments pointed out that this resulted in a great deal of confusion in understanding what is required of a State. Section 123.12 now combines, in a single section, all the cross-references. In addition, a person reading Parts 122, 124 or 125 should be able to determine, from the context, whether a particular section is applicable to State programs. In case of any doubt, however, § 123.12 is controlling.

It should be noted that, while all the provisions of § 123.12 are applicable to State programs, States need not have detailed State regulations on each provision. For example, as long as a State has adequate legal authority to implement § 123.22 (which indicates how information is submitted to EPA) and acts in accordance with § 123.22, it need not have a regulation which duplicates the Federal requirement. Again, States are always free to impose more stringent requirements than are included in these regulations.

§ 123.12(a)(14)—This section allows States to operate a general permit program. This section greatly modifies and simplifies the requirements for State general permit programs which were proposed at 42 FR 6846 (February 4, 1977); see preamble discussion of § 122.48. Of course, operating a general permit program is strictly optional. A State may choose to require individual permits in all cases. If a State chooses to issue general permits it is subject to the provisions of § 123.12(a)(14). This specifies that such permits shall be issued in accordance with § 122.48, and that they are subject to a full 90-day EPA review, including review by EPA Headquarters for all proposed general permits other than those for separate storm sewers.

§ 123.13 Control of disposal of pollutants into wells.

The requirement of this section was proposed in § 122.41(a) but was moved to § 123.13 since it is applicable only to State programs. Some commenters questioned EPA's authority to require States to control well disposal by permit. Section 402(b)(1)(D) of the Act specifically requires States to have this authority, although EPA lacks similar authority under the Act. See *Exxon Corp.* v. *Train*, 554 F.2d 1310 (5th Cir. 1977). NPDES States are urged to use the authority required by this section in developing and implementing an underground injection control program required under the Safe Drinking Water Act. The requirements of these two Acts are consistent and complementary. State UIC program regulations will be promulgated as part of EPA's consolidated regulations.

The requirement of § 122.41, that permit conditions for surface discharges be adjusted where a portion of the permittee's effluent is discharged underground, into a POTW or by land application, remains applicable to States.

§ 123.22 Transmission of information to EPA.

This section was proposed as § 123.23. Several commenters felt that EPA should provide the permit applicant with a copy of any comment, objection, or recommendation respecting a proposed State permit. EPA agrees and has incorporated such a requirement into § 123.22(a).

§ 123.23 Objections to proposed NPDES permits.

The requirements of this section were not included in the August proposal (Part 124, Subpart L was reserved for these requirements) but were included as a portion of the regulations promulgated at 43 FR 22160–22164, (May 23, 1978). EPA believes that the portion of those regulations dealing with EPA objection to State permits belongs in Part 123 where the other requirements for State programs are contained. Therefore, they will not be included in Subpart L to Part 124. In transferring the objection regulations into § 123.23, no substantive changes were made.

Reviewability of Objections. Although the Agency has not sought comment on the incorporation of the objection regulations into Part 123, and issue associated with these regulations is the availability of administrative and judicial review of EPA's decision to object to a permit.

An EPA objection is, in essence, a determination that certain conditions which are not included in a proposed State permit are necessary to carry out the requirements of the Clean Water Act. Section 402(d)(2) of the Act requires the Administrator, when he objects to the issuance of a permit, to state the reasons and to set forth the effluent limitations and conditions which the permit would include if it were issued by the Administrator. If the State fails to submit a revised permit (after any EPA hearing on the objection), the Administrator may issue the permit. All determinations underlying the objection are then subject to Agency review in accordance with Part 124 of these regulations. Under those regulations, contested provisions of the permit are stayed during Agency review. Thus, EPA's determinations do not affect the discharger until the administrative process is at an end and a final permit is issued.

Where EPA objected to a permit prior to the 1977 amendments to the Act, the Act made no provision for further action by EPA. The objection to the permit was the final Agency action, and the Act prohibited the State from issuing the permit objected to. In these circumstances, the Agency took the position that the objection was reviewable in the Court of Appeals as the Agency's action in "denying any permit" under section 509(b) of the Act. In general, the courts agreed. See, *Republic Steel Corp.* v. *Costle*, 581 F.2d 1228 (6th Cir. 1978); *Ford Motor Company* v. *EPA*, 567 F.2d 661 (6th Cir. 1977); *Mianus River Preservation Committee* v. *Administrator, EPA*, 541 F.2d 899 (2nd Cir. 1976); but see, *Washington* v. *EPA*, 573 F.2d 583 (9th Cir. 1978).

This resulted in a situation which the Senate Report on the 1977 amendments described as the:

> Impasse which may result when the Administrator objects to the issuance of a permit which is contrary to the provisions of the Act and the State is unwilling to issue a permit to the point source which is consistent with the provisions of the Act. Under the present Act, neither EPA nor the State may issue a valid permit in these circumstances. [*CWA Legis. Hist.*, Vol. 4 at 706.]

Accordingly, the Congress amended the Act to allow EPA to issue the permit after an objection. The Senate Committee report criticized EPA as having been "much too hesitant" to take actions to object too State permits, and called for a "vigorous overview of State

programs to assure uniformity and consistency of permit requirements and of the enforcement of violations of permit conditions." *Id.*

The theme of the Senate Report—that the objection was an expeditious mechanism to avoid delays in permit issuance and resolve disputes between the States and EPA—was echoed in the Conference Report on Pub. L. 95-217, which said:

> After the date of enactment of this provision the Administrator is expected to use the authority given by this amendment to issue a permit after objection to a State issued permit. Thus any litigation over the degree of effluent reduction required for a source should take place in the context of judicial review of the permit, rather than in the context of an enforcement action. *. *. *.
>
> Judicial review arising out of this provision would be in the same manner as judicial review of any EPA issued 402 permit. [*CWA Legis. Hist.*, Vol. 3 at 281.]

This passage clearly indicates that EPA permit issuance under section 402 is the only reviewable action associated with an EPA objection. The objection is an interlocutory decision, one which has no effect on the applicant and other interested persons except to shift the forum for hearings and review. Thus, Congress thought judicial review of the permit was the appropriate place to review EPA's determinations. Several other factors militate in favor of this view:

1. The availability of administrative review and the stay provision in EPA's permit issuance regulations means that EPA's objection determination has no effect on the discharger. In such cases, review is properly delayed until Agency action is final and effective. See *Toilet Goods Association* v. *Gardner*, 387 U.S. 158, 165 (1967).

2. Judicial review of an Agency objection prior to final permit issuance would unnecessarily bifurcate the judicial review proceedings and delay final Agency action. Review of the objection could consume months or even years. Permit issuance, appeals, and judicial review of the permit could consume additional months or years.

3. The short time period for Agency action precludes the sort of record building by EPA which is a normal prerequisite of effective judicial review. See *American Iron and Steel Institute* v. *EPA*, 543 F.2d 521 (3rd Cir. 1976).

§ 123.31 Compliance evaluation programs.

This section, which was proposed § 123.71, was retitled and slightly condensed. A few new requirements were included based on existing Agency policy. In particular, this section now requires that the State enforcement program have procedures and ability to receive citizen complaints about possible program violations and to ensure that these complaints are adequately considered. This requirement was included in the public participation regulations of former Part 105 and as proposed in Part 25. In order to include all the public participation requirements for State programs in Part 123, this requirement was moved from Part 25. EPA believes that this is an important aspect of involving the public in enforcement as mandated by section 101(e).

§ 123.32 Enforcement.

Proposed as § 123.72, this section drew many comments. However, most of the provisions of § 123.32 are identical to the requirements of the 1973 regulations (former § 124.73). EPA has not changed these provisions, although minor wording changes have been made for clarification. The new element of § 123.32 (proposed § 123.72(i)) is the addition of a penalty policy provision requiring States to calculate civil penalties for deadline violations using specified criteria. This requirement generated a great deal of confusion. Many commenters feared that States would be required to implement all aspects of EPA's penalty policy including use of the penalty panel and EPA's computer programs. While States are strongly encouraged to use these, § 123.32(i) only requires States to employ the basic precepts of the penalty policy. It allows States to exercise substantial discretion in settling civil enforcement cases. No change was made to the proposed version.

Another new provision, § 123.32(h)(2), has been added to clarify that State enforcement proceedings may not include additional elements of proof or mental state for establishing violations. EPA's approach has consistently been to require States to have the same enforcement remedies that are available to EPA. In exercising this enforcement authority, States should not have any additional elements of proof or other legal requirements which make State imposition of penalties more difficult than EPA action.

Availability of Resources.—Proposed § 123.81. Part of this proposed section has been deleted and part has been moved into § 123.4 (Program description). Proposed § 123.81(b) (identifying criteria for EPA evaluation of State resources) was deleted entirely because these criteria are matters relating to internal EPA review and do not need to be promulgated in the form of regulations. Nonetheless, EPA does require that sufficient resources be devoted to State programs. Proposed § 123.81(a) has been incorporated into § 123.4.

§ 123.42 Agency board membership.

Proposed § 123.83 on Agency board membership drew a very large number of comments, most of which argued that it was too stringent. Nonetheless, since § 123.42 is identical to former § 124.94 and is clearly mandated by section 304(i)(2)(D) of the Act, no changes have been made.

§ 123.51 and § 123.52 Section 402 and 404 approval process.

The approval process sections (proposed §§ 123.91 and 123.92) have been clarified and made more specific. The changes are consistent with the process EPA has routinely employed in these matters. Requirements from the proposed public participation regulations (e.g., the need for EPA to prepare a responsiveness summary) have been added.

§ 123.61 Procedure for revision of State permit programs.

The procedures for State program revision have been clarified and include a new requirement that EPA publish notice of any action substantially modifying a State program. Proposed § 123.103 was inserted into § 123.61.

§ 123.62 NPDES program revisions under the CWA of 1977.

A large number of comments were received on the dates specified in proposed § 123.102(c) for modifications to State programs implementing the 1977 amendments. These dates have been adjusted to be more realistic. Proposed § 123.102(a) was deleted because it contained only optional changes. States are still free to make these changes.

IV. Part 124—Procedures for Decisionmaking Regarding National Pollutant Discharge Elimination System Permits

A. *What Does This Part Do?* Part 124 establishes the procedures which EPA will use for receiving permit applications, writing draft permits, and soliciting public comment on them. It also establishes the procedures which EPA will follow in issuing final permits and holding evidentiary and panel hearings. A number of provisions of this Part are applicable to approved States through incorporation by reference in § 123.12.

B. *How Does This Part Relate To Existing Regulations?* In most cases, this Part will not change the general framework of the former regulations covering permit determinations. Applications for permits will still be filed with the appropriate permit issuing authority; draft permits will be prepared and made available for comment. After comments have been received and analyzed, any necessary changes will be made by the permit issuing authority, and a final permit will be issued. Any interested person will then be able to request an evidentiary hearing on any factual issues involved.

However, significant changes have been made in the procedures for variances, modifications, and other permit actions besides the basic issuance of a permit: In the degree to which permit decisions are documented before an evidentiary hearing begins; in the relationship of prior administrative proceedings to any evidentiary hearing; and in the hearing procedures for "initial licensing". Each of these points, all of which were the subject of comments, are explained in the following sections.

C. *How Does This Part Relate To The August 21, 1978 Proposed Regulations?* The following is a discussion of the significant comments received and the basis for revisions made to Part 124 of the proposed regulations, including the integration of the section 301(h) procedures into Part 124 (section 301(h) procedures were proposed separately on April 25, 1978, 43 FR 17484). Minor editorial changes have been made in all sections.

§ *124.1 Purpose and scope.*

A number of comments inquired whether denials of a permit would be subject to the same rights of public comment and potential evidentiary hearing as other permit actions. The answer is "yes" and a new section has been added to make this clear (§ 124.15). A denial of a permit could be based on, among other things, the discharger not complying with the requirements of Part 122, Subpart B.

§ *124.11 Applications.*

This section has been modified by moving proposed § 124.11 (b) and (c) into § 122.10. Proposed § 122.17, "Requests for additional information" has been made part of this section.

§ *124.12 Special provisions for applications from new sources.*

(1) This section allows the Regional Administrator to delay a hearing on a new source determination until the hearing on the final permit. Some commenters objected to such a delay, arguing that it could result in an Environmental Impact Statement (EIS) being written before the discharger had an opportunity to argue on appeal that the discharge was not a "new source."

The Agency believes the proposed approach is efficient. Hearings on a new source determination and permit terms will often involve common issues and witnesses. In such cases, the Regional Administrator should have the option of either bifurcating the hearing or waiting until after a final permit is written to hear all the issues. The choice will depend on which option would consume the least resources and time. Since EPA is legally responsible for preparing the EIS, EPA will share the burden of making a wrong decision.

(2) Some comments claimed the EPA lacked authority to restrict the construction of new sources pending National Environmental Policy Act (NEPA) environmental review, arguing that the Agency may regulate only discharges and has no power to regulate construction of sources.

While it is true that EPA lacks authority to regulate construction which will not result in a discharge of pollutants, EPA has an obligation under NEPA to consider alternatives to the proposed action where a permit issuance would necessarily involve a discharge. Judicial decisions under NEPA have made it clear the EPA must consider reasonable alternatives, and that the alternatives (where a new source is involved) must always include not permitting the source. Where a source's operation necessarily results in a discharge, denial of an NPDES permit is tantamount to denial of the right to construct the facility. Thus, in such cases, EPA cannot fully consider such environmental matters as land use, air quality degradation, solid waste disposal problems, and others, without consideration of alternatives which involve no construction at the selected site. Since construction of the facility could limit or eliminate some of the options which should be considered, EPA has the authority to require that NEPA review be completed prior to actual construction. For a complete discussion of this issue, see *EPA General Counsel Opinions*, "Water Pollution" at 310-311 (NILS 1979).

Proposed § *124.13 Information required for thermal discharge modifications.*

This section, which was essentially substantive requirements for thermal discharges, has been incorporated into Part 125, Subpart H.

§ *124.13 Modification, revocation and reissuance requests.*

Several persons urged that it would be inefficient in processing modification requests to require (as proposed in § 124.15) submission first of a request to apply for a modification and then of the application itself. EPA agrees and has revised this section to state that the modification can be based on the initial request itself unless more information is needed.

The proposed regulations also intended to put modification requests and variance applications on the same procedural "track" as other permit applications. They did this by requiring those seeking a modification to write to EPA and request permission to apply for a new permit. If the request was granted, an application could then be filed and would be processed like any other application. This basic approach has been retained in the final regulations.

Suggestions for an automatic right to a hearing when permit modification requests are denied, have been rejected. Departures from the five year cycle of permit issuance and reexamination laid down by section 402(b)(1)(B) of the Act should not be encouraged. If encouraged, they could keep numerous permits in a state of perpetual reexamination to the detriment of the water pollution control program. By the same token, the regulation has been amended to make clear that even modification requests which are granted only reopen the permit to a limited extent.

§ *124.14 Permits required on a case-by-case basis.*

This section (proposed § 124.16) provides that sources which in the normal course are subject to a general permit program under § 122.48, may be required to apply for an individual permit in certain cases. Comments urging that an evidentiary hearing be afforded before requiring individual permit application have not been accepted. To allow this would produce long delays and a potential for two consecutive evidentiary hearings on closely related issues. Instead, the question whether an individual permit should be required at all will be open to full reconsideration as part of the deliberations on the potential terms of any such permit.

§ 124.21–24 State certification.

(a) State certification under section 401 of the Act was also the subject of numerous comments.[1]

(1) Many commenters objected to the delays caused by the State certification process in the NPDES program. Specifically they thought that the provision in the proposal for potentially allowing a State one year to certify was unconscionable. In response to those comments the regulations have been modified so that the right to certify will be deemed waived unless exercised within a *specified* reasonable time which shall not exceed 60 days unless the Regional Administrator finds that unusual circumstances require a longer time.

Because of some ambiguity in the certification provisions concerning the role of State certification in the EPA permit issuance process, the certification provisions were amended so as to set out a realistic, workable procedure consistent with the statute. A State will now be required to identify those provisions which it finds necessary to comply with applicable State or Federal law. However, since certification as to Federal requirements would duplicate EPA's work, EPA expects that ordinarily States will limit their certifications to requirements of State law.

Some problems have resulted from the practice of certifying draft permits, which practice has arisen from the practical difficulties of certifying applications. In particular, certifications have not always clearly stated exactly what conditions are necessary to comply with State law, and whether less stringent conditions would also satisfy State law. The final regulations remedy these problems by requiring States to set forth in all cases the minimum terms and conditions which will be necessary to comply with applicable law. For example, if a State certifies a permit with an effluent limitation imposing a daily maximum BOD of 25 mg/1, it will be required to identify also a ceiling representing the minimum level of control, such as 30 mg/1 or 40 mg/1, which the State finds necessary to comply with State law. In responding to public comments, or in an evidentiary hearing, EPA will be barred from considering any effluent limitation less stringent than the "ceiling" set by the State in its certification.

If the State fails to provide the "ceiling" required by these rules, EPA will be free to consider any changes which it finds appropriate during the subsequent permit review process. Of course, the Agency has an independent obligation to include in permits effluent limitations which are necessary to comply with State law, including water quality standards, whether or not the State has certified. See Decision of the General Counsel No. 58.

While EPA recognizes the burden that this procedure imposes upon States, the only logical alternative is unacceptable as a practical matter; that is continual resubmission to the State for recertification each time a draft permit is made less stringent as a result of public review during the permit issuance process.

(2) Changes have been made to allow EPA to modify a permit under certain circumstances if a State changes its certification during the EPA permit review process. The modified certification must be based upon changes in State law or upon a State court decision. Moreover, if a permit is final before the modified certification is received, it will be modified only to delete provisions resulting from a certification found invalid by a State court. These limitations are necessary to avoid a "moving target" of State law during the permit's life. See § 124.86(c) and preamble discussion of that paragraph for a fuller treatment of this issue.

(3) A new section § 124.24 has been added to the State certification Subpart. This addition contains the provisions for concurrence/certification from the April 25, 1978 proposal for section 301(h) modifications. The major divergence from normal permit procedures is that NPDES States (or the certifying Agency within a non-NPDES State) must concur/certify as described in this new section. Proposed § 124.61(a)(2) stated that no final permit shall be issued by EPA which grants a section 301(h) modification until the appropriate State has been given 30 days to approve or disapprove the modification. If the State disapproved the modification within 30 days, the modification would be deleted from the permit. Proposed § 233.45 had a similar provision except that there was no time limitation. One comment to proposed § 233.45 suggested that EPA should allow 30 days for State concurrence or concurrence would be considered denied. Although EPA recognizes the need to reduce delays in section 301(h) processing, we do not believe we can deem concurrence denied (as opposed to waived) if not granted within a certain number of days. Therefore we have instead chosen to deem concurrence/certification waived after 60 days rather than adopt the suggestion that concurrence be deemed denied.

§ 124.31 Draft permit.

A number of comments objected to the statement in proposed § 124.41(a) (now § 124.31(a)) that "any other relevant information" in addition to the types specified could be considered in deciding on a draft permit. Although the Agency has retained the language, it is not intended to allow draft permits to be based on material that is not reflected in the administrative record.

§ 124.32 Other draft permits.

This section provides that when EPA moves to revoke or suspend a permit, it shall do so by formulating a new draft permit subject to notice and comment and potential evidentiary hearing. Although commenters did not object to the purpose behind this section (to make sure that such decisions are made through the same basic procedures that apply to the permit issuance) some commenters suggested that the permit holder should be notified before any such draft permit was issued. EPA has not accepted this suggestion because the draft permit will constitute sufficient notice well before any legally effective action is taken. This section has also been revised to require *all* draft general permits other than separate storm sewers, (whether issued by EPA Regional Offices or the States) be sent to the EPA Deputy Assistant Administrator for Water Enforcement for 90 days for his/her concurrence or denial.

§§ 124.33–35 Statement of basis, fact sheet, and administrative record.

A major purpose of the proposed regulations was to increase the level of explanation of how and why EPA arrived at specific permit conditions, and to specifically identify the documents or other information considered in doing this.

The proposal would have done this by: (1) requiring each permit to be accompanied by a fact sheet explaining the factors considered and the reasons for the decision, and (2) requiring permits to be based on an "administrative record."

The administrative record could simply be an adequately organized file

[1] EPA recognizes that the former regulations in 40 CFR Part 123 are in need of revision. The substance of these regulations predates the 1972 amendments to the Clean Water Act and has never been updated. However, because of the impact of State certification of non-NPDES permits on a myriad of Federal programs, it will be necessary to consult with the affected agencies in some detail before changes are made. Meanwhile, the current certification requirements for Federally issued non-NPDES permits or licenses have been moved from Part 123 to Part 121.

drawer containing the relevant information. This ensures that the information considered in formulating a permit is identified and publicly available for comment. The administrative record requirement does not mean that there must be individual copies of the monitoring or reporting conditions or effluent limitations guidelines and development documents in the file, as long as they are properly cited. EPA's response to the many comments that were received on these provisions is provided below.

(1) A number of commenters argued that to prepare a detailed "fact sheet" and administrative record for every permit would result in a lot of paperwork for which there was no real demand. EPA agrees with these comments since, in our experience, although all permits are made available for public comment, over 90% of the EPA-issued permits become final without any public comment or requests for an evidentiary hearing. Accordingly, § 124.34 (proposed § 124.44) has been rewritten to require a "fact sheet" only for permits to major dischargers and other controversial permits including all variances or modifications. Permits for small discharges will not require a fact sheet and will only require a less detailed "statement of basis".

In many cases the "statement of basis" could consist of the internal memorandum prepared within the Agency which informs the person signing the permit of the guideline or other source of the effluent limits and any issues which the permit raises. By utilizing such an approach, EPA believes we are maximizing the utilization of the permit issuing authority's limited resources without denying the public or permittee basic information upon which to judge the adequacy of the permit.

The regulations have also been revised to provide explicitly that a fact sheet can be prepared for any permit which is the subject of widespread public interest during the public comment period and for which no fact sheet was prepared originally.

(2) Since the fact sheet can be quite extensive, States objected to mailing a copy to each person on a mailing list since most permits have proved to be of little interest. Therefore, the public notice of every draft permit will be sent to those on the mailing list but the fact sheet (or statement of basis) will be sent only on request.

(3) Because the fact sheet requirement has been limited to major or controversial discharges, the requirement of a special level of discussion for discharges of over 500,000 gallons per day has been eliminated. Distinctions among major or controversial permits based on the amount of water discharged do not correspond to any real differences in the degree of discussion that is advisable.

(4) Comments from both industry and EPA Regions on proposed § 124.44(a)(6)(iii) suggested deletion of the requirement that the record contain all documents cited in an EIS or similar analysis. These comments argued that since so many documents are generally cited, the requirement would be impossible practically and would also make the record less, rather than more useful. EPA agrees with these comments and has revised this section accordingly. Persons who wish specific documents to become part of the record may supply those documents as part of their comments under § 124.42.

This section has also been reworded to clarify that generally available material cited in a fact sheet does not need to be physically included in the administrative record.

§ 124.36 Applicability of Subpart D to draft permits incorporating section 301(h) modifications.

A new section, § 124.36, has been added to indicate that Subpart D is applicable to section 301(h) proceedings except, as provided in proposed Subpart C of Part 233, the Administrator, or a person designated by the Administrator will prepare the draft permit, not the Regional Administrator as with other draft permits.

§§ 124.41 and 124.42 Public comments and public notice.

The public notice sections were amended to cut time and paperwork requirements based on overwhelming objections to the proposed changes. On the advice of the States, the public comment period reverts from the proposed 45 days to the former regulations' 30 days. Many States felt that 30 days is sufficient for the vast majority of noncontroversial permits and additional time can be made available for those permits that generate public interest. EPA suggests, however, that a liberal policy be followed in granting extensions of the comment period.

Some commenters suggested that other methods of public notice of an action should be authorized. EPA and the States have found that the mailing list has been by far the most effective means of eliciting public participation into the NPDES process. Therefore, we urge States to develop mailing lists as provided or by any additional means they have found effective.

Similarly, States and EPA Regional Offices both stated that newspaper notices were ineffective in eliciting public comment and were a substantial drain on limited resources. EPA agrees and has revised this section to make newspaper notices shorter as well as optional if other means, such as posting, are utilized.

The proposed regulations allowed certain Federal and State agencies a separate early chance to comment on permit applications before the public comment period began. This provision has been eliminated in response to comments both from EPA Regions and from representatives of dischargers. These agencies now will be expected to comment during the public comment period. In particular cases, however, they may still be consulted informally before the draft permit is formulated.

This revision also deals with those comments which argued that the comments of other agencies on a draft permit must be reflected in the record. As noted elsewhere in this preamble, any permit terms in EPA-issued permits must be supported by the administrative record whether or not they are based on the views of other agencies.

§ 124.43 Obligation to raise points and provide information during the public comment period.

This section is discussed below along with § 124.76.

§ 124.44 Terms requested by the Corps of Engineers and other Government agencies.

Proposed §§ 124.21 and 124.22 stated the circumstances in which terms may be included in an NPDES permit at the request of another Federal agency. Although many comments were received on this, no substantive change has been made because EPA continues to believe the language in the proposal was correct. The Act says that EPA "shall" include in permits those conditions requested by certifying States and the Corps of Engineers.[2] Any challenge to those conditions must therefore be made through the State or Corps of Engineers procedures for challenging decisions. Terms based on the comments of other agencies without such veto authority must be within the discretion of EPA

[2] The statement of one commenter that the Corps authority under section 402(b)(6) of the Act is limited to vetoing permits, not imposing conditions on them, seems simplistic to EPA. A Corps of Engineers' statement that certain terms must be included in a permit can properly be viewed as a statement that the permit will be vetoed unless it contains those terms.

under the Clean Water Act and are therefore subject to the same procedures that apply to permits generally.

In response to comments, affected States are now included in § 124.44(c). This revision clarifies the right of such States under sections 402(b)(5) and 401(a)(2) of the Act to require more stringent requirements so that a discharge of another State does not violate its water quality standards.

§ 124.45 Reopening of comment period.

Proposed § 124.44 (now § 124.45) allowed for reopening of a comment period (or reproposal of a permit) at the discretion of the Regional Administrator.

Several comments suggested an automatic "reply comment" period in which the discharger and others could respond to points made during the main comment period. EPA agrees that this may be a good idea in some specific cases, but it could be unnecessarily burdensome if required by regulation in all cases. Therefore, the proposal has not been changed.

Subpart F—Special Provisions for Variances and Statutory Modifications

In response to several suggestions, the procedures for variances have all been placed in a single Subpart. This revision is done to present the public with an organized view of how variances will be handled within the normal permit procedures.

Under the Clean Water Act and the former regulations, there are more than a dozen different statutory or regulatory provisions on which permit requirements could be based, and seven provisions under which a variance from those provisions could be granted. Many of these provisions are not covered in the existing regulations, and where they are, the references are scattered through various parts of the Code of Federal Regulations.

Subpart F deals with the problems in two ways. First, it consolidates into one Federal Register Subpart the former procedures for making decisions on permit terms contained in 40 CFR Parts 122 and 402 (relating to thermal discharge requirements) and the former Part 124.

Second, it specifies where in the sequence, "application—draft permit—comment—final permit", permit actions other than the simple one of deciding on permit applications should fit.

In particular, it provides that whenever possible, a variance must be applied for before the close of comment on a draft permit. This will ensure that there is an opportunity to consider all the relevant issues before deciding the terms of a final permit and that issues are not raised at a later date for purposes of delay. The regulations also provide that where a variance is properly requested after this stage but before a permit has become final under § 124.101, the decision on the variance will still be made through the same permit procedures that apply to other permits. This will be done in appropriate cases by issuing a new supplementary draft permit embodying the Agency's response to the variance request, and holding action on the original permit until the supplementary permit has reached the same procedural stage and the two permits can proceed together.

§ 124.51 Time deadlines for applications for variance from and modifications of effluent limitations.

(1) A number of comments argued that the time limits for variance applications set forth in proposed § 124.14 were too strict. These comments have been accepted in a number of particulars.

(a) The statute requires applications for variances under section 301(c) and under section 301(g) to be submitted 270 days after promulgation of the relevant effluent guidelines or by September 25, 1978, whichever is later. However, since EPA has not yet issued crieteria for such applications, it clearly would have been unreasonable to have required a complete application by last September. Accordingly, these regulations incorporate the requirements of previous interim final regulations stating that applicants need only have submitted a very brief notice by September 25, 1978, (or within 270 days of the promulgation of an applicable effluent guideline) to qualify under that deadline. See 43 FR 40859 (Sept. 13, 1978).

Similarly, in the case of section 301(h), § 124.51(c)(1) revises proposed 40 CFR § 233.32 to indicate that a preliminary application must have been submitted to EPA by the statutory deadline, but the final application should not be filed until the section 301(h) criteria are promulgated in final form in Part 125, Subpart G. The criteria, when promulgated, will also specify the method of, and timing for, making a final application. This revision to the timing requirement is necessary because the statutory deadline has passed and EPA has not yet issued section 301(h) criteria.

(b) Dischargers who wish to be considered for a section 301(c) or section 301(g) variance will be required to comply with the substantive requirements of § 124.43 and Part 125 (once they are promulgated) by the close of the public comment period of their draft permits.

In some cases, draft permits will contain effluent limits that are not based on effluent guidelines but may still be eligible for variances. In those cases, it would be impossible to submit supporting evidence that a variance should be granted during the 30-day period of public comment. Therefore, in those cases, and in other cases the Agency believes appropriate, the Regional Administrator may grant an extension for up to six months to allow the applicant to complete his or her submission.

However, there will be many times when waiting until the last minute of the comment period would not be in the interest of the permitting process, the applicant, or the public. Therefore, in those cases where it is clear that a discharger will be submitting an application for a variance, the Director may require the applicant to submit that application in full before the draft permit is formulated. This requirement is intended to reduce the time for permit issuance, especially in those cases where it is clear that a variance or modification will be applied for, such as where the discharger has submitted the 270 day application for a section 301(c) or 301(g) variance (§ 124.51(b)(2)(i)) or where a fundamentally different factors variance is still pending on the first permit. This will lower the permit processing costs for the permitting agencies, the applicant and the public because there will no longer be a draft permit subject to a public notice that is irrelevant to the issues in the final permit.

§ 124.52 Decisions on variances and modifications which EPA or the State can grant.

Section 124.52 explains how decisions will be made on variances. There is a distinction between the variances and modifications EPA and the States may grant and those the Act requires that only EPA may grant.

(1) Many commenters objected to EPA and not approved NPDES States making variance determinations for fundamentally different factors variances, economic variances, environmental variances, and section 301(h) secondary treatment waivers. These commenters thought the States with NPDES authority have the authority to rule on these particular variances.

The 1972 Amendments to the Federal Water Pollution Control Act carefully spell out the relationship between the Federal Government and the States in

achieving the Act's goals of eliminating the discharge of pollutants from the Nation's waters. A major responsibility of the Federal Government under the Act is the development and promulgation of uniform national technology-based standards for categories and classes of industrial discharges. Variances from these standards are allowed if the applicant can show the plant is fundamentally different from those plants used in developing the limits. Since EPA promulgates those national standards, EPA, not the States, is the authority best able to judge if a plant is fundamentally different from those that were the basis for the standard.

The variance sections in the Act clearly designate who the Congress intended to make the determinations. For example, section 316(a) provided for thermal waivers to be granted by either EPA or NPDES States. Specific grants of authority appear in the 1977 amendments which added sections 301(g), 301(h) and 301(i). Section 301(g) authorizes "the Administrator, with the concurrence of the State" to grant variances from BAT effluent limitations. Similarly, section 301(h) provides that permits incorporating modifications of the secondary treatment required may be issued by "the Administrator with the concurrence of the State. . . ." Section 301(i)(1), municipal time extensions like section 316(a) variances, may be granted by the "Administrator (or, if appropriate, the State)." Finally, section 301(c), only mentions the Administrator and so variances under it can only be granted by the Agency.

(2) A number of commenters objected to the condition in the proposal that when the Act required State concurrence in a variance that is issued by EPA, the variance request would not be considered by the Agency until the State had first approved it. In response, proposed § 124.14(e) has been modified in § 124.52(b) to allow the State Director to concur after EPA makes a draft determination. In States where EPA is the permit issuing authority a State will certify the draft permit in the regular procedure. All State (whether NPDES or not) must concur/certify section 301(h) determinations before EPA can issue the section 301(h) modified permit (see § 124.24).

Some commenters objected to considering States' views at all where the act did not explicitly require it. However, States have authority, where State law requires it, to set more stringent limitations for a permittee under sections 401 and 510. Though EPA grants the variances, the variance sections do not allow EPA to overrule State authority to require more stringent State requirements. Therefore, it is not appropriate to disregard State input into variance determinations.

§ 124.55 Special provisions for modifying the secondary treatment requirement under section 301(h).

Paragraph 124.55(a) sets out the requirements for submission of additional information necessary to make a section 301(h) determination. This section is substantially the same as proposed § 233.32(c) except that it states that if an application, "on its face," demonstrates that the applicant is not entitled to a section 301(h) modification, then the applicant cannot submit additional information and the application will be denied. This requirement is consistent with Congressional intent, [*CWA Legis. Hist.* at 448] and has been added to clarify EPA's original intent behind proposed 40 CFR § 233.32(c). This is similar to the "summary denial mechanism" suggested by some commenters.

States argue they should be allowed to issue permits with section 301(h) modifications. EPA disagrees and believes that the proper procedure is dictated by the Act itself. Section 301(h) provides, not that EPA may modify an existing NPDES permit to allow a less than secondary discharge if the permittee meets the requirements of section 301(h), but that EPA may "*issue a permit* under section 402 which modifies the requirements of section 301(b)(1)(B)" (emphasis added). This requires EPA to assume full NPDES permitting authority—even where the State has an approved NPDES permit program—in issuing any section 301(h) permit. This interpretation is buttressed by the fact that the statute calls only for "State concurrence" in any section 301(h) permit issued, and does not require the State to crank the permit back into the State permitting process and add additional terms and conditions necessary to assure compliance with sections of the act other than section 301(h).

EPA believes this result is not only required by the act but makes a great deal of sense as a practical matter. Any other approach would bifurcate the permitting process for section 301(h) dischargers between EPA and the State, resulting in a great deal of confusion (especially since there is some overlap between section 301(h) requirements and other applicable requirements of the act) and delaying issuance of final permits. To clarify this issue, EPA has revised proposed § 124.61(a)(2) (now § 124.55(d)) to indicate that NPDES States may (not must) revoke the existing NPDES permit when they concur in the modification and they may also choose to cosign the section 301(h) permit. EPA hopes that NPDES States will choose to revoke any existing State-issued permits and cosign the EPA-issued section 301(h) permit because this will reduce confusion as to permit limitations.

§ 124.61 Stays.

(a) Proposed § 124.61(a) provided for automatic stays of contested permit provisions if an evidentiary hearing request is granted, or if a petition for review of denial of a request for an evidentiary hearing is filed with the Administrator.

Numerous comments were received on this provision. One recurrent theme was that if a permit was stayed by EPA, compliance schedules in it should be extended for the same period that the stay was in effect. This suggestion has been accepted except where the technology is not contested but the ability of such technology to reach certain effluent limits is. In addition, compliance schedules cannot be stayed where failure to meet a statutory deadline or a permit term of more than five years would result from such an extension. It has been EPA's consistent position that it lacks power to grant dischargers more time to comply with the statutory mandate than Congress has decided they should have, or to extend the statutorily prescribed permit term. However, permits may be continued by operation of law under the Administrative Procedure Act. See § 122.12(b).

(b) A number of comments objected to the statement in proposed § 124.61(c)(2)(ii) (now § 124.61(d)) that a new source or a new discharger is considered to be without a permit pending the completion of any evidentiary hearing. However, this provision is only a logical extension of the provision (which most of these same commenters endorsed), that new permit terms are stayed pending those hearings and therefore has been retained.

For this reason EPA has deleted the provision allowing the Regional Administrator to approve the start of discharge by a new source or a new discharger even though a hearing on that source's permit is still in progress. Such sources which are concerned about their ability to open on schedule under these provisions should apply for the necessary permit far enough in advance of their target opening dates to allow

time for completing all necessary procedures.

EPA has recently established several procedures to expedite the issuance of NPDES and other EPA permits (e.g., Prevention of Significant Deterioration permits for air new sources) to new facilities. EPA has designated in each EPA Regional Office a New Source Coordinator charged with the responsibility of shepherding these applicants through the permit process. EPA has also adopted a policy of (1) informing each new facility within 30 days of request whether a particular permit program will apply to the new facility and (2) determining within 30 days of receipt whether an application is complete. Furthermore, EPA Regions are establishing permit tracking systems or procedures to ensure that new facility applications are addressed expeditiously. All of these initiatives will help minimize delay.

One comment also asked about the relation of § 124.61(c)(2)(ii) to proposed § 124.11(c) (now § 122.10(c)) which required new dischargers to apply 180 days before the scheduled start of operations. The 180 days is a minimum period; it does not preclude applications before then.

(c) A number of commenters asked that a provision be made for appealing stays, or asked about the status and applicability of determinations that permit terms were uncontested and severable from contested ones.

In these regulations we have accommodated these concerns by requiring the Regional Administrator to identify in the notice of a grant of the hearing the terms of the permit which are not contested and therefore are enforceable against the discharger during the permit proceedings. In some cases it may be necessary for the Regional Administrator to write new conditions to represent uncontested requirements. For example, if a final permit would require compliance with effluent limitations representing the application of both technologies A and B, and the discharger agrees that compliance with technology A is appropriate but challenges application of technology B, the Regional Administrator must write specific permit conditions requiring the installation of technology A. The fact sheet or statement of basis should include the type of technology contemplated by the permit writer to meet any technology-based limits in the permit.

Appeals from determinations on uncontested conditions will be available only through the provisions of § 124.101.

(d) A number of comments questioned the provisions in the proposed regulations that made certain deadlines run from the date of receipt of a specified notice. Such a provision could result in different deadlines for different people, and make it more difficult to find out when deadlines actually did elapse. Accordingly, these provisions have been changed to specify the time when the notice is given as the starting point for deadline, and three additional days provided to cover mailing delays (§ 124.134).

§ 124.64 Response to comments.

A major part of the effort in the proposed regulations to increase the extent to which EPA explains the basis for permits was requiring a response to comments received on a draft permit. The substance of those proposed provisions has been left essentially unchanged. However, proposed § 124.63 ("final fact sheet") has been retitled "Response to comments" to clarify that a document must be prepared for every issued permit which responds to all significant comments and objections to the draft permit and indicates which provisions have been changed and the reasons for the change. A comment has also been added to make clear that if new points are raised during the public comment period, EPA has the right to add new material to the administrative record to document its response to those new points.

§ 124.65 Administrative record.

The "administrative record" provisions have not been changed, except to delete the proposed requirement that all records be indexed and subcategorized. Though this may be advisable as a matter of policy for large records in significant cases, it seems inadvisable to require it across the board by regulation.

At the request of NPDES States, the administrative record, as detailed in this section, is not a requirement for State programs.

Subpart H—Evidentiary Hearings for EPA-Issued Permits

§ 124.71 Applicability.

The provision in this section for not holding evidentiary hearings on general permits was approved by the one commenter to address it directly. The Natural Resource Defense Council in its comments did not criticize this approach but asked what alternative mechanisms for tightening requirements on individual sources subject to general permits were available. In response, EPA wishes to point out that interested persons are always free to suggest in their comments on draft general permits, or in a petition to EPA, that issuance of an individual permit should be required. EPA will then be obliged to answer the points made and to issue an individual permit if it appears that step is required.

§ 124.72 Definitions.

Comments from the Natural Resource Defense Council pointed out that the proposal, by automatically making the permittee a party to any evidentiary hearing, could result in the permittee not having to make the commitments to make witnesses available and to file certain papers to focus the issues that are required of those who become parties through their own affirmative actions.

EPA agrees with this comment and has therefore deleted this provision. Permittees will still get notice of all hearing requests, and will be free to intervene in hearings to protect their interests.

§ 124.74 Request's for evidentiary hearings.

(a) The test for "standing" to request an evidentiary hearing has been relaxed in the final version of the regulations. Instead of the stricter test contained in the proposal, the standard in the existing regulations will be retained.

(b) Some comments questioned the provision in § 124.74(b)(4) that persons requesting a hearing agree in advance to make potential witnesses under their control available to testify. EPA lacks explicit subpoena authority for hearings held in connection with NPDES proceedings and this language is necessary to provide some equivalent assurance that needed witnesses will be available. In line with this purpose, and as suggested by other comments, § 124.74(b)(4) (now § 124.74(e)(4)) has been revised to clarify that the duty to produce witnesses only applies when the Presiding Officer has ordered their production.

§ 124.75 Decision on a request for a hearing.

Section 124.75 and § 124.101 have been revised to clarify that a Regional Administrator's denial of a hearing may be appealed to the Administrator, and the Administrator may review or reverse any legal or policy conclusions on which that denial was based.

§ 124.76 Obligation to submit evidence and raise issues before a final permit is issued.

Two major purposes of the proposed changes to EPA procedures were to

encourage resolution of issues at the time of comments on a draft permit, rather than in the far more burdensome context of an evidentiary hearing, and to link that hearing explicitly to the preceding stages of permit issuance. At present, even where all major issues have been fully analyzed and resolved before the final permit was issued, they can be re-examined anew in the evidentiary hearing. The Presiding Officer may not know what happened regarding the permit before the hearing began. Also, new issues might be raised at the evidentiary hearing even though they could have been settled much more simply if raised at an earlier stage.

The proposed regulations attempted to remedy this situation in two ways. First, the administrative record on which the final permit was based would automatically go into evidence at any evidentiary hearing so that the decisionmaker would have the benefit of the earlier stages of consideration of the issues.

Second, no issue could be raised at an evidentiary hearing if it was not first raised during the comment period on the draft permit (proposed § 124.53). An exemption from this requirement was provided if "good cause" could be shown for the failure to raise the issue earlier. These provisions have largely been retained in the final regulations (§ 124.43). The purpose is not to exclude any person from EPA's decision-making process, but rather to focus the attention of the Agency and parties on the informal comment and public hearing stage of the permit issuance process. EPA believes that policy issues and most technical issues relating to the issuance of NPDES permits should be decided in the most open, accessible forum possible, and at a stage where the Agency has the greatest flexibility to make appropriate modifications to the permit. Evidentiary hearings, because they entail great delays, because they are cumbersome, and because only the well-financed can afford to participate, are disfavored as a means of solving any issues other than contested factual issues requiring cross-examination. Not only will this in the long-run lead to greater and better informed citizen participation, it will increase efficiency in the permit issuance process and will speed application of pollution control requirements.

Many comments were received on these different aspects of the proposal. The proposed changes were very widely endorsed and supported in principle. However, non-governmental commenters argued that the regulations went too far in tying the evidentiary hearing to the preceding notice-and-comment stages. These comments have been largely accepted. Specifically, § 124.53 (now § 124.43) and § 124.76 have been amended very much along the lines suggested in the comments of the Utility Water Act Group.

In addition, though the proposed requirement for automatic receipt of the administrative record in evidence has been retained, a comment has been added and the section has been changed slightly to make clear that testimonial material in the administrative record should be subjected to the same tests of its testimonial value as other testimonial material introduced at the evidentiary hearing.

Some comments argued that receiving the administrative record in evidence automatically conflicted with the provision in 5 U.S.C. § 556 for the exclusion of "irrelevant, immaterial, or unduly repetitious evidence". As the comment described above explains, receiving the administrative record in evidence serves to document for the Presiding Officer and the parties the prior proceedings out of which the evidentiary hearing will arise and on which it must in part be based. A substantial useful purpose is therefore served by this procedure. This purpose could not be served as well, and many opportunities for useless arguments would be opened up, if the section were amended to provide that the administrative record could be edited in some fashion before or after its introduction.

§ 124.84 Summary determinations.

A number of comments objected to the provision in § 124.84 that allowed motions for summary determination to be made "with or without" supporting affidavits. They feared that by explicitly mentioning the possibility of a motion without supporting affidavits, the regulations might result in shifting the burden of proof to the party against whom the motion is made. No such result is intended by this provision. Motions for summary determination must be affirmatively supported. The form of the proposal was only meant to recognize the possibility that material already in the record might amount to that affirmative support.

§ 124.85 Hearing procedure.

(1) *Burden of proof.* Comments came in on all sides of the question "Who should bear the burden of proof?" The comments discussed, not so much the burden of going forward, which most commenters agreed could properly be shifted by regulation, as the ultimate burden of persuasion. Several changes have been made in response to comments, but the basic approach has not been changed. Because this is a complex issue, it is discussed in some detail.

Most comments agreed that the Act explicitly assigns a burden of persuasion for most variance decisions. The Act explicitly provides that variances under sections 301(c), 301(h), 301(g), and 316(a) may only be granted if the applicant carries an affirmative burden of proof. Variances under section 301(c) are conditioned on a "showing by the owner or operator of such point source satisfactory to the Administrator"; sections 301(g) and 316(a) uses almost the same language; section 301(h) variances may be granted "if the applicant demonstrates to the satisfaction of the Administrator [that the conditions are met"].

The question then becomes what the substantive burden should be for basic permit terms not involving a variance. That question, in EPA's opinion, is of more limited importance than might first appear.

When EPA proposes permit terms, it has a burden of going forward, or, stated differently, an obligation to provide information and material so that other interested persons can understand what the proposed terms are based on and the reasoning behind them. Other persons have a similar burden with respect to terms they propose. This obligation has been recognized by EPA (See Decision of the General Counsel No. 63, pp. 28–31), and is part of the law of informal rulemaking as well. *Portland Cement Ass'n.* v. *Ruckelshaus,* 486 F.2d 375 (D.C. Cir. 1973). The provisions of these regulations on statement of basis and fact sheet, administrative record, and comments are largely aimed at implementing those requirements.

The question of the substantive burden of proof assumes importance when the information provided by the various interested persons under these obligations is fairly evenly balanced in the conclusions it points to. A substantive burden of proof rule can be used to help decide which conclusions should be accepted. It is in this context that the question of whether EPA or the person challenging a permit term bears the burden of proof assumes importance. In one sense, every party could be said to have the "burden of persuasion" as to the permit terms that it was advocating, but that approach would be of little use as a guide to decision. Accordingly, the regulations (as proposed and promulgated) assign the substantive burden of proof to the permit applicant

in all cases. The Administrative Procedure Act (APA), 5 U.S.C. section 556(d) provides that "except as otherwise provided by statute, the proponent of a rule or order has the burden of proof." Since dischargers are under a statutory obligation to apply for and receive an NPDES permit, the United States Court of Appeals for the Seventh Circuit has recently held the discharger is the proponent "as the applicant for a permit, without which it would be forbidden by law to discharge pollutants," *U.S. Steel* v. *EPA*, 536 F.2d 822, 834 (7th Cir. 1977).

Such a conclusion follows from a literal reading of the statute. It also makes sense from the standpoint of the public policy. Though we acknowledge that EPA may have some disposition to favor its own conclusions on the terms of a given permit, in general it can be expected to be more concerned with carrying out the terms of the statute in the context of given permits than a discharger. Accordingly, it is proper to fix the substantive burden of proof on the party which can be expected to have relatively less interest in achievement of the statutory purpose.

Comments were received suggesting that the Agency's position regarding burden of proof is inconsistent with Decision of the General Counsel Nos. 63 and 72. The difficulty is caused by the use of inconsistent terminology in these opinions. In Decision of the General Counsel No. 63, the term "ultimate burden of persuasion" was used with respect to the EPA's obligation under section 316(b) to present evidence regarding best available technology for minimizing the environmental impact of intake structures. In context it is apparent that EPA has the burden of coming forward with evidence regarding intake structures. This cannot shift the ultimate risk of non-persuasion, which lies always with the discharger. To the exent that Decision of the General Counsel No. 63 can be construed to shift this risk of non-persuasion to EPA, it is incorrect. Decision of the General Counsel No. 72 correctly distinguishes between the burden of coming forward with evidence and the risk of non-persuasion, and labels the burden of coming forward the "burden of proof."

(2) *Cross-examination.* (a) Several commenters objected to the restrictions on cross-examination of EPA employees set forth in proposed § 124.83(b)(16). They argued that cross-examination should be allowed on facts which formed the basis of legal or policy matters, or on those matters themselves.

Facts which meet the other tests for cross-examination and which are relevant to legal or policy judgments are of course potentially eligible for cross-examination. However, the proposed language has been retained to underline that cross-examination on legal or policy matters per se should not be allowed. These matters of course deserve to be clarified as much as any factual issues, but cross-examination is not the right way to do it. Written presentations and oral argument can perform the same task far more efficiently and should be relied on instead.

One comment also objected to the provision that required all evidence in an NPDES proceeding to be submitted in written form unless an affirmative showing could be made that oral presentation was necessary. It argued that the Food and Drug Administration (FDA) regulations cited in support of this position did not really support it. However, the FDA regulations at issue are similar to § 124.85(c) and EPA interprets the content of the two provisions as being the same (see 21 CFR § 2.154(b)). FDA regulations require written evidence on "general" matters and leaves the form of presentation to the choice of the parties where "particular" matters are concerned. However, "general" matters are said to involve (among other things) "scientific, medical or technical information not relating to a unique event", 41 FR 51706, 51716 (Nov. 23, 1976), and this is a description that could apply to many issues in an NPDES proceeding.

(c) Proposed § 124.83(c)(5)(iii) is a limited provision for "discovery" in NPDES evidentiary hearings. Comments were received arguing both for the expansion and for the deletion of this section. In the final version, this section has been kept and also applies in panel hearings (Subpart I). Although information may be attainable under the Freedom of Information Act or section 308 of the Act, discovery may be a more useful and direct approach to elicit information for a hearing.

(d) Several comments challenged as illegal the provision in § 124.83(c)(6) authorizing the Presiding Officer to group parties with similar interests. We have not changed this section since we agree with Judge Friendly and the Food and Drug Administration that such a provision is fully authorized by existing law, see *National Nutritional Foods Assoc.* v. *Food and Drug Administration*, 504 F.2d 761, 795 (2d Cir. 1974). See also 41 FR 51706, 51718.

§ *124.86(c) Motions.*

The general rule is set out in § 122.15 that the applicable regulations and requirements for NPDES permit issuance are those in effect at the time a permit is issued by a State or by EPA under § 124.61.

This provision is consistent with the decision of the Administrator *In the Matter of U.S. Pipe and Foundry Co.*, NPDES Appeal No. 75–4 reprinted in EPA, *Decisions of the Administrator and Decisions of the General Counsel* v.I at 110 (1975). The Administrator's views on this issue were adopted by the Fifth Circuit in *Alabama ex rel. Baxley* v. *EPA*, 557 F.2d 1101 (5th Cir. 1977).

Proposed § 124.86(c) authorized Presiding Officers to apply in permit hearings regulations issued after the permit is issued under § 124.61. For an explanation of the proposed regulation, see 43 FR 37080 (Aug. 21, 1978).

Several commenters contended that § 124.86(c) violates due process and is inconsistent with the *Alabama* v. *EPA* decision. EPA does not believe that any due process issue can be involved here. All parties will have a full opportunity to challenge in the adjudicatory hearing the application of any regulations which are applied to a discharger under § 124.86(c). Moreover, the provision may not be used when any party would be "unduly prejudiced thereby."

It is the general rule that laws which become effective during the pendency of judicial review proceedings control those proceedings, *Bradley* v. *Richmond School Board*, 416 U.S. 696 (1974); *Republic Steel Corp.* v. *Costle*, 581 F.2d 1228 (6th Cir. 1978). This rule also holds true for the application of Federal regulations in administrative proceedings. *Thorpe* v. *Housing Authority of Durham*, 393 U.S. 268 (1969). The Supreme Court has only recognized exceptions to this general rule to prevent "manifest injustice." *Thorpe* v. *Housing Authority*, *supra* at 282; *Greene* v. *United States*, 376 U.S. 149 (1964). The Administrator departed from this rule in his decision in *U.S. Pipe, supra.* There he set forth a fixed rule that permits would always be governed by rules in effect at the time of initial permit issuance, and would be unaffected by changes in applicable regulations during permit appeals. The Administrator concluded that:

> To allow permit limitations and conditions to change according to a "floating" standard or guideline during the pendency of a permit review proceeding would be highly disruptive and counter-productive. [Id. at 117]

The Fifth Circuit approved the Administrator's position in *Alabama ex rel. Baxley* v. *EPA, supra.* However, neither the Administrator nor the Fifth Circuit discussed *Bradley* or *Thorpe*,

and EPA can only speculate as to what result would have been reached had those decisions been brought to EPA's and the court's attention.

EPA recognizes the potential for disruption which a continuously shifting field of applicable regulations could bring to permit proceedings. However, the Agency now believes that the *per se* rule established by the Administrator in the *U.S. Pipe* decision was too inflexible and in certain respects unlawful. EPA is clearly obligated under *Bradley* and *Thorpe* to apply new statutory law to administrative proceedings which are not final, unless a contrary legislative intent can be discerned. However, courts will give deference to EPA's own regulations controlling the application of EPA rules to pending proceedings. See *Greene* v. *United States, supra* at 160–162. Moreover, the courts will not apply the *Thorpe* rule blindly where to do so would result in unnecessary delay. *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402, 418–19 (1971). Accordingly, EPA has preserved the general rule enunciated in the *U.S. Pipe* decision, but has modified it to require the Presiding Officer to apply intervening statutory requirements, and to allow him to apply new regulations where to do so would not unduly prejudice any party. The Agency expects that motions to apply new regulations will be liberally granted where to do so will shorten the hearing or resolve issues (such as determination of BCT or BAT on a case-by-case basis) that otherwise would consume considerable staff and hearing time. See *Public Service Co. of Indiana* v. *FERC*, 575 F.2d 1204 1220–21 (7th Cir. 1978).

§ *124.90 Interlocutory appeal.*

The present practice of deciding legal issues separately through referral to the Office of General Counsel has been eliminated. Instead, these issues will be subject to normal interlocutory appeal procedures. The regulations also provide that the General Counsel's Office will play a major role in deciding any legal issues raised in such appeals. This approach was suggested in the comments of the Utility Water Act Group. Similar changes have been made to § 124.101.

This approach presupposes that members of the General Counsel's Office who take part in deciding interlocutory appeals under this provision will not have performed "investigative or prosecutorial functions" in the hearing at issue, and will not be organizationally subordinate to those who have. 5 U.S.C. Section 554(d). In the normal course lawyers in the General Counsel's office do not perform such functions. In NPDES cases where they do, the lawyer in question and all that lawyer's subordinates will be barred from advising the Administrator.

§ *124.101 Appeals to the Administrator.*

(1) The proposed regulations would have provided two administrative appeals from ALJ decisions—once to the Regional Administrator and then after that to the Administrator in Washington. In the final regulations the opportunity to appeal to the Regional Administrator has been eliminated and only the appeal to the Administrator has been retained. This will make the process far less cumbersome. Regional Administrators will still be able to express their views by advising on the terms of draft and final permits and either by participating in the evidentiary hearing or by declaring themselves part of the decisional body (and thus subject to the *ex parte* rules of § 124.78) and advising the Administrator.

(2) Comments were received objecting to the provisions in this section for the Administrator to consider new issues on appeal or to base a decision on material erroneously excluded. These provisions were inserted to provide a measure of flexibility in the administrative decisionmaking process. Of course they should not be invoked where the matters to be considered are of a type that properly should have been subject to an evidentiary hearing.

(3) A number of commenters objected to the showing of substantial issues in justification of an appeal to the Administrator has a very broad power § 124.101. We agree with those commenters who stated that the Administrator has a very board power of review of decisions in NPDES permit cases. However, EPA's intent in setting up this program is that: (1) this power of review should be only sparingly exercised; (2) most permits be finally adjudicated at the Regional level; and (3) review by the Administrator be confined to cases which have precedential importance for the program as a whole. The threshold showing as proposed was intended to further that purpose; and thus has been retained.

(4) Another commenter asked about the availability of interlocutory judicial review of decisions such as new source determinations and section 316(a) determinations.

EPA's position is that judicial review is only available for final permits for which appeal to the Administrator has been sought under §124.101. Except in the special cases explicitly described in §124.56 all other decisions in connection with a permit are subject to challenge and revision in future administrative proceedings. They represent cases in which the administrative process is therefore not complete, and are not ripe for review because they fall under the requirement to exhaust administrative remedies.

§§*124.111 through 124.127 Non-adversary procedures for initial licensing.*

The APA allows decisions on the initial grant of a license or variance to be made by procedures that are much less adversarial than strict court room procedures, even when a formal hearing is required. The regulations use this provision of the APA to move away from traditional format hearings in which EPA and other parties present separate cases before a single hearing officer. Instead, under Subpart I, a panel of EPA employees with expert knowledge of, or responsibility for, the subjects involved will be present at the hearing and will question the parties, subject to over-all control of the proceeding by the Presiding Officer, an Administrative Law Judge. We expect that in some cases no Agency trial staff will be designated, although the regulations allow one to be named if necessary. Instead, the Agency will prepare a draft response to the permit application, and the information contained in the application and the draft response will be the focus of attention at the hearing. The hearing itself will be divided into a "legislative" phase—at which the parties can present views and arguments to the panel and engage in a colloquy, and an "adjudicative" phase—at which formal cross-examination can be ordered if certain threshold conditions are met. After the hearing, the panel will prepare a recommended decision which may be appealed to the Administrator. Though the Administrator will make an independent review of the decision upon deciding to review it, the Administrator would be free to consult with panel members. EPA believes that this procedure complies with the literal language of the "initial licensing" provisions of the APA and fits the purpose of those provisions more closely than existing procedures.

Under the APA, in cases of formal rulemaking, ratemaking or initial licensing, agencies have more latitude than in other formal cases to require the submission of evidence in written form. 5 U.S.C. Section 556(d). An initial decision by the "independent" presiding Administrative Law Judge (ALJ) is not

required; instead any "responsible employee" of the Agency may recommend a decision. 5 U.S.C. Section 557(b)(1).

As the preamble to the proposal explained, these exemptions were provided for initial licensing because the decisions involved were complex and policy-dominated and thus were thought to be "like rulemaking." Since these decisions did not involve accusing anyone of wrongdoing, there was no reasons for "separation of functions" within the Agency or for an initial decision by a statutorily independent individual. Rather, the complexity of the problems required that the Agency be able to draw on its staff experts freely without being hampered by such artificial barriers. *APA: Legislative History;* S. Doc. 248, 79th Cong., 2d. Sess. 204, 229, 262, 361 (1946) (henceforth *APA Leg. Hist.).*

The use of a panel and the omission or deemphasis of an EPA trial staff in proceedings under these regulations would make their structure conform more closely to the non-accusatory nature of the decision in question. The form of proceeding would correspond to its function—a group of EPA employees exploring the issues to determine what decision to make or recommend—rather than to a courtroom trial.

The comments raised a number of closely intertwined objections to the legal justification for this approach and to the implementation of it. The most important general objections are discussed first, followed by a discussion of comments relating to individual sections.

(1) General comments.

(a) *First objection—issuing NPDES permits to existing sources is not "initial licensing".*

The commenters who raised this issue made little effort to support it, and it suffers from the initial weaknesses of being contrary to the plain language of the statute, consistent EPA practice and the relevant judicial opinions.

The APA defines "license" to include:

> The whole or a part of an agency permit, certificate, registration, charter, or other form of permission, 5 U.S.C. section 551(8),

and "licensing" as including:

> Agency process respecting the grant, renewal, denial, revocation, suspension, annulment, withdrawal, limitation, amendment, modification, or conditioning of a license, 5 U.S.C. section 551(9).

Though "initial" is not defined, its natural meaning (according to Webster's Third World Dictionary, unabridged 1947) is "of or relating to the beginning," or, in other words to the *first grant* of the license in question. Neither this definition nor the statutory language offers any basis for distinguishing between first grants of licenses to existing sources and those which are physically new.

In the more than six years since the NPDES system was authorized by the Federal Water Pollution Control Act Amendments of 1972, EPA has consistently treated the first grant of an NPDES permit to an existing source as "initial licensing" and this reading has been upheld by both courts which have considered the point. *United States Steel Corp.* v. *Train,* 556 F.2d 822, 834–35 (6th Cir. 1977); *Marathon Oil Corp.* v. *Environmental Protection Agency,* 564 F.2d 1253, 1265 (9th Cir. 1977).

Analogous provisions of the APA confirm that the exemptions made available for "initial licensing" may properly be used even when an existing source is being permitted. Whatever the examples of "licensing" Congress had in mind, Congress made the same exemptions available for all cases of ratemaking, and ratemaking of course in the majority of cases would involve existing companies.[3]

(b) *"Separation of functions" should be followed in initial licensing.* "Separation of functions" in the strict sense will be observed in proceedings under this Subpart. Whenever an agency trial staff is named to perform an advocacy role in the hearing, separation of functions requirements will apply to it (§ 124.78).

The comments on this point argued by analogy that persons involved in preparing the draft permit should not sit on the panel, and that members of the panel should not advise the Administrator on appeal. The APA contains no prohibition on either of these practices. Nevertheless, we have discussed them as though the literal bar on separation of functions in the narrow case was concerned.

The legislative history of the APA contains a number of statements cautioning agencies against overbroad application of the exemptions which the text of the statute provides from "separation of functions" requirements and from the requirement to prepare a proposed decision before making a final one. Several commenters argued that these statements demonstrated that NPDES permitting is not the kind of "initial licensing" Congress had in mind, and that accordingly, these exemptions should not be applied to it.

We disagree. As the preamble to the proposal stated, these exemptions were provided for cases which involved a complex array of factual and policy issues requiring a division of labor among the staff, and which were not "accusatory". NPDES permitting easily meets both tests.

Particularly where a permit to a major source is concerned, questions can arise concerning the nature of given industrial processes, their similarity to or difference from other industrial processes, and how this should affect control requirements or classification under effluent limitations guidelines. For section 301(c) determinations, EPA must consider the economic impact of the proposed discharge requirement, and alternative discharge requirements, on the plant itself and the company. Section 316(a) thermal variances can require consideration of the dispersal and persistence of the discharge in the receiving waters, and its effect there on numbers of different species and the ecosystem generally. In many cases, certainty on these points will not be attainable; yet the final judgment will depend on highly discretionary judgments on a variety of legal and factual issues.

In such cases, the final decision will depend largely on "policy" choices about how to choose among uncertainties and weigh various facts against each other, just as it does, for example, when economic information of various sorts must be analyzed for rate-setting purposes, or information on traffic growth, company and community economic health, and other factors must be assessed for purposes of CAB or ICC route awards. These latter decisions are clearly among those which Congress meant to exempt from "separation of functions" requirements, and NPDES permitting in our view should be similarly classified.

Similarly, the initial grant of an NPDES permit is "non-accusatory" like these other decisions because it is the first time the Agency will have confronted the task of applying the standards of the statute to the particular discharge at issue. The Agency will have not made a prior decision to which it might feel compelled to adhere, as could be the case in renewal licensing, and whatever decision is made will not amount to a finding of legal wrong-doing.

The legislative history of the APA, we believe, recognizes these points. Both the House and Senate Reports say at

[3] Under 5 U.S.C. sections 551 (4) and (5), "rulemaking" includes "ratemaking". 5 U.S.C. section 554, which contains the APA's separation of functions requirements, states in subsection (a) that it only applies to "adjudication", while sections 556(d) and 557(b) contain parallel exemptions from other APA requirements for rulemaking and initial licensing.

one point that "instances" of the exempted categories may arise which "tend to be accusatory in form *and* involve sharply controverted factual issues" and where the exemption contained in 5 U.S.C. section 554(d) from separation of functions should not be invoked (emphasis added). As this preamble explains, the whole purpose of EPA's new provisions is to avoid being "accusatory in form" while for the reasons just given, EPA does not believe they are accusatory in substance. The logic of these passages accordingly does not apply.

Both the House and the Senate reports also say that:

> The alternative intermediate procedure [in 5 U.S.C. section 557(b) (1) and (2)] which an agency may adopt in rulemaking or determining applications for initial licenses is broadly drawn. But even in those cases, if issues of fact are sharply controverted or the case or class of cases tends to become accusatory in nature, sound practice would require the agency to adopt the intermediate *recommended* decision procedure, *APA leg. Hist.* p. 273, accord, p. 210 (emphasis added).

This language only states that agencies should not omit an intermediate decision *entirely* under section 557(b)(2) in the described cases. There is no indication that an intermediate decision by an ALJ would be required; indeed, the implication is to the contrary. The text of 5 U.S.C section 557 provides that as a general matter ALJs in adjudicatory proceedings must render "initial" decisions, but that in rulemaking and initial licensing any "responsible employee" may instead "recommend" a decision. Yet the quoted passages refer to a "recommended" decision (by a "responsible employee"), not an "initial" decision (by an ALJ).

Under this reading, the quoted passage does not pertain to the procedures at issue here, which provide for a recommended decision by the panel in every case.

In addition to these reasons based on the letter of the APA's language and legislative history, we believe EPA has made a legitimate effort to respond to the spirit of the statute. First, the procedures are not mandatory for all cases of initial licensing, and so the Agency will retain discretion to follow more conventional procedures in those cases where they are most appropriate. In general, EPA believes that Regions should consider using these procedures in complicated cases where the record will be long and technical. These are the cases that will best justify the work of assembling and using a panel, and that will profit most from the increased reliance on procedures other than cross-examination. Cases with few issues or issues that are easily focused should be handled through the more customary procedures. However, EPA also believes that Regions must have discretion to make this choice in individual cases, and that the only proper question for judicial review should be whether the procedure actually selected resulted in a legally satisfactory hearing, not whether some other procedure might have been better.

Second, the procedures themselves have been structured to avoid as much as possible creation of an "adversary" or "accusatory" mentality through overreliance on courtroom devices. Finally, in response to comments, the regulations have been rewritten to ensure that there will be independent review of a permit during Agency decisionmaking, but in a way that avoids the costs of formal separation of functions.

The regulations do this by stating that any hearing panel on a permit must include at least two persons who had no connection with preparing the draft permit, and that when the Administrator reviews a permit, any persons assisting him or her directly in preparing the opinion must be "without substantial prior connection with the matter." This will ensure that at successive levels of review new people will take a fresh look at the permit, and that the same small group will not be in charge of decisionmaking from start to finish.

However, no restriction has been placed on who these new people may talk to. To do that would be in effect to re-adopt separation of functions with all its inefficiencies. Instead, the effort has been to build a system of "checks and balances" within the internal structure of the Agency that can serve the same purpose in a less costly manner. See II K. Davis, Administrative Law Treatise 11.10 at 87 (1958).

For these reasons, we believe the elimination of formal "separation of functions" from the new initial licensing procedures is well within the discretion recently recognized by the Supreme Court. "Absent constitutional constraints or extremely compelling circumstances, the administrative agencies should be free to fashion their own rules of inquiry and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties", *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 98 S.Ct. 1197, 1211 (1978) citing and endorsing language from two prior opinions.

(c) *Third objection—variances are not initial licenses.* Many comments argued that the proposed procedures went too far in applying the APA "initial licensing" provisions to "the first decision on any variance applied for by a discharger." We believe our position is supported both by the language of the statute and by its purposes.

Under the APA, " 'license' includes the whole *or part* of any agency permit . . . [or] statutory exemption," and " 'licensing' includes agency process respecting the . . . amendment, modification, or conditioning of a license." (emphasis added) The language of the statute, then, furnishes no reason why a variance cannot be regarded as a "license" in itself, either as "part" of the existing permit or as a "statutory exemption" from the requirements. Granting a variance similarly fits under the definition of "licensing" both because the variance can be viewed as a license in itself and because in any event the proceeding results in the actual or potential amendment or modification of a permit.

This line of construction could be pressed so far that it gave results contrary to the main purpose of the statute. However, where the initial grant of a variance is concerned, the results of this approach are in harmony with those purposes.

The first decision on a statutory or administrative variance granted to a source will be the first occasion on which EPA will be applying the policy of that particular provision of the statute or authorizing regulations to the given discharge. Very often the factual and policy considerations relevant to a decision on that variance will be just as wide-ranging, and just as incapable of precise resolution, as the considerations bearing on the initial grant of the basic permit. For example, variances under sections 301(g), 301(h) and 316(a) of the Act depend on predicting the impact of the uncontrolled discharge on the entire relevant ecosystem, while variances under section 301(c) depend on an assessment and evaluation of the cost of technology for a given plant and on drawing the conclusions that installing this technology would be "beyond the economic capability" of the source and that alternate requirements will result in "reasonable further progress" toward full control.

Such decisions therefore, will often fit the tests put forth above for determining when a decision is "initial licensing." Indeed, in *Seacoast Anti-Pollution League* v. *Costle*, 572 F.2d. 872, 875 n.3, 879 (1st Cir. 1978), (henceforth *Seabrook*) the court held in effect that it made little difference whether the *Seabrook* proceedings were characterized as the initial grant of a

permit under section 402 of the Act or the initial grant of a variance under section 316(a)—the procedures would be the same and would be governed by the "initial licensing" provisions of the APA.

The one 21 year old case cited against this conclusion, *Chotin Towing Corp.* v. *Federal Power Commission*, 250 F.2d. 394 (D.C. Cir. 1957) is not on point. That case held that a proceeding to abandon a pipeline was not "initial licensing." The abandonment decision would presumably be made under the same statutory provisions the license was granted under, and would therefore not represent the first time the agency took a position on those provisions in the context of the particular pipeline. By contrast, variances under the Clean Water Act result from the application of statutory provisions on which the Agency will not previously have taken a position, and which therefore fit the purpose of the "initial licensing" provisions the way the abandonment proceeding at issue in *Chotin Towing* did not.

Experience, however, has shown that hearings for variance are seldom necessary. For instance, in all the fundamentally different factor variances decided to date, there has not been a question of fact at issue but if a particular situation applied to a quideline. In such cases, where facts are not at issue, the decision on the variances may be handled without a hearing but on the papers filed by interested parties.

(d) *Fourth objection—cross examination would be unduly limited.* Many comments asserted that the test for being granted cross-examination set forth in these procedures was too strict. The statute, however, states only that cross-examination must be allowed to the extent required for a "full and true disclosure of the [material] facts." A long line of commenters have criticized the tendency of formal administrative hearings to allow long and unproductive cross-examination. The procedures set forth in these regulations do no more than set forth in a manner essentially endorsed by one Court of Appeals, a method by which the standards of the statute may be particularized. *Seabrook* at 880. How rigorously they are applied will depend on the factual circumstances of each particular case.

Commenters also asserted generally that the restrictions on cross-examination in these procedures showed that EPA was prepared to ignore important factual questions in initial licensing.

On the contrary, EPA believes that resolving factual questions may often be important in initial licensing, though there may also be many cases where their resolution is not governing or where they cannot be resolved. However, there are many devices other than cross-examination for such questions. Written comments and panel hearings are two of them. These regulations have been structured to encourage the use of such alternative ways of resolving such important factual questions before the more cumbersome tools of cross-examination are called on.

On a more specific point, several commenters asserted that in requiring testimony to be submitted in written form in initial licensing, the regulations violated the holding in *Seabrook*. However, on March 24, 1978, Administrator Costle issued a Response to the Remand Order in this opinion. In the document that Administrator said:

> The Court of Appeals disapproved the manner in which I requested written information * * * after the initial hearing had been held and when the case was on appeal to me.
>
> Under the Administrative Procedure Act, the submission of evidence in written form may be required in cases, such as this one, concerning the initial grant of a license or permit. The court acknowledged that but held that this result had to be qualified by the special language of the Federal Water Pollution Control Act, which requires an "opportunity for public hearing" in permit cases.
>
> As I read the court's opinion, their holding on this point was motivated by a concern that all evidence received at an adjudicatory hearing be subject to a full opportunity for public comment and potential cross-examination. * * * I do not believe the court meant totally to exclude the use of written testimony in initial licensing cases such as this.
>
> The examples of abuse of the "written evidence" provision the court gave in its opinion all relate to evidence received *after* the hearing. Here I can appreciate the conclusion that evidence so received may, as a practical matter, be less exposed to public comment than it should be, even if a formal opportunity for cross-examination is provided.
>
> No such danger would arise if the evidence is provided before the hearing and can be the subject of comment, argument, and potential cross-examination at it. In addition, the hearing would provide a chance to correct any unanticipated deficiencies that might arise. Cf. Attorney General's Manual on the Administrative Procedure Act. P. 78. (1947).
>
> By contrast, there is at least a possibility that an absolute right to present direct testimony orally could be abused for purposes of delay in complicated or controversial cases.
>
> The trend of the law has been to allow more latitude, not less, to agencies to require the submission of complicated technical material in written form to increase efficiency and avoid delay, as long as an adequate opportunity for public challenge and dispute was preserved. See 40 *Fed. Reg.* 40682, 40703 (Sept. 3, 1975); 41 *Fed. Reg.* 51716–17 (Nov. 23, 1976).
>
> Beyond these considerations, I believe a careful reading of the conceptual framework of the court's opinion also supports the position I have adopted.
>
> The question of the extent to which written evidence is proper under the APA only arises when an initial licensing decision must be made by formal adjudicatory procedures. Those procedures are only applicable where the statute (or in some cases, due process) requires them. The court held that where adjudicatory decisions are concerned, an intent to hold formal hearings should generally be inferred whenever the statute requires a "hearing" in connection with that decision.
>
> However, to hold that written evidence may not be required in initial licensing cases if the governing statute requires a "hearing" would be inconsistent with that basic analysis. The "written evidence" provision only applies when the statute requires a formal hearing. It was deliberately inserted to govern such hearings. To say that it does not apply whenever the statute at issue requires a "hearing" would be in effect to say that it never or almost never applied, since a statutory "hearing" requirement is necessary to make the APA applicable in the first place. It would be in effect to say that the same statutory reference that makes formal hearing procedures applicable generally also makes the "written evidence" provision for initial licensing cases inapplicable, even though Congress expressly inserted that provision as a general rule for formal hearing procedures.
>
> Though the Federal Water Pollution Control Act does not simply require an opportunity for a hearing, but an opportunity for a "public" hearing, I do not believe that the presence or absence of this one word should change the outcome of the analysis. There is no indication Congress intended such a sweeping result to follow, and the term has never been understood to carry this meaning. Indeed, virtually all hearings are "public" by definition and to the extent "public" has any explicit connotation, I take it to be one of less, rather than more, formality—a hearing to receive *public* views and complaints, rather than to generate a record for decision.
>
> Instead, I take the court's opinion to mean that where the statute requires a "public hearing" any written evidence received must come in before that hearing begins, or at it, so that it can be the subject of potential cross-examination, or other types of challenge, in a public forum.

This interpretation was not challenged in the remand proceedings and has now been decided in EPA's favor by the First Circuit. It is adopted here.

A related change has been made in consequence. Comments came in asking about the relationship between "reply comments" under proposed § 124.119 and post-hearing briefs under § 124.123.

Since under the interpretation here adopted, reply comments could not contain testimonial material in any event, the "reply comment" provision and the section on post-hearing briefs perform the same function and the "reply comment" provision has been deleted.

Some commenters also argued that the use of a panel violates the "on the record" decision requirement of the APA. However, as the court in the *Seabrook* case explicitly recognized, consultation among experts is legal and desirable in decisionmaking in technical areas. *Seabrook* at 872, 880–81. The statutory background discussed above explicitly contemplates that the decision in initial licensing cases may be the work of a group. See especially *APA Leg. Hist. at 229.*

(e) *Fifth objection—there is no need for two procedures.* Several persons urged that having two types of procedures for making decisions on "initial licensing" would be cumbersome and create confusion beyond any purpose it might serve.

We disagree. Procedures analogous to those set forth in Subpart I have been used in other contexts at EPA and have worked well. They have proved easy to follow and did not require undue explanation. The costs of delay and lack of coordination in formal adjudication can be so great that a new approach would be justified if it saved time and effort in only a few cases. We think the savings from this approach will be much more considerable than that.

The Natural Resources Defense Council suggested that these procedures might be adapted to all NPDES permit decisions, which would make the creation of separate initial licensing procedures unnecessary. Though this would be desirable as a matter of policy, in EPA's judgment the legal differences between initial and non-initial licensing under the APA are too great to make such an approach feasible. However, § 124.111(a)(3) has been amended to allow applicants who do not come within the definition of "initial licensing" to voluntarily be subject to these procedures instead of Subpart H. A request under § 124.111(a)(3) made during the public comment period, if granted, can have the effect of this Subpart superseding Subparts E and G.

(2) *The Extent of Disagreement.* Despite the number of comments received on these proposals, EPA believes the disagreement is more about means than about ends. This emerges clearly from the following comments of the Utility Water Act Group, which submitted the longest and most detailed analysis of these procedures. As an alternative to the proposed procedures, they suggested these steps:

> Hearing panels, with independent decision makers [sic] as suggested below, could be used either during the informal public hearings on draft permits or, in proper cases of initial licensing, during the adjudicatory hearing itself. They might, under the supervision of the presiding officer, be used to write some or all of the technical portions of the decisions involved. Separate technical advice (perhaps drawn from the same pool of technical persons involved in the hearing panels, but not including those persons involved in the particular case in question) could be provided to the Administrator on appeal. Thus, the advantages of technical input to the decisionmakers could be combined with independence of decisionmakers, both initially and on review. This would fill the Agency's needs while also providing fair and imparital decision [sic] making.
>
> In the evidentiary hearing process, presiding officers can be authorized to impose very abbreviated cross-examination rights where proper initial licensing cases are involved, subject to the same sorts of tests articulated now in the separate [initial licensing] procedures. The Agency staff would function as party to these proceedings. But the rules could specifically require that they eschew an adversary position and act affirmatively to ensure that the record is adequate and that a reasoned and objective Agency decision results from the process. Participating staff members must be prepared to confess error, after hearing the evidence, on some positions which the staff originally took in the draft permit. [Utility Water Act Group Comments pp. 252–53.]

These are the same basic ends EPA seeks through the special "initial licensing" procedures promulgated today. The only differences are that the Agency believes that a strict, courtroom type separation of functions is too costly in time, resources, and the quality of the resulting decision to be compatible with that goal, and that a "non-adversary" agency staff can only be achieved by removing it from participation in the inherently adversary setting of a trial-type hearing.[4]

Comments on Specific Sections

§124.111 Applicability.

The major questions under this section, regarding the treatment of existing sources, variances and the need for an alternative procedure, have been discussed above. A new provision has been added to allow parties to elect to follow this procedure in cases that do not involve initial licensing.

One commenter raised the question whether a permit to a source that has changed owners would be considered an "initial license" potentially subject to these procedures. The answer is "No"—it is the first permit to the physical facility, not to the owning entity—that is significant under the purposes of the "initial licensing" provisions discussed above.

§124.112 Relation to other Subparts.

A number of commenters point out that the procedures in this Subpart were not articulated in as much detail as the other evidentiary hearing provisions, and asked that more provisions be added.

This lesser degree of formality was to some extent deliberate on EPA's part, since these proceedings are meant to be relatively less "judicialized" in form than those under Subpart H. For that reason, not all the suggestions on this point have been accepted. However, a substantial number have been, and therefore §124.112 has been added to specify the provisions from Subpart E, F, G and H that are incorporated in this Subpart I by reference.

§124.116 Notice of hearing.

Under the proposal, the Regional Administrator would have issued the decision in all cases after the hearing. This proposal left open the question of the role of the Presiding Officer in preparing that decision. To correct this ambiguity the regulations have been rewritten to provide that the Regional Administrator must choose, at the time the notice of hearing is issued, whether the decision will be issued in his or her name or in the name of the Presiding Officer. If the Presiding Officer is chosen, then the analysis and conclusions of the initial decision will be wholly the responsibility of the Presiding Officer, though consultation with the panel and consideration of their views will be expected. If a Regional Administrator decision is chosen, the Presiding Officer will have no obligation to take part in preparing it, although he or she may take part.

§124.120 Panel hearing.

(1) Commenters attacked the provision in this section and §124.121 requiring the Presiding Officer to consult with the panel before making rulings on cross-examination. They argued this might prejudice the independence of the Presiding Officer.

The APA allows decisions in "initial licensing" cases to be "institutional" decisions that draw on the training and experience of a number of different staff members, rather than the work of the Presiding Officer alone. These staff

[4] For further discussion of these and other points relating to these "initial licensing" procedures see Pedersen "The Decline of Separation of Functions in Regulatory Agencies", 64 Va. L. Rev. 991 (1978).

members must work from the record in preparing their decision. Under these regulations those staff members will also be members of the hearing panel or its support staff. Because the panel members will therefore have a stake in the contents of the record from which they will all have to work, it is appropriate for the Presiding Officer to consult them on key decisions that may help to shape that record. The Presiding Officer, of course, will retain the final power to rule on these matters.

(2) Several commenters argued that the entire panel be present at any cross-examination under this section. This comment has been accepted, so that all panel members, to the extent feasible, be present

Subpart J—Miscellaneous

§ 124.131 Public access to information.

A number of commenters suggested that trade secret information either should not be disclosed to other persons in NPDES proceedings, or should only be disclosed subject to specific safeguards. The handling of trade secret information has not generally been a problem in NPDES proceedings, in part because the statute restricts the types of information that qualify.

However, to remove any ambiguity EPA has added a reference to EPA's general regulations on this point to this section to make clear that they continue to govern except to the extent that the Clean Water Act mandates disclosure.

§ 124.132 Delegation of authority; time limitations.

Quite a few commenters urged that EPA should set additional deadlines for its actions under this Part, or that failure to meet the deadlines already established should have more drastic consequences. These comments have not been accepted. The Agency's workload, commitments, and future resources are too unpredictable to make it advisable for any more binding deadlines to be set. One of the major purposes of these revisions is to speed the processing of permits and that result should be evident whether or not more deadlines are established.

§ 124.133 EPA Headquarters approval of stipulations or consent agreement.

Some commenters also question the provision that all stipulations be approved by the EPA Deputy Assistant Administrator for Water Enforcement. This provision has been retained because cases which are settled upon stipulation after having been set down for hearing are apt to be the major controversial cases for which a specific provision for central review is appropriate. However, it has been rewritten and renumbered to make clear that only stipulations which settle the case or a major portion of it are subject to this provision.

§ 124.135 Effective date.

While Parts 121, 122, 123, 125, and 403 will be effective 60 days after issuance, this is a new section which states that Part 124, with some exceptions, shall not be effective until 120 days after issuance. This extra time is necessary to allow EPA Regional Offices and NPDES States to change internal operating procedures as necessary.

V. Part 125—Criteria and Standards for the National Pollutant Discharge Elimination System

A. *What Does This Part Do?* Part 125 contains requirements or standards which must be applied by EPA or approved States in making specialized types of permit determinations. One or more of these determinations must often be made in the course of permit issuance or modification.

B. *How Does This Part Relate To Existing Regulations?* Three of the Subparts contained in this Part are taken from existing, i.e., former, EPA regulations. Subpart B (proposed Subpart C) establishes the criteria for issuance of permits to aquaculture projects. These criteria are substantially the same as the criteria in former 40 CFR 115.10. The other requirements of former 40 CFR Part 115 are now contained in various sections of Part 122 and 124. These regulatory revisions were made in response to the 1977 amendments to section 318 which stated that such permits must now be issued pursuant to section 402 of the Act. Since the requirements of former Part 115 are now contained in these regulations, Part 115 is deleted. Subpart H (proposed Subpart I) establishes the criteria for determining alternative effluent limitations under section 316(a) of the Act. The criteria are substantially the same as in former 40 CFR Part 122. Since the requirements of former Part 122 are now contained in these regulations, former Part 122 is deleted. Subpart J (proposed Subpart K) establishes the criteria for extending compliance dates under section 301(i) of the Act. This Subpart J incorporates the interim final section 301(i) regulations published on May 16, 1978.

Two of the Subparts contained in Part 125 were proposed for the first time on August 21, 1978. Subpart A establishes criteria and standards for imposing technology-based treatment requirements under section 301(b) of the Act. Subpart D (proposed Subpart E) establishes criteria and standards for determining fundamentally different factors under sections 301(b)(1)(A), 301(b)(2)(A), 301(b)(2)(E) and 307(b) of the Act.

One Subpart contained in this Part was proposed for the first time on September 1, 1978. Subpart K (proposed reserved Subpart L) establishes criteria and standards for imposing best management practices for ancillary industrial activities under section 304(e) of the Act.

C. *How Does This Part Relate to the August 21, 1978 Proposed Regulations?* The following is a discussion of the significant comments received and the basis for revisions made to Part 125 of the proposed regulations. Minor editorial changes have been made in all sections.

Proposed Reserved Subparts

Proposed reserved Subpart B—EPA Objection to State-Issued Permits Under Section 402(d)(2) of the Act. This Subpart was reserved for the provisions of former 40 CFR § 124.42. EPA has decided to move these requirements to § 123.23 so that all requirements relating to State permit programs will appear in that Part.

Proposed Reserved Subpart L—Criteria and Standards for Best Management Practices Under Section 304(e) of the Act.

This Subpart was reserved in the August 21, 1978 proposal. On September 1, 1978, EPA proposed regulations establishing criteria and standards for best management practices under section 304(e) of the Act. These regulations are now incorporated in part in the final regulations as Subpart K. A more detailed discussion of this Subpart is found in the preamble discussion of Subpart K.

Other Proposed Reserved Subparts.

Other proposed reserved Subparts remain reserved pending development of criteria and standards. These Subparts are relettered as follows:

Subpart C (proposed Subpart D)—Criteria for Extending Compliance Dates for Facilities Installing Innovative Technology

Under Section 301(k) of the Act.

Subpart E (proposed Subpart F)—Criteria for Granting Economic Variances from BAT Under Section 301(c) of the Act.

Subpart F (proposed Subpart G)—Criteria for Granting Water Quality Related Variances Under Section 301(g) of the Act.

Subpart G (proposed Subpart H)—Criteria for Modifying the Secondary Treatment Requirements Under Section 301(h) of the Act (criteria proposed as 40 CFR 233, Subpart B on April 25, 1978).

Subpart I (proposed Subpart J)—Criteria Applicable to Cooling Water Intake Structures Under Section 316(b) of the Act.

Subpart L (proposed Subpart M)—Criteria and Standards for Imposing Conditions for the Disposal of Sewage Sludge Under Section 405 of the Act.

Subpart A—Technology-Based Treatment Requirements

This Subpart establishes the criteria and standards for imposing technology-based treatment requirements of the Clean Water Act into permits under section 301(b). It clarifies and sets forth in regulatory form the long-standing EPA policy that these technology-based treatment requirements represent the minimum levels of controls under section 402, and that they cannot be satisfied through the use of "non-treatment" techniques such as flow augmentation and in-stream mechanical aerators (although such techniques may be used to achieve water quality standards in certain limited circumstances).

Technology-based requirements may be imposed in permits through the application of an EPA promulgated effluent guideline or on a case-by-case basis under section 402(a)(1) of the Act. Case-by-case determinations must consider: the factors listed in section 304(b) of the Act for development of EPA effluent guidelines; EPA draft or proposed development documents or other guidance; and other appropriate factors.

Commenters had little difficulty with the requirement that EPA promulgated effluent guidelines limitations must be applied in permits but several argued that EPA cannot require technology-based effluent limitations to be included in State-issued permits until EPA has promulgated effluent guidelines, citing *Ford Motor Co.* v. *EPA*, 567 F.2d 661 (6th Cir. 1977) and *Washington* v. *EPA*, 573 F.2d 583 (9th Cir. 1978). EPA disagrees and believes that these commenters misread those cases. EPA believes that issuance of these regulations satisfies the criteria expressed by the court in *Ford Motor Co.* v. *EPA*, (which indicated that EPA may "veto" State-issued permits only on the basis of validly promulgated EPA regulations or clear statutory requirements). For example, § 125.3 contains a clear and explicit requirement that even if effluent limitations guidelines have not been promulgated for a class or category of point sources, State and Federal permit issuers are obligated to establish technology-based permit requirements. See *United States Steel Corp.* v. *Train*, 556, F.2d 822 (7th Cir. 1977). As to the decision of the Ninth Circuit in *Washington* v. *EPA*, the court there held that the requirements of sections 301 and 304 of the Act are not self-executing, and that there were no regulations which would support a veto by EPA. The Agency believes that these regulations provide the support the court found lacking in *Washington* v. *EPA*, and that States can properly be required to set case-by-case technology-based effluent limitations even where EPA has not been able to promulgate effluent limitations guidelines. This requirement is also supported by the decision of the Sixth Circuit in *Republic Steel Corp.* v. *Costle*, 581 F.2d 1228 (1978).

Subpart B—Aquaculture

Subpart B (proposed Subpart C) sets out the criteria and standards for approving aquaculture research projects. The final version is essentially unchanged from the proposal except for § 125.11(a)(4). Two commenters pointed out that the proposal requiring the crop be fit for human consumption was too strict, in that it precluded crops which may be consumed by animals or plants. Therefore, this requirement was changed to require only that the crop not have a significant potential for human health hazards resulting from its consumption. As stated earlier, this Subpart incorporates the criteria found in former 40 CFR Part 115, and since the other requirements of 40 CFR Part 115 have been incorporated into the NPDES regulations revision, 40 CFR Part 115 is deleted.

Subpart D—Fundamentally Different Factors Variances

Subpart D (proposed Subpart E) establishes the criteria for determining whether a particular industrial discharger should be subject to more or less stringent effluent limits than those required by national effluent limitations guidelines or pretreatment standards promulgated under sections 301(b)(1)(A), 301(b)(2)(A) and (E), and 307(b) of the Act ("national limits"), because of site-specific "fundamentally different factors". When EPA establishes national limits under these sections of the Act, EPA considers a great deal of information regarding the appropriate statutory factors from various dischargers in an industrial category. In some cases, however, data on a particular discharger may not be available or may not be considered. It may therefore be necessary, on a case-by-case basis, to vary the nationally prescribed limits for a particular discharger if the relevant statutory factors relating to that discharger are shown to be fundamentally different from those previously considered by EPA.

No discharger, however, may be excused from the Act's requirement to meet BPT, BCT, BAT or a pretreatment standard through this variance clause. A discharger may instead receive an individualized definition of such a limitation or standard where the nationally prescribed limit is shown to be more or less stringent than appropriate for the discharger under the Act.

Subpart D is substantially similar to proposed Subpart E. However, the provisions have been reorganized and edited for greater clarity and have been revised in certain respects in response to public comments.

In response to some comments, EPA has deleted proposed § 125.26(a)(9). This paragraph would have prohibited a variance for a discharger if, as a result of the variance, other dischargers (or nonpoint sources) would be subject to additional controls through water quality wasteload allocations. EPA agrees that potential changes to wasteload allocations are irrelevant when considering the appropriate technology-based limitation for a particular discharger under the Act.

EPA has also modified proposed § 125.26(b)(3) (now § 125.31(d)(3)) by deleting the requirement that a treatment technology must cause a violation of State or Federal law to be considered an adverse non-water quality impact. EPA recognizes that a discharger's non-water quality impact, while not in violation of the law, could be fundamentally worse than the impact of the dischargers EPA studied when promulgating a national limit.

EPA has been prompted by other comments to add a new provision (§ 125.31(e)(4)) which makes clear that specific receiving water quality is not a relevant factor in the fundamentally different factors variance context. To allow relaxation from technology-based limits because of case-by-case variations in receiving water quality would be grossly violative of the Act

and contrary to its fundamental principles. *Weyerhaeuser Company* v. *Costle*, 11 ERC 2149, 2170–73 (D.C. Cir. 1978); *Appalachian Power Company* v. *Train*, 545 F.2d 1351, 1360, 1378 (4th Cir. 1976); *In Re Louisiana-Pacific Corp.*, 10 ERC 1841 (Administrator's Decision 1977). Similarly, new § 125.31(f) makes clear that nothing in the variance provisions impairs rights of States and localities under section 510 of the Act. Thus, a State or local government need not grant a variance even if a discharger satisfies all of the requirements of Subpart D.

It should be stressed that only "fundamental" differences may qualify a discharger for a variance. The above-cited authorities and the Act's legislative history show that Congress intended for plants in a given industrial category to meet technology-based limitations which are as uniform as possible. EPA's national limits are therefore "presumptively applicable," *Appalachian, supra* at 1358, and the variance clause must assure that the "pin-hole safety valve envisioned in the Act and *duPont* does not become a yawning loophole." *Weyerhaeuser, supra* at 2169. Accordingly, a discharger should not expect to obtain a variance by merely showing certain differences between itself and the plants EPA studied since no two plants in the country are exactly alike. The discharger must instead show such a substantial difference with respect to one or more of the relevant statutory factors that either (i) the costs of complying would be wholly out of proportion to the costs EPA considered on a national basis or (ii) the non-water quality environmental impact (including energy requirements) would be fundamentally more adverse than the impacts EPA considered on a national basis.

Paragraph 125.31(e)(2) provides that a variance may not be granted on the basis that a technology which EPA relied upon in establishing a national limit will not achieve the limit at a particular discharger's plant. Rather, a variance must be based on a showing that the discharger's plant is fundamentally different from the plants EPA studied. If a discharger does not believe that EPA's national limit is supported by a technology which EPA identified in its rulemaking record, the discharger's legal recourse is to seek judicial review of the national limit under section 509(b)(1)(E) of the Act within 90 days after promulgation. Alternatively, if the discharger's arguments are based solely on grounds which arose after this 90-day period, the discharger's remedy is to petition EPA for an amendment to its national rules. (See Administrator's final decision in the matter of Martin Marietta Aluminum, Inc.'s request for variance approval, October 1977, at pp. 15–16.)

Finally, as in the proposal, this Subpart does not apply to national limits promulgated in 40 CFR Part 423 (steam electric generating point source category). Pursuant to an order of the U.S. Court of Appeals for the Fourth Circuit, EPA has already published a new BPT variance clause for that industry; 43 FR 44846, September 29, 1978. EPA plans to propose an appropriate BAT variance clause for this category at the same time it proposes new BAT limitations for steam electric plants in compliance with the 1977 Clean Water Act Amendments.

Subpart H—Criteria for Determination of Alternative Thermal Effluent Limitations Section 316(a).

Subpart H (proposed Subpart I) is unchanged except for the addition of language regarding demonstrations of prior applicable harm discussed below. This language is now found in new § 125.72, *Early screening of applications for section 316(a) variances*, (proposed § 124.13); this section was moved into Part 125 because EPA believes it is more in the nature of a substantive, rather than a procedural requirement.

Commenters questioned why EPA did not discuss the use of "absence of prior appreciable harm" demonstrations for obtaining thermal variances under section 316. EPA considers the "absence of prior appreciable harm" demonstrations to be very important part of the section 316(a) process, and when warranted, encourages their use. EPA excluded reference to this type of demonstration because detailed guidance on how and when to conduct them will not be included in these regulations. However, for clarification, a reference to "absence of prior appreciable harm" has been added to this section.

The regulations have also been revised to provide that the specific forms of studies prescribed apply only to the initial grant of a section 316(a) variance. In many cases, neither the nature of the thermal discharge nor the aquatic population will have changed since a variance was initially granted. It would therefore be an unnecessary and costly burden on the Agency and dischargers alike to require a full section 316(a) demonstration for each renewal. Section 125.72 accordingly gives the Director the flexibility to require substantially less information in the case of renewal requests. This does not mean, however, that the Director may not require a full demonstration for a renewal in cases where he has reason to believe that circumstances have changed, that the initial variance may have been improperly granted, or that some adjustment in the terms of the initial variance may be warranted. Persons holding such a variance should, of course, be prepared to justify its continuation with studies based on actual operating experience, and a comment has been added to that effect.

One commenter suggested that the definitions of "representative important species" and "balanced indigenous community" should include only native species unless otherwise designated by the Director. Another commenter suggested the inclusion of all species. EPA has not changed this language.

Several commenters argued that applicants should not be required to analyze cumulative effects of thermal discharges together with other sources of impact upon the affected species as required by proposed § 125.47(a) (now § 125.72(a)). This issue was addressed in the Administrator's first *Seabrook* decision which concluded that analysis of cumulative effects is required.

Several commenters pointed out that the criteria in proposed § 125.47 (now § 125.72) are vague. The criteria have intentionally been written in a general manner because, as one commenter noted, factors in section 316(a) demonstrations are site-specific. Indeed, Agency experience in reviewing section 316(a) requests under the more detailed criteria of the former part 122 ("Thermal Discharges") has shown the inappropriateness of such criteria and has led to the more general criteria of present Part 125, Subpart H.

Subpart J—Criteria for Extending Compliance Dates Under Section 301(i) of the Act.

Proposed Subpart K (now Subpart J) was reserved for the criteria for extending compliance dates under section 301(i) of the Act. On May 16, 1978, EPA published interim final regulations implementing section 301(i) of the Act (43 FR 21266). Section 301(i) authorizes the Administrator, or where appropriate, the State Director, to grant timely requests for permits extending the July 1, 1977 statutory treatment requirements to no later than July 1, 1983. These extensions are potentially available only to POTWs that require construction to meet 1977 treatment levels and to certain dischargers which planned, in good faith, to discharge into a presently unavailable POTW ("tie-

ins"). The purpose of the interim final regulation was to establish the criteria for granting section 301(i) extensions and the method for incorporating these extensions into permits issued under section 402 of the Act. A 60-day comment period was provided, and the Agency received 11 written comments.

The EPA response to significant comments, including the development of an *Interim National Municipal Policy and Strategy* (Notice of Availability published 43 FR 47774, October 17, 1978) is described below.

The Enforcement Compliance Schedule Letter (ECSL) Policy

In the preamble to the interim final regulation, EPA announced that no more municipal ECSLs or comparable State procedural mechanisms would be issued "[s]ince section 301(i) and the ECSL are different solutions to the same noncompliance problem" (43 FR 21267). The preamble further stated that ECSL holders should elect a remedy; they could either request a section 301(i) extension and thus ultimately give up the ECSL or not request a section 301(i) and thus retain the ECSL. EPA strongly encouraged all potentially eligible POTWs, whether or not they held an ECSL, to request section 301(i)(1) extensions. In response to this effort, over 9,500 POTWs have requested section 301(i)(1) extensions while slightly more than 600 POTWs elected to retain their ECSLs. Thus, almost every POTW in the Nation which needs construction to meet the 1977 treatment deadline has either taken advantage of section 301(i)(1) or chosen to retain its ECSL. One commenter expressed the belief that all ECSLs should remain in effect and that the prior granting of an ECSL indicated a finding of good faith and therefore should be dispositive of a section 301(i) request. EPA does not intend to change its policy on the effect of an extension request on an ECSL because to do so after the deadline for 301(i)(1) requests (June 26, 1978) would unfairly penalize the 600 ECSL holding POTWs which may have relied on this EPA policy in deciding not to request an extension. EPA also continues to believe that the prior granting of an ECSL is not dispositive of a 301(i) request and that Congress intended for each request to be considered independently in light of the statutory criteria and actions by the ECSL-holder subsequent to the issuance of the ECSL.

EPA is aware of possible situations under section 301(i)(2) where an extension request must be denied for reasons completely outside the control of the discharger (e.g. the POTW did not request or receive a section 301(i)(1) extension as required by the Act). In such a situation, the use of a section 309(a)(6) order to "tie-in" (or comparable State procedural mechanism) may be appropriate.

Eligibility for a Section 301(i)(1) Extension

Under interim final § 124.103, a POTW would be eligible for a section 301(i)(1) extension if, among other requirements, it required construction to achieve statutory treatment limitations. The term "construction" was defined in interim final § 124.102(a). One commenter suggested that the definition of "construction" should be the same as the definition in section 212 of the Act. EPA agrees with this comment, particularly since the granting of a section 301(i)(1) request and the awarding of Federal financial assistance are closely related. The definition of "construction" has been changed accordingly.

Under interim final § 124.103(a), a POTW that needed construction to achieve the statutory treatment limitations and that had begun "actual construction . . . before July 1, 1977, but construction could not physically be completed by July 1, 1977, despite all expeditious effort of the POTW" was eligible for a section 301(i)(1) extension. "Actual construction" was intended to mean that the POTW must have begun a continuous program of physical construction of the facility before July 1, 1977, as opposed to actions which have been abandoned or are so insignificant that they did not lead to completion of the facility. However, when the EPA Regional offices and NPDES States began to process section 301(i)(1) requests it became apparent that there was some confusion as to what "actual" construction meant since only the term "construction" was defined. Therefore, EPA has clarified this concept by replacing the term "actual construction" with the definition of the term "initiation of construction" to allow a precise definition which is consistent with the construction grants definition found at 40 CFR § 35.905. Thus, under § 125.93 a POTW would be eligible for a section 301(i)(1) extension if it: (1) needs construction to achieve the statutory treatment limitations; (2) before July 1, 1977, issued a notice to proceed under a construction contract for any segment of Step 3 project work (or executed a construction contract if notice to proceed was not necessary) and (3) made all expeditious efforts to complete construction.

Under interim final § 124.103(b) (now § 125.93(b)), a POTW that needed construction to achieve the statutory treatment limitations and did not complete construction because "[F]ederal financial assistance was not available, or was not available in time for construction required to achieve these limitations, and the POTW did not in any significant way contribute to this unavailability or delay", was eligible for a section 301(i)(1) extension. This criterion has not been changed. EPA recognizes that many POTWs, especially minor POTWs, meet this requirement but will not receive Federal funding in time (or at all) to complete construction by July 1, 1983. Since, by the terms of the Act, these POTWs cannot be granted a section 301(i)(1) extension, EPA has developed an *Interim National Municipal Policy and Strategy* which indicates that such POTWs should receive 309(a)(5)(A) Administrative Orders (or comparable State procedural mechanisms) which are also based on the Construction Grant process. These orders, like 301(i)(1) extensions, should not be written to extend the July 1, 1983 deadline.

Section 301(i)(1) Compliance Schedules

Many commenters expressed confusion as to when fixed date compliance schedules, as opposed to floating or ratchet compliance schedules, should be used. This confusion was as a result of the use of the phrases "when the availability of Federal funding is certain" and "when the availability of Federal funding is uncertain" to indicate what type of schedule should be used. EPA discourages the use of ratchet schedules or floating schedules because they decrease the ability of the public to participate in the permit process. Furthermore, by definition, if the availability of Federal funding is so uncertain that compliance with the July 1, 1983 deadline cannot reasonably be assured, then the POTW is not eligible for a section 301(i) extension. Thus the regulations now require fixed date compliance schedules in all instances. In the *Interim National Municipal Policy and Strategy*, EPA established the priority in which section 301(i)(1) extension requests should be considered. Generally, projects in the earliest stage of the Construction Grant process (i.e., Step 1) are to be processed last. One of the reasons for giving Step 1 projects lowest priority was that EPA recognized that uncertainties in the Step 1 planning process, such as the need to prepare an Environmental Impact Statement or to make changes after a

public hearing, make it difficult to project the amount of time it will take to complete the Step 1 planning process. However, if *after* acting on requests from POTWs in Steps 2 and 3, extensions are granted for POTWs in Step 1, fixed dates for the submission of a facility plan should be used, recognizing that up to a four month slippage without permit modification is allowable. Permits issued during or prior to Step 1 planning generally should be written to expire on the date set for submission of a facility plan. The reissued permit will then contain a fixed date compliance schedule derived from the facility plan. However, if the permitting authority is able to accurately establish dates certain beyond the Step 1 process, such dates may be included in the permit.

When developing fixed date compliance schedules based on the construction grant process, the permit issuing authority should assume that appropriation will be provided in accordance with the EPA Annual Operating Guidance. Use of this approach in developing permit compliance dates will be considered sufficient to meet the requirement that the permit assure that the July 1, 1983 deadline will be met. It should also be noted that while the regulations contemplate certification that funding will be available in time to complete construction by July 1, 1983 to be by whatever method the EPA Regional Office and the State agree on, the mere granting of a section 301(i)(1) extension by an NPDES State does not constitute certification.

Subpart K—Criteria and Standards for Imposing Best Management Practice Under Section 304(e) of the Act.

Proposed Subpart L (now Subpart K) was reserved for the criteria and standards for imposing best management practices under section 304(e) of the Act. On September 1, 1978, EPA published proposed regulations establishing these criteria and standards (43 FR 39282). Section 304(e) of the Act authorizes the Administrator to publish regulations to control plant site runoff, spillage or leaks, sludge or waste disposal, and drainage from raw material storage which may contribute significant amounts of toxic and hazardous pollutants to navigable waters. The purpose of Subpart K is to prevent discharges of toxic and hazardous substances from facilities which are subject to the NPDES. In *NRDC v. Costle* (Runoff Point Sources) the court recognized EPA's authority under section 402(a)(1) of the Act to include BMPs in permits where numeric effluent limitations are infeasible or where reasonably necessary to achieve effluent limitations and standards (see § 122.15(g) (2) and (3) and preamble discussion to § 122.15(g)). Subpart K, however, addresses EPA's authority to require BMPs under section 304(e) of the Act.

On September 1, 1978, EPA also proposed Spill Prevention Control and Countermeasure (SPCC) regulations under the authority of section 311(j)(1)(C) of the Act. Section 311(j)(1)(C) authorizes the issuance of regulations establishing procedures, methods and equipment to prevent discharges of oil and hazardous substances from vessels and from on-shore and off-shore facilities and to contain such discharges. The purpose of proposed 40 CFR Part 151 was to prevent discharges of hazardous substances from facilities subject to section 402 permitting requirements.

The approach used in both proposed regulations was similar to the one developed and used in EPA's oil pollution prevention regulation, 40 CFR Part 112. This was the concept of a plan developed by the owner or operator of a facility or by his/her engineer, in accordance with guidelines contained in the respective regulations. The proposal required that the plans be certified by a registered professional engineer and subsequently implemented by the owner or operator.

The requirements of the two proposed regulations (40 CFR Parts 125 and 151) were coordinated and the proposals stated that compliance by a facility with the provisions of the SPCC plan requirements set out in 40 CFR Part 151 would be established as a minimum level of control for the BMP plan required by 40 CFR Part 125. The purpose of publishing the two regulations concurrently was to allow the owner or operator of a permitted facility to develop BMP and SPCC plans concurrently and thereby avoid duplication of environmental controls. The proposal stated that SPCC plans could be incorporated into BMP Plans by reference.

A thirty-day comment period was provided which was extended twenty days (43 FR 47213, October 31, 1978). The Agency received 75 comments and EPA's response to the significant comments is described below.

Several comments were received suggesting that BMP Plans and SPCC Plans are duplicative and should be developed together. Other comments requested a clarification of the relationship between the two. Finally, some comments argued that since BMPs and SPCC Plans are authorized by different sections of the Act, they are therefore designed for different purposes and should not be linked. In response to the first comment, EPA wishes to point out that BMP Programs and SPCC Plans are being developed together. This first step in this development is Subpart K, i.e., BMPs which involve minor new construction or modifications to existing facilities. The second step will be SPCC Plans (and perhaps another BMP regulation) which will emphasize secondary containment to control spills and may require major construction for drainage control, sewering and diking.

EPA believes that a requirement for BMP programs is a necessary step at this time, for a number of reasons. Many industrial permits were issued during 1974 and 1975 and will be due for renewal before the SPCC requirements under section 311 become effective. Since the timing for preparation of SPCC plans by NPDES-permitted facilities will be tied to permit reissuance, many facilities would be subject to no spill prevention controls at all until 1984 or 1985. The development of a BMP program by such facilities will focus attention on the potential for spills and other unplanned discharges and help to prevent such occurrences until the time SPCC requirements become effective. BMP programs will be compatible with later requirements for SPCC plans, and steps taken in implementing a BMP program will satisfy some of the SPCC requirements. Additionally, EPA believes that prevention of unplanned releases of toxic materials requires actions by facilities not yet subject to SPCC requirements, and that the BMP program is an effective and relatively inexpensive way to achieve such prevention.

EPA also agrees with some commenters that, while both BMPs and SPCC Plans have many common features, their emphasis is different. Facilities subject to the NPDES Program normally have continuous discharges of wastewater and the capability to treat that wastewater. SPCC Plans, on the other hand, focus on classic spill events and may require containment. Thus, there is some overlap between BMPs and SPCC Plans (BMPs are normally a subpart of SPCC Plans) and therefore a need exists for a regulatory link. It should be noted that BMPs are broader than SPCC Plans in one sense because BMPs control both section 307 and 311 pollutants whereas SPCC Plans control only section 311 pollutants.

Many commenters argued that the economic impact of the proposed

regulations would be excessive and that the benefits to the environment would not justify the expense of employing the BMPs contemplated by the regulation. Although EPA explicitly requested information in the preamble to the proposed regulation (43 FR 39282) concerning the costs of BMPs and preparation of BMP plans for particular industries, few commenters directly addressed costs. It appears that the major categories of expense in the proposal were for SPCC related requirements. Because of this economic impact, EPA has revised today's regulations to make inclusion of SPCC plans in BMP programs discretionary rather than mandatory as was proposed. (See § 125.104(b)(4)(i).) Thus, Subpart K emphasizes BMPs of a procedural nature (especially preventive maintenance and housekeeping) and BMPs requiring only minor construction.

Based on a recent EPA survey of representative plants in the chemical industry, it appears that many of these type of BMPs are currently in use by facilities. Good housekeeping or preventive maintenance procedures, material recovery programs, safety procedures, training programs, etc. are common and thus the costs of complying with Subpart K will not be great. Facilities are encouraged, nevertheless, to begin planning for BMP-related major construction (drainage control, waste stream segregation, and secondary containment) to coincide with construction related to the installation of best available technology (BAT) and of the implementation of (SPCC) plans. BMP regulations requiring major construction may be published in the future.

Under authority of section 402(a)(1) of the Act, permitting authorities may impose BMPs on a case-by-case basis using best engineering judgment. These case-specific BMPs may be more costly than those contemplated by Subpart K which requires only procedural BMPs or minor construction. Guidance to permitting authorities will emphasize procedural BMPs and will encourage equivalency for potentially costly BMPs, such as secondary containment. Where permitting authorities have knowledge of a specific facility or receive information through the permit application indicating the opportunity for discharges of toxic or hazardous pollutants which could be prevented by a BMP, the permitting authority may impose a BMP based on best engineering judgment. Such BMPs, which may involve construction, are expected to be limited to facilities with spill histories or other indications of an inadequate program to control discharges from ancillary industrial activities.

Several commenters argued that dictating manufacturing process changes or operational procedures and activities went beyond the intent of Congress. EPA does not intend to use BMPs to dictate how plants are operated or to otherwise infringe on plant management's prerogatives. However, section 304(e) does give EPA the authority to prescribe certain "in-plant" procedures or practices which would be useful to prevent the discharge of toxic or hazardous pollutants where traditional effluent limitations guidelines are impractical or ineffective.

To further explain EPA's intent, changes have been made to proposed § 125.62 and § 125.64(b)(4)(iii), now § 125.102 and § 125.104(iii), to clearly distinguish between ancillary manufacturing operations (sources of pollutants) and BMPs (methods to prevent or minimize pollution). For example, preventive maintenance and housekeeping are BMPs, not ancillary operations. Material storage and loading/unloading operations are ancillary manufacturing operations, not BMPs.

To allow due process and public notice of BMP programs, permittees are now required to submit a description of their program with their NPDES permit application, (§ 125.104(c)). Some commenters thought one year for the implementation of BMP plans, proposed § 125.64(c), was too short. EPA feels that the one year after permit issuance is realistic and reasonable, particularly for the BMPs of a procedural nature or minor construction required by this Subpart. However, a discharger could be given more than one year under special circumstances such as coordinating a BMP plan with an SPCC plan required under 40 CFR Part 151.

Many commenters suggested that the term "significant amount" should be defined or that a minimum amount of a particular chemical should be specified to require the preparation of a BMP plan. EPA has not defined this term but wishes to clarify its meaning. In the case of section 311 pollutants EPA has proposed reportable quantities of hazardous substances (44 FR 10271, Feb 16, 1979) and considers these quantities potentially significant for the purpose of this Subpart. For section 307 pollutants, the fact that a chemical is on the section 307 toxic pollutant list indicates potentially toxic effects of its discharge. As guidance to facilities developing BMP programs, two examples are given to demonstrate the definition of "significant amount" in terms of the BMPs applicable to a particular chemical:

1. A facility uses laboratory quantities of toxic chemical X in an analytical chemistry laboratory adjacent to its manufacturing facility. Chemical X is used for no other purpose at the facility. No more than five pounds of the chemical are on hand at any given time. An appropriate BMP could be to label all containers of chemical X with instructions such as "Do not dispose of this material in laboratory sinks. Refer to Laboratory Procedures Manual for Disposal Instructions." The Laboratory Procedures Manual might further provide that chemical X and other compatible chemicals be disposed of in an appropriately labelled 55 gallon drum to be periodically picked up and treated by a responsible hazardous waste contractor in accordance with RCRA regulations.

2. A facility uses thousands of gallons daily of a hazardous chemical Y (a section 311 Category "A" pollutant) as a raw material in a batch chemical manufacturing process and is located next to a small stream. Chemical Y is stored outside in a single 10,000 gallon tank and is periodically pumped to the reactor vessel. An appropriate BMP would be to provide secondary containment around the storage tank in the form of a dike to contain the maximum volume of chemical Y stored in the tank plus a reasonable allowance for rainfall. In the alternate, a facility might choose to use a combination of measures instead of secondary containment to attempt to achieve equivalency to secondary containment. For example, a liquid level alarm, frequent non-destructive testing and daily visual inspections might be employed rather than constructing a dike around the storage tank. However, this latter approach may not satisfy proposed SPCC requirements which require the former approach, i.e., secondary containment wherever reasonable probability of a discharge to navigable waters exists. Thus, provision of secondary containment would satisfy both BMP and proposed SPCC requirements simultaneously.

Numerous commenters stated that the proposed regulations went beyond the intent of Congress because the development of BMPs is discretionary and can ony be on the basis of point source categories supplemental to effluent guidelines. EPA disagrees and believes that BMP programs and case-by-case determination of BMPs are appropriate based on the legislative history to section 304(e) (see *CWA Legis. Hist.* at 453 which specifically discusses case-by-case determinations of BMPs). BMPs supplemental to effluent limitations guidelines have not yet been promulgated by EPA. However, the potential for confusion and duplication of effort by the permittee between BMPs and SPCC plans has led us to delete the requirement for a BMP plan in favor of a BMP program. The BMP program approach provides a self-regulatory,

flexible mechanism to control toxic and hazardous pollutant discharges from ancillary sources and will allow permittees to develop BMPs tailored to their particular circumstances with attendant cost savings.

Many comments were received concerning the relationship of BMPs to the requirements of the Resource Conservation and Recovery Act (RCRA), arguing that RCRA requirements should not be imposed by the Clean Water Act. EPA disagrees and wishes to point out that section 304(e) specifically includes the phrase "sludge or waste disposal" as one of four general activities subject to BMPs. Thus § 125.104(b)(4)(ii) has not been changed and continues to require management practices developed by companies to comply with RCRA to simultaneously satisfy the BMP requirements of the Clean Water Act by expressly incorporating the practices into the BMP program.

Many commenters felt that the requirement for a professional engineer (PE) to certify the BMP plan was unnecessary and should be eliminated or made optional. Since Subpart K no longer requires BMP plans, PE certification is no longer required. However, EPA continues to believe that PE certification would assure a *minimum* level of quality in both BMPs and SPCC plans. Since today's regulations are the first step in a two step process, and the second step (SPCC regulations 40 CFR Part 151) may require PE certification of SPCC plans, EPA encourages facilities to develop their programs in accordance with sound engineering practices. These facilities would then have BMP-related procedures and construction which could satisfy, in part, future SPCC requirements.

Economic Impact of Subpart K

Since Subpart K now requires only BMPs of a procedural nature or those requiring minor construction, the costs of compliance with these regulations should be minimal. Permittees are encouraged to use innovative, inexpensive techniques to achieve the basic goal of preventing the discharge of toxic or hazardous pollutants from ancillary industrial activities to surface waters. Because BMP requirements will vary among facilities, guidance will be provided to the permit writers on what requirements are sufficient. This guidance will reflect the conclusion of a BMP cost analysis which is being undertaken by the Agency. The guidance will consider reasonableness of cost. Most facilities have many of these generic BMPs in place and Subpart K only requires documentation of the existing practices or, in some cases, upgrading and documentation of the BMP program. Although BMPs requiring major construction (e.g., grading, paving, sewering, waste stream segregation, covering, and secondary containment) may be included in the BMP program description, the implementation of these BMPs is not mandated by these regulations. Therefore, EPA has determined that Subpart K does not constitute a major regulation requiring the preparation of an economic impact statement under Excecutive Order 12044.

Because there is much flexibility in how the individual facility complies with BMP procedural requirements, there is also flexibility in compliance costs. The cost of developing and implementing BMP procedures is estimated to be within the range of $10,000 to $30,000 per facility for the costs of a materials inventory, some engineering modifications, training, maintenance, housekeeping, and some minor construction for items such as the installation of liquid level alarms. To develop these costs the assumption was made that 50% of the BMP procedural requirements would already be in place in order to meet normal safety, fire, and other occupational or operational standards. Clearly, a facility with minor problems will require a less elaborate program.

Because the requirements may be less flexible under the SPCC program for which these BMP requirements are the first stage and we have so little cost data now on the BMP procedures because of their flexibility, further cost estimates for BMPs will be acquired when we prepare a detailed analysis of the SPCC cost requirements. These estimates will be necessary for the Agency to adequately assess the cost and usefulness of specific aspects of the SPCC program.

Based on existing predictions of NPDES permit issuance, industrial facilities will be required to develop and implement BMP programs on the following schedule:

Number of Permits

FY 1979	2,600
FY 1980	3,000
FY 1981	1,700
FY 1982	1,000

Using an average cost of $20,000 per facility, the total costs of BMPs, thru FY 1982 are expected to be no greater than the following:

FY 1979	$52,000,000
FY 1980	$60,000,000
FY 1981	$34,000,000
FY 1982	$20,000,000

This does not include the cost of BMPs established under authority of section 402(a)(1) using best engineering judgment.

The Agency may propose a new form of BMP guidelines in the future which will describe BMPs which are broadly applicable to industrial facilities and relatively independent of the chemical under consideration. In addition, these BMP guidelines would address more specific or advanced BMPs for certain chemicals or ancillary industrial activities and would include an economic impact analysis. Major construction would probably be required to comply with these *future* BMPs and likely will be required to comply with the SPCC regulations.

VI. The Relationship of the NPDES Program to the Regulation of Hazardous Substances Under Section 311 of the Act

On November 2, 1978, Congress amended section 311 of the Act (Pub. L. 95-576). Because this Congressional action was taken after the August 21, 1978 proposal, EPA feels a brief discussion of the relationship of the NPDES program to section 311 is warranted.

Section 311 of the Act regulates discharges of oil and hazardous substances and contains reporting requirements, penalties and other requirements. Until the 1978 amendments, the relationship between the requirements of section 311 and those of section 402 has been unclear. In particular, it was unclear whether, and to what extent, discharges from facilities with NPDES permits were subject to the provisions of section 311.

On November 2, 1978, Congress amended section 311 and set forth three types of discharges of hazardous substances which will be subject to sections 402 and 309 of the Clean Water Act and excluded from section 311 liability. The three cases excluded are (1) discharges in compliance with a permit under section 402 of the Act, (2) discharges resulting from circumstances identified and reviewed and made a part of the public record with respect to a permit issued or modified under section 402 of the Act, and subject to a condition in such permit, and (3) continous or anticipated intermittent discharges from a point source, identified in a permit or a permit application under section 402 of the Act, which are caused by events occurring within the scope of relevant operating or treatment systems. These excluded discharges are exempted from the

reporting requirements, civil penalties and clean-up cost liabilities under section 311 and are instead subject to sections 402 and 309 of the Act.

On February 16, 1979, EPA proposed regulations addressing the 1978 amendments to section 311 (44 FR 10271, 40 CFR § 117.12). The proposed regulations include detailed criteria for exclusions from section 311. The preamble to that proposal contained an extensive discussion of the criteria for section 311 exemptions. Interested persons are advised to review that proposal. When the section 311 regulations are published in final form, they will be incorporated into NPDES regulations as appropriate.

The Agency is presently developing revised application requirements which will be announced in the near future in the form of proposed regulations and a draft revised NPDES permit application form (reserved § 122.14(a)). The new requirements will afford applicants the opportunity to identify discharges and spills of hazardous substances. Where adequate treatment equipment or management practices are available to control such events, permits will contain appropriate requirements reflecting such control. Coverage of these discharges or spills by permits will result in exemption from the requirements of section 311.

VII. Conforming Amendments to the General Pretreatment Regulations 40 CFR Part 403.

This rulemaking contains a series of technical amendments to the General Pretreatment Regulations for New and Existing Sources of Pollution (40 CFR Part 403, 43 FR 27736–27762, June 26, 1978). These amendments will conform the pretreatment regulations to both the final NPDES regulations and the Public Participation Regulations (40 CFR Part 25, 44 FR 10286–10297 February 16, 1979). Since the provisions in the pretreatment regulations were based on the proposed or draft versions of both the regulations, changes are necessary. The majority of these changes are in the nature of cross-reference corrections in 40 CFR Part 403.

The most significant revision is that the process for EPA review and approval of State pretreatment programs is now governed by 40 CFR § 123.61 rather than 40 CFR § 403.11. This was done to assure that EPA has a uniform process for approving revisions to State NPDES programs. The time deadlines for applying for State pretreatment program approval and the contents of the application will continue to be governed by § 403.10. It is anticipated that further amendments to the pretreatment regulations will be made in the near future.

Note.—The Enivronmental Protection Agency has determined that this document does not constitute a major regulation requiring preparation of an economic impact statement under Executive Order 12044. In accordance with Executive Order 12044, EPA is committed to evaluating significant new regulations within five years of implementation. The evaluation plan for this regulation was not included in the August 21, 1978 proposal since the Agency policy was established several months subsequent to publication of the proposed regulation. Since an evaluation plan was not included in the proposed regulations, an evaluation plan is not included in this final rule. However, these NPDES regulations will be incorporated into the EPA consolidated permit regulations schedule to be proposed sometime in June 1979. A proposed evaluation plan for these NPDES regulations will be incorporated into the overall evaluation plan for the consolidated permit regulations. EPA anticipates the evaluation plan will include assessments of: reporting requirements; elimination of duplicative requirements for permit applicants and NPDES States; new permit procedures designed to reduce unnecessary delay and the effectiveness of the reorganization of the regulations for greater clarity.

Authority.—These regulations are issued under authority of the Clean Water Act, as amended by the Clean Water Act of 1977, 33 U.S.C. § 1251 *et seq.*

Date: May 22, 1979

Douglas M. Costle,

Administrator.

PART 6—PREPARATION OF ENVIRONMENTAL IMPACT STATEMENTS

1. 40 CFR Part 6, Subpart I, is amended by deleting §§ 6.906, 6.909 6.916 (b) and (c) and 6.918.

PART 115—REQUIREMENTS FOR APPROVAL OF AQUACULTURE PROJECTS [DELETED]

2. 40 CFR Part 115 is deleted.

PART 121—STATE CERTIFICATION OF ACTIVITIES REQUIRING A FEDERAL LICENSE OR PERMIT

3. 40 CFR Part 121 is redesignated from 40 CFR Part 123.

4. Part 122 is revised to read as follows:

PART 122—NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM

Subpart A—General

Sec.

122.1 Purpose and scope.
122.2 Law authorizing NPDES permits.
122.3 Definitions.
122.4 Exclusions.
122.5 Signatories.

Subpart B—NPDES Permit Application and Issuance

122.10 Application for a permit.
122.11 Permit issuance; effect of permit.
122.12 Duration of permits and continuation of expiring permits; Transferability of permits.
122.13 Prohibitions.
122.14 Conditions applicable to all permits.
122.15 Applicable limitations, standards, prohibitions, and conditions.
122.16 Calculation and specification of effluent limitations and standards.
122.17 Schedules of compliance.

Subpart C—Permit Compliance

122.20 Monitoring.
122.21 Recording of monitoring results.
122.22 Reporting of monitoring results and compliance by permittees.
122.23 Noncompliance reporting.

Subpart D—Permit Modification, Revocation and Reissuance, and Termination

122.30 General.
122.31 Modification, revocation and reissuance, and termination.

Subpart E—Special NPDES Programs

122.40 General.
122.41 Disposal of pollutants into wells, into publicly owned treatment works or by land application.
122.42 Concentrated animal feeding operations.
122.43 Concentrated aquatic animal production facilities.
122.44 Aquaculture projects.
122.45 Separate storm sewers.
122.46 Silvicultural activities.
122.47 New sources and new dischargers.
122.48 General permit program.
122.49 Special considerations under Federal law.

Subpart F—Miscellaneous

122.60 Delegation of authority.
Appendix A.—Point Source Categories and Permit Expiration Dates.

Authority.—Clean Water Act, as amended by the Clean Water Act of 1977, 33 U.S.C. 1251 et seq; Administrative Procedure Act, 5 U.S.C. 551 et seq.

Subpart A—General

§ 122.1 Purpose and scope.

(a) The regulations in this Part define the National Pollutant Discharge Elimination System (NPDES) program including permit programs under sections 402, 318 and 405 of the Act. They apply to the program as administered by EPA and, to the extent incorporated by reference in Part 123, by approved NPDES States.

(b) The regulations in Parts 123, 124, and 125 also apply to the NPDES program as follows:

(1) Part 123 describes the requirements for State participation in

the NPDES permit program and in the permit program established under section 404 of the Act ("section 404 program").

(2) Part 124 describes certain permitting procedures for the NPDES program; these procedures apply in their entirety to the program as it is administered by EPA and, to the extent incorporated by reference in Part 123, by approved NPDES States.

(3) Part 125 describes some of the criteria and standards for making certain determinations in the NPDES program; these criteria and standards apply to the program as administered by EPA and, to the extent incorporated by reference in Part 123, by approved NPDES States.

(c) Section 402 of the Clean Water Act (formerly referred to as the Federal Water Pollution Control Act), (Pub. L. 92–500, as amended by Pub. L. 95–217 and Pub. L. 95–576) establishes the NPDES program. The NPDES program also includes permit program requirements under sections 318 and 405 of the Act. This program regulates the discharge of pollutants from point sources and related activities into the waters of the United States. All such discharges or activities are unlawful absent an NPDES permit. After a permit is obtained, a discharge not in compliance with all permit terms and conditions is unlawful.

(d) NPDES permits are issued by the State Director, or by the EPA Regional Administrator where there is no approved State program or where the permit is for discharges resulting from activities on Indian lands over which the States has no jurisdiction.

[*Comment:* Throughout this Part, the Regional Administrator is designated as the EPA permit issuing authority where no State NPDES program is approved. However, reference to the "Regional Administrator" for purposes of permit issuance should be read to include the Enforcement Division Director. Similarly, the term "State Director" includes the delegated representative of the State Director.]

§ 122.2 Law authorizing NPDES permits.

(a) Section 301(a) of the Act provides that "Except as in compliance with this section and sections 302, 306, 307, 318, 402, and 404 of this Act, the discharge of any pollutant by any person shall be unlawful."

(b) Section 402(a)(1) of the Act provides in part that "the Administrator may, after opportunity for public hearing, issue a permit for the discharge of any pollutant, or combination of pollutants, . . . upon condition that such discharge will meet either all applicable requirements under sections 301, 302, 306, 307, 308, and 403 of [the] Act, or prior to the taking of necessary implementing actions relating to all such requirements, such conditions as the Administrator determines are necessary to carry out the provisions of [the] Act."

(c) Section 318(a) of the Act provides that "The Administrator is authorized, after public hearings, to permit the discharge of a specific pollutant or pollutants under controlled conditions associated with an approved aquaculture project under Federal or State supervision pursuant to section 402 of this Act."

(d) Section 405 of the Act provides, in part, that "where the disposal of sewage sludge resulting from the operation of a treatment works as defined in section 212 of this Act (including the removal of in-place sewage sludge from one location and its deposit at another location) would result in any pollutant from such sewage sludge entering the navigable waters, such disposal is prohibited except in accordance with a permit issued by the Administrator under section 402 of the Act."

(e) Sections 402(b), 318 (b) and (c), and 405(c) of the Act authorize EPA approval of State permit programs for discharges form point sources, discharges to aquaculture projects, and disposal of sewage sludge.

(f) Section 404 of the Act authorizes EPA approval of State permit programs for the discharge of dredge or fill material.

(g) Section 304(i) of the Act provides that the Administrator shall promulgate guidelines establishing uniform application forms and other minimum requirements for the acquisition of information from discharges in approved States and establishing minimum procedural and other elements of approved State NPDES programs.

(h) Section 501(a) of the Act provides that "The Administrator is authorized to prescribe such regulations as are necessary to carry out his functions under this Act."

(i) Section 101(e) of the Act provides that "Public participation in the development, revision, and enforcement of any regulations, standard, effluent limitations, plan, or program established by the Administrator or any State under this Act shall be provided for, encouraged, and assisted by the Administrator and the States. The Administrator, in cooperation with the States, shall develop and publish regulations specifying minimum guidelines for public participation in such processes." Public participation requirements set forth in these regulations carry out the purposes of 40 CFR 25 and supersede the requirments of that Part as they apply to actions controlled by Parts 121–125 of these regulations.

§ 122.3 Definitions.

The following definitions apply to this Part and to Parts 123, 124 and 125:

[*Comment:* Terms used in this Part and in Parts 123, 124 and 125 which are defined in the Act, and are not defined here shall have the meaning provided in the Act.]

(a) "Act" means the Clean Water Act (formerly referred to as the Federal Water Pollution Control Act) Pub. L. 92–500, as amended by Pub. L. 95–217 and Pub. L. 95–576, 33 U.S.C. 1251 *et seq.*

(b) "Administrator" means the Administrator of the United States Environmental Protection Agency.

(c) "Application" means:

(1) The EPA standard national forms for applying for an NPDES permit, including any subsequent additions, revisions or modifications, or

(2) Substantially similar forms approved by EPA for use in approved States at the time of a program approval under Part 123, including any approved subsequent additions, revisions or modifications.

[*Comment:* EPA is presently developing a new application form. The essential elements of this new application form will be required to be used by the States.]

(d) "Applicable standards and limitations" means all State, interstate and Federal standards and limitations to which a discharge or related activity is subject under the Act, including, but not limited to, effluent limitations, water quality standards, standards of performance, toxic effluent standards and prohibitions, best management practices, and pretreatment standards under sections 301, 302, 303, 304, 306, 307, 218, 403 and 405 of the Act.

(e) "Approved State program" means a State or interstate permit program which meets the requirements of section 402(b) of the act, and which has been submitted to and approved by EPA under §123.51 and section 402(c) of the Act. Approved State programs must include authority to regulate discharges specified in sections 318 and 405 of the Act through the NPDES program.

(f) "Best management practices" "BMPs" includes treatment requirements, operating and maintenance procedures, schedules of activities, prohibitions of activities, and other management practices to control plant site runoff, spillage, leaks, sludge or waste disposal, or drainage from raw material storage. BMPs may be imposed

in addition to or in the absence of other applicable standards and limitations.

(g) "Contiguous zone" means the entire zone established by the United States under Article 24 of the Convention on the Territorial Sea and the Contiguous Zone.

(h) "Direct discharge" means the discharge of a pollutant or the discharge of pollutants.

(i) "Director" means the "Regional Administrator" or the "State Director," as appropriate.

[Comment: Where there is no approved State program, the term "Director" refers to the Regional Administrator. Where there is an approved State program, the term "Director" normally refers to the State Director. In some circumstances, however, EPA retains authority to take certain actions even where there is an approved State program. E.g., where EPA issued a permit prior to the approval of a State program, EPA may retain jurisdiction over that permit after program approval, see §123.1(d). In such cases, the term "Director" means the Regional Administrator and not the State Director.]

(j) "Discharge" when used without qualification includes a discharge of a pollutant and a discharge of pollutants.

(k) "Discharge of a pollutant" and "discharge of pollutants" each means:

(1) Any addition of any pollutant or combination of pollutants to navigable waters from any point source, or

(2) Any addition of any pollutant or combination of pollutants to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft when being used as a means of transportation.

This definition includes discharge into waters of the United States from: surface runoff which is collected or channelled by man; discharges through pipes, sewers, or other conveyances owned by a State, municipality or other party which do not lead to treatment systems; and discharges through pipes, sewers, or other conveyances, leading into treatment systems owned in whole or in part by a third party other than a State or a municipality.

(l) "Discharge Monitoring Report ("DMR") means the EPA uniform national form, including any subsequent additions, revisions or modifications for the reporting of self-monitoring results by permittees. DMRs must be used by approved States as well as by EPA.

[Comment: EPA will supply DMRs to any approved State upon request. The EPA uniform national forms may be modified to substitute the State Agency name, address, logo, and other similar information, as appropriate, in place of EPA's]

(m) "Effluent limitation" means any restriction imposed by the Director on quantities, rates, and concentrations of pollutants which are discharged from point sources into navigable waters, the waters of the contiguous zone, or the ocean.

(n) "Enforcement Division Director" means the Director of the Enforcement Division within the appropriate Regional Office of the Environmental Protection Agency.

(o) "Environmental Protection Agency" ("EPA") means the United States Environmental protection Agency.

(p) "Indirect discharger" means a non-municipal, non-domestic discharger introducing pollutants to a publicly owned treatment works, which introduction does not constitute a "discharge of pollutants."

(q) "Interstate agency" means an agency of two or more States established by or under an agreement or compact approved by the Congress, or any other agency of two or more States, having substantial powers or duties pertaining to the control of pollution as determined and approved by the Administrator.

(r) "Municipality" means a city, town, borough, county, parish, district, association or other public body created by or pursuant to State law and having jurisdiction over disposal of sewage, industrial wastes, or other wastes, or an Indian tribe or an authorized Indian tribal organization, or a designated and approved management agency under section 208 of the Act.

(s) "NPDES" ["National Pollutant Discharge Elimination System"] means the national program for issuing, modifying, revoking and reissuing, terminating, monitoring, and enforcing permits pursuant to sections 402, 318, and 405 of the Act. The term includes any State or interstate program which has been approved by the Administrator.

(t) "Navigable waters" means "waters of the United States, including the territorial seas." This term includes:

(1) All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;

(2) Interstate waters, including interstate wetlands;

(3) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats and wetlands, the use, degradation or destruction of which would affect or could affect interstate or foreign commerce including any such waters:

(i) Which are or could be used by interstate or foreign travelers for recreational or other purposes;

(ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce;

(iii) Which are used or could be used for industrial purposes by industries in interstate commerce;

(4) All inpoundments of waters otherwise defined as navigable waters under this paragraph;

(5) Tributaries of waters identified in paragraphs (1)–(4) of this section, including adjacent wetlands; and

(6) Wetlands adjacent to waters identified in paragaphs (1)–(5) of this section ["Wetlands" means those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally included playa lakes, swamps, marshes, bogs, and similar areas such as sloughs, prairie potholes, wet meadows, prairie river overflows, mudflats, and natural ponds); *provided that* waste treatment systems [other than cooling ponds meeting the criteria of this paragraph] are not waters of the United States.

[Comment:] For purposes of clarity the term "waters of the United States" is primarily used throughout the regulations rather than "navigable waters"]

(u) "New discharger" means any building, struture, facility or installation: (1) which on October 18, 1972, has never discharged pollutants; (2) which has never received a finally effective NPDES permit; (3) from which there is or may be a new or additional discharge of pollutants; and (4) which does not fall within the definition of "new source."

(v) "New source" means any building, structure, facility or installation from which there is or may be a discharge of pollutants the contruction of which commences:

(1) After promulgation of standards of performance under section 306 of the Act which are applicable to such source; or

(2) After proposal of standards of performance under section 306 which are applicable to such source, but only if the standards are promulgated within 120 days of their proposal.

[*Comment:* See § 122.47 for the criteria and standards to be used in determining whether a source has commenced construction within the meaning of this definition, for the types of construction activities which result in new sources or new dischargers, and for the effect of a new source determination.]

(w) "Permit" means any permit issued by EPA under the authority of section 402 of the Act or by an approved State under the authority of State law, controlling the discharge of pollutants into the waters of the United States.

[*Comment*: Approved States are not required to use the EPA standard permit form. However, State permit forms are reviewed and approved at the time of NPDES program approval. See § 123.3(a)(5).]

(x) "Person" means an individual, corporation, partnership, association, Federal agency, State, municipality, commission, or political subdivision of a State or any interstate body.

(y) "Point source" means any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, vessel or other floating craft, from which pollutants are or may be discharged. This term does not include return flows from irrigated agriculture.

(z) "Pollutant" means dredged spoil, solid waste, incinerator residue, filter backwash, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt, and industrial, municipal, and agricultural waste discharged into water. It does not mean:

(1) Sewage from vessels or

(2) Water, gas, or other material which is injected into a well to facilitate production of oil or gas, or water derived in association with oil or gas production and disposed of in a well, if the well used either to facilitate production or for disposal purposes is approved by authority of the State in which the well is located, and if such State determines that such injection or disposal will not result in the degradation or ground or surface water resources.

[*Comment*: The legislative history of the Act reflects that "radioactive materials" as included within the definition of "pollutant" in section 502 of the Act means only radioactive materials which are not encompassed in the definition of source, by-product, or special nuclear materials as defined by the Atomic Energy Act of 1954, as amended, and regulated under the Atomic Energy Act. Examples of radioactive materials not covered by the Atomic Energy Act and, therefore, included within the term "pollutant" are radium and accelerator produced isotopes. See *Train* v. *Colorado Public Interest Research Group, Inc.*, 426 U.S. 1 (1976).]

(aa) "Process waste water" means any water which, during manufacturing or processing, comes into direct contact with or results from the production or use of any raw material, intermediate product, finished product, byproduct, or waste product.

(bb) "Publicly owned treatment works" ("POTW") means a treatment works as defined in section 212 of the Act, which is owned by a State or municipality, excluding any sewers or other conveyances not leading to a facility providing treatment.

(cc) "Regional Administrator" means the Regional Administrator of the appropriate Regional Office of the Enviromental Protection Agency or the delegated representative of the Regional Administrator.

(dd) "Schedule of compliance" means a schedule of remedial measures including an enforceable sequence of interim requirements (e.g., actions, operations, or milestone events) leading to compliance with applicable standards or limitations or other permit requirements. Unless otherwise provided in these regulations, each schedule shall culminate in a specific requirement to achieve expeditious final compliance with all applicable standards and limitations.

(ee) "Secretary" means the Secretary of the Army, acting through the Chief of Engineers.

(ff) "Sewage from vessels" means human body wastes and the wastes from toilets and other receptacles intended to receive or retain body wastes that are discharged from vessels and regulated under section 312 of the Act, except that with respect to commercial vessels on the Great Lakes this term includes graywater. For the purposes of this definition, "graywater" means galley, bath, and shower water.

(gg) "Sewage sludge" means the solids, residues, and precipitate separated from or created in sewage by the unit processes of a publicly owned treatment works. "Sewage" as used in this definition means any wastes, including wastes from humans, households, commercial establishments, industries, and storm water runoff, that are discharged to or otherwise enter a publicly owned treatment works.

(hh) "State" means a State, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, or the Trust Territory of the Pacific Islands.

(ii) "State Director" means the chief administrative officer of a State water pollution control agency or interstate agency approved by EPA to administer the NPDES program, or the delegated representative of the State Director. If responsibility for water pollution control and enforcement is divided within a State agency or among two or more State or interstate agencies, "State Director" means the administrative officer authorized to perform the particular procedure or function to which reference is made.

(jj) "Variance" means any mechanism or provision under sections 301 or 316 of the Act and Part 125, or in the applicable effluent limitation guidelines which allow modification to or waivers of the effluent limitation requirements of the Act. This includes provisions which allow the establishment of alternative limitations based on fundamentally different factors and sections 301(c), 301(g), 301(h), and 316(a) of the Act, where appropriate.

(kk) "Waters of the United States" means "navigable waters."

§ 122.4 Exclusions.

(a) The following discharges do not require an NPDES permit:

(1) Any discharge of sewage from vessels, effluent from properly functioning marine engines, laundry, shower, and galley sink wastes, or any other discharge incidental to the normal operation of a vessel. This exclusion does not apply to rubbish, trash, garbage, or other such materials discharged overboard; nor to other discharges when the vessel is operating in a capacity other than as a means of transportation such as when a vessel is being used as an energy or mining facility, a storage facility, or a seafood processing facility, or is secured to the bed of the ocean, contiguous zone, or waters of the United States for the purpose of mineral or oil exploration or development;

(2) Discharges of dredged or fill material into waters of the United States and regulated under section 404 of the Act.

(3) The introduction of sewage, industrial wastes or other pollutants into publicly owned treatment works by indirect dischargers.

[*Comment:* This exclusion applies only to the actual introduction of pollutants into publicly owned treatment works. Plans or agreement to switch to this method of disposal in the future do not relieve dischargers of the obligation to apply for and receive permits until all discharges of pollutants to waters of the United States are actually eliminated. All applicable pretreatment standards promulgated under section 307(b) of the Act must also be complied with, and may be included in the permit to the publicly owned treatment works. This exclusion does not apply to the introduction of pollutants to privately owned treatment works or to other discharges through pipes, sewers, or other

conveyances owned by a State, municipality, or other party not leading to treatment works. See § 122.3(k)].

(4) Any introduction of pollutants from agricultural and silvicultural activities, including runoff from orchards, cultivated crops, pastures, range lands, and forest lands, except that this exclusion shall not apply to:

(i) Discharges from concentrated animal feeding operations as defined in § 122.42;

(ii) Discharges from concentrated aquatic animal production facilities as defined in § 122.43;

(iii) Discharges to aquaculture projects as defined in § 122.44; and

(iv) Discharges from silvicultural point sources as defined in § 122.46.

(b) The exemption of a discharge from NPDES requirements in paragraph (a) of this section does not preclude State regulation of the exempted discharge under State authority, in accordance with section 510 of the Act.

§ 122.5 Signatories.

(a) All permit applications shall be signed as follows:

(1) For a corporation, by a principal executive officer of at least the level of vice president;

(2) For a partnership or sole proprietorship, by a general partner or the proprietor, respectively; or

(3) For a muncipality, State, Federal, or other public facility, by either a principal executive officer or ranking elected official.

(b) All other reports or requests for information required by the permit issuing authority shall be signed by a person designated in paragraph (a) or a duly authorized representative of such person, if:

(1) The representative so authorized is responsible for the overall operation of the facility from which the discharge originates, e.g., a plant manager, superintendent or person of equivalent responsibity;

(2) The authorization is made in writing by the person designated under paragraph (a); and

(3) The written authorization is submitted to the Director.

(c) Any changes in the written authorization submitted to the permitting authority under paragraph (b) which occur after the issuance of a permit shall be reported to the permitting authority by submitting a copy of a new written authorization which meets the requirements of paragraph (b) (1) and (2).

(d) Any person signing any document under paragraph (a) or (b) shall make the following certification: "I certify under penalty of law that I have personally examined and am familiar with the information submitted in the attached document; and based on my inquiry of those individuals immediately responsible for obtaining the information, I believe the submitted information is true, accurate and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment."

[*Comment:* The permit application will be revised to incorporate this statement. Where a permit program document does not contain the statement, the certification must accompany the appropriate document.]

(e) This section is applicable to approved States (see § 123.12). States may adopt language which is equivalent to, but not identical to, the certification statement in paragraph (d), if such equivalent language is approved by the Regional Administrator.

Subpart B—NPDES Permit Application and Issuance

§ 122.10 Application for a permit.

(a) Any person who discharges or proposes to discharge pollutants, except persons covered by general permits under § 122.48 or excluded under § 122.4, shall complete, sign, and submit an application (which includes a BMP program if necessary under § 125.102) to the Director in accordance with Part 124, Subpart B.

(b) Persons currently discharging who have:

(1) Existing permits shall submit a new application under paragraph (c) of this section where facility expansions, production increases, or process modifications will:

(i) Result in new or substantially increased discharges of pollutants or a change in the nature of the discharge of pollutants, or

(ii) Violate the terms and conditions of the existing permit.

(2) Expiring permits shall submit new applications at least 180 days before the expiration date of the existing permit, unless permission for a later date has been granted by the Director.

(c) A person proposing a new discharge shall submit an application at least 180 days before the date on which the discharge is to commence, unless permission for a later date has been granted by the Regional Administrator.

[*Comment:* Persons proposing a new discharge are encouraged to submit their applications well in advance of the 180 day requirement to avoid delay. In addition, information required by § 124.12(b)(1) must be submitted before on-site construction, which normally will commence long before the permit application is required.]

§ 122.11 Permit issuance; effect of permit.

(a) The receipt of a complete application by the Director initiates the permit issuance process described in Part 124.

(b) Following the permit issuance process the Director may issue or deny a finally effective permit. Where EPA is the permitting authority, EPA action shall not be final for the purpose of judicial review under section 509(b) of the Act until this issuance or denial has taken place. (See § 124.61).

(c) Compliance with a permit during its term constitutes compliance, for purposes of sections 309 and 505, with applicable standards and limitations of the Act, except for any standard imposed under section 307 for a toxic pollutant injurious to human health. However, a permit may be modified, revoked and reissued, or terminated during its term for cause as described in § 122.31.

(d) The issuance of a permit does not:

(1) Convey any property rights of any sort, or any exclusive privileges;

(2) Authorize any injury to private property or invasion of other private rights, or any infringement of Federal, State, or local laws or regulations; or

(3) Preempt any duty to obtain State or local assent required by law for the discharge.

§ 122.12 Duration of permits and continuation of expiring permits; transferability of permits.

(a) *Duration of Permits.* All permits shall be issued for fixed terms not to exceed five years. Permits of less than five years duration may be issued in appropriate circumstances (see paragraph (c)). Permits may be modified, revoked and reissued, or terminated as specified in Subpart D. Except for the continuation provisions of paragraph (b) for expiring permits, the term of a permit shall not be extended beyond five years from its original date of effectiveness by modification, extension or other means.

(b) *Continuation of expiring permits.* (1) Where EPA is the permit issuing authority, the terms and conditions of an expired permit are automatically continued under 5 U.S.C. § 558(c) pending issuance of a new permit if:

(i) The permittee has submitted a timely and sufficient application for a new permit under § 122.10(a); and

(ii) The Regional Administrator is unable, through no fault of the permittee, to issue a new permit before the expiration date of the previous permit

(e.g., where it is impracticable due to time and/or resource constraints).

(2) Permits continued under paragraph (b)(1) remain fully effective and enforceable against the discharger.

(3) Where the permittee is not in compliance with the terms and conditions of the expiring permit:

(i) The permit may be continued under this section pending a final determination by the Regional Administrator on the application for a new permit and enforcement action may be taken based upon the continued permit; or

(ii) The Regional Administrator may make a determination to deny the application for a new permit in accordance with the procedures specified in Part 124. The discharger would then be subject to enforcement action for discharging without a permit.

(4) States authorized to administer the NPDES may continue permits in a similar manner if so authorized by State law. However, a permit is not continued under Federal law where EPA originally issued the permit, but the State is the permitting authority at the time the permit expired. In such case, the discharger is discharging without a permit, from the time the EPA-issued permit expires to the time that the State-issued permit is effective.

(c) No permit issued to a discharger within an industrial category listed in Appendix A of this Part, prior to the applicable permit expiration date listed in Appendix A, may be issued to expire after that date, unless:

(1) The permit incorporates effluent limitations and standards applicable to the discharger which are promulgated or approved under sections 301(b)(2)(C) and (D), 304(b)(2), and 307(a)(2) of the Act; or

[*Comment:* EPA is presently reviewing and revising effluent limitations guidelines for industries listed in Appendix A. In some cases, EPA may approve existing guidelines or choose not to develop new guidelines. If EPA decides not to develop new effluent guidelines, it will publish notice in the **Federal Register** as to that decision. Such a **Federal Register** notice would mean, in effect, that the guidelines are "approved" for the purpose of this regulation.]

(2) The permit incorporates:

(i) The "reopener clause" required by § 122.15(b)(1); and

(ii) Effluent limitations to meet the requirements of sections 301(b)(2) (A), (C), (D), (E) and (F) of the Act.

[*Comments:* (1) NPDES States are urged to issue short term permits expiring on or before the dates listed in Appendix A. This will ensure that all appropriate provisions of the Act, including compliance with the effluent limitations by the statutory deadlines, are met in permits issued after the promulgation of effluent guidelines under sections 301(b)(2)(C) and (D), 304(b)(2), and 307(a)(2). Even if States issue long term permits with later expiration dates (in accordance with paragraph (c)(2)), dischargers are legally required to meet all applicable statutory deadlines and requirements, including compliance with any promulgated EPA effluent guidelines defining "best conventional pollutant control technology" (BCT) and "best available control technology economically achieveable" (BAT).

(2) A determination that a particular discharger falls within a given industrial category for purposes of setting a permit expiration date under paragraph (c) is not conclusive as to the discharger's inclusion in that industrial category for any other prupose, and does not prejudice any rights to challenge or change that inclusion at the time a new permit based on that determination is formulated.]

(d) *Transferability of permits.* A permit may be transferred to another person by a permittee if:

(1) The permittee notifies the Director of the proposed transfer;

(2) A written agreement containing a specific date for transfer of permit responsibility and coverage between the current and new permittees (including acknowledgement that the existing permittee is liable for violations up to that date, and that the new permittee is liable for violations from that date on) is submitted to the Director; and

(3) The Director within 30 days does not notify the current permittee and the new permittee of his or her intent to modify, revoke and reissue, or terminate the permit and to require that a new application be filed rather than agreeing to the transfer of the permit.

[*Comment.* A new application could be required under this paragraph where the change of ownership is accompanied by a change or proposed change in process or wastewater characteristics or a change or potential change in any circumstances that the permitting authority believes will affect the conditions or restrictions in the permit.]

§ 122.13 Prohibitions.

No permit shall be issued in the following circumstances:

(a) Where the terms or conditions of the permit do not comply with the applicable guidelines or requirements of the Act, or regulations.

(b) Where the applicant is required to obtain a State or other appropriate certification under section 401 of the Act and Part 124, Subpart C, and that certification has not been obtained or been waived.

(c) By the State Director where the Regional Administrator has objected to issuance of the permit under § 123.23.

(d) Where the imposition of conditions cannot ensure compliance with the applicable water quality requirements of all affected States as required by section 401(a)(2) of the Act.

(e) Where, in the judgment of the Secretary, anchorage and navigation in or on any of the waters of the United States would be substantially impaired by the discharge.

(f) For the discharge of any radiological, chemical, or biological warfare agent or high-level radioactive waste.

(g) For any discharge from a point source inconsistent with a plan or plan amendment approved under section 208(b) of the Act.

(h) For any discharge to the territorial sea, the waters of the contiguous zone, or the oceans in the following circumstances:

(1) Prior to the promulgation of the guidelines under section 403(c) of the Act, unless the Director determines permit issuance to be in the public interest; or

(2) After promulgation of guidelines under section 403(c) of the Act, where insufficient information exists to make a reasonable judgment as to whether the discharge complies with any such guidelines.

(i) To a facility which is a new source or a new discharger, if the discharge from the construction or operation of the facility will:

(1) Cause or contribute to the violation of water quality standards if the point of discharge is located in a segment that was an effluent limitation segment (as defined in 40 CFR § 130.2(o)(2)) prior to the introduction of the discharge from the new source or new discharger; or

(2) Exceed the total pollutant load allocation if the discharge is into a water quality segment as defined in 40 CFR § 130.2(o)(1).

The owner or operator of a facility which is a new source or new discharger into a water quality segment must also demonstrate, at the time of applying for a permit that there are sufficient remaining pollutant load allocations to allow the discharge and that the facility is entitled to these allocations.

§ 122.14 Conditions applicable to all permits.

The following conditions apply to all permits, whether issued by the Regional Administrator or the State Director. They shall be either expressly incorporated into the permit or incorporated by reference.

[*Comment:* If not incorporated by reference, the inclusion of the requirements of this section into permits may require some

wording changes. Where this is the case, the permit conditions should be worded substantially similar to the requirements of this section, and should be of equivalent force.]

(a) [Reserved]

[*Comment:* This paragraph is reserved pending publication of a revised NPDES application form. When a proposed revised application form is available this paragraph will be reproposed in a manner consistent with the proposed revised form. At that time EPA will outline a comprehensive scheme for the relationship between the data required in the application form, monitoring requirements, permit conditions, and the pollutants authorized to be discharged by the permit and not authorized to be discharged by the permit. The existing NPDES application forms should be utilized until the revised application form is available, except as otherwise provided in these regulations. See § 122.5.]

(b) All discharges shall be consistent with the terms and conditions of the permit.

(c) The permit may be modified, terminated, or revoked during its term for cause as described in § 122.31.

(d) If any applicable toxic effluent standard or prohibition (including any schedule of compliance specified in such effluent standard or prohibition) is established under section 307(a) of the Act for a toxic pollutant and that standard or prohibition is more stringent than any limitation upon such pollutant in the permit, the Director shall institute proceedings under these regulations to modify or revoke and reissue the permit to conform to the toxic effluent standard or prohibition.

[*Comment*: Effluent standards or prohibitions established under section 307(a) for toxic pollutants injurious to human health are effective within the time provided in the implementing regulations, even absent permit modification.]

(e) Any permittee who knows or has reason to believe that any activity has occurred or will occur which would constitute cause for modification or revocation and reissuance under § 122.31 must report its plans, or such information, to the Director so that the Director can decide whether action to modify or revoke and reissue a permit under § 122.31 will be required. The Director may then require submission of a new application. Submission of such application does not relieve the discharger of the duty to comply with the existing permit until it is modified or reissued.

(f) The permittee shall allow the Director, or an authorized representative, upon the presentation of credentials and such other documents as may be required by law:

(1) To enter upon the permittee's premises where a point source is located or where any records must be kept under the terms and conditions of the permit;

(2) To have access to and copy at reasonable times any records that must be kept under the terms and conditions of the permit;

(3) To inspect at reasonable times any monitoring equipment or method required in the permit;

(4) To inspect at reasonable times any collection, treatment, pollution management, or discharge facilities required under the permit; and

(5) To sample at reasonable times any discharge of pollutants.

(g) The permittee shall at all times maintain in good working order and operate as efficiently as possible all facilities and systems (and related appurtenances) for collection and treatment which are installed or used by the permittee for water pollution control and abatement to achieve compliance with the terms and conditions of the permit. Proper operation and maintenance includes but is not limited to effective performance based on designed facility removals, adequate funding, effective management, adequate operator staffing and training, and adequate laboratory and process controls including appropriate quality assurance procedures.

(h)(1) If, for any reason, the permittee does not comply with or will be unable to comply with any maximum daily or average weekly discharge limitations or standards specified in the permit, the permittee shall, at a minimum, provide the Director with the following information as specified in paragraph (h)(2):

(i) A description of the discharge and cause of noncompliance;

(ii) The period of noncompliance, including exact dates and times and/or the anticipated time when the discharge will return to compliance; and

(iii) Steps being taken to reduce, eliminate, and prevent recurrence of the noncomplying discharge.

(2)(i) In the case of any discharge subject to any applicable toxic pollutant effluent standard under section 307(a), the information required by paragraph (1) regarding a violation of such standard shall be provided within 24 hours from the time the permittee becomes aware of the circumstances. If this information is provided orally, a written submission covering these points shall be provided within five days of the time the permittee becomes aware of the circumstances covered by this paragraph.

(ii) In the case of other discharges which could constitute a threat to human health, welfare, or the environment, the Director may require that the information required by paragraph (1) be provided within 24 hours or five days from the time the permittee becomes aware of the circumstances. Where the Director requires 24-hour notice, if the information is provided orally, a written submission covering these points must be provided within five days of the time the permittee becomes aware of the circumstances covered by this paragraph.

[*Comment:* Discharges that may be required to be reported within 24 hours under paragraph (h)(2)(ii) could include discharges containing section 311 pollutants or pollutants which could cause a threat to public drinking water supplies.]

(iii) Where a permittee orally reports a violation within 24 hours in accordance with paragraphs (h)(2) (i) or (ii), the Director may waive, on a case-by-case basis, the requirement that a written submission be provided within five days of the time the permittee becomes aware of the violation.

(iv) In all other cases this information shall be provided in the DMR in accordance with the requirements of § 122.22.

(i) The permittee shall take all reasonable steps to minimize any adverse impact to waters of the United States resulting from noncompliance with the permit.

(j) The permittee, in order to maintain compliance with its permit, shall control production and all discharges upon reduction, loss, or failure of the treatment facility unitl the facility is restored or an alternative method of treatment is provided. This requirement applies in the situation where, among other things, the primary source of power of the treatment facility is reduced, lost, or fails.

(k) *Bypass.*

(1) *Definitions.*

(i) "Bypass" means the intentional diversion of wastes from any portion of a treatment facility.

(ii) "Severe property damage" means substantial physical damage to property, damage to the treatment facilities which would cause them to become inoperable, or substantial and permanent loss of natural resources which can reasonably be expected to occur in the absence of a bypass. Severe property damage does not mean economic loss caused by delays in production.

(2) *Conditions necessary for bypass.* Bypass is prohibited unless the following four conditions are met:

(i) Bypass is unavoidable to prevent loss of life, personal injury or severe property damage;

(ii) There are no feasible alternatives to bypass, such as the use of auxiliary treatment facilities, retention of untreated wastes, or maintenance during normal periods of equipment down-time;

(iii) The permittee submits notice of an unanticipated bypass to the Director within 24 hours of becoming aware of the bypass (if this information is provided orally, a written submission must be provided within five days). Where the permittee knows or should have known in advance of the need for a bypass, this prior notification shall be submitted for approval to the director, if possible, at least ten days before the date of the bypass;

[*Comment:* Fully efficient operation of treatment systems is required at all times. Although this generally requires the use of all portions of an existing treatment system, in some cases, maintenance necessary to ensure efficient operation may require bypassing portions of a system. Where such a bypass will not cause applicable effluent limitations or standards to be exceeded, it may be done without notification to the permitting authority. Where, however, a bypass is undertaken for reasons other than essential maintenance or where a bypass would cause effluent limitations or standards to be exceeded, it may be undertaken only in accordance with the provisions of this section.]

(iv) The bypass is allowed under conditions determined to be necessary by the Director to minimize any adverse effects. The public shall be notified and given an opportunity to comment on bypass incidents of significant duration, to the extent feasible.

(3) *Prohibition of bypass.* The Director may prohibit bypass in consideration of the adverse effect of the proposed bypass or where the proposed bypass does not meet the conditions set forth in paragraphs (k)(2) (i) and (ii).

[*Comment:* When a bypass occurs, the burden is on the discharger to demonstrate compliance with this paragraph. If the reason for the bypass was the need for regular preventive maintenance, for which backup equipment should have been provided by the discharger, in accordance with paragraph (2)(ii), the bypass will not be allowed. If there is any doubt as to the necessity of the bypass or the availability of methods to reduce or eliminate the discharge, appropriate enforcement action may be taken.]

(l) *Upset.*—(1) *Definition.* "Upset" means an exceptional incident in which there is unintentional and temporary noncompliance with technology-based permit effluent limitations because of factors beyond the reasonable control of the permittee. An upset does not include noncompliance to the extent caused by operational error, improperly designed treatment facilities, inadequate treatment facilities, lack of preventive maintenance, or careless or improper operation.

(2) *Effect of an upset.* An upset shall constitute an affirmative defense to an action brought for noncompliance with such technology-based permit effluent limitations if the requirements of paragraph (1)(3) are met.

(3) *Conditions necessary for a demonstration of upset.* A permittee who wishes to establish the affirmative defense of upset shall demonstrate, through properly signed, contemporaneous operating logs, or other relevant evidence that:

(i) An upset occurred and that the permittee can identify the specific cause(s) of the upset;

(ii) The permitted facility was at the time being operated in a prudent and workman-like manner and in compliance with proper operation and maintenance procedures;

(iii) The permittee submitted information required in § 122.14(h)(1) within 24 hours of becoming aware of the upset (if this information is provided orally, a written submission must be provided within five days), and

(iv) The permittee complied with any remedial measures required under § 122.14(i).

(4) *Burden of proof.* In any enforcement proceeding the permittee seeking to establish the occurrence of an upset shall have the burden of proof.

[*Comments:* (1) Upset is only available for permit limits which are based on technology. It is not available for non-technology-based requirements such as water quality standards, State laws, or health or environmentally based toxic pollutant effluent standards. (2) Although in the usual exercise of prosecutorial discretion, Agency enforcement personnel should review any claims that noncompliance was caused by an upset, no determination made in the course of the review constitutes final Agency action subject to judicial review. Permittees will have the opportunity for a judicial determination on any claim of upset only in an enforcement action brought for noncompliance with technology-based permit effluent limitations.]

§ 122.15 Applicable limitations, standards, prohibitions, and conditions.

Each NPDES permit shall provide for and ensure compliance with all applicable requirements of the Act and regulations promulgated under the Act. For the purposes of this section, an applicable requirement is a statutory or regulatory requirement which takes effect prior to final administrative disposition of a permit issued by a State with an approved NPDES program, or, in the case of a permit issued by EPA, which takes effect prior to the issuance of the permit except as provided in § 124.86(c). Permits shall ensure compliance with the following as applicable:

(a) Effluent limitations and standards under sections 301, 302, 303, 304, 307, 318, and 405 of the Act, including any interim final limitations and standards.

(b) For a discharger within any industrial category listed in Appendix A, requirements under section 307(a)(2) of the Act, as follows:

(1) Prior to the applicable permit expiration date listed in Appendix A,

(i) If applicable standards or limitations have not yet been issued:

(A) The permit shall include conditions stating that, if an applicable standard or limitation is issued or approved under sections 301(b)(2) (C) and (D), 304(b)(2) and 307(a)(2) and such effluent standard or limitation is more stringent than any effluent limitation in the permit or controls a pollutant not limited in the permit, the permit shall be promptly modified or, alternatively, revoked and reissued in accordance with such effluent standard or limitation and any other requirements of the Act then applicable.

[*Comment:* The following language is an acceptable permit condition for the purposes of this section:

"This permit shall be modified, or alternatively, revoked and reissued, to comply with any applicable standard or limitation promulgated or approved under sections 301(b)(2) (C) and (D), 304(b)(2), and 307(a)(2) of the Clean Water Act, if the effluent standard or limitation so issued or approved:

(i) Contains different conditions or is otherwise more stringent than any effluent limitation in the permit; or

(ii) Controls any pollutant not limited in the permit.

The permit as modified or reissued under this paragraph shall also contain any other requirements of the Act then applicable."]

(B) The Director shall promptly modify, or alternatively revoke and reissue, the permit to incorporate an applicable standard or limitation under sections 301(b)(2) (C) and (D), 304(b)(2), and 307(a)(2) is issued or approved if such effluent standard or limitation is more stringent than any effluent limitation in the permit, or controls a pollutant not limited in the permit.

[*Comment:* The requirements of this section are intended to assure compliance with the

1984 statutory deadline for the achievement of best available technology economically achievable for pollutants now listed under section 307(a)(1) of the Act. When a permit is modified or revoked and reissued pursuant to subparagraph (B), additional limitations may be included in the permit to assure achievement of applicable statutory requirements (e.g., best conventional pollutant control technology for "conventional" pollutants and best available technology economically achievable for "non-conventional" pollutants) by appropriate statutory deadlines.]

(ii) If applicable standards or limitations have been issued, the permit shall include those standards or limitations.

(2) Any permit issued after the applicable permit expiration date listed in Appendix A, shall include effluent limitations and a compliance schedule to meet the requirements of sections 301(b)(2) (A), (C), (D), (E), and (F) of the Act, whether or not applicable effluent limitations guidelines have been promulgated or approved. Such permits need not incorporate the clause required by paragraph (b)(1)(i)(A) of this section.

(c) Standards of performance for new sources under section 306 of the Act, including any promulgated interim final effluent limitations and standards.

(d) If the permit is for a discharge from a publicly owned treatment works, a condition requiring the permittee to:

(1) Provide adequate notice to the Director of the following:

(i) Any new introduction of pollutants into that POTW from an indirect discharger which would be subject to sections 301 or 306 of the Act if it were directly discharging those pollutants; and

(ii) Any substantial change in the volume or character of pollutants being introduced into that POTW by a source introducing pollutants into the POTW at the time of issuance of the permit.

[*Comment:* For purposes of this paragraph, adequate notice shall include information on (1) the quality and quantity of effluent to be introduced into such POTW and (2) any anticipated impact of such change in the quantity or quality of effluent to be discharged from such POTW.]

(2) Identify, in terms of character and volume of pollutants, any significant indirect dischargers into the POTW subject to pretreatment standards under section 307(b) of the Act and 40 CFR Part 403.

(3) Establish a local program when required by and in accordance with 40 CFR Part 403 to assure compliance with pretreatment standards to the extent applicable under section 307(b). The local program shall be incorporated into the permit as described in 40 CFR Part 403.

(4) Require any indirect discharger to such POTW to comply with the reporting requirements of sections 204(b), 307, and 308 of the Act, including any requirements established under 40 CFR Part 403.

(e) Any conditions imposed in grants made by the Administrator to POTWs under sections 201 and 204 of the Act which are reasonably necessary for the achievement of effluent limitations under section 301 of the Act.

[*Comment:* Among other things, this paragraph contemplates permit conditions embodying measures to protect the POTW against overloading and schedules of compliance which are consistent with, and determined from, construction grant award dates.]

(f) Any requirements in addition to or more stringent than promulgated effluent limitations guidelines or standards under sections 301, 304, 306, 307, 318 and 405 where necessary to:

(1) Achieve water quality standards established under section 303 of the Act;

(2) Attain or maintain a specified water quality through water quality related effluent limits established under section 302 of the Act;

(3) Conform to the conditions of a State certification under section 401 of the Act where EPA is the permit issuing authority;

(4) Conform to applicable water quality requirements under section 401(a)(2) of the Act when the discharge affects a State other than the certifying State;

(5) Incorporate any more stringent limitations, treatment standards or schedules of compliance requirements established under Federal or State law or regulations in accordance with section 301(b)(1)(C) of the Act;

(6) Ensure consistency with the requirements of a Water Quality Management plan approved by EPA under section 208(b) of the Act;

(7) Incorporate section 403(c) criteria under Part 125 Subpart M for ocean discharges;

(8) Incorporate alternative effluent limitations or standards where warranted by "fundamentally different factors," under Part 125 Subpart D;

(9) Incorporate other requirements, or conditions, or limitations into a new source permit under the National Environmental Policy Act 42 U.S.C. §§4321 *et seq.* and section 511 of the Act, where EPA is the permit issuing authority;

(10) Establish on a case-by-case basis technology-based limitations controlling a pollutant not included in promulgated effluent limitation guidelines or standards in accordance with §125.3.

(g) Best management practices to control or abate the discharge of pollutants where:

(1) Authorized under section 304(e) of the Act for the control of toxic and hazardous pollutants from ancillary industrial activities;

(2) Numeric effluent limitations are infeasible; or

(3) The practices are reasonably necessary to achieve effluent limitations and standards or to carry out the purposes of the Act.

[*Comment:* Examples of best management practices which may be imposed under (g)(2) include: a) proper operator qualifications of treatment facility personnel (see Decision of the General Counsel No. 19), and b) sludge-handling requirements (see Decision of General Counsel No. 33). Examples of best management practices which may be imposed under (g)(3) include: a) coal mining operation's diversion of water from an active coal mining area to prevent contact between water and iron pyrites which could react to form sulfuric acid and wastewaters with low pH values; (b) the construction of sheds over material storage piles to prevent rainfall from leaching materials from these piles and creating a source of pollution; (c) ditching and diversion of rainfall runoff for treatment prior to discharge; and (d) the use of solid, absorbent materials for cleaning up leaks and drips as opposed to washing these materials down a floor drain creating additional sources of pollution. Although these best management practices under (g)(2) and (3) would be required under the authority of *NRDC* v. *Costle,* (Runoff Point Sources) 568 F.2d 1369 (D.C. Cir. 1977) they are similar to those in (g)(1) and Subpart K of Part 125 imposed for toxic and hazardous materials under section 304(e).]

(h) Requirements under section 405 of the Act governing the disposal of sewage sludge from publicly owned treatment works, in accordance with any applicable regulations.

(i) Where a permit is renewed or reissued, interim limitations, standards, or conditions which are at least as stringent as the final limitations, standards or conditions in the previous permit (unless the circumstances on which the previous permit was based have materially and substantially changed since the time the permit was issued and would constitute cause for permit modification or revocation and reissuance under § 122.31). Where effluent limitations were imposed under section 402(a)(1) of the Act in a previously issued permit and these limitations are more stringent than the subsequently promulgated effluent guidelines, this paragraph shall apply unless:

(1) The discharger has installed the treatment facilities contemplated by the discharger in connection with the issuance of the previous permit and has properly operated and maintained the facilities but has nevertheless been unable to achieve the previous effluent limitations. In this case the limitations in the reissued permit may reflect the level of pollutant control actually achieved (but shall not be less stringent that required by the subsequently promulgated effluent guidelines);

(2) In the case of an approved State, State law prohibits permit conditions more stringent than an applicable effluent guideline; or

(3) The subsequently promulgated effluent guidelines are based on best conventional pollutant control technology (section 301(b)(2)(E) of the Act).

(j) In the case of a permit issued to a facility that may operate at certain times as a means of transportation over water, a general condition that the discharge shall comply with any applicable regulations promulgated by the Secretary of the Department in which the Coast Guard is operating, establishing specifications for safe transportation, handling, carriage, and storage of pollutants.

(k) Any conditions that the Secretary of the Army considers necessary to ensure that navigation and anchorage will not be substantially impaired.

§ 122.16 Calculation and specification of effluent limitations and standards.

(a)(1) All permits shall impose final, and where necessary, interim final effluent limitations, standards and prohibitions under §§ 122.14 and 122.15 for each outfall or discharge point of the permitted facility, except as otherwise provided under § 122.15(g)(2) and § 122.16(i).

(2) Except in the case of POTWs, permit limitations, standards or prohibitions shall be calculated based on the actual production and not the designed production capacity of the facility where the promulgated effluent guideline limitations and standards are based on production.

[*Comment:* Where design capacity is not representative of actual production, permit limitations will be calculated to reflect a reasonable measure of actual production, such as the high month during the previous year, or the monthly average for the highest year of the previous five years, for facilities where such data is available. For new sources, or new discharges, actual production generally will be projected production based on market data, and permit limitations may require modification once actual production figures are available.]

(3) In the case of POTWs, permit limitations, standards, or prohibitions shall be calculated based on design flow.

(b) All interim and final permit effluent limitations, standards, or prohibitions established under §§ 122.14 and 122.15 for a metal shall be expressed in terms of the total metal (i.e., the sum of the dissolved and suspended fractions of the metal) unless:

(1) The promulgated effluent limitation and standard under the Act specifies the limitation for the metal in the dissolved or valent form; or

(2) In establishing permit limitations on a case-by-case basis, it is necessary to express the limitation on the metal in the dissolved or valent form in order to carry out the provisions of the Act.

(c) For continuous discharges all interim and final permit effluent limitations, standards, and prohibitions established under §§ 122.14 and 122.15, including those necessary to achieve water quality standards, shall be stated as maximum daily and average monthly discharge limitations for all dischargers other than publicly owned treatment works, and average weekly and average monthly discharge limitations for POTWs.

For the purposes of this part:

(1) A "continuous discharge" means a discharge which occurs without interruption, except for infrequent shutdowns for maintenance, process changes, or other similar activities throughout the operating hours of the facility.

(2) The "maximum daily discharge" is the total mass of a pollutant discharged during the calendar day or, in the case of a pollutant limited in terms other than mass pursuant to paragraph (d), the average concentration or other measurement of the pollutant specified during the calendar day or any 24-hour period that reasonably represents the calendar day for the purposes of sampling. The maximum daily discharge limitation may not be violated during any calendar day.

(3) The "average monthly discharge limitation" is the total mass, and concentration in the case of POTWs, of all daily discharges sampled and/or measured during a calendar month on which daily discharges are sampled and measured, divided by the number of daily discharges sampled and/or measured during such month. The average monthly discharge limitation may not be violated during any calendar month.

(4) The "average weekly discharge limitation" is the total mass and concentration of all daily POTW discharges during any calendar week on which daily discharges are sampled and/or measured, divided by the number of daily discharges sampled and/or measured during such calendar week. The average weekly discharge limitation may not be violated during any calendar week.

[*Comment:* Calculations for all such limitations which require averaging of measurements or of daily discharges, shall utilize an arithmetic mean average, unless otherwise specified or approved by the Director.]

(d) Paragraph (c) is not applicable:

(1) For pH, temperature, radiation or other pollutants which cannot be appropriately expressed by mass; or

(2) Where applicable promulgated effluent guideline limitations, standards, or prohibitions are expressed in other terms than mass, e.g., as concentration levels.

(e) Except as provided in paragraph (f), effluent limitations imposed in permits shall not be adjusted for pollutants in the intake water.

(f)(1) Upon request of the discharger, effluent limitations or standards imposed in a permit will be calculated on a "net" basis, i.e., adjusted to reflect credit for pollutants in the discharger's intake water, if the discharger demonstrates that its intake water is drawn from the same body of water into which the discharge is made and if:

(i)(A) The applicable effluent limitations and standards contained in Subchapter N of this Chapter specifically provide that they shall be applied on a net basis; or

(B) The discharger demonstrates that pollutants present in the intake water will not be substantially removed by the treatment systems operated by the discharger; and

(ii) The permit contains conditions requiring the permittee to conduct additional monitoring (i.e., for flow and concentration of pollutants) as necessary to determine continued eligibility for and compliance with any such adjustments.

The discharger shall notify the Director if this monitoring indicates that eligibility for an adjustment under this section has been altered or no longer exists. In such case, the permit shall be modified or revoked and reissued under § 122.31.

(2) Permit effluent limitations or standards adjusted under this paragraph shall be calculated on the basis of the amount of pollutants present after any treatment steps have been performed on the intake water by or for the

discharger. Adjustments under this paragraph shall be given only to the extent that pollutants in the intake water which are limited in the permit are not removed by the treatment technology employed by the discharger. In addition, effluent limitations or standards shall not be adjusted when the pollutants in the intake water vary physically, chemically or biologically form the pollutants limited by the permit. Nor shall effluent limitations or standards be adjusted when the discharger significantly increases concentrations of pollutants in the intake water, even though the total amount of pollutants might remain the same.

(g) Discharges which are not continuous, as defined in paragraph (c), shall be particularly described and limited, considering the following factors, as appropriate:

(1) Frequency (e.g., a batch discharge shall not occur more than once every 3 weeks);

(2) Total mass (e.g., not to exceed 100 kilograms of zinc and 200 kilograms of chromium per batch discharge);

(3) Maximum rate of discharge of pollutants during the discharge (e.g., not to exceed 2 kilograms of zinc per minute); and

(4) Prohibition or limitation of specified pollutants by mass, concentration, or other appropriate measure (e.g., shall not contain at any time more than 0.1 mg/l zinc or more than 250 grams (¼ kilogram) of zinc in any discharge).

(h) Where permit effluent limitations or standards imposed at the point of discharge are impractical or infeasible, effluent limitations or standards for discharges of pollutants may be imposed on internal waste streams prior to mixing with other waste streams or cooling water streams. In such instances, the monitoring required by Subpart C shall also be applied to the internal waste streams.

[*Comment:* Limits on internal waste streams will only be imposed in exceptional circumstances, such as where the final discharge point is inaccessible (e.g., under 10 meters of water), where the wastes at the point of discharge are so diluted as to make monitoring impracticable, or where the interferences among pollutants at the point of discharge would make detection and/or analysis impracticable.]

§ 122.17 Schedules of compliance.

(a) Permits shall contain schedules of compliance requiring the permittee to take specific steps where necessary to achieve expeditious compliance with applicable standards and limitations and other requirements. Schedules of compliance shall require compliance as soon as possible, but in no case later than an applicable statutory deadline.

(b) If any permit allows a time for achieving final compliance which exceeds 9 months from the date of permit issuance, the schedule of compliance in the permit shall set forth interim requirements and the dates for their achievement. Examples of interim requirements include the following events: submit complete Step 1 construction grant (for POTWs); let contract (for nonPOTWs); commence construction and complete construction.

(1) In no event shall more than 9 months elapse between dates specified for interim requirements.

(2) If the time necessary for completion of any interim requirements (such as the construction of a treatment facility) is more than nine months and is not readily divisible into stages for completion, the permit shall specify interim dates not more than nine months apart for the submission of reports of progress toward completion of the interim requirements.

(c) A permittee may terminate its direct discharge by cessation of operation or discharge to a POTW rather than achieve applicable standards and limitations by the final date for compliance established in its permit or in the Act under the following circumstances:

(1) If the decision to terminate a direct discharge is made after issuance of a permit:

(i) The permit shall be modified or revoked and reissued to contain a schedule of compliance leading to termination of the direct discharge by a date which is no later than the statutory deadline; or

(ii) The permittee shall terminate direct discharge before noncompliance with any interim requirement specified in the schedule of compliance in the permit.

(2) If the decision to terminate a direct discharge is made before issuance of the permit, the permit shall contain a schedule leading to termination of the direct discharge by a date which is no later than the statutory deadline.

(3) If the permittee contemplates but has not made a final decision to terminate the direct discharge before the issuance of the permit, the permit shall contain alternative schedules leading to compliance as follows:

(i) The schedule shall contain an interim requirement requiring such a final decision no later than a date which allows sufficient time to comply with applicable limitations and standards in accordance with paragraph (c)(3)(iii) of this section, (i.e., a milestone event for commencement of construction of control equipment); and

(ii) A subsequent schedule leading to termination of the direct discharge by a date which is no later than the statutory deadline; and

(iii) A subsequent alternative schedule leading to compliance with applicable standards and limitations, no later than the statutory date; and

(iv) A requirement that after the permittee has made a decision pursuant to paragraph (c)(3)(i) of this section, it shall:

(A) Follow the Schedule required by paragraph (c)(3)(ii) of this section if the decision is to terminate its discharge, or

(B) Follow the schedule required by paragraph (c)(3)(iii) of this section if the decision is not to terminate its discharger; and

(4) If the permittee has made a decision to terminate its direct discharge in accordance with this section, it shall post a bond within 30 days of permit issuance, or the date of the decision, in the amount of the cost of compliance with applicable limitations and standards, payable to the permit issuing authority in the event that termination or compliance with applicable limitations and standards is not achieved by the statutory deadline or the date set forth in the permit, if earlier.

(5) In all cases, the permittee's decision to terminate its direct discharge of pollutants shall be evidenced by a Board of Directors resolution which has been made public or by such other means as EPA determines evidences a firm public commitment.

[*Comment:* A permittee may evidence a firm public commitment: (1) by a resolution of the Board of Directors signed by the Chairman of the Board and the Chief Executive Officer; (2) in the case of a public facility, by appropriate action by either the principal executive officer or elected official or (3) as otherwise appropriate for partnerships, sole proprietorship, etc.]

(d) The Director may, upon request of the applicant, modify a schedule of compliance in an issued permit if he or she determines good and valid cause (such as an act of God, strike, flood, materials shortage, or other events over which the permittee has little or no control or remedy) exists for such modification under § 122.31. In no case shall the compliance schedule be modified to extend beyond an applicable statutory treatment deadline.

(e) In the case of a POTW which has received a grant under section 202(a)(3) of the Act, to fund 100% of the costs to modify or replace facilities construction

with a grant for innovative and alternative wastewater technology under section 202(a)(2), the schedule of compliance may be modified to reflect the amount of time lost during construction of the innovative and alternative facility. In no case shall the compliance schedule be modified to extend beyond an applicable statutory deadline for compliance.

(f) New sources, new dischargers, sources which recommence discharging after terminating operations and those sources which had been indirect dischargers which commence discharging into navigable waters do not qualify for compliance schedules under this section and are subject to § 122.47(d)(4).

Subpart C—Permit Compliance

§ 122.20 Monitoring.

(a) To assure compliance with permit terms and conditions, all permittees shall monitor as specified in the permit:

(1) The amount, concentration, or other measurement specified in § 122.16 for each pollutant specified in the permit;

(2) The volume of effluent discharged from each point source; and

(3) As otherwise specifically required in the permit, e.g., as required under § 122.16(g)(2).

(b) For purposes of paragraph (a), the Director shall specify the following monitoring requirements in the permit:

(1) Requirements concerning proper installation, use, and maintenance of monitoring equipment or methods (including biological monitoring methods where appropriate);

(2) Monitoring frequency, type, and intervals sufficient to yield continuing data representative of the volume of effluent flow and the quantity of pollutants discharged. Variable effluent flows and pollutant quantities shall be monitored at more frequent intervals than relatively constant effluent flows and pollutant quantities; and

(3) Test procedures for the analysis of pollutants meeting the requirements of paragraph (c) of this section.

(c)(1) Test procedures identified in 40 CFR Part 136 shall be utilized for pollutants or parameters listed in that Part, unless an alternative test procedure has been approved under that Part.

(2) Where no test procedure under 40 CFR Part 136 has been approved, the Director shall specify a test method in the permit.

(3) Notwithstanding paragraph (c)(1) of this section, the Director may specify in a permit the test procedure used in developing the data on which an effluent limitations guideline was based, or specified by the standards and guidelines.

(4) Where a method approved under 40 CFR Part 136 for any pollutant or parameter was used in developing the applicable standards and limitations or is specified by the standards and limitations, the same method shall be specified in the permit.

(d) The sampling frequency and other monitoring requirements specified by the Director under paragraph (b) of this section shall, to the extent applicable, be consistent with monitoring requirements specified in a standard or effluent limitations guideline on which the effluent limitations in the permit are based.

(e) If the permittee believes that the monitoring requirements specified by the Director under paragraph (b) of this section in any draft permit under § 124.31 are not sufficient to yield data representative of the volume of effluent flow and the quantity of pollutants discharged, it should request that additional monitoring requirements sufficient to yield such data be included in the final permit. Compliance with effluent limitations contained in the permit will be determined in accordance with the monitoring requirements specified in the permit which, when finally effective, are deemed to yield data representative of the volume of effluent flow and the quantity of pollutants discharged.

(f) The Act provides that any person who falsifies, tampers with, or knowingly renders inaccurate any monitoring device or method required to be maintained under this section shall, upon conviction, be punished by a fine of not more than $10,000 per violation, or by imprisonment for not more than 6 months per violation, or by both.

§ 122.21 Recording of monitoring results.

(a) Any permittee required to monitor under § 122.20 shall maintain records of all monitoring information and monitoring activities, including:

(1) The date, exact place and time of sampling or measurements;

(2) The person(s) who performed the sampling or measurements;

(3) The date(s) analyses were performed;

(4) The person(s) who performed the analyses;

(5) The analytical techniques or methods used; and

(6) The results of such analyses.

(b) All records of monitoring activities and results (including all original strip chart recordings for continuous monitoring instrumentation and calibration and maintenance records) shall be retained by the permittee for three years. The three-year period shall be extended:

(1) Automatically during the course of any unresolved litigation regarding the discharge of pollutants by the permittee or regarding promulgated effluent guidelines applicable to the permittee, or

(2) As requested by the Director.

(c) The Act provides that any person who knowingly makes any false statement, representation, or certification in any record or other document required to be maintained under this section shall, upon conviction, be punished by a fine of not more than $10,000 per violation, or by imprisonment for not more than six months per violation, or by both.

§ 122.22 Reporting of monitoring results and compliance by permittees.

(a) Permittees shall report to the Director, using Discharge Monitoring Reports, the results of any monitoring specified by the permit. This includes reporting of the results of monitoring required by § 122.20 to the Director, as often as required by the permit, but in no case less than once per year. Other monitoring data not specifically required in the permit (such as internal process or internal waste stream data) or data collected by third parties need not be submitted unless it indicates a violation, but it shall be identified and referenced as a supplement to the DMR.

[*Comment:* Reporting frequency depends upon the nature and effect of the discharge. For discharges such as small volume, non-contact cooling water, annual report submission may be sufficient. Discharges which require more frequent reporting include: variable discharges; discharges which contribute significant amounts of pollutants to the waters of the United States; discharges which contain toxic or hazardous pollutants or other pollutants of concern; and discharges which apply new treatment or control methods.]

(b) If the permittee monitors any pollutant more frequently than required by the permit, using approved analytical methods, the results of this monitoring shall be reported in the DMR. For purposes of this paragraph, "approved analytical methods" are those test procedures for the analysis of pollutants which conform to 40 CFR 136 or are specified in the permit.

(c) Within 14 days after each interim or final permit compliance schedule date, the permittee shall provide the Director with written notice of the permittee's compliance or

noncompliance with the interim or final requirements.

(d) The Act provides that any person who knowingly makes any false statement, representation, or certification in the monitoring report or notice of compliance shall, upon conviction, be punished by a fine of not more than $10,000 per violation, or by imprisonment for not more than six months per violation, or by both.

§ 122.23 Noncompliance reporting.

(a) On the last working day of February, May, August, and November, the State Director shall submit to the Enforcement Division Director information concerning noncompliance with NPDES permit requirements by major discharges in the State in accordance with the reporting schedule contained in paragraph (g). The Enforcement Division Director shall submit such information, and shall also prepare and submit information for EPA-issued permits, to the EPA Office of Water Enforcement in accordance with paragraph (g).

(b) The reports required by paragraph (a) shall include the following information:

(1) *Failure to complete construction elements.* Noncompliance shall be reported:

(i) When the permittee has failed to complete by the date specified in the permit, an element of the compliance schedule (e.g., award of contract, preliminary plans, begin construction or attain operational level); and

(ii) The permittee has not returned to compliance by accomplishing the requirements of the permit within 30 days from the date a report is due under § 122.22(c).

(2) *Failure to complete or provide compliance schedule reports.* Noncompliance shall be reported in the following circumstances:

(i) When the permittee fails to complete or provide a report required in the permit compliance schedule or under § 122.22 (e.g., progress reports or notification of compliance or noncompliance); and

(ii) The permittee has not returned to compliance by submitting the report within 30 days from the date it is due under § 122.22(c).

(3) *Noncompliance with applicable standards and limitations.* Noncompliance shall be reported:

(i) When the permittee has violated an applicable standard or limitation and has not returned to compliance with the NPDES permit requirements within 45 days from the date that the DMR or notification of noncompliance under § 122.14(h) was due; or

(ii) When a pattern of noncompliance with applicable standards or limitations as determined by the Director exists for any major discharger over a period of 12 months prior to the end of the current reporting period. This pattern of noncompliance is based on violation of monthly averages and excludes parameters where there is continuous monitoring. A pattern of noncompliance shall be reported whenever there is:

(A) Any violation of the same permit or limitation or standard in two consecutive quarters; and

(B) Any violation of one or more permit limitations or standards in each of four consecutive quarters; or

(iii) When, as determined by the Director, a significant discharge of a pollutant occurs, such as a discharge of a toxic or hazardous substance.

(4) *Failure to Report Effluent Data.* Noncompliance shall be reported where the permittee has failed to provide a DMR within 30 days of the date it is due or where the permittee has exceeded effluent limitations and has failed to report this noncompliance.

(5) *Deficient Reports.* Noncompliance shall be reported where the required reports provided by the permittee are so deficient as to cause misunderstanding by the permit issuing authority and thus impede the review of the status of compliance.

(6) *Modifications to schedules of compliance under § 122.17(d).* Noncompliance resulting from or constituting the basis for a modification under § 122.17(d) shall be reported.

[*Comment:* Noncompliance reported under paragraph (b) shall be reported in successive reports until the noncompliance is resolved. The resolution of noncompliance shall be reported, and when the noncompliance is reported as resolved, it will not appear in subsequent reports.]

(c) The narrative information required under paragraph (b) shall:

(1) Include the following data in the following order:

(i) Name, location, and permit number of each noncomplying permittee;

(ii) A brief description and date of each instance of noncompliance;

(iii) The date(s) and a brief description of the action(s) taken by the Director to insure compliance;

(iv) Status of the instance of noncompliance with the date of the action or resolution;

(v) Any details which tend to explain or mitigate an instance of noncompliance; and

(2) Provide separate lists for non-POTWs, POTWs, and Federal permittees:

(3) Combine information concerning schedule and effluent noncompliance in a single entry for each permittee; and

(4) Alphabetize all narrative listings by permittee name. Where two or more permittees have the same name, the lowest permit number shall govern the order of entry, i.e., the lowest number shall be entered first.

(d) Statistical information shall be reported quarterly on all other instances of noncompliance with permit requirements by major dischargers not set forth in paragraph (b) of this section.

(e) For minor dischargers whose compliance has been reviewed by the permitting authority, statistical information on the types of noncompliance listed under paragraph (b) of this section shall be reported annually. In addition, a separate list of minor dischargers which are one or more years behind in construction phases of the compliance schedule shall be submitted annually in alphabetical order by name and permit number.

(f) *Reporting schedules:* (1) The schedule for reporting noncompliance by major dischargers under paragraphs (b), (c), and (d) of this section shall be as follows:

Quarters [1]	Dates for completion of reports
January, February, and March	May 31.[2]
April, May, and June	August 31.[2]
July, August, and September	November 30.[2]
October, November, and December	February 28.[2]

[1] Covered by reports on noncompliance by major dischargers.

[2] Report made available to the public on this date.

(2) The annual reporting period for noncompliance by minor dischargers under paragraph (e) of this section shall end at the end of the Federal fiscal year (currently September 30), with reports completed and available to the public no more than 60 days later.

(g) All reports prepared under this section shall be made available to the public for inspection and copying.

[*Comment:* The distinction between "major" and "minor" dischargers is established in EPA's annual operating guidance for the EPA Regional Offices and the States.]

Subpart D—Permit Modification, Revocation and Reissuance, and Termination

§ 122.30 General.

Permits shall be (a) modified, (b) revoked and reissued, or (c) terminated

only as authorized in this Subpart, and then only in conformance with applicable provisions of Part 124.

§ 122.31 Modification, revocation and reissuance, and termination.

(a) An issued permit may be modified in whole or in part, revoked and reissued, or terminated during its term for cause as specified in this section.

(b) Permit modifications shall not be used to extend the term of a permit beyond 5 years from the original date of issuance.

(c) Modification, revocation and reissuance, or termination of an issued permit may be initiated by the Director under applicable provisions of Part 124. Any interested person may request the Director to modify, revoke and reissue, or terminate an issued permit.

(d) Causes for modification, revocation and reissuance, or termination include the following:

(1) Violation of any term or condition of the permit;

(2) Failure of the permittee to disclose fully all relevant facts or misrepresentation of any relevant facts by the permittee in the application or during the permit issuance process;

(3) A change in any condition that requires either a temporary or a permanent reduction or elimination of any discharge controlled by the permit (e.g., plant closure, termination of discharge by connection to a POTW, the promulgation of any applicable effluent standard or prohibition under section 307 of the Act, any change in State law that requires the reduction or elimination of the discharge, etc.);

(4) Information indicating that the permitted discharge poses a threat to human health or welfare; or

(5) A change in ownership or control of a source which has a permit, where required by the Director in accordance with § 122.12(d).

(e) In addition to the provisions of paragraph (d) of this section, causes for modification, or revocation and reissuance, but not termination, of a permit include the following:

(1) Material and substantial alterations or additions to the discharger's operation which were not covered in the effective permit (e.g., production changes, relocation or combination of discharge points, changes in the nature or mix of products produced), provided that such alterations do not constitute total replacement of the process or production equipment causing the discharge which converts it into a new source;

[*Comment:* Certain reconstruction activities may cause the new source provisions of section 306 to become applicable to the discharger. (See § 122.47.) In such cases the new source permit issuance procedures of § 124.12 should be followed rather than the modification procedures of § 124.13.]

(2) The existence of a factor or factors which, if properly and timely brought to the attention of the Director, would have justified the application of limitations or other requirements different from those required by applicable standards or limitations but only if the requester shows that such factor or factors arose after the final permit was issued;

(3) Revision, withdrawal, or modification of water quality standards or EPA promulgated effluent limitations guidelines (including interim final effluent limitations guidelines), *but only when:*

(i) The permit term or condition requested to be modified or revoked was based on a promulgated effluent limitations guideline or an EPA approved or promulgated water quality standards

(ii)(A) EPA has revised, withdrawn, or modified that portion of the effluent limitations guidelines on which the permit term or condition was based; or

(B) EPA has approved a State action with regard to a water quality standard on which the permit term or condition was based; and

(iii) A request for modification, or revocation and reissuance, is filed in accordance with § 124.13 (or applicable State procedures meeting the requirements of § 124.13) within ninety (90) days after Federal Register notice of:

(A) Revision, withdrawal, or modification of that portion of the effluent limitations guidelines; or

(B) EPA approval of State action regarding a water quality standard;

(4) Judicial remand of EPA promulgated effluent limitations guidelines, if the remand concerns that portion of the guidelines on which the permit term or condition was based and the request is filed within ninety (90) days of the judicial remand;

(5) Any modification, or revocation and reissuance of permits specifically authorized by the Act, e.g., sections 301(c), 301(g), 301(h), 301(i) or 301(k);

(6) As necessary under §§ 122.14(d), 122.15(b) and 122.17 (c) and (e); or

(7) Failure of an approved State to notify another State whose waters may be affected by the discharge from the approved State, as required by section 402(b)(3) of the Act.

(f) The following permit modifications shall not require public notice and opportunity for hearing under Part 124 unless they would render the applicable standards and limitations in the permit less stringent, or unless contested by the permittee:

(1) Correction of typographical errors;

(2) A change requiring more frequent monitoring or reporting by the permittee;

(3) A change in an interim compliance date, but not beyond 120 days and not where the change would interfere with the attainment of a final compliance date;

(4) A change in ownership or control of a source which has a permit where no other change in the permit is necessary and where transfer is accomplished in accordance with § 122.12(d);

(5) A change in the construction schedule for a discharger which is a new source. No such change shall affect a discharger's obligation to have all pollution control equipment installed and in operation prior to discharge under § 122.47(d)(4); and

(6) Deletion of a point source outfall, where the discharge from that outfall is terminated and does not result in discharge of pollutants from other outfalls except in accordance with permit limits.

Subpart E—Special NPDES Programs

§ 122.40 General.

The following sections described NPDES program coverage for certain categories of point source dischargers.

§ 122.41 Disposal of pollutants into wells, into publicly owned treatment works, or by land application.

(a) Where part of a discharger's process waste water is not being discharged into waters of the United States or contiguous zone because it is disposed into a well, into a POTW, or by land application thereby reducing the flow or level of pollutants being discharged into waters of the United States, applicable effluent limitations and standards for the discharge in the permit shall be adjusted to reflect the reduced raw waste resulting from such disposal. Effluent limitations and standards in the permit shall be calculated by one of the following methods:

(1) If none of the waste from a particular process is discharged into waters of the United States, and effluent limitations guidelines provide separate allocation for wastes from that process, all allocations for the process shall be eliminated from calculation of permit effluent limitations or standards;

(2) In all cases other than those described in paragraph (1), effluent

limitations shall be adjusted by multiplying the effluent limitation derived by applying effluent guidelines to the total waste stream by the amount of wastewater flow to be treated and discharged into waters of the United States, and dividing the result by the total wastewater flow. Effluent limitations and standards so calculated may be further adjusted under Part 125, Subpart D to make them more stringent if dischargers to wells, publicly owned treatment works, or by land application change the character or treatability of the pollutants being discharged to receiving waters.

[*Comments* This method may be algebraically expressed as:
$P = E \times N / T$; where P is the permit effluent limitation, E is the limitation derived by applying effluent guidelines to the total waste stream, N is the wastewater flow to be treated and discharged to waters of the United States, and T is the total wastewater flow.]

(b) Paragraph (a) shall not apply where promulgated effluent limitations guidelines:

(1) Control concentrations of pollutants discharged, but not mass; or

(2) Specify a different specific technique for adjusting effluent limitations to account for well injection.

(c) Paragraph (a) does not alter a discharger's obligation to meet any more stringent requirements established under §§ 122.14 and 122.15.

§ 122.42 Concentrated animal feeding operations.

(a) Concentrated animal feeding operations are point sources subject to the NPDES permit program.

(b) *Definitions.*

(1) "Animal feeding operation" means a lot or facility (other than an aquatic animal production facility) where the following conditions are met:

(i) Animals (other than aquatic animals) have been, are, or will be, stabled or confined and fed or maintained for a total of 45 days or more in any 12-month period, and

(ii) Crops, vegetation, forage growth or post-harvest residues are not sustained in the normal growing season over any portion of the lot or facility.

Two or more animal feeding operations under common ownership are considered, for the purposes of these regulations, to be a single animal feeding operation if they adjoin each other or if they use a common area or system for the disposal of wastes.

(2) "Concentrated animal feeding operation" means an animal feeding operation which meets the criteria set forth in paragraphs (b)(2) (i), (ii), or (iii) of this section:

(i) More than the numbers of animals specified in any of the following categories are confined:

(A) 1,000 slaughter and feeder cattle,

(B) 700 mature dairy cattle (whether milked or dry cows),

(C) 2,500 swine each weighing over 25 kilograms (approximately 55 pounds),

(D) 500 horses,

(E) 10,000 sheep or lambs,

(F) 55,000 turkeys,

(G) 100,000 laying hens or broilers (if the facility has a continuous overflow watering),

(H) 30,000 laying hens or broilers (if the facility has a liquid manure system),

(I) 5,000 ducks, or

(J) 1,000 animal units; or

(ii) More than the following numbers and types of animals are confined:

(A) 300 slaughter or feeder cattle,

(B) 200 mature dairy cattle (whether milked or dry cows),

(C) 750 swine each weighing over 25 kilograms (approximately 55 pounds),

(D) 150 horses.

(E) 3,000 sheep or lamb,

(F) 16,500 turkeys,

(G) 30,000 laying hens or broilers (if the facility has continuous overflow watering),

(H) 9,000 laying hens or broilers (if the facility has a liquid manure handling system),

(I) 1,500 ducks, or

(J) 300 animal units;

and either one of the following conditions are met: pollutants are discharged into waters of the United States through a man-made ditch, flushing system, or other similar man-made device; or pollutants are discharged directly into navigable waters which originate outside of and pass over, across, or through the facility or otherwise come into direct contact with the animals confined in the operation. Provided, however, that no animal feeding operation is a concentrated animal feeding operation as defined above if such animal feeding operation discharges only in the event of a 25 year, 24 hour storm event.

(iii) The Director determines that the operation is a significant contributor of pollution to waters of the United States, in accordance with paragraph (c).

(3) The term "animal unit" means a unit of measurement for any animal feeding operation calculated by adding the following numbers: the number of slaughter and feeder cattle multiplied by 1.0, plus the number of mature dairy cattle multiplied by 1.4, plus the number of swine weighing over 25 kilograms (approximately 55 pounds), multiplied by 0.4, plus the number of sheep multiplied by 0.1, plus the number of horses multiplied by 2.0.

(4) The term "man-made" means constructed by man and used for the purpose of transporting wastes.

(c) *Case-by-case designation of concentrated animal feeding operations.*

(1) Notwithstanding any other provision of this section, any animal feeding operation may be designated as a concentrated animal feeding operation where it is determined to be a significant contributor of pollution to the waters of the United States. In making this designation the Director shall consider the following factors:

(i) The size of the animal feeding operation and the amount of wastes reaching waters of the United States;

(ii) The location of the animal feeding operation relative to waters of the United States;

(iii) The means of conveyance of animal wastes and process waste waters into waters of the United States;

(iv) The slope, vegetation, rainfall, and other factors affecting the likelihood or frequency of discharge of animal wastes and process wastewaters into waters of the United States; and

(v) Other such factors relative to the significance of the pollution problem sought to be regulated.

(2) No animal feeding operation with less than the numbers of animals set forth in paragraphs (b)(2) (i) and (ii) of this section designated as a concentrated animal feeding operation unless:

(i) Pollutants are discharged into waters of the United States through a man-made ditch, flushing system, or other similar man-made device; or

(ii) Pollutants are discharged directly into waters of the United States which originate outside of the facility and pass over, across, through the facility or otherwise come into direct contact with the animals confined in the operation.

(3) In no case shall a permit application be required from a concentrated animal feeding operation designated under this paragraph until there has been an onsite inspection of the operation and a determination that the operation should and could be regulated under the permit program.

§ 122.43 Concentrated aquatic animal production facilities.

(a) Concentrated aquatic animal production facilities, as defined in this section, are point sources subject to the NPDES permit program.

(b) *Definitions.* (1) "Concentrated aquatic animal production facility"

means a hatchery, fish farm, or other facility which contains, grows, or holds:

(i) Cold water fish species or other cold water aquatic animals in ponds, raceways, or other similar structures which discharge at least 30 days per year but does not include:

(A) Facilities which produce less than 9,090 harvest weight kilograms (approximately 20,000 pounds) of aquatic animals per year; and

(B) Facilities which feed less than 2,272 kilograms (approximately 5,000 pounds) of food during the calendar month of maximum feeding.

(ii) Warm water fish species or other warm water aquatic animals in ponds, raceways or other similar structures which discharge at least 30 days per year, but does not include:

(A) Closed ponds which discharge only during periods of excess runoff; or

(B) Facilities which produce less than 45,454 harvest weight kilograms (approximately 100,000 pounds) of aquatic animals per year.

(2) "Cold water aquatic animals" include, but are not limited to, the *Salmonidae* family of fish, e.g., trout and salmon.

(3) "Warm water aquatic animals" include, but are not limited to, the *Ameiuride, Centrarchidae* and *Cyprinidae* families of fish, e.g., respectively catfish, sunfish, and minnows.

(c) *Case-by-case designation of concentrated aquatic animal production facilities.* Any warm or cold water aquatic animal production facility not otherwise falling within the definitions provided in paragraph (b) may be designated as a concentrated aquatic animal production facility where the facility is determined to be a significant contributor of pollution to waters of the United States. In making this designation the Director shall consider the following factors:

(1) The location and quality of the receiving waters of the Unites States;

(2) The holding, feeding, and production capacities of the facility;

(3) The quantity and nature of the pollutants reaching waters of the United States; and

(4) Other such factors relating to the significance of the pollution problem sought to be regulated.

In no case shall a permit application be required from a concentrated aquatic animal production facility designated under this paragraph until there has been an on-site inspection of the facility and a determination that the facility should and could be regulated under the permit program.

§ 122.44 Aquaculture projects

(a) Discharges into aquaculture projects, as defined in this section, are subject to the NPDES permit program through section 318 of the Act, and in accordance with Part 125, Subpart B.

(b) *Definitions.* (1) "Aquaculture project" means a defined managed water area which uses discharges of pollutants into that designated area for the maintenance or production of harvestable freshwater, estuarine, or marine plants or animals.

(2) "Designated project area" means the portions of the waters of the United States within which the applicant for a permit plans to confine the cultivated species, using a method or plan or operation (including, but not limited to physical confinement) which, on the basis of reliable scientific evidence, is expected to ensure that specific individual organisms comprising an aquaculture crop will enjoy increased growth attributable to the discharge of pollutants permitted under this section and be harvested within a defined geographic area.

§ 122.45 Separate storm sewers.

(a) Separate storm sewers, as defined in this section, are point sources subject to the NPDES permit program. Separate storm sewers may be covered either under individual NPDES permits or under the general permit program (see § 122.48).

(b) *Definition.* "Separate storm sewer" means a conveyance or system of conveyances (including but not limited to pipes, conduits, ditches, and channels) primarily used for collecting and conveying storm water runoff and either:

(1) Located in an urbanized area as designed by the Bureau of Census according to the criteria in 39 FR 15202 (May 1, 1974); or

(2) Not located in an urbanized area but designated as a significant contributor of pollution under paragraph (c).

"Separate storm sewer" does not include any conveyance which discharges process wastewater or storm water runoff contaminated by contact with wastes, raw materials, or pollutant-contaminated soil, from lands or facilities used for industrial or commercial activities, into waters of the United States or into separate storm sewers. Such discharges are subject to the general provision of this Part.

[*Comment:* Whether or not a system of conveyances is or is not a separate storm sewer for purposes of this Part shall have no bearing on whether or not the system is eligible for funding under Title II of the Act, see 40 CFR § 35.925-21.]

(c) *Case-by-case designation of separate storm sewers.* The Director may designate a storm sewer not located in an urbanized area as a separate storm sewer. This designation may be made to the extent allowed or required by EPA promulgated effluent guidelines for point sources in the separate storm sewer category or when:

(1) A Water Quality Management plan under section 208 of the Act, which contains requirements applicable to such point sources is approved; or

(2) A storm sewer is determined to be a significant contributor of pollution to the waters of the United States. In making this determination the following factors shall be considered:

(i) The location of the storm sewer with respect to waters of the United States;

(ii) The size of the storm sewer;

(iii) The quantity and nature of the pollutants reaching waters of the United States; and

(iv) Other such factors relating to the significance of the pollution problems sought to be regulated.

[*Comment:* An NPDES permit for discharges into waters of the United States from a separate storm sewer covers all conveyances which are a part of that separate storm sewer system, even though there may be several owners-operators of such conveyances. However, discharges into separate storm sewers from point sources which are not part of the separate storm sewer systems may also require a permit.]

§ 122.46 Silvicultural activities.

(a) Silvicultural point sources, as defined in this section, are point sources subject to the NPDES permit program.

(b) *Definitions.* (1) "Silvicultural point source" means any discernible, confined, and discrete conveyance related to rock crushing, gravel washing, log sorting, or log storage facilities which are operated in connection with silvicultural activities and from which pollutants are discharged into waters of the United States.

[*Comment:* The term does not include non-point source silvicultural activities such as nursery operations, site preparation, reforestation, and subsequent cultural treatment, thinning, prescribed burning, pest and fire control, harvesting operations, surface drainage, and road construction and maintenance from which there is runoff during precipitation events. However, some of these activities (such as stream crossing for roads) may involve point source discharges of dredged or fill material which may require a section 404 permit (see 33 CFR § 209.120).]

(2) "Rock crushing and gravel washing facilities" means facilities which process crushed and broken stone, gravel and riprap (see 40 CFR Part 436, Subpart B, and the effluent limitations guidelines pursuant thereto).

(3) "Log sorting and log storage facilities" means facilities whose discharges result from the holding of unprocessed wood, i.e. logs or roundwood with bark or after removal of bark in self-contained bodies of water (mill ponds or log ponds) or stored on land where water is applied intentionally on the logs (wet decking). (See 40 CFR Part 429, Subpart J, and the effluent limitations guidelines pursuant thereto.)

§ 122.47 New sources and new dischargers.

(a) *Definitions.* (1) "New source" and "new discharger" are defined in § 122.3 (u) and (v).

(2) "Source" means any building, structure, facility, or installation from which there is or may be a discharge of pollutants;

(3) "Existing source" means any source which is not a new source or a new discharger;

(4) "Site" means the land or water area upon which a source and its water pollution control facilities are physically located, including but not limited to adjacent land used for utility systems, repair, storage, shipping or processing areas, or other areas incident to the industrial, manufacturing, or water pollution treatment processes.

(5) "Facilities or equipment" means buildings, structures, process or production equipment or machinery which form a permanent part of the new source and which will be used in its operation, provided that such facilities or equipment are of such value as to represent a substantial commitment to construct. It does not include facilities or equipment used in connection with feasibility, engineering, and design studies regarding the source or water pollution treatment for the source.

(b) *Criteria and standards for new source determination.* (1) The following construction activities result in a new source as defined in § 122.3.

(i) Construction of a source on a site where another source is not located, or

(ii) Construction of a source on a site where another source is located, provided that the process or production equipment which causes the discharge of pollutants from the other source is totally replaced by this construction or the construction results in a new or additional discharge.

[*Comment:* The fact that a source is constructed on a site so that it shares or uses common land or water areas of another source for utility systems, repair, storage, or shipping does not prevent that source from being considered a new source.]

(2) The modification of an existing source by changing existing process or production equipment, replacing existing process or production equipment (except as provided in paragraph (b)(1)), or by the addition of such equipment on the site of the existing source which results in a change in the nature or quantity of pollutants discharged is not a new source under this section. Modifications of this nature are subject to the provisions of § 122.31(e)(2).

(3) Construction of a new source as defined under § 122.3(v) has commenced if the owner or operator has:

(i) Begun, or caused to begin as part of a continuous on-site construction program:

(A) Any placement, assembly, or installation of facilities or equipment;

(B) Significant site preparation work including clearing, excavation, or removal of existing buildings, structures, or facilities which is necessary for the placement, assembly, or installation of new source facilities or equipment; or

(ii) Entered a binding contractual obligation for the purchase of facilities or equipment which is intended to be used in its operation within a reasonable time. Options to purchase or contracts which can be terminated or modified without substantial loss, and contracts for feasibility, engineering, and design studies do not constitute a contractual obligation under this paragraph.

(c) *Requirement of an Environmental Impact Statement.* (1) The issuance of a permit to a new source:

(i) By EPA may be a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969 (NEPA), 33 U.S.C. 4321 *et seq.* and is subject to the environmental review provisions of NEPA as set out in 40 CFR 6, Subpart I. EPA will determine whether an Environmental Impact Statement (EIS) is required under § 124.12 and 40 CFR 6, Subpart I;

(ii) By an NPDES-approved State is not a Federal action and therefore does not require EPA to conduct an environmental review.

(2) The EIS shall include a recommendation on whether the permit is to be issued or denied.

(i) If the recommendation is to deny the permit, the final EIS shall contain the reasons for the recommendation and list those measures, if any, which the applicant could take to cause the recommendation to be changed;

(ii) If the recommendation is to issue the permit, the final EIS shall recommend the actions which the permittee should take to prevent or minimize any adverse environmental impacts;

(3) The Regional Administrator shall issue or deny the new source NPDES permit following a complete evaluation of any significant beneficial and adverse environmental impacts and a review of the recommendations contained in the EIS.

(4)(i) No on-site construction of a new source for which an EIS is required shall commence before issuance of a final permit incorporating appropriate EIS-related requirements, or before execution by the applicant of a legally binding written agreement which requires compliance with all such requirements, unless such construction is determined by the Regional Administrator not to cause significant adverse environmental impact.

(ii) No on-site construction of a new source for which no EIS is required shall commence before 15 days following issuance of a finding of no significant impact, unless the new source requests permission to construct and the Regional Administrator determines that a finding of no significant impact will probably be made.

(5) The permit applicant must notify the Regional Administrator of any on-site construction which begins before the times specified in paragraph (c)(4) of this section. If on-site construction begins in violation of this paragraph, the Regional Administrator shall advise the owner or operator that it is proceeding with construction at its own risk, and that such construction activities constitute grounds for denial of a permit. The Regional Administrator may seek a court order to enjoin construction in violation of this paragraph.

(d) *Effect of compliance with new source performance standards.* (1) Except as provided in paragraph (d)(2), any new discharger on which construction commenced after October 18, 1972, or any new source, which meets the applicable promulgated new source performance standards before the commencement of discharge, shall not be subject to any more stringent new source performance standards, or to any more stringent technology-based standards under section 301(b)(2) of the Act for the shortest of the following periods:

(i) Ten years from the date that construction is completed;

(ii) Ten years from the date the source begins to discharge process or other non-construction related wastewater; or

(iii) The period of depreciation or amortization of the facility for the purposes of section 167 or 169 (or both) of the Internal Revenue Code of 1954.

[*Comment:* The provisions of this paragraph do not apply to existing sources which modify their pollution control facilities or construct new pollution control facilities and achieve performance standards, but which are neither new sources nor new dischargers or otherwise do not meet the requirements of this paragraph.]

(2) The protection from more stringent standards of performance afforded by paragraph (d)(1) of this section does not apply to:

(i) Additional or more stringent permit conditions which are not technology based, e.g., conditions based on water quality standards, or effluent standards or prohibitions under section 307(a); and

(ii) Additional permit conditions controlling pollutants listed as toxic under section 307(a) of the Act or as hazardous substances under section 311 of the act and which are not controlled by new source performance standards. This includes permit conditions controlling pollutants other than those identified as toxic or hazardous where control of those other pollutants has been specifically identified as the method to control the toxic or hazardous pollutant.

(3) Where an NPDES permit issued to a source enjoying a "protection period" under paragraph (d)(1), will expire on or before the expiration of the protection period, such permit shall require the owner or operator of the source to be in compliance with the requirements of section 301 and any other than applicable requirements of the act immediately upon the expiration of the protection period. No additional period for achieving compliance with these requirements shall be allowed.

(4) The owner or operator of a new source, a new discharger, a source recommencing discharge after terminating operations, or a source which had been an indirect discharger which commences discharging into navigable waters shall install and have in operating condition, and shall "start-up" all pollution control equipment required to meet the terms and conditions of its permits before beginning to discharge. Within the shortest feasible time (not to exceed 90 days), the owner or operator must meet all permit terms and conditions.

(5) After the effective date of new source performance standards, in accordance with section 306(e), it shall be unlawful for any owner or operator of any new source to operate such source in violation of those standards applicable to such source.

§ 122.48 General permit program.

(a) *Definitions.* (1) The term "separate storm sewer" is defined in § 122.45.

(2) The term "general permit program area" ("GPPA") means any area so designated under paragraph (c) of this section in which all owners or operators of separate storm sewers or other categories of point sources are subject to the same general permit, other than owners or operators of such sources to whom individual NPDES permits have been issued.

[*Comment:* All draft general permits for point sources other than separate storm sewers must be sent to the EPA Deputy Assistant Administrator for Water Enforcement during the public comment period for a 90-day review. If the draft general permit does not meet the criteria of § 122.48(b)(2), the EPA Deputy Assistant Administrator may object to the issuance of the general permit within those 90 days. See § 123.12(a)(14) and 124.32(a)(2).]

(3) The term "general permit" means an authorization to discharge which,

(i) Where issued by EPA, is published in the **Federal Register** or,

(ii) Where issued by a State, published in accordance with applicable State procedures, and

(iii) Is applicable to all owners and operators of separate storm sewers or other categories of point sources in a designated GPPA, other than owners and operators of such sources to whom individual NPDES permits have been issued.

(b) The Director may regulate the following discharges under general permits:

(1) Separate storm sewers; and

(2) Such other categories of point sources if there are a number of minor point sources operating in a geographical area that:

(i) Involve the same or substantially similar types of operations;

(ii) Discharge the same types of wastes;

(iii) Would require the same effluent limitations or operating conditions;

(iv) Would require the same similar monitoring requirements; and

(v) In the opinion of the director, would be more appropriately controlled under a general permit than under an individual NPDES permit.

(c) Each general permit shall be applicable to a class or category of dischargers meeting the criteria of paragraph (b) within a GPPA designated by the Director.

(1) The GPPA shall correspond with existing geographic or political boundaries such as:

(i) Designated planning areas under sections 208 and 303 of the Act;

(ii) Sewer districts or sewer authorities;

(iii) City, county or State political boundaries;

(iv) State highway systems;

(v) Standard metropolitan statistical areas as defined by the Office of Management and Budget;

(vi) Urbanized areas as defined by the Bureau of Census (see § 122.45(b)(1)); or

(vii) Any other appropriate divisions or combinations of the above boundaries which will encompass the sources subject to the same general permit.

(2) Any designation of any GPPA is subject to review by the Director at the expiration of the general permit for the GPPA, or if individual permits have been issued to all the owners and operators in the categories of point sources within the GPPA, or as necessary to address water quality problems effectively.

(3) General permits shall be issued in accordance with the applicable requirements of Part 124.

[*Comment:* The permit issuing authority is encouraged to provide as much actual notice of the draft general permit to the permitees as possible. This notice would be in addition to the public notice requirements in § 124.41(f) and could include notice in trade association journals and newsletters.]

(d) *Scope of General Permits.* (1) Each general permit shall cover all owners and operators of separate storm sewers or other designated categories of point sources in the GPPA for which the general permit is issued, except:

(i) As provided in paragraph (e); and

(ii) Owners and operators of separate storm sewers or other categories of point sources, who are already subject to individual NPDES permits prior to the effective date of the general permit;

(2)(i) All sources not excluded from general permit coverage for these reasons are permittees subject to the terms and conditions of the general permit.

(ii) Source excluded from general permit coverage solely because they already have an individual NPDES permit may request that the individual permit be revoked, and that they be covered by the general permit. Upon revocation of the individual NPDES permit, the general permit shall apply to such point source.

(e) *Case-by-case designation.* (1) Under § 124.14, the Director may revoke a general permit as it applies to any

person and require such person to apply for and obtain an individual NPDES permit. Interested persons may petition the Director to take action under this paragraph if one of the six cases listed below occurs. Cases where individual NPDES permits may be required include the following:

(i) The covered discharge(s) is a significant contributor of pollution;

(ii) The discharger is not in compliance with the terms and conditions of the general permit;

(iii) A change has occurred in the availability of demonstrated technology or practices for the control or abatement of pollutants from the covered point source;

(iv) Effluent limitations guidelines are subsequently promulgated for point sources covered by the general permit;

(v) A Water Quality Management plan containing requirements applicable to such point source is approved; or

(vi) The requirements of paragraph (b)(2)(i) through (iv) are not met.

(2) Where EPA is the permit issuing authority, the Regional Administrator may revoke a general permit as it applies to any person and require such person to apply for an individual NPDES permit if:

(i) There has been an on-site inspection of the facility and a determination that the point source should and could be regulated under an individual permit; and

(ii) The owner or operator has been notified in writing of the revocation of the general permit and that a permit application is required. This notice shall include an application form, a statement that the owner or operator has sixty days from receipt of notice to file the application, and a statement that the general permit no longer authorizes the owner or operator to discharge pollutants.

(3) Any owner or operator subject to a general permit may request to be excluded from the coverage of the general permit by applying for an individual permit. The owner or operator shall submit such application, with reasons supporting the request, to the Director no later than ninety days after the publication by EPA of the general permit in the Federal Register or the publication by the State in accordance with applicable State law. All such requests shall be granted by issuance of any individual permit if the reasons cited by the owner or operator are adequate to support the request.

(4) Where an individual NPDES permit is issued to an owner or operator otherwise subject to a general permit, the general permit as it applies to the individual NPDES permittee is automatically revoked on the effective date of the individual permit.

(5) Any owner or operator applying for an individual NPDES permit under this paragraph is subject to the procedures set forth in Part 124.

§ 122.49 Special considerations under Federal law.

Under section 301(b)(1)(C) of the Act, permits shall be consistent with and reflect requirements under applicable Federal laws other than the Act, and to the extent authorized by law, requirements under Executive Orders. For permits issued by the Regional Administrators, such Federal requirements include but are not limited to the following:

(a) Executive order 11990 (Protection of Wetlands).

(b) Executive Order 11988 (Preservation of Floodplains).

(c) Sections 3, 4, and 5 of the Wild and Scenic Rivers Act, 16 U.S.C. 1273 et seq.

(d) The National Historic Preservation Act of 1966, 42 U.S.C. 4321 et seq. (and the related Executive Order 11593).

(e) The Land and Water Conservation Act, 16 U.S.C. 460, et seq.

(f) Section 7 of the endangered Species Act, 16 U.S.C. 1531 et seq.

(g) Section 307 of the Coastal Zone Management Act, 16 U.S.C. 1451 et seq.

[*Comment:* NPDES permits must be consistent with approved coastal zone management plans by virtue of sections 307(c)(3)(A) (Federally issued permits) and 307(c)(1) (approval and oversight of State permit programs).]

(h) The Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act of 1976, 42 U.S.C. 6901 et seq.

(i) The Safe Drinking Water Act, 42 U.S.C. 300f et seq.

(j) The Marine Protection, Research, and Sanctuaries Act (the Ocean Dumping Act), 33 U.S.C. 1401 et seq.

(k) The Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. 1201 et seq.

(l) The Fish and Wildlife Coordination Act, 16 U.S.C. 661 et seq.

Subpart F—Miscellaneous

§ 122.60 Delegation of authority.

Subject to the appeal provisions of Part 124, the following authorities are hereby delegated to each of the Regional Administrators for the Region in which they are located:

(a) The authority to issue, condition, revoke, modify, deny, monitor, and enforce permits for discharges regulated by the NPDES program under sections 318, 402 and 405 of the Act.

(b) The authority to receive permit applications and related documents from States and to object in writing to the issuance of permits under section 402(d)(2) of the Act or (if such permits are outside the guidelines and requirements of the Act) under sections 402(d) (1), (2) and (4) of the Act.

(c) The authority under section 403(c) of the Act to issue permits under section 402 of the Act for a discharge into the territorial sea, the contiguous zone, or the oceans before the promulgation of guidelines under section 403(c) of the Act, including the determination that issuance is in the public interest.

(d) The authority granted to the Administrator by sections 308(a) and 308(b) of the Act.

(e) The authority to grant variances granted to the Administrator under sections 301(c), 301(g), and 316(a) of the Act.

(f) The authority to grant time extensions of statutory compliance dates under sections 301(i) and 301(k) of the Act.

(g) The authority to establish water-quality-related effluent limitations under section 302 of the Act.

(h) These authorities may be redelegated to the Enforcement Division Director of each Region. Permit issuance authority may not be redelegated below the Enforcement Division Director.

Appendix A—Point Source Categories and Permit Expiration Dates

Point source category	Permit expiration dates
Adhesives	June 30, 1981.
Aluminum Forming	June 30, 1981.
Auto & Other Laundries	June 30, 1981.
Battery Manufacturing	June 30, 1981.
Coal Mining	December 31, 1980.
Coil Coating	June 30, 1981.
Copper Forming	June 30, 1981.
Electric & Electronic Components	June 30, 1981.
Electroplating	June 30, 1981.
Explosives Manufacturing	June 30, 1981.
Foundries	June 30, 1981.
Gum & Wood Chemicals	June 30, 1981.
Inorganic Chemicals	March 31, 1981.
Iron & Steel	September 30, 1980.
Leather Tanning and Finishing	September 30, 1980.
Mechanical Products	June 30, 1981.
Nonferrous Metals	December 31, 1980.
Ore Mining	December 31, 1980.
Organic Chemicals	March 31, 1981.
Paint & Ink	December 31, 1980.
Pesticides	June 30, 1981.
Petroleum Refining	September 30, 1980.
Pharmaceuticals	June 30, 1981.
Photographic Supplies	June 30, 1981.
Plastics Processing	June 30, 1981.
Plastic & Synthetic materials	March 31, 1981.
Porcelain Enamel	June 30, 1981.
Printing & Publishing	December 31, 1980.
Pulp & Paper	March 31, 1981.
Rubber	March 31, 1981.
Soaps & Detergents	June 30, 1981.
Steam Electric	September 30, 1980.
Textile Mills	March 31, 1981.
Timber	September 30, 1980.

5. A new Part 123 is added as follows:

PART 123—STATE PERMIT PROGRAM REQUIREMENTS

Subpart A—General

Sec.
123.1 Purpose and scope.
123.2 Definitions.
123.3 Elements of a program submission.
123.4 Program description.
123.5 Memorandum of Agreement with the Secretary for section 404 programs.
123.6 Attorney General's Statement.
123.7 Memorandum of Agreement with the Regional Administrator.
123.8 Sharing of information.

Subpart B—Requirements of State Programs

123.11 Requirement to obtain a permit.
123.12 Operational requirements.
123.13 Control of disposal of pollutants into wells.
123.14 Inspections, monitoring, entry, and reporting.

Subpart C—Transfer of Information, Objections to Permits

123.21 Receipt and use of Federal information.
123.22 Transmission of information to EPA.
123.23 Objections to proposed NPDES permits.
123.24 Prohibitions.

Subpart D—Enforcement Provisions

123.31 Compliance evaluation programs.
123.32 Enforcement.

Subpart E—Planning and Conflict of Interest Requirements

123.41 Continuing planning process.
123.42 Agency board membership.

Subpart F—Procedures for Approval of State Permit Programs

123.51 Section 402 approval process.
123.52 Section 404 approval process.

Subpart G—Revisions to Approved Programs

123.61 Procedure for revision of State permit programs.
123.62 NPDES program revisions under the Clean Water Act of 1977.

Authority: Clean Water Act, as amended by the Clean Water Act of 1977, 33 U.S.C. 1251 et seq.

Subpart A—General

§ 123.1 Purpose and scope.

(a)(1) This Part specifies the requirements of State section 404 (discharges of dredged or fill material) and NPDES (sections 318, 402, and 405) permit programs which must be met in order to obtain approval of the Administrator under the Clean Water Act.

(2) This Part also specifies the process for approving and modifying State programs and for EPA objection to proposed State permits.

(b) A State permit program which conforms to this Part shall be approved by the Administrator. A State permit program will not be approved by the Administrator under section 402 of the Act unless it has authority to control the discharges specified in sections 318 and 405(a) of the Act. Except as provided below, State section 402 permit programs approved by EPA prior to the date of promulgation of these regulations may implement sections 318 and 405 of the Act. If a State lacks authority to implement these sections, it shall notify EPA and revise its program in accordance with § 123.62. Permit programs under sections 318 and 405 will not be approved independent of a section 402 permit program.

(c) Upon approval (and upon subsequent notification from the State that it is administering the permit program for purposes of section 404), the Administrator or the Secretary (in the case of section 404 programs), shall suspend the issuance of permits for those activities subject to the approved program.

(d) After program approval EPA or the Secretary (in the case of section 404 programs) shall retain jurisdiction over any permits (including general permits) which have been issued by the Federal government unless arrangements have been made with the State in the Memorandum of Agreement for the State to assume responsibility for these permits. Retention of jurisdiction shall include the processing of any permit appeals, modification requests or variance requests; the conduct of inspections, and the receipt and review of self-monitoring reports. If any permit appeal, modification request or variance request is not finally resolved when the Federally issued permit expires, EPA or the Secretary (in the case of section 404 programs) when agreed to by the State, may continue to retain jurisdiction until the matter is resolved. Under section 404(h)(5) of the Act States are entitled, after program approval, to administer and enforce general permits issued by the Secretary. However, if the State chooses not to administer and enforce these permits the Secretary retains jurisdiction until they expire.

(e) Any State permit program approved by the Administrator shall at all times be conducted in accordance with the requirements of this Part (including, where incorporated by reference, provisions of Parts 122, 124, and 125).

(f) These regulations are promulgated under the authority of sections 304(i), 101(e) and 501(a) of the Act, and implement the requirements of those sections.

[*Comment:* No partial program approvals may be granted. States must have authority to issue permits for all discharges into all waters of the United States within the State's jurisdiction. (In appropriate circumstances more than one State Agency can be approved to issue NPDES permits; see § 123.4(b).) In addition, States (including States which have previously been approved) must implement the Clean Water Act of 1977, (Pub. L. 95–217), amendments to sections 313 (Federal facilities); 304(e) (best management practices); and 402(b)(8) (pretreatment) of the Act. Similarly, all the requirements of section 404 must be satisfied prior to approval of a State section 404 program. The section 404 and NPDES programs are independent; a State may obtain approval for one without the other.

Although these regulations require States to administer complete programs, EPA recognizes that, as a matter of Federal law, a State may lack authority to exercise jurisdiction over discharges from facilities on Indian lands. The lack of such authority does not constitute grounds for refusal to authorize State administration of a program. However, to the extent that States have authority to exercise jurisdiction, they are required to do so.]

(g) Nothing in this Part precludes a State from:

(1) Adopting or enforcing any standard, limitation, or other requirement which is more stringent than required under the Act; or

(2) Operating a permit program with a greater scope of coverage than required under the Act.

(h) A State permit program approved under this Part is established and operated under State law.

[*Comment:* EPA has a continuing statutory responsibility to assure that the operation of State programs in in accordance with Federal law. States must cooperate with EPA and assure that it has access to information which it requests in order to carry out this responsibility. See §§ 123.8 and 123.61(d).]

§ 123.2 Definitions.

(a) The definitions in Part 122 apply to this Part.

(b) "Draft permit" means the permit prepared pursuant to §§ 124.31 or 124.32 indicating the State Director's tentative determination to issue or modify a permit with specified conditions.

(c) "Proposed permit" means a state permit or permit modification prepared after the public comment period (and, where applicable, any public hearing) which is sent to EPA for review before final issuance by the State. In the case of section 404 programs, proposed permits are not required unless requested by EPA.

[*Comment:* Where EPA has waived permit review no proposed permit is required under these regulations. The State may issue a final permit after meeting the requirements of §§ 124.31, 124.41, 124.42 and 124.44.]

(d) "Memorandum of Agreement" means the agreement entered into pursuant to § 123.7 between the Regional Administrator and the State Director, governing the relationship, duties, and rights of the parties in operating a State NPDES program.

(e) "State/EPA Agreement" means an agreement between the Regional Administrator and the State which integrates and coordinates EPA and State activities, responsibilities and programs under the Clean Water Act, the Resource Conservation and Recovery Act, and the Safe Drinking Water Act. The scope of the State/EPA Agreement may be expanded in the future to cover other environmental programs. Guidance for these agreements will be published from time to time in the **Federal Register** (see, e.g., 44 FR 17294 March 21, 1979).

§ 123.3 Elements of a program submission.

(a) EPA will not initiate formal review of a proposed State program until it receives three copies of a complete program submission. If a submission made by a State is not complete, the statutory review period (i.e., the period of time allotted for EPA review under the Act) shall not commence until the deficiency is corrected. The submission shall contain the following elements:

(1) A letter from the Governor of the State requesting program approval;

(2) An Attorney General's Statement as required by § 123.6;

(3) A Memorandum of Agreement as required by § 123.7;

(4) A complete program description as required by § 123.4;

(5) Copies of the permit application and permit forms which the State intends to employ in its program. Except for Discharge Monitoring Reports, forms used by States need not be identical to the forms used by EPA or the Secretary but should require the same basic information. The State need not provide copies of uniform national forms it intends to use but should note that it intends to use these:

[*Comment:* The States are encouraged to use uniform national forms established by the Administrator in the case of NPDES, or the Secretary in the case of section 404 programs. States are required to use uniform national Discharge Monitoring Reports, see § 122.31(1). Regulations will be proposed in the near future specifying information required on State NPDES and section 404 application forms. Uniform national forms may be modified to substitute the State Agency's name, address, logo, and other similar information, as appropriate, in place of EPA's.]

(6) Copies of all applicable statutes and regulations, including those governing applicable State administrative procedures; and

(7) In the case of section 404 programs, a Memorandum of Agreement between the State and the Secretary as required by § 123.5.

(b) If the State's submission is materially changed during the statutory review period, the review period shall recommence.

§ 123.4 Program description.

Any State desiring to administer a permit program shall submit to the Administrator a complete description of the program it proposes to establish and administer under State law or under an interstate compact. The program description shall include:

(a) A description of how the State intends to carry out its responsibilities under the Act.

(b)(1) A description (including organization charts) of the organization and structure of the State agency or agencies which will have responsibility for administering the permit program. NPDES authority may be shared by two or more State agencies but each agency must have Statewide jurisdiction over a class of activities. Where more than one agency is responsible for issuing permits, each agency must make a submission meeting the requirements of § 123.3 before formal EPA review will commence. In the case of section 404 programs, the State must designate one agency to be responsible for issuing section 404 permits.

(2) In the case of section 404 programs, the program description shall describe how the State section 404 agency will interact with other State and local agencies.

[*Comment:* There is no restriction limiting the number and type of state agencies implementing the NPDES program. However, EPA favors the use of a single agency.]

(c) A description of State procedures for the issuance of permits (including general permits if the State chooses to implement § 122.48), and any State appellate review procedures.

(d) A description of the State's priorities for issuance of permits.

(e) A description of the State's priorities for enforcement of permits, including a complete description of the State's compliance tracking and enforcement programs. In addition, in the case of section 404 programs the State must explain how it will coordinate its enforcement strategy with that of the Corps of Engineers and EPA.

(f) A description of the funding arrangements and personnel qualifications for the State's program, including the following information:

(1) A description of the agency staff who will be engaged in carrying out the State program, including the number and occupations of the employees;

(2) A list of the proposed or actual costs of establishing and administering the program, including the cost of the personnel listed in paragraph (f)(1) of this section, the cost of administrative support, and the cost of technical support;

(3) A description of the funding, including Federal grant money, available to the State Director to meet the costs listed in paragraph (f)(2) of this section, including any restriction or limitation upon this funding. Where the State proposes to administer a program of greater scope than is required by Federal law, the information provided under this paragraph shall indicate the resources dedicated to administering the federally required portion of the program; and

(4) For section 404 programs, a description of the categories and sizes of dicharges of dredged or fill material to which the State Director proposes to issue permits. For each category, the following information shall be given:

(i) Estimated number within the category which must file for a permit; and

(ii) Number and percent within each category for which the State has already issued a State permit or equivalent document regulating the discharge.

(g) In the case of section 404 programs, a description of the specific best management practices requirements proposed to be used to satisfy the exemption provisions of section 404(f)(1)(E) for construction or maintenance of farm roads, forest roads, or temporary roads for moving mining equipment in accordance with applicable regulations.

[*Comment:* Regulations governing these BMPs will be proposed in the near future.]

§ 123.5 Memorandum of Agreement with the Secretary for section 404 programs.

In the case of section 404 programs the State shall enter into a Memorandum of Agreement with the Secretary, which shall include:

(a) An identification of those waters in which the Secretary will suspend the issuance of section 404 permits (pursuant to section 404 (h)(2) and (g)(1))

upon approval of the State program by the Administrator;

(b) Where an agreement is reached, procedures for joint processing of permits for activities which require both a section 404 permit from the State and a section 9 or 10 permit from the Secretary under the River and Harbor Act of 1899.

(c) An identification of those individual and general permits, if any, issued by the Secretary, the terms and conditions of which the State intends to administer and enforce (including inspection, monitoring, and surveillance responsibilities) upon receiving approval of its program, and a plan for transferring these permits to the State.

[*Comment:* See *Comment* to § 123.7(b)(1).]

(d) Procedures whereby the Secretary will transfer to the State pending section 404 permit applications and other relevant information, as specified in § 123.21.

(e) Assurance that the State will not issue any section 404 permit for a discharge which, in the judgment of the Secretary after consultation with the Secretary of the Department in which the Coast Guard is operating, would substantially impair anchorage or navigation.

(f) Those "classes or categories" if any, of proposed State permits for which the Secretary waives the right to review.

(g) Other matters not inconsistent with this Part that the Secretary and the State deem appropriate.

[*Comment:* States that regulate the discharge of dredged or fill material into those traditionally navigable waters which, by virtue of section 404(g)(1), will also require a section 404 permit from the Secretary after State program approval, are strongly encouraged to establish in this Memorandum of Agreement procedures for joint processing of permits, including joint public notices and public hearings.]

§ 123.6 Attorney General's Statement.

(a) Any State desiring to administer a permit program shall submit a statement from the State Attorney General (or the attorney for those State agencies which have independent legal counsel), that the laws of the State, or the interstate compact, as the case may be, provide adequate authority to carry out the program described under § 123.4 and to meet the requirements of this Part. The Attorney General's Statement shall include citations to specific statutes, administrative regulations, and, where appropriate, judicial decisions to demonstrate adequate legal authority.

[*Comment:* To qualify as "independent legal counsel" the attorney signing the statement required by this section must have full authority to independently represent the State in court on all matters pertaining to the State program.]

(b) Where juridiction may be exercised over activities on Indian lands, the statement shall certify that the State has such authority.

(c) In the case of section 404 programs, in addition to certifying the authorities described in paragraph (a), the Attorney General's Statement shall also contain:

(1)An analysis of the State's law prohibiting the taking of private property without just compensation, including any applicable judicial interpretations, and assurance that this will not adversely affect the successful implementation of the State's regulation of the discharge of dredged or fill material; and

(2) A certification that the State has authority to prohibit, deny, restrict, or withdraw the specification of disposal sites for the discharge of dredged or fill material in any defined area of those waters for which the State receives section 404 authority, including:

(i) Authority to apply the criteria contained in 40 CFR Part 230;

(ii) Authority (similar to EPA's authority under section 404(c)) to prohibit the discharge of dredged or fill material into areas where such discharges would have an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas (including spawning and breeding areas), wildlife or recreational areas.

[*Comment:* The above authority to prohibit, deny, restrict, or withdraw the specification of disposal sites should not be limited to situations where an application for a 404 permit has been made, but should also include the authority to designate areas which will not be available for disposal site specification, as described in 40 CFR § 230.7(d). Nothing in subparagraph (c)(2)(ii) is intended to limit the Administrator's authority to take similar actions under section 404(c) of the Act.]

(d) The authorities cited by the State Attorney General or other legal officer as authority to meet the requirements of this Part shall be in the form of lawfully adopted State statutes or regulations which shall be in full force and effect at the time the statement is signed.

[*Comment:* This Part sets forth a number of procedural requirements. For example, § 123.22 requires approved States to transmit information to EPA and other agencies. Not all such procedural requirements need be embodied in State regulations. However, the State must show it has adequate authority to carry out all the requirements of this Part, and that no State statute or regulation is inconsistent with those requirements.]

§ 123.7 Memorandum of Agreement with the regional administrator.

(a) Before the Administrator approves any State NPDES or section 404 program, the State Director and the Regional Administrator shall execute a Memorandum of Agreement (MOA), which shall be approved by the Administrator not later than the time of program approval. In addition to including the requirements of paragraph (b), the Memorandum of Agreement may include other terms, conditions, or agreements relevant to the administration and enforcement of the State's regulatory program which are not inconsistent with this Part. No Memorandum of Agreement shall be approved which restricts EPA's statutory oversight responsibility. The Memorandum of Agreement shall be available for inspection and comment before the public hearing required by §§ 123.51 or 123.52.

(b) The Memorandum of Agreement shall include the following:

(1) Provisions implementing § 123.21 for the prompt transfer of any pending permit applications or any other relevant information not already in the possession of the State Director. Where existing permits are transferred to the State for administration, the Memorandum of Agreement shall contain provisions specifying a procedure for transferring responsibility for these permits. Where existing permits are not transferred, § 123.1(d) applies.

[*Comment:* In many instances States will lack the authority to directly administer permits issued by EPA. However, a procedure may be established to transfer responsibility for these permits. For example, a State could issue permits identical to the outstanding EPA permits which could be simultaneously revoked.]

(2) Provisions implementing §§ 123.22 and 123.23 specifying the basis and procedures for EPA to receive permits and permit applications from the State for review, comment, and objection. In the case of a State section 404 program the State shall assure that it will transmit copies of all proposed permits to the Corps of Engineers, the U.S. Fish and Wildlife Service, and the National Marine Fisheries Service at the same time such permits are transmitted to EPA, subject to the right of any of these agencies to waive, in whole or in part, the right to receive such permits.

(3)(i) In the case of section 402 programs, provisions specifying the extent to which EPA review of State-issued permits will be waived under sections 402(d)(3), (e) or (f) of the Act. While the Regional Administrator and

the State may agree to waive EPA review of certain "classes or categories" of permits, no waiver of review may be granted for the following discharges:

(A) Discharges into the territorial sea or contiguous zone;

(B) Discharges which may affect the waters of a State other than the one in which the discharge originates;

(C) Proposed NPDES general permits (see § 122.48);

(D) Discharges from publicly owned treatment works with a daily average discharge exceeding 1 million gallons per day;

(E) Discharges of uncontaminated cooling water with a daily average discharge exceeding 500 million gallons per day;

(F) Discharges from any major discharger or from any discharger within any of the industrial categories listed in Appendix A to Part 122;

(G) Discharges from other sources with a daily average discharge exceeding 0.5 million gallons per day, except that EPA review of permits for discharges of non-process wastewater may be waived, regardless of flow, with the prior concurrence of the EPA Deputy Assistant Administrator for Water Enforcement;

(ii) In the case of section 404 programs, provisions specifying the extent to which EPA review of permit applications and State-issued permits will be waived under sections 404(k) or (l) of the Act. While the Regional Administrator and the State, in consultation with the Corps of Engineers, the U.S. Fish and Wildlife Service, and the National Marine Fisheries Service, may agree to waive Federal review of certain "classes or categories" of permits no waiver may be granted for the following activities:

(A) Discharges which may affect the waters of a State other than one from which the discharge originates;

(B) Discharges incidental to activities described in section 404(f)(2) of the Act (i.e., activities having as their purpose bringing an area of the waters of the United States into a new use, where the flow and circulation of waters may be impaired or their reach reduced);

(C) Proposed section 404 general permits; or

(D) Discharges known or suspected to contain toxic or hazardous pollutants in significant amounts.

(iii) Whenever a waiver is granted under paragraph (b)(3) (i) or (ii) of this section, a statement that the Regional Administrator retains the right to terminate the waiver, in whole or in part, at any time by sending the State Director written notice of termination. The waiver shall not affect the duty of the State to supply EPA with copies of all permit applications, public notices and final permits.

(4) Provisions, consistent with this Part, specifying the frequency and content of reports, documents and other information which the State must submit to EPA.

(5) Provisions on the State's enforcement program including:

(i) Provisions for compliance monitoring by the State and by EPA and for the coordination of these efforts. These provisions may specify the basis on which the Regional Administrator will select facilities or activities within the State for EPA inspection;

(ii) Fiscal arrangements for effective litigation support for the State attorney general or other appropriate legal officers;

(iii) The establishment of an enforcement management system implementing the requirements of § 123.31.

(6) Where appropriate, provisions for joint processing of permits by the State and EPA.

[*Comment:* To promote efficiency and to avoid duplication and inconsistency, States are encouraged to enter into joint processing agreements with EPA for permit issuance. Likewise, States are encouraged to consolidate their own permit programs and activities.]

(7) Provisions for modification of the Memorandum of Agreement with the approval of the Administrator.

(c) The Memorandum of Agreement and the State/EPA Agreement should be consistent. If the State/EPA Agreement indicates that a change is needed in the Memorandum of Agreement, the Memorandum of Agreement may be amended in accordance with procedures set forth in this Part. The State/EPA Agreement may not override the Memorandum of Agreement.

[*Comment:* Detailed program priorities and specific arrangements for EPA support of the State program will change and are therefore more appropriately negotiated in the context of annual agreements rather than in the MOA. Where this is the case, it may still be appropriate to specify in the MOA the basis for such detailed agreements, for example, a provision in the MOA specifying that EPA will select facilities in the State for inspection annually as part of the State/EPA Agreement.]

§ 123.8 Sharing of information.

(a) Any information obtained or used pursuant to a State program shall be available to EPA upon request without restriction. If the information has been submitted to the State under a claim of confidentiality, the State must pass that claim on to EPA. Any information obtained from a State and subject to a claim of confidentiality will be treated in accordance with the regulations in 40 CFR Part 2. If EPA obtains information from a State that is not claimed to be confidential, EPA may make that information available to the public without further notice.

(b) EPA may furnish information to States in order to implement these regulations. In the case of information claimed as confidential by submitters, State access will be subject to the rules in 40 CFR Part 2, Subpart B.

Subpart B—Requirements of State Programs

§ 123.11 Requirement to obtain a permit.

(a) State NPDES permit programs must have a statute or regulation, enforceable in State courts, which prohibits the discharge of pollutants by any person except as authorized by a permit in effect under the State program or under section 402 of the Act, except that States need not regulate discharges exempt from the Federal permit requirement under § 122.4.

(b) State section 404 permit programs must have a statute or regulation, enforceable in State courts, which prohibits the discharge of dredged or fill material into waters subject to the State's jurisdiction by any person except as authorized by a permit in effect under the State program or under section 404 of the Act, except that States need not regulate discharges exempt from the Federal permit requirement under section 404(r) or under the regulations implementing section 404(f)(1) of the Act.

[*Comment:* § 123.1(g) provides that States are not preempted from adopting more stringent standards or regulating more activities than the Act requires. For example, States may choose to regulate certain minor categories of discharges of dredged or fill material which have been exempted from the Federal program by section 404(f)(1) of the Act. Likewise, States are not precluded from regulating activities which, by virtue of section 404(g)(1) of the Act, also require a 404 permit from the Secretary. Although State permits in waters described in section 404(g)(1) are not section 404 permits, section 404(t) of the Act provides that a State is not preempted from requiring permits for discharges into these waters. It should be noted that the regulations of the Corps of Engineers encourage joint Corps-State processing of permits, including joint public notices and hearings (33 CFR § 320.4(j)). The Secretary attaches considerable weight to State determinations (33 CFR § 320.4(j)(1)–(7).]

§ 123.12 Operational requirements.

(a) State section 402 programs must have legal authority to implement each of the following provisions and must be administered in conformance with each of the following provisions:

(1) § 122.5—(Signatories);

(2) § 122.11(d)—(Permit issuance; effect of permit);

(3) §122.12(a), (c) and (d)—(Duration and transferability of permits);

(4) §122.13—(Prohibitions);

(5) §122.14—(Conditions applicable to all permits);

(6) §122.15—(Applicable limitations, standards, prohibitions and conditions);

(7) §122.16—(Calculation and specification of effluent limitations and standards);

(8) §122.17(a), (b), (d), (e) and (f)—(Schedules of compliance);

(9) §122.20—(Monitoring);

(10) §122.21—(Recording of monitoring results);

(11) §122.22—(Reporting of monitoring results);

(12) § 122.23—(Noncompliance reporting);

(13) § 122.31—(Modification, revocation and reissuance, and termination);

(14) Part 122, Subpart E except §§ 122.40, 122.47(a)–(c) and 122.49—(Special NPDES Programs)—*provided,* States are not required to implement the general permit program under § 122.48. If a State chooses to issue general permits such action is subject to the following conditions:

(i) Any general permit shall be issued in accordance with § 122.48;

(ii) Prior to, or at the time of proposal of any general permit, the State Attorney General (or other legal officer as appropriate, see § 123.6) shall certify that the State has adequate legal authority to issue and enforce general permits;

(iii) EPA shall have 90 days to review any proposed general permit; and

(iv) All general permits, except those for separate storm sewers, may be objected to on EPA's behalf by the EPA Deputy Assistant Administrator for Water Enforcement. The State shall transmit a copy of any such proposed general permit to the EPA Deputy Assistant Administrator for Water Enforcement at the same time the proposed permit is transmitted to the EPA Regional Office.

(15) § 124.13—(Modification requests);

(16) § 124.31(b)—(Draft permits);

(17) § 124.32(a)—(Other draft permits);

(18) § 124.33—(Statement of basis);

(19) § 124.34—(Fact sheet);

(20) § 124.41—(Public notices);

(21) § 124.42—(Public comments and hearing);

(22) § 124.44—(Comments from government agencies);

(23) § 124.51—(Time requirements for variances), *provided,* State programs are not required to provide for any or all of the variances listed in § 124.51;

(24) § 124.52—(Decision on variances);

(25) § 124.63(a)—(Response to comments);

(26) § 124.131(a)—(Public access);

(27) Subparts A, B, C, D, H, I, J, K and L of Part 125—(NPDES Determinations); and

(28) 40 CFR Parts 129, 133 and Subchapter N.

(b) States seeking approval of section 404 programs should consult with EPA on the operational aspects of their programs.

[*Comment:* Regulations governing the operational aspects of State section 404 programs will be proposed in the near future.]

§ 123.13 Control of disposal of pollutants into wells.

State section 402 permit programs must have authority to issue permits to control the disposal of pollutants into wells. Such authority shall enable the State Director to protect the public health and welfare and to prevent the pollution of ground and surface waters by prohibiting well discharges or by permitting them with appropriate permit terms and conditions.

[*Comment:* States which are authorized to administer the NPDES permit program under section 402 of the Act are encouraged to rely on existing statutory authority, to the extent possible, in developing a State underground injection control (UIC) program under section 1422 of the Safe Drinking Water Act. Section 402(b)(1)(D) of the Clean Water Act requires that NPDES States have the authority "to issue permits which . . . control the disposal of pollutants into wells." In many instances, therefore, NPDES States will have statutory authority to regulate well disposal which satisfies the requirements of the UIC program. However, the Clean Water Act excludes certain types of well injections from the definition of "pollutant." If the State's statutory authority contains a similar exclusion it may need to be modified to qualify for UIC program approval.]

§ 123.14 Inspections, monitoring, entry, and reporting.

Any State permit program shall provide adequate authority to inspect, monitor, enter, and require reports to at least the same extent as required in section 308 of the Act.

Subpart C—Transfer of Information, Objections To Permits

§ 123.21 Receipt and use of Federal information.

Upon receiving EPA approval, the State agency administering a permit program shall be sent any relevant information which was collected by EPA or, where appropriate, the Secretary. The Memoranda of Agreement under §§ 123.5 and 123.7 shall provide for the following, in such manner as the State Director and the Regional Administrator or, where appropriate, the Secretary, shall agree:

(a) Prompt transmission to the State Director from the Regional Administrator or the Secretary of copies of any pending permit applications or any other relevant information collected before the approval of the State permit program and not already in the possession of the State Director. Where existing permits are transferred to the State Director (e.g., for purposes of compliance monitoring, enforcement, or reissuance), relevant information includes support files for permit issuance, compliance reports, and records of enforcement actions.

(b) Procedures to ensure that the State Director will not issue a permit on the basis of any application received from the Regional Administrator or the Secretary which the Regional Administrator or the Secretary identifies as incomplete or otherwise deficient until the State Director receives information sufficient to correct the deficiency.

§ 123.22 Transmission of information to EPA.

(a) Each State agency administering a permit program shall transmit to the Regional Administrator (and in the case of section 404 programs, to the Corps of Engineers, the U.S. Fish and Wildlife Service, and the National Marine Fisheries Service), copies of permit program forms and any other relevant information to the extent and in the manner agreed to by the Director and the Regional Administrator in the Memorandum of Agreement and not inconsistent with this Part. EPA review of proposed NPDES general permits is governed by § 123.12(a)(14). The Memorandum of Agreement shall provide for the following:

(1) Prompt transmission to the Regional Administrator of a copy of any complete permit applications received by the State Director.

(2) Prompt transmission to the Regional Administrator and any affected State of notice of every action

taken by the State agency related to the consideration of any permit application, including a copy of each proposed or draft permit and any terms, conditions, requirements, or documents which are related to the proposed or draft permit or which affect the authorization of the proposed permit. In the case of section 404 programs, the above shall be transmitted to the Corps of Engineers, the U.S. Fish and Wildlife Service, and the National Marine Fisheries Service at the same time they are transmitted to EPA. The State program shall provide:

(i) A period of time (up to 90 days) in which the Regional Administrator, or where appropriate, the EPA Deputy Assistant Administrator for Water Enforcement (see § 123.12(a)(14)), may comment upon, object to, or make recommendations with respect to the proposed permit and, in the case of section 404 programs, on the permit application. A copy of any comment, objection, or recommendation shall be sent to the permit applicant by EPA. In the case of NPDES general permits, EPA shall have 90 days to comment upon, object to, or make recommendations with respect to the proposed permit.

(ii) In the case of a draft or proposed permit which includes a tentative determination to approve a variance request which may only be authorized by EPA (see § 124.52(b)), formal EPA review of the permit shall not begin under this section and § 123.23 until EPA rules on the variance request.

[*Comment:* Normally EPA review time is substantially less than 90 days. However, EPA reserves the right to take a full 90 days to supply specific grounds for objection where a general objection is filed within the review period of the Memorandum of Agreement. In making comments, objections or recommendations on proposed State section 404 permits, the Regional Administrator will consider any timely written comments submitted to him by the Secretary, the U.S. Fish and Wildlife Service or the National Marine Fisheries Service.]

(3) Transmission to the Regional Administrator of a copy of every issued permit following issuance, along with any and all terms, conditions, requirements, or documents which are related to or affect the authorization of the permit.

(b) In the case of NPDES programs, transmission by the State Director to EPA of:

(1) Notices from publicly owned treatment works under § 122.15(d) and 40 CFR Part 403, upon request of the Regional Administrator;

(2) A copy of any significant comments presented in writing pursuant to the public notice and the response to comments prepared pursuant to § 124.63(a) if:

(i) The Regional Administrator requests this information; or

(ii) The proposed permit contains requirements significantly different from those contained in the tentative determination and draft permit; or

(iii) Significant comments adverse to the tentative determination and draft permit have been presented at the hearing or in writing pursuant to the public notice; and

(3) A quarterly noncompliance report in accordance with § 122.23.

(c) Within the time period agreed upon in the Memorandum of Agreement (or 90 days in the case of proposed NPDES general permits), the Regional Administrator (or, where appropriate, the EPA Deputy Assistant Administrator for Water Enforcement), pursuant to the right to object provided in the Act and § 123.23, may comment upon, object to, or make recommendations with respect to any proposed permit. In the case of section 404 programs, the Regional Administrator shall notify the State Director of his or her intent to comment upon or object to a proposed permit within 30 days of receipt.

(d) The Regional Administrator may, by agreement with the State Director in the Memorandum of Agreement (see § 123.7(b)(3)), waive the right to review, object to, or comment upon permit applications and proposed permits for classes, types, or sizes of discharges within any category of point sources, including the right to receive information under paragraphs (a)(2) and (b)(2) of this section.

(e) Any State section 404 permit program shall provide for transmission by the State Director to the Regional Administrator of the quarterly and annual reports on the permit program, in accordance with applicable regulations.

[*Comment:* Regulations governing reporting requirements for State section 404 programs will be proposed in the near future.]

(f) Any State permit program shall keep such records and submit to the Administrator such information as the Administrator may reasonably require to ascertain whether the State program complies with the requirements of the Act or of this Part.

§ 123.23 Objections to proposed NPDES permits.

(a)(1) Within the period of time provided under the Memorandum of Agreement, the Regional Administrator shall notify the State Director of any objection to issuance of a proposed permit (except as provided in paragraph (a)(2) of this section for proposed general permits). This notification shall set forth in writing the general nature of the objection.

(2) Within 90 days following receipt of the proposed permit which has been objected to under subparagraph (a)(1) of this section, or in the case of general permits, within 90 days after the receipt of the proposed general permit, the Regional Administrator, or, in the case of general permits other than for separate storm sewers, the EPA Deputy Assistant Administrator for Water Enforcement shall set forth in writing and transmit to the State Director:

(i) A statement of the reasons for the objection (including the section of the Act or regulations that support the objection), and

(ii) The actions that must be taken by the State Director in order to eliminate the objection (including the effluent limitations and conditions which the permit would include if it were issued by EPA).

[*Comment:* This paragraph, in effect, modifies any existing agreement between EPA and the State which provides less than 90 days for EPA to supply the specific grounds for an objection. However, where an agreement provides for an EPA review period of less than 90 days EPA must file a general objection, in accordance with paragraph (a)(1) within the time specified in the agreement. This general objection will be followed by a specific objection within the 90-day statutory period. This modification to the MOA's is necessary for EPA review of general permits and since the Clean Water Act of 1977 now requires EPA to provide detailed information concerning acceptable permit terms and conditions. To avoid possible confusion, MOA's should be changed to reflect this.]

(b) The Regional Administrator may object to the issuance of a proposed permit as being outside the guidelines and requirements of the Act. This objection must be based upon one or more of the following grounds:

(1) The permit fails to apply, or to ensure compliance with, any applicable requirement of this Part;

[*Comment:* Under the provisions of this section, a permit not requiring the achievement of required effluent limitations by applicable statutory deadlines shall be subject to objection by the Regional Administrator.]

(2) In the case of any proposed permit for which notification is required under section 402(b)(5) of the Act, the written recommendations of an affected State have not been accepted by the permitting State and the Regional Administrator finds the reasons for rejecting the recommendations are inadequate;

(3) The procedures followed in connection with formulation of the proposed permit failed in a material respect to comply with procedures required by the Act, or by regulations thereunder or by the Memorandum of Agreement;

(4) Any finding made by the State Director in connection with the proposed permit misinterprets the Act or any guidelines or regulations under the Act, or misapplies them to the facts;

(5) Any provisions of the proposed permit relating to the maintenance of records, reporting, monitoring, sampling, or the provision of any other information by the permittee are inadequate, in the judgment of the Regional Administrator, to assure compliance with permit conditions, including effluent standards and limitations required by the Act, by the guidelines and regulations issued under the Act, or by the proposed permit;

(6) In the case of any proposed permit with respect to which applicable standards and limitations under sections 301, 304, 306, 307, 318, 403 and 405 of the Act have not yet been promulgated by the Agency, the proposed permit, in the judgment of the Regional Administrator, fails to carry out the provisions of the Act or of any regulations issued under the Act;

[*Comment:* The provisions of this paragraph apply to determinations made pursuant to § 125.3(c)(2) in the absence of applicable guidelines and to best management practices under section 304(e) of the Act, which must be incorporated into permits as requirements under sections 301, 306, 307, 318, 403, or 405 as the case may be.]

(7) Issuance of the proposed permit would in any other respect be outside the requirements of the Act, or regulations issued under the Act.

(c) Prior to notifying the State Director of an objection based upon any of the grounds set forth in paragraph (b) of this section, the Regional Administrator:

(1) Shall consider all data transmitted pursuant to § 123.22;

(2) May, if the information provided is inadequate to determine whether the proposed permit meets the guidelines and requirements of the Act, request the State Director to transmit to the Regional Administrator the complete record of the permit proceedings before the State, or any portions of the record that the Regional Administrator determines are necessary for review. If this request is made within 30 days of receipt of the State submittal under § 123.22, it shall constitute an interim objection to the issuance of the permit, and the full period of time specified in the Memorandum of Agreement for the Regional Administrator's review shall recommence when the Regional Administrator has received such record or portions; and

(3) May, in his or her discretion and to the extent feasible within the period of time available under the Memorandum of Agreement, afford to every interested person an opportunity to comment on the basis for an objection.

(d) Within 90 days of receipt by the State Director of an objection by the Regional Administrator, the State or any interested person may request that a public hearing be held by the Regional Administrator on the objection. Following a request, the Regional Administrator may provide public notice and hold a public hearing in accordance with the procedures of §§ 124.41 and 124.42 if warranted by significant public interest. A hearing shall be held whenever requested by the State which proposed the permit.

(e) A public hearing held under paragraph (d) shall be conducted by an EPA panel in an orderly and expeditious manner. Members of this panel shall include the Regional Administrator, the Assistant Administrator for Enforcement, the General Counsel, or their respective representatives.

(f) At the conclusion of the public hearing the Regional Administrator shall reaffirm the original objection, modify the terms of the objection, or withdraw the objection, and shall notify the State of this decision.

(g) Where the Regional Administrator has objected to a proposed permit under this section, he or she may issue the permit in accordance with Parts 121, 122 and 124 and any other guidelines and requirements of the Act in the following circumstances:

(1) If no public hearing is held under paragraph (d) and the State does not resubmit a permit revised to meet the Regional Administrator's objection within 90 days of receipt of the objection; or

(2) If a public hearing is held under paragraph (d) and the State does not resubmit a permit revised to meet the Regional Administrator's objection or modified objection within 30 days of the date of the Regional Administrator's notification under paragraph (f) of this section.

[*Comment:* Where the time set out in this paragraph expires without acceptable State action, exclusive authority to issue the permit passes to EPA.]

(h) In the case of proposed general permits for discharges other than from separate storm sewers substitute "EPA Deputy Assistant Administrator for Water Enforcement" for "Regional Administrator" whenever it appears in paragraphs (b), (c), (d), (f) and (g).

§ 123.24 Prohibitions.

Any State permit program shall provide that no permit shall be issued when EPA has objected in writing under section 402(d) or section 404(j) of the Act, whichever is applicable, and in the case of section 404 programs, in any defined area as to which the administrator has made a determination to prohibit or withdraw specification for disposal under section 404(c) of the act. In addition, no permit shall be issued if objected to by the Secretary pursuant to sections 402(b)(6) or 404(h)(1)(F) of the Act.

Subpart D—Enforcement Provisions

§ 123.31 Compliance evaluation programs.

(a) Any State program shall have procedures for receipt, evaluation, and investigation for possible enforcement action of all notices and reports required of permittees (or failure to submit such notices and reports).

(b) Any State section 402 permit program shall have procedures and ability for:

(1) The maintenance of a comprehensive inventory of all sources covered by NPDES permits and a forecast of all reporting requirements to the agency. Any compilation, index or inventory of such sources shall be made available to the Regional Administrator upon request;

(2) Initial screening (i.e., pre-enforcement evaluation) of all permit or grant-related compliance information to identify violations and to establish the priority for further substantive technical evaluation;

(3) Following the initial screening, a substantive technical evaluation, where warranted, of all permit or grant-related compliance information to determine the appropriate agency response;

(4) The maintenance of a management information system which supports and guides the activities of this paragraph and paragraph (c).

(c) Any State program shall have inspection and surveillance procedures to determine, independent of information supplied by dischargers, compliance or noncompliance with applicable program requirements, standards and limitations, filing requirements and permit terms or conditions, including the following:

(1) A program which is capable of surveying State waters to identify dischargers subject to regulation who have failed to apply for permits;

(2) A program for periodic inspections of the activities subject to regulation. The facilities of major dischargers (for a discussion of "major discharger", see *Comment* to § 122.23) shall be inspected at least annually. These inspections shall:

(i) Determine compliance or noncompliance with issued permit terms and conditions and other program requirements, and, in particular, compliance or noncompliance with specific standards and limitations, operation and maintenance requirements, and schedules of compliance;

(ii) Verify the accuracy of information submitted by permittees in reporting forms and other forms supplying monitoring data;

(iii) Verify the adequacy of sampling, monitoring and other methods used by permittees to develop that information; and

(3) A program for investigating evidence of violations of applicable program requirements, standards and limitations, filing requirements, or permit terms and conditions indicated by reports and notifications evaluated under paragraph (b) or by the survey, inspection, and surveillance activities in paragraphs (c) (1) and (2) of this section. This program shall include procedures for receiving and ensuring proper consideration of evidence submitted by the public about violations. Public effort in reporting violations shall be encouraged, and the State Director shall make available information on reporting procedures.

(d) Inspections shall be conducted, samples shall be taken and other information shall be gathered in a manner that will produce evidence admissible in an enforcement proceeding or in court.

§ 123.32 Enforcement.

Any State agency administering a permit program shall have the following powers and procedures and recourse to criminal and civil remedies:

(a) In the case of Section 402 programs, procedures which enable the State Director immediately and effectively to halt or eliminate any imminent or substantial endangerment to the public health or welfare resulting from the discharge of pollutants:

(1) By an order or suit in the appropriate State court to immediately restrain any person causing or contributing to the discharge of pollutants; or

(2) By a procedure for immediate telephone notice to the Regional Administrator of any actual or threatened endangerment to the public health or welfare resulting from the discharge of pollutants.

(b) In the case of section 404 programs, procedures which enable the State Director immediately and effectively to halt or eliminate any unauthorized discharges of dredged or fill material, including the authority to do each of the following:

(1) Issue a cease and desist or an interim protective order to any person responsible for or involved in an unauthorized discharge;

(2) Sue in the appropriate State court to immediately restrain any person responsible for or involved in an unauthorized discharge; and

(3) Immediately notify the Regional Administrator by telephone of any actual or threatened endangerment to the public health or welfare resulting from any discharge of dredged or fill material.

(c) Procedures which enable the State Director to sue in courts of competent jurisdiction to enjoin any threatened or continuing violation of any permit term or condition without the necessity of a prior revocation of the permit.

(d) Procedures which enable the State Director to enter any premises in which a source of a discharge, including a treatment facility, is located or in which records must be kept under terms or conditions of a permit, and otherwise to investigate, inspect or monitor any suspected violations of applicable standards and limitations or of permit terms or conditions.

(e) Procedures which enable the State Director to require compliance with and to assess or to sue to recover in court civil penalties, for the violation by any person of the following:

(1) Any applicable standards and limitations;

(2) Any permit term or condition;

(3) Any filing requirements;

(4) Any duty to allow or carry out inspection, entry, or monitoring activities;

(5) any order issued by the State Director under paragraph (a) or (b) of this section; or

(6) Any rules, regulations, or orders issued by the State Director.

(f) Procedures which enable the State Director to seek criminal fines for the willful or negligent violation by any person of any of the following:

(1) Any applicable standard or limitations;

(2) Any permit term or condition; or

(3) Any filing requirements.

(g) Procedures which enable the State Director to seek criminal fines against any person who knowingly makes any false statement, representation, or certification in any permit program form or any notice or report required by the terms and conditions of any issued permit or who knowingly renders inaccurate any monitoring device or method required to be maintained by the State Director.

[*Comment:* It is understood that in many States the State Director is represented in State courts by the State Attorney General or other appropriate legal officer. While the State Director need not appear in court actions under this section, he or she should have the power to request that such actions be brought.]

(h)(1) The maximum civil penalties and criminal fines that can be sought by the State Director under paragraphs (e), (f) and (g) of this section shall be comparable to similar maximum amounts that can be sought by the Administrator under section 309 of the Act. The maximum amounts of these civil penalties or criminal fines shall be applicable to each violation specified in paragraphs (e), (f) and (g) of this section, or, if the violation is continuous, to each day the discharge occurs.

(2) The burden of proof and degree of knowledge or intent required under State law for establishing violations under paragraphs (e), (f) and (g) shall be no greater than the burden of proof or degree of knowledge or intent EPA must show when it brings an action under section 309 of the Act.

[*Comment:* For example, this requirement is not met if the State law includes any mental state as an element of proof for civil violations.]

(i) Any civil penalty assessed, sought, or agreed upon by the State Director under paragraph (e) of this section shall be appropriate to the violation. A civil penalty agreed upon by the State Director in settlement of administrative or judicial litigation may be adjusted by a percentage which represents the likelihood of success of establishing the underlying violation or violations in such litigation. In the event that such a civil penalty would be so severely disproportionate to the resources of the owner or operator of the violating facility that its imposition, together with the costs of expeditious compliance, would jeopardize its continuance in business, the payment of the penalty may be deferred or the penalty may be forgiven in whole or in part, as circumstances may warrant. For violations resulting from a source's failure to bring itself into initial compliance with a statutory or final permit deadline, "appropriate to the

violation" as used in this paragraph, means a penalty which is equal to:

(1) An amount appropriate to redress the harm or risk of harm to public health or the environment; plus

(2) An amount appropriate to remove the economic benefit gained or to be gained from delayed compliance; plus

(3) An amount appropriate as a penalty for the violator's degree of recalcitrance, defiance, or indifference to requirements of the law; plus

(4) An amount appropriate to recover unusual or extraordinary enforcement costs thrust upon the public; minus

(5) An amount, if any, appropriate to reflect any part of the noncompliance attributable to the Government itself; minus

(6) An amount appropriate to reflect any part of the noncompliance caused by factors completely beyond the violator's control (e.g., floods, fires, etc.)

[*Comment:* The following enforcement options, while not mandatory, are highly recommended:

(i) Procedures for assessment by the State Director or by a State court of the costs of an investigation, inspection, or monitoring survey which led to the establishment of the violation;

(ii) Procedures which enable the State Director to assess or to sue any person responsible for an unauthorized discharge for any expenses incurred by the State in removing, correcting, or terminating any adverse effects upon water quality resulting from the unauthorized discharge, whether or not accidental; and

(iii) Procedures which enable the State Director to sue for compensation for any loss or destruction of wildlife, fish, or aquatic life, and for any other actual damages caused by an unauthorized discharge either on behalf of the State, on behalf of any residents of the State who are directly aggrieved by the unauthorized discharge, or both.]

Subpart E—Planning and Conflict of Interest Requirements.

§ 123.41 Continuing planning process.

Any State permit program shall have an approved continuing planning process under 40 CFR Part 35, Subpart G and shall assure that its approved planning process is at all times consistent with the Act.

§ 123.42 Agency board membership.

(a) Each State permit program shall ensure that any board or body which approves all or portions of permits shall not include as a member any person who receives, or has during the previous two years received, a significant portion of income directly or indirectly from permit holders or applicants for a permit.

(b) For the purposes of this section:

(1) "Board or body" includes any individual, including the Director, who has or shares authority to approve all or portions of permits in the first instance, as modified or reissued, or on appeal.

(2) "Significant portion of income" shall mean 10 percent of gross personal income for a calendar year, except that it shall mean 50 percent of gross personal income for a calendar year if the recipient is over 60 years of age and is receiving that portion under retirement, pension, or similar arrangement.

(3) "Permit holders or applicants for a permit" shall not include any department or agency of a State government, such as a Department of Parks or a Department of Fish and Wildlife.

(4) "Income" includes retirement benefits, consultant fees, and stock dividends.

(c) for the purposes of this section, income is not received "directly or indirectly from permit holders or applicants for a permit" where it is derived from mutual fund payments, or from other diversified investments over which the recipient does not know the identity of the primary sources of income.

Subpart F—Procedures for Approval of State Permit Programs

§ 123.51 Section 402 approval process.

(a) After determining that a State program submission is complete, EPA shall publish notice of the State's application in the **Federal Register**, in enough of the largest newspapers in the State to attract statewide attention, and mail notice to persons known to be interested in such matters, including all people on EPA mailing lists under § 124.41(b) and appropriate State mailing lists and all permit holders and applicants within the State. This notice shall:

(1) Provide a comment period of not less than 45 days during which interested members of the public may express their views on the State program;

(2) Provide for a public hearing within the State to be held no less than 30 days after notice is published in the **Federal Register**;

(3) Indicate the cost of obtaining a copy of the State's submission;

(4) Indicate where and when the State's submission may be reviewed by the public;

(5) Indicate whom an interested member of the public should contact with any questions; and

(6) Briefly outline the fundamental aspects of the State's proposed program, and the process for EPA review and decision.

(b) Within 90 days of the receipt of a complete program submission under § 123.3 the Administrator shall approve or disapprove the program based on the requirements of this Part and of the Act and taking into consideration all comments received. A responsiveness summary shall be prepared by the Regional Office which identifies the public participation activities conducted, describes the matters presented to the public, summarizes significant comments received and explains the Agency's response to these comments.

(c) If the Administrator approves the State's section 402 program he or she shall notify the State and publish notice in the **Federal Register.** The Regional Administrator shall suspend the issuance of permits by EPA as of the date of program approval.

(d) If the Administrator disapproves the State program he or she shall notify the State of the reasons for the disapproval and of any revisions or modifications to the State program which are necessary to obtain approval.

§ 123.52 Section 404 approval process.

(a) Within 10 day of receipt of a State section 404 program submission under § 123.3 of this Part, the Administrator shall provide copies of the State's submission to the Corps of Engineers, the U.S. Fish and Wildlife Service, and the National Marine Fisheries Service.

(b) After determining that a State program submission is complete, EPA shall publish notice of a State's application in the **Federal Register,** in enough of the largest newspapers in the State to attract Statewide attention, and mail notice to persons known to be interested in such matters, including all people on appropriate State, EPA, and Corps of Engineers mailing lists and all permit holders and applicants within the State. This notice shall:

(1) Provide a comment period of not less than 45 days during which interested members of the public may express their views on the State program;

(2) Provide for a public hearing within the State to be held no less than 30 days after notice is published in the **Federal Register;**

(3) Indicate the cost of obtaining a copy of the State's submission;

(4) Indicate where and when the State's submission may be reviewed by the public;

(5) Indicate whom an interested member of the public should contact with any questions; and

(6) Briefly outline the fundamental aspects of the State's proposed program, and the process for EPA review and decision.

(c) Within 120 days of the receipt of a complete program submission under § 123.3 the Administrator shall approve or disapprove the program based on the requirements of this Part and of the Act and taking into consideration all comments received. A responsiveness summary shall be prepared by the Regional Office which identifies the public participation activities conducted, describes the matters presented to the public, summarizes significant comments received and explains the Agency's response to these comments.

(d) If the Administrator approves the State's section 404 program he or she shall notify the State and the Secretary and publish notice in the **Federal Register**. The Secretary shall suspend the issuance of section 404 permits by the Corps of engineers within the State, except for those waters specified in section 404(g)(1) of the Act as identified in the Memorandum of Agreement between the State and the Secretary (see § 123.5(a)).

(e) If the Administrator disapproves the State program he or she shall notify the State of the reasons for the disapproval and of any revisions or modifications to the State program which are necessary to obtain approval.

Subpart G—Revisions to Approved Programs

§ 123.61 Procedure for revision of State permit programs.

(a) Program revision may be initiated at the request of either EPA or the State. Program revision may be necessary when the controlling Federal or State statutory or regulatory authority is modified or supplemented. The State Director shall keep EPA fully informed of any proposed modifications to its basic statutory or regulatory authority or its forms, procedures or priorities.

(b) Revision of a State program shall be accomplished as follows:

(1) The State shall submit a modified program description, Attorney General's Statement, Memorandum of Agreement, or other documents as are necessary under the circumstances.

(2) If EPA determines that the proposed program modification(s) is substantial, the Agency shall issue public notice and provide at least 30 days for the public to comment. The public notice shall be mailed to interested persons and shall be published in enough of the largest newspapers in the State to attract statewide attention. The public notice shall summarize the proposed modifications and provide for the opportunity to request a public hearing. A hearing will be held if there is significant public interest.

(3) The program modification shall become effective upon the approval of the Administrator. Notice of approval of substantial program modifications shall be published in the **Federal Register.** Non-substantial program modifications may be approved by a letter from the Agency.

(c) The State Director shall notify EPA whenever the State proposes to transfer all or part of any program from the approved State agency to any other agency, and shall identify any new division of responsibilities among the agencies involved. The new agency is not authorized to administer the program until approved by the Administrator. Organizational charts required under § 123.4(b) shall be revised and resubmitted.

(d) If the Administrator has reason to believe that circumstances may have changed with respect to a State program, he or she may request, and the State shall provide a supplemental Attorney General's Statement, program description, other document or information as necessary.

§ 123.62 NPDES program revisions under the Clean Water Act of 1977.

(a) Approved State NPDES permit programs shall be revised, if necessary:

(1) To include authority to require permits for the discharges specified in sections 318 and 405(a) of the Act (see § 123.1(b)).

(2) To ensure that permits comply with the requirements of section 304(e) of the Act and Part 125, Subpart K (best management practices).

(3) To comply with the amendment to section 402(b)(8) of the Act, and with 40 CFR Part 403 (pretreatment programs).

(4) To authorize State issuance, monitoring (including reporting, entry, and inspection), and enforcement of permits to Federal facilities to the same extent as any person.

[*Comment:* Facilities on Indian lands are not necessarily Federal facilities.]

(b) All new programs must comply with these regulations upon approval. Any approved State section 402 permit program which requires modification to conform to this Part shall be so modified within one year of the date of promulgation of these regulations, unless a State must amend or enact a statute in order to make the required modification in which case such modification shall take place within two years, except that revision of State programs to implement the requirements of 40 CFR Part 403 (pretreatment) shall be accomplished as provided in 40 CFR § 403.10. In addition, approved States shall submit, within six months, copies of their permit forms for EPA review and approval.

[*Comment:* EPA anticipates that many approved States may need to revise their permit forms to comply with these regulations, particularly § 122.14.]

(c) Failure of an approved State to modify its permit program under this section constitutes grounds for withdrawal of program approval.

6. Part 124 is revised to read as follows:

PART 124—PROCEDURES FOR DECISIONMAKING REGARDING NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM PERMITS

Subpart A—Applicability

Sec.
124.1 Purpose and scope.
124.2 Definitions.

Subpart B—The Application Process

124.11 Application for a permit.
124.12 Special provisions for applications from new sources.
124.13 Requests for modification, revocation and reissuance, or termination.
124.14 Permits required on a use-by-case basis.
124.15 Decisions on permit denials and terminations.

Subpart C—State Certification

124.21 Circulation of applications and draft permits to certifying States.
124.22 State certification.
124.23 Effect of State certification.
124.24 Special provisions for State certification and concurrence in applications for section 301(h) modifications.

Subpart D—Preparation of a Draft Permit

124.31 Draft permit after application.
124.32 Other draft permits.
124.33 Statement of basis.
124.34 Fact sheet.
124.35 Administrative record for EPA draft permits.
124.36 Applicability of Subpart D to draft permits incorporating section 301(h) modifications.

Subpart E—Public Comment and Hearings

124.41 Public notice regarding permits and permit hearings.
124.42 Public comments and hearings.
124.43 Obligation to raise points and provide information during the comment period.
124.44 Terms requested by the Corps of Engineers and other governmental agencies.
124.45 Reopening of comment period.

Subpart F—Special Provisions for Variances and Statutory Modifications

124.51 Time deadlines for applications for variances from and modifications of effluent limitations.
124.52 Decisions on variances and modifications.
124.53 Procedures for variances and modifications where EPA is the permit issuing authority.
124.54 Appeals of modifications and variances.
124.55 Special provisions for modifying the secondary treatment requirements under section 301(h).
124.56 Special procedures for decisions on thermal variances (section 316(a)).

Subpart G—Issuance and Effective Date of Permit

124.61 Issuance and effective date of permit; stays.
124.62 Final Environmental Impact Statement.
124.63 Response to comments.
124.64 Administrative record for final permit issued by EPA.

Subpart H—Evidentiary Hearings for EPA-Issued Permits

124.71 Applicability.
124.72 Definitions.
124.73 Filing and submission of documents.
124.74 Requests for evidentiary hearing.
124.75 Decision on request for a hearing.
124.76 Obligation to raise issues and submit evidence before a final permit is issued.
124.77 Notice of the grant of a hearing.
124.78 Ex parte communications.
124.79 Additional parties and issues.
124.80 Filing and service.
124.81 Assignment of Administrative Law Judge.
124.82 Consolidation and severance.
124.83 Prehearing conferences.
124.84 Summary determination.
124.85 Hearing procedure.
124.86 Motions.
124.87 Record of hearings.
124.88 Proposed findings of fact and conclusions; brief.
124.89 Decisions.
124.90 Interlocutory appeal.
124.101 Appeal to the Administrator.

Subpart I—Non-Adversary Procedures for Initial Licensing

124.111 Applicability.
124.112 Relation of other Subparts.
124.113 Public notice regarding draft permits and permit conditions.
124.114 Hearings.
124.115 Effect of denial or absence of request for hearing.
124.116 Notice of hearing.
124.117 Request to participate in hearing.
124.118 Submission of written comments on draft permit.
124.119 Presiding Officer.
124.120 Panel hearing.
124.121 Opportunity for cross-examination.
124.122 Record for final permit.
124.123 Filing of brief, proposed findings of fact and conclusions of law and proposed modified permit.
124.124 Recommended decision.
124.125 Appeal from or review of recommended decision.
124.126 Final decision.
124.127 Final decision if there is no review.

Subpart J—Miscellaneous

124.131 Public access to information.
124.132 Delegation of authority; time limitations.
124.133 EPA Headquarters' approval of stipulation or consent agreement.
124.134 Additional time after service by mail.
124.135 Effective date of Part 124.

Authority.—Clean Water Act, as amended by the Clean Water Act of 1977, 33 U.S.C. 1251 et seq; Administrative Procedure Act, 5 U.S.C. 551 et seq.

Subpart A—Applicability

§ 124.1 Purpose and scope.

This Part specifies the procedures governing EPA's issuance of NPDES permits and permit appeals. The portions of this Part listed in § 123.12 apply to State permit programs approved under Part 123. This Part organizes permit decisions into a sequence of seven procedural stages. First, an application must be made in proper form (Subpart B). This application will then be circulated to affected States for certification or the State will certify the draft permit under section 401 (Subpart C). EPA will then prepare a draft permit or permit denial (Subpart D), which will be made available for public comment (Subpart E or I). This is the stage for interested governmental agencies, other than certifying States, to express their views of the permit. After these comments have been considered, EPA will issue a final permit (Subpart G or I), and any interested person may then request an evidentiary hearing on any factual questions involved. The initial decision made after that hearing may then be appealed to the Administrator. Under Part 124, decisions on variance requests will ordinarily be made during the permit issuance process (Subpart F). Requests for permit modifications and other changes in permit terms will be made where possible, through the same procedures that apply in making decisions on initial permits. Each such decision must move through the same procedures of notice-and-comment and potential hearings as the basic permit.

§ 124.2 Definitions.

(a) The definitions of Parts 122, 123 and 125 apply to this Part.

(b) "BAT" or "Best Available Technology" means the level of treatment of best available technology economically achievable as determined by the Administrator.

Subpart B—The Application Process

§ 124.11 Application for a permit.

(a) Any person who discharges or proposes to discharge pollutants, except persons covered by general permits under § 122.48, or excluded under § 122.4, shall complete, sign, and submit an application to the Regional Administrator, in accordance with Part 122, Subpart B.

(b) Expect as provided by § 124.32(a) no NPDES permit other than a general permit shall be issued until the applicant has filed a complete application that complies with the filing requirements in this Subpart and Part 122. If an applicant fails or refuses to correct deficiencies in its NPDES application form, the permit may be denied or appropriate enforcement action may be taken under sections 308, 309, or 402(h) of the Act.

(c) Permit applications shall comply with the signature and certification requirements of § 122.5.

(d) If the Director determines that further information or a site visit is necessary in order to evaluate the discharge completely and accurately, the applicant shall be notified and a date shall be scheduled for receipt of the requested information and for any necessary site visit.

(e) Special procedures for applications for variances and statutory modifications are provided in Subpart F.

§ 124.12 Special provisions for applications from new sources.

(a) The owner or operator of any facility which may be a new source as defined in § 122.3(v) and which is located in a State without an approved NPDES program must comply with the provisions of this section in addition to the requirements of § 124.11.

(b)(1) Before beginning any on-site construction as defined in § 122.47, the owner or operator of any facility which may be a new source must submit information to the Regional Administrator so that he or she can determine if the facility is a new source. The Regional Administrator may request any additional information needed to

determine whether the facility is a new source.

(2) The Regional Administrator shall make an initial determination whether the facility is a new source within 30 days of receiving all necessary information under paragraph (b)(1).

(c) The Regional Administrator shall issue a public notice in accordance with § 124.41 of the new source determination under paragraph (b). The notice shall state that the applicant, if determined to be a new source, must comply with the environmental review requirements of 40 CFR § 6.900 *et seq.*

(d) Any interested person may challenge the Regional Administrator's initial new source determination by requesting an evidentiary hearing under § 124.74 within 30 days of issuance of the public notice of the initial determination. The Regional Administrator may defer the evidentiary hearing on the determination until after a final permit decision is made under § 124.61, and consolidate the hearing on the determination with any hearing on the permit.

§ 124.13 Requests for modification, revocation, and reissuance, or termination.

(a) If a discharger with a permit or an interested person believes that a modification, revocation or reissuance, or termination is justified under the standards of § 122.31, it may request a modification, revocation and reissuance, or termination from the Director in writing. The request shall set forth all facts or reasons known to the requester which may be relevant to a decision on the modification request.

(b)(1) If the Director agrees that the modification or revocation and reissuance request appears to meet the requirements of § 122.31, the Director shall formulate a draft permit under § 124.32 incorporating the changes. If additional information is needed to prepare a draft permit, the Director may request it under § 124.11(d) or in appropriate cases may require the submission of a complete new permit application under § 124.11(a). When a request for a modification under this section is granted and a new draft permit is formulated, only those terms dependent on the request will be reopened. All other aspects of the permit will remain in force until the expiration of the permit. If the permit is revoked and reissued, the draft permit is subject to the same procedures as if the permit had expired and was being reissued.

(2) If the Director agrees that the termination request appears to meet the requirements of § 122.31, the Director shall prepare a notice of intent to terminate under § 124.32.

(3) If the Director decides that the modification request does not appear to meet the requirements of § 122.31 the Director shall reply in writing to the discharger (and the person requesting the modification, if different) briefly setting forth in writing the reasons for that decision.

§ 124.14 Permits required on a case-by-case basis.

(a) Various sections of Part 122 allow the Director to determine, on a case-by-case basis, that certain concentrated animal feeding operations (§ 122.43), aquatic animal production facilities (§ 122.44), separate storm sewers (§ 122.46), and certain other facilities covered by general permits (§ 122.48) that do not generally require individual permits may be required to obtain one because of their contribution to water pollution.

(b) Whenever the Regional Administrator decides that an individual permit should be required under this section, the Regional Administrator shall inform the discharger in writing of that decision, the reasons underlying it and shall include an application form in such notice. The discharger must apply under § 124.11 for a permit within 60 days of such notice. The question whether the initial designation was proper will remain open for consideration during the public comment period under Subpart D and any subsequent hearing.

§ 124.15 Decisions on permit denials and terminations.

(a) The decision to deny a permit which has been applied for shall be made through the same procedures as any other decision on a permit. A draft notice of intent to deny will be issued and made available for public comment, accompanied by a fact sheet or statement of basis. A response to comments and final decision will then be prepared, and an evidentiary hearing with a right of appeal to the Administrator may be requested on the issues raised.

(b) The decision to terminate a permit shall be made through the same procedures that apply to any other permit action initiated by EPA under § 124.32.

(c) References to a "permit" or to decisionmaking on a permit in this Part shall be read to include decisions on permit denial or termination where necessary to carry out the intent of this section.

Subpart C—State Certification

§ 124.21 Circulation of applications or draft permits to certifying States.

(a) Under section 401(a)(1) of the Act, EPA may not issue a permit until a certification is granted or waived in accordance with that section by the State in which the discharge originates or will originate.

(b) When an application is received which does not include a State certification, the Regional Administrator shall forward the application to the certifying State agency with a request that certification be granted or denied.

(c) If State certification has not been received by the time the draft permit is prepared, the Regional Administrator shall send the certifying State agency:

(1) A copy of the draft permit;

(2) A statement that the EPA cannot issue or deny the permit until the certifying State agency has granted or denied certification under § 124.22, or waived its right to certify; and

(3) A statement that the right to certify will be deemed waived unless exercised within a specified reasonable time which shall not exceed 60 days from the date the draft permit is sent to the State unless the Regional Administrator finds that unusual circumstances require a longer time.

§ 124.22 State certification.

(a) Any State certification shall be issued or denied within the reasonable time specified under § 124.21(c)(3). The State shall provide notice of its action, including a copy of any certification, to the applicant and the Regional Administrator.

(b) A State certification shall be made in writing and shall include:

(1) The terms and conditions which will result in compliance with the applicable provisions of sections 208(e), 301, 302, 303, 306, and 307 of the Act and with appropriate requirements of State law;

(2) Where the State certifies a draft permit instead of an application, any conditions, more stringent than those in the draft permit, which the State finds necessary to comply with the requirements listed in paragraph (b)(1) of this section. For each such condition, the provision of the Act or State law which forms the basis for the condition shall be identified. Failure to provide such a statement shall be deemed a waiver of the right to certify with respect to such condition; and

(3) A statement with respect to each term and condition of the draft permit of the extent to which such term or condition can be made less stringent

without violating the requirements of State law including water quality standards. Failure to provide such a statement shall be deemed a waiver of the right to certify with respect to any such less stringent term or condition which may be established during the EPA permit issuance process.

[*Comment:* The requirement of paragraph (b)(3) of this section is necessary to enable the certification to serve its statutory function without requiring continual resubmission to the State. For example, a State might certify that a draft permit containing a technology-based limitation of 300 kg/day of BOD will meet State water quality standards and other State law requirements. However, if during the permit issuance process EPA decides that 400 kg/day is the appropriate technology requirement, it is not clear at present whether the previous State certification continues to be valid. It would be impracticable and would add to delay in permit issuance if EPA resubmitted such permits to the State each time EPA considered setting a less stringent limitation than contained in the draft permit. The requirement that States clearly identify what conditions are necessary to meet State law will simplify the permit issuance process and make certification more useful. However, States may not require EPA to adopt less stringent requirements. See § 124.23(c).]

§ 124.23 Effect of State certification.

(a) Where certification is required under section 401(a)(1) of the Act, no final permit shall be issued:

(1) If certification is denied, or

(2) Unless the final permit incorporates any requirements specified in the certification under § 124.22(b)(1) and (2).

(b) If the State law upon which a certification is based changes, or if a State court stays, vacates, or remands a certification, a State which has issued a certification under § 124.22 may issue a modified certification or notice of waiver and forward it to EPA. If the modified certification is received prior to final Agency action on the permit, the permit shall be issued consistent with any more stringent conditions which are based upon State law identified in such certification. If the certification or notice of waiver is received after final Agency action on the permit, the Regional Administrator may modify the permit only to the extent necessary to delete any conditions based on a condition in a certification found invalid by a State court.

(c) A State may not condition a certification or deny a certification on the grounds that State law requires a less stringent condition. The Regional Administrator shall disregard any such certification conditions, and will consider such denials of certification to constitute waivers of certification.

[*Comment:* State certification rights proceed from the authority of States under section 510 of the Act to set more stringent limitations than those required by the Act. States may not require EPA to disregard or downgrade Federal requirements.]

(d) A permit may be modified during Agency review in any manner consistent with a certification meeting the requirements of § 124.22(b). No such modifications shall require EPA to submit the permit to the State for recertification.

(e) Review and appeals of conditions specified by the State shall be made through the applicable procedures of the State and may not be made through the procedures in this Part.

§ 124.24 Special provisions for State certification and concurrence in applications for section 301(h) modifications.

(a) Where an application for a permit incorporating a request under 301(h) of the Act is submitted to the State, the appropriate State official may either:

(1) Deny the request for the modified permit under section 301(h) (and so notify the applicant and EPA) and if the State is an approved NPDES State and the permit is due for reissuance, proceed to process the permit application under normal procedures; or

(2) Forward a certification meeting the requirements of this Subpart to the Administrator or a person designated by the Administrator.

(b) Where EPA issues a tentative determination on the request for a modified permit under section 301(h), and no certification has been received under paragraph (a), the Administrator or a person designated by the Administrator shall forward the tentative determination to the State in accordance with § 124.21(c) specifying a reasonable time for State certification and concurrence. If the State fails to deny or grant certification and concurrence under paragraph (a) within such reasonable time, certification will be deemed to be waived and the State will be deemed to have concurred in the issuance of a modified permit under section 301(h).

(c) Any certification provided by a State under paragraph (a)(2) shall constitute the State's concurrence (as required by section 301(h)) in the issuance of the section 301(h) modified permit subject to any conditions specified therein by the State.

[*Comment:* Section 301(h) certification/concurrence under this section will not be forwarded to the State by EPA for recertification after the permit issuance process. Accordingly, States must specify any conditions required by State law, including water quality standards, in the certification.]

Subpart D—Preparation of Draft Permit

§ 124.31 Draft permit after application.

(a) If a permit has been properly requested under § 124.11, the Director, after analyzing the data and other information concerning a permit furnished under Subparts B and C, and any other relevant information, shall tentatively decide whether to issue or deny the permit. Any Environmental Impact Statement prepared under 40 CFR § 6.912, and any other applicable factors listed in 40 CFR § 6.920, shall be considered by the Regional Administrator in deciding whether to issue a permit for a new source under this section.

(b) If the Director tentatively decides to issue a permit, a draft permit shall be prepared containing:

(1) All conditions, limitations, or requirements specified in § 122.14;

(2) All effluent limitations, standards, prohibitions, and conditions required by § 122.15, including, where applicable, any conditions certified by a State agency under Subpart C, and all variances or other modifications that are to be included under Subpart F. All effluent limitations and standards shall be calculated and specified as required by § 122.16;

(3) All compliance schedules required by § 122.17; and

(4) All monitoring requirements required by § 122.20.

(c) Any draft permit formulated by EPA shall be based on the administrative record required by § 124.35.

(d) If the Regional Administrator determines under 40 CFR § 6.910 that an EIS shall be prepared for a new source the public notice of the draft permit under this section shall occur at the same time or after a draft EIS is issued.

§ 124.32 Other draft permits.

(a) In the following cases the Director may formulate a draft permit without having received an application from a discharger.

(1) If the Director decides that a permit should be modified, or revoked and reissued under § 122.31, the Director shall formulate a draft permit reflecting the modifications or a draft reissued permit including a notice of intent to revoke the existing permit. If the Director decides that a permit should be terminated, the Director shall issue a notice of intent to terminate.

(2) General permits to be issued either by EPA or by States under § 122.48 shall be proposed in draft form, shall contain the designation of the General Permit Program Area (as defined in § 122.48(a)(2)) and, except for general permits for separate storm sewers, shall be sent to the EPA Deputy Assistant Administrator for Water Enforcement for concurrence or objection during the public comment period. No final permit shall be issued if the EPA Deputy Assistant Administrator for Water Enforcement objects to the general permit. Such objection must be made within 90 days from the date of publication of the public notice for the draft general permit under § 124.41(f).

(b) Any draft permit or notice of intent to revoke or terminate, issued under paragraph (a), shall be based on the administrative record defined in § 124.35.

§ 124.33 Statement of basis.

A statement of basis shall be prepared for every draft permit formulated under §§ 124.31 or 124.32 where a fact sheet is not required under § 124.34. The statement of basis shall briefly describe the derivation of the terms and conditions of the permit and the reasons for them. For instance, if effluent limitations in a permit are based upon the application of treatment technologies, the statement of basis shall identify the technologies and the degree of effluent reduction or control which the treatment technologies are assumed to achieve. The statement of basis shall be part of the administrative record and shall be made available to the discharger and other members of the public on request.

§ 124.34 Fact sheet.

(a) A fact sheet shall be prepared for every draft permit for a major discharger (as established in EPA's annual operating guidance for EPA Regional Offices and the States), any draft permit which incorporates a variance or modification, general permits under § 124.48, and every draft permit which the Regional Administrator or State Director finds is the subject of widespread public interest or raises major issues. The fact sheet shall briefly set forth the major facts and the significant factual, legal, methodological, and policy questions considered in setting the terms of the draft permit. The Director shall send this fact sheet to the applicant, to the District Engineer of the Corps of Engineers, to the Regional Director of the U.S. Fish and Wildlife Service and the National Marine Fisheries Service, to other interested State and Federal agencies, (including EPA where the draft permit is prepared by the State) and to any other person on request. Any of these persons may waive their right to receive a fact sheet for any classes and categories of permits.

(b) The fact sheet shall include: (1) A brief explanation of the express statutory or regulatory provisions on which permit requirements are based, and for permits issued by EPA, appropriate supporting references to the administrative record required by § 124.35;

(2) Any calculations or other necessary explanation of the derivation of specific effluent limitations and conditions, including a citation to the applicable guideline or development documents or standard provisions as required under § 122.15 and reasons why they are applicable or an explanation of how the alternate effluent limitations were developed;

(3) Where appropriate, a sketch or detailed description of the location of the discharge described in the application;

(4) A quantitative description of the discharge described in the application;

(5) Reasons requested variances or modifications do or do not appear justified;

(6) For EPA-issued permits the results of any State certification under Subpart C;

(7) Name and telephone number of a person who can provide additional information; and

(8) Any information, not otherwise specified herein, required by § 124.33.

§ 124.35 Administrative record for EPA draft permits.

(a) Decisions by the Regional Adminstrator to formulate a draft permit under § 124.31 or § 124.32 shall be made on the basis of the administrative record defined in this section.

(b) The record for a draft permit under § 124.31 shall consist of:

(1) The initial application and any supporting data furnished by the applicant;

(2) The draft permit;

(3) The statement of basis required by § 124.33 or fact sheet prepared under § 124.34;

(4) All documents cited in the fact sheet or the statement of basis;

(5) Other documents contained in the supporting file for the permit, including correspondence, telephone and meeting memoranda, compliance reports, etc;

(6) All comments submitted on a new source determination under § 124.12, and any other documents EPA considers relevant to the determination; and

(7) Any environmental assessment, Environmental Impact Statement, negative declaration, or environmental impact appraisal that may have been prepared.

(c) The record for formulating a draft permit under § 124.32 shall consist of the draft permit, the statement of basis required by § 124.33 or fact sheet prepared under § 124.34 and all documents cited in the fact sheet or the statement of basis.

(d) Material readily available at the issuing Regional Office or published material which is generally available, and which is included in the administrative record under the standards of paragraphs (b) and (c), does not need to be physically included in the same file as the rest of the record as long as it is specifically referenced in the statement of basis or the fact sheet.

(e) No later than the time a draft permit is issued, a Record Clerk shall be designated with responsibility for maintaining the records established under this section. Copying of any documents in the record shall be allowed under appropriate arrangements to prevent their loss. The charge for such copies shall be made in accordance with the written schedule contained in 40 CFR Part 2.

[*Comment:* The administrative record for draft permits under this section will comprise the bulk of the material for the final administrative record. See § 124.64.]

§ 124.36 Applicability of Subpart D to draft permits incorporating section 301(h) modifications.

Subpart D is applicable to draft permits incorporating section 301(h) modifications except that the terms "Administrator or a person designated by the Administrator" shall be substituted for the terms "Regional Administrator" as appropriate.

Subpart E—Public Comment and Hearings

§ 124.41 Public notice regarding permits and permit hearings.

(a) Notices shall be circulated in a manner designed to inform interested persons of a hearing or determination dealing with permit denial or issuance. Notice of a draft permit shall allow at least 30 days for public comments and notice of a hearing shall be given 30 days before the hearing.

[*Comment:* At the discretion of the Director, this could include press releases or the use of additional means to elicit public participation.]

(b) Notice of the formulation of any draft permit and notice of all hearings shall be given by the Director:

(1) By mailing a copy to the applicant; to the U.S. Army Corps of Engineers, to Federal and State agencies with jurisdiction over fish, shellfish and wildlife resources and to other appropriate governmental authorities including any affected State; to any person on request and to all persons on a mailing list developed from those who request to be on the list and by using the following methods:

(i) Soliciting persons for "area lists" from participants in past permit proceedings in that area; and

(ii) Notifying the public as to the availability of mailings of public notices through periodic press publication and notices in such publications as Regional and State funded newsletters, environmental bulletins or State Law Journals. The mailing list may be updated from time to time by requesting an indication of continued interest in being on the mailing list; and

(2) By any of the following methods:

(i) By publication of a notice meeting the requirements of paragraph (c) in a daily or weekly newspaper within the area affected by the discharge; or

(ii) By posting a copy of the information required under paragraph (c) and (d) at the principal office of the municipality or political subdivision affected by the facility or discharge, and by posting a copy at the United States Post Office serving those premises; or

(iii) Where the State is the permit issuing authority in any other manner constituting legal notice under State law.

(3) Any person otherwise entitled to receive notice under paragraph (1) of this section may waive the right to receive notice for any classes and categories of permits.

(c) All public notices issued under this section shall contain the following information:

(1) Name and address of the office processing the application or conducting the hearing;

(2) Except in the case of general permits, name and address of the applicant and the discharger (if different from the applicant) and a general description of the location of each existing or proposed discharge point, including the receiving water;

(3) Name of a person, and an address and telephone number where interested persons may obtain further information, including copies of the draft permit, the statement of basis or fact sheet;

(4) For EPA-issued permits, the location of the administrative record required by § 124.35 and the times at which it will be open for public inspection;

(5) If the applicant has properly applied under section 316(a) for a thermal variance, a statement to that effect. The notice shall state that all data submitted by the applicant are available as part of the administrative record for public inspection during office hours. The notice shall also state that any person may comment in writing under § 124.42 upon the applicant's desired alternative effluent limitations and may also request a hearing.

(d) Mailed public notice to those identified in paragraph (b)(1) shall contain the information required under paragraph (c) and the following:

(1) A brief description of the applicant's activities or operations that result in the discharge described in the application, and a statement whether the application pertains to a new or existing discharge;

(2) A brief description of the comment procedures required by § 124.42, including the time and place of any public hearing that will be held.

(3) If the discharge is from a new source, a statement of the Regional Administrator's decision as to whether an Environmental Impact Statement will be or has been prepared.

(4) A statement of the right and procedures to request a public hearing.

(e) In addition to the information required by paragraphs (c) and (d) above, mailed public notice of a draft permit for a discharge where a section 316(a) application has been filed under § 124.51(b)(6) shall include:

(1) A statement that the thermal component of the discharge is subject to effluent limitations under sections 301 or 306 of the Act and a brief description including a quantitative statement of the thermal effluent limitations proposed under sections 301 or 306; and

(2) A statement that a section 316(a) application has been filed and that alternative less stringent effluent limitations may be imposed on the thermal component of the discharge under section 316(a) and a brief description including a quantitative statement of the alternative effluent limitations, if any, included in the application.

(3) If the applicant has filed an early screening application for a section 316(a) variance under § 125.72, a statement that the applicant has submitted such a plan.

(f) Notice of the formulation of a draft general permit and the issuance of a final general permit under § 122.48 shall meet:

(1) The requirements of paragraphs (c) and (d) and shall be published in a daily or weekly newspaper within the area affected by the discharge and in the Federal Register for EPA-issued permits or in a manner constituting legal notice under State law for State-issued permits.

(2) The public notice for general permits shall also include:

(i) A brief description of the types of activities or operations to be covered by the general permit;

(ii) A map or description of the General Permit Program Area; and

(iii) The basis for choosing the General Permit Program Area.

(3) The Director shall use all other reasonable means to notify affected dischargers of the draft and final general permit.

(g) In addition to the information required under paragraph (c), public notice of a public hearing held under § 124.42(b) shall contain the following information:

(1) Reference to the date of the public notice of the draft permit;

(2) Date, time and place of the hearing; and

(3) In the case of a mailed public notice, a brief description of the nature and purpose of the hearing, including the applicable rules and procedures.

(h) A public notice of the grant of an evidentiary hearing under Subpart H shall contain the information required under paragraph (c), (g)(1), (g)(3) and a mailed public notice of such a hearing shall also include:

(1) Reference to any public hearing under § 124.42 on the disputed permit;

(2) Name and address of the person(s) requesting the evidentiary hearing;

(3) Brief description of the permit terms and conditions which have been contested and for which the evidentiary hearing has been granted;

(4) Brief description of the nature and purpose of the hearing including the following declarations:

(i) Any person seeking to be a party must file a request to be admitted as a party to the hearing within 15 days of the date of publication of this notice;

(ii) Any person seeking to be a party may, subject to the requirements of § 124.76, propose material issues of fact or law not already raised by the original requester or another party;

(iii) The terms and conditions of the permit(s) at issue may be amended after the evidentiary hearing and any person interested in those permit(s) must request to be a party in order to preserve any right to appeal or otherwise contest the final administrative determination.

(5) Names or organizational description of the EPA employees who shall constitute "Agency trial staff" and the "decisional body" under § 124.78 who are subject to the *ex parte* communication rules.

(6) The name, address and office telephone number of the Regional Hearing Clerk.

(i) A public notice for a draft permit that will be processed under Subpart I shall include the information in paragraphs (c) and a statement that any hearing will be held under the non-adversary initial licensing procedures. In addition, a mailed public notice shall include:

(1) The information in paragraph (d) except that a public hearing under paragraph (d)(2) is discretionary with the Regional Administrator;

(2) A statement that the permit will be processed under the nonadversary procedures for initial licensing of Subpart I, together with a brief description of those procedures. This description shall state explicitly the manner and timing for any person to request a hearing on the permit. If EPA has decided on its own motion to hold a hearing, the notice shall so state, and shall also contain the information required by § 124.41(j);

(3) A statement that written comments on the draft permit and, in the case of a section 301(h) application, the tentative determination to grant or deny the application submitted to EPA with thirty (30) days of the date of the notice will be considered by EPA in making a final decision on the application. This 30-day period may be extended up to 60 days *sua sponte* or on request of an interested party;

(4) In the case of the public notice of the draft permit or denial of an application for a modified permit under section 301(h) shall include:

(i) A summary of the information contained in the application; and

(ii) A summary of the tentative determination prepared under § 124.114(f).

(j) A notice of a grant of a panel hearing requested under Subpart I shall include the applicable information from paragraph (i). In addition, the mailed public notices shall include:

(1) Name and address of the person requesting the hearing, or a statement that the hearing is being held by order of the Regional Administrator, and the name and address of each known party to the hearing;

(2) Names or organization description of the EPA employees who shall constitute the "decisional body" and the "Agency trial staff," under § 124.78 who are subject to the *ex parte* communication rules;

(3) A statement whether the recommended decision will be issued by the Presiding Officer or by the Regional Administrator;

(4) The due date for filing a written request to participate in the hearing under § 124.117;

(5) The due date for filing comments under § 124.118; and

(6) The name, address, and office telephone number of the Regional Hearing Clerk.

§ 124.42 Public comments and hearings.

(a) A comment period of at least 30 days following the date of public notice of the formulation of a draft permit shall be provided. During this period any interested persons may submit written comments on the draft permit and administrative record and may request a public hearing. A request for a public hearing shall be in writing and shall state the nature of the issues to be raised. All comments shall be considered in preparing the final permit and shall be responded to as provided in § 124.63.

(b)(1) In appropriate cases, including cases where there is significant public interest, the Director may hold a public hearing on a draft permit or permits. Public notice of that hearing shall be given as specified in § 124.41.

(2) Any person appearing at such a hearing may submit oral or written statements and data concerning the draft permit. Reasonable limits may be set upon the time allowed for oral statements, and the submission of statements in writing may be required.

§ 124.43 Obligation to raise points and provide information during the comment period.

All persons, including applicants, who believe any of the terms of a draft permit are not appropriate either because one of the variances or modifications listed in Subpart F should be granted or for some other reason, must raise all reasonably ascertainable issues and submit all arguments and factual grounds supporting their position, including all supporting material by the close of the public comment period (including any public hearing period) required by § 124.42.

§ 124.44 Terms requested by the Corps of Engineers and other governmental agencies.

(a) If the District engineer of the Corps of Engineers advises the Director in writing during the public comment period that anchorage and navigation of any of the waters of the United States would be substantially impaired by the granting of a permit, the permit shall be denied and the applicant so notified. If the District Engineer advises the Director that imposing specified conditions upon the permit is necessary to avoid any substantial impairment of anchorage or navigation, then the Director shall include the specified conditions in the permit. Review or appeal of a denial of a permit or of conditions specified by the District Engineer shall be made through the applicable procedures of the Corps of Engineers, and may not be made through the procedures provided in this Part.

(b) If during the comment period the U.S. Fish and Wildlife Service, the National Marine Fisheries Service, or any State or other Federal Agency with jurisdiction over fish, wildlife, or public health advises the Director in writing that the imposition of specified conditions upon the permit is necessary to avoid substantial impairment of fish, shellfish, or wildlife resources, the Director may include the specified conditions in the permit to the extent they are determined necessary to carry out the provisions of the Act.

(c) In appropriate cases the Director may consult with one or more of the agencies referred to in this section before issuing a draft permit and may reflect their views in the statement of basis, the fact sheet, or the draft permit.

§ 124.45 Reopening of comment period.

If any information or arguments submitted during the public comment period, including information or arguments whose submission is required under § 124.43, appears to raise substantial new questions concerning a permit, the Director may conclude that one of the following actions is necessary for an informed decision:

(a) Formulation of a new draft permit, appropriately modified, under § 124.42;

(b) Preparation of a fact sheet or revised fact sheet under § 124.34 and reopening the comment period under § 124.42; or

(c) Reopening of the comment period under § 124.42 to give interested persons an opportunity to comment on the information or arguments submitted.

In each case the notice required by § 124.41 shall be given.

Subpart F—Special Provisions for Variances and Statutory Modifications

§ 124.51 Time deadlines for applications for variances from and modifications of effluent limitations.

(a) Except as provided in paragraph (d), applications for variances from and

modification of effluent limitations under the statutory and regulatory provisions of the Act shall be made as provided in paragraph (b) and (c).

(b) *Dischargers other than publicly owned treatment works.* (1) A request for a variance based on the presence of "fundamentally different factors" from those on which the effluent limitations guideline was based, shall be made by the close of the public comment period under § 124.42. The request shall explain why the requirements of § 124.43 and Part 125, Subpart D have been met.

(2) A request for a variance from the BAT requirements for section 301(b)(2)(F) pollutants (commonly called "non-conventional" pollutants) pursuant to section 301(c) because of the economic capability of the owner or operator; or pursuant to section 301(g) because of certain environmental considerations, where those requirements were based on effluent limitation guidelines, must be made by:

(i) Submitting an initial application to the Regional Administrator and the State Director stating the name of the applicant, the permit number, the outfall number(s), the applicable effluent guideline, and whether the applicant is applying for a section 301(c) or section 301(g) modification or both. This application shall be filed not later than:

(A) September 25, 1978, for a pollutant which is controlled by a BAT effluent limitation guideline promulgated before December 27, 1977; or

(B) 270 days after promulgation of an applicable effluent limitation guideline for guidelines promulgated after December 27, 1977;

(ii) Submitting a completed request demonstrating that the requirements of § 124.43 and the applicable requirements of Part 125 have been met no later than the close of the public comment period under § 124.42.

(iii) Requests for variance of effluent limitations based on other than effluent limitation guidelines, shall comply only with paragraph (ii) and need not submit an initial application under paragraph (i).

(3) An extension under section 301(i)(2) of the statutory deadlines in sections 301(b)(1)(A) or (b)(1)(C) based on delay in completion of a publicly owned treatment work into which the source is to discharge must have been requested on or before June 26, 1978, or 180 days after the relevant publicly owned treatment works requests an extension under paragraph (c)(2) of this section, whichever is later. The request shall explain why the requirements of Part 125, Subpart J have been met.

(4) An extension under section 301(k) from the statutory deadline of section 301(b)(2)(A) for best available control technology based on the use of innovative technology may be requested no later than the close of the public comment period under § 124.42 for the discharger's initial permit requiring compliance with best available control technology. The request shall explain why the requirements of § 124.43 and Part 125, Subpart C have been met.

(5) A modification under section 302(b)(2) of requirements under section 302(a) for achieving water quality related effluent limitations may be requested no later than the close of the public comment period under § 124.42 on the permit from which the variance is sought. The request shall explain why the requirements of that section have been met.

(6) A variance under section 316(a) for the thermal component of any discharge must be filed with a timely application for a permit under § 124.11. If thermal effluent limitations are established under section 402(a)(1) or are based on water quality standards the application shall by filed by the close of the public comment period under § 124.42. A copy of the application as required under Part 125, Subpart H shall be sent simultaneously to the appropriate State or interstate certifying agency. (See § 124.56 for special procedures for section 316(a) thermal variances.)

(c) *Publicly owned treatment works.* (1) A preliminary application for a modification under section 301(h) from requirements of section 301(b)(1)(B) for discharges into marine waters must have been submitted to the Agency no later than September 25, 1978. A final application must be submitted in accordance with the filing requirements of Part 125, Subpart G, after that Subpart is promulgated, and shall demonstrate on its face that all the requirements of Part 125, Subpart G have been met. (See § 124.55 for special rules for section 301(h) modifications.)

(2) An extension under section 301(i)(1) from the statutory deadlines in sections 301(b)(1)(B) or (b)(1)C) based on delay in the construction of publicly owned treatment works must have been requested on or before June 26, 1978.

(3) A modification under section 302(b)(2) of the requirements under section 302(a) for achieving water quality based effluent limitations may be requested no later than the close of the public comment period under § 124.42 on the permit from which the modification is sought.

(d)(1) Notwithstanding any later time specified in paragraphs (b) and (c), the Director may notify the applicant before a draft permit is published pursuant to § 124.41 that the draft permit will likely contain limitations which are eligible for variances or modifications. In such notice the Director may require the applicant as a condition of consideration of any potential variance request to submit a full application within a specified reasonable time before the draft permit is formulated. This notice can be sent before the application under § 124.11 has been submitted.

[*Comment:* This paragraph is intended to reduce the time for permit issuance, especially in those cases where it is clear that a variance or modification will be applied for, such as where the discharger has submitted a variance application under § 124.51(b)(2)(i) even before the permit application is filed under § 124.11.]

(2) A discharger who cannot file a complete request required under paragraphs (b)(2)(ii), (b)(2)(iii), (b)(3)(ii) or (b)(3)(iii) may request an extension to apply. Extensions shall be limited to the time the Director determines is necessary to satisfy the requirements of the appropriate regulations, but shall be no more than six months in duration. The request may be granted or denied in the discretion of the Director.

§ 124.52 Decisions on variances and modifications.

(a) The Director may grant or deny the following modifications or variances (subject to EPA objection under § 123.23 for State permits):

(1) Extensions under section 301(i) based on delay in completion of a publicly owned treatment works;

(2) After consultation with the Regional Administrator, extensions under section 301(k) based on the use of innovative technology; or

(3) Variances under section 316(a) for thermal pollution.

(b) The State Director may deny, or forward to the Regional Administrator with a written concurrence or submit to EPA without recommendation a completed application for:

(1) A variance based on the presence of "fundamentally different factors" from those on which an effluent limitations guideline was based;

(2) A variance based on the economic capability of the applicant under section 301(c) of the Act;

(3) A variance based upon certain water quality factors under section 301(g); of

(4) A modification of section 302(b)(2) requirements under section 302(a) (water quality related effluent limitations).

(c) The Regional Administrator may deny, or may forward to the EPA Deputy Assistant Administrator for Water Enforcement with recommendation for approval, an application for a variance listed in paragraph (b) which is forwarded by the State Director, or submitted to the Regional Administrator by the applicant where EPA is the permitting authority.

(d) The EPA Deputy Assistant Administrator for Water Enforcement may approve or deny any variance application submitted under paragraph (c). If the EPA Deputy Assistant Administrator approves the variance, the Director may formulate a draft permit incorporating the variance. Any public notice of a draft permit for which a variance or modification has been approved or denied shall identify the applicable procedures for appealing that determination under § 124.54.

§ 124.53 Procedures for variances and modifications where EPA is the permit issuing authority.

(a) In states where EPA is the permit issuing authority and an application for a variance or modification is filed as required by § 124.51, the application shall be processed as follows:

(1) If at the time an application for a variance or modification is submitted the Regional Administrator has received an application under § 124.11 for issuance or renewal of that permit but has not yet formulated a draft permit under § 124.31 covering the discharge in question, the Regional Administrator after obtaining any necessary concurrence of the EPA Deputy Assistant Administrator for Water Enforcement under § 124.52, shall set forth a tentative determination on the request at the time the draft permit is formulated as specified in § 124.31, unless this would significantly delay the processing of the permit. In that case the processing of the variance or modification request may be separated from the permit in accordance with paragraph (3), and the processing of the permit shall proceed without delay.

(2) If at the time an application for a variance or modification is filed the Regional Administrator has formulated a draft permit under § 124.31 covering the discharge in question, but that permit has not yet become final under § 124.101, administrative proceedings concerning that permit may be stayed and the Regional Administrator shall formulate a new draft permit including a tentative determination on the request, and the fact sheet required by § 124.34. However, if this will significantly delay the processing of the existing permit or the Regional Administrator for other reasons considers combining the variance request and the existing permit inadvisable, the request may be separated from the permit in accordance with paragraph (3), and the administrative disposition of the existing permit shall proceed without delay.

(3) If the permit has become final under § 124.101 and no application under § 124.11 concerning it is pending or if the variance or modification request has been separated from a permit as described in paragraphs (1) and (2), the Regional Administrator shall formulate a new draft permit under § 124.31. This permit shall be accompanied by the fact sheet required by § 124.34, except that the only matters considered shall relate to the requested variance.

§ 124.54 Appeals of modifications and variances.

(a) Normally, the appeals of permit determinations are handled in one proceeding, either State or Federal. When a State issues a permit in which EPA has made a variance determination, a separate appeal on that determination is possible. In such cases, requests for appeal of the EPA permit conditions must be filed under Subpart I after the public notice of the grant or denial of the variance. If the owner or operator is challenging issues in a State proceedings on the same permit, the Regional Administrator will decide, in consultation with State officials, which case will be heard first.

(b) Appeals of modifications or variance determinations shall be governed by Subpart I unless the Regional Administrator determines that consolidation with an evidentiary hearing under Subpart H will expedite consideration of the issues presented.

[*Comment:* The panel proceedings of Subpart I will generally be utilized when there is a State-issued permit and only the variance issues are in the Federal forum.]

(c) *Stays for section 301(g) variances.* Under the authority of section 301(j)(2), if a request for an evidentiary hearing is granted regarding a variance under section 301(g), or if a petition for timely review of the denial of a request for an evidentiary hearing is timely filed with the Administrator under § 124.101 with respect to such a variance, any otherwise applicable standards and limitations under section 301 of the Act shall not be stayed unless:

(1) In the judgment of the Regional Administrator, the stay or the variance sought will not result in the discharge of pollutants in quantities which may reasonably be anticipated to pose an unacceptable risk to human health or the environment because of bioaccumulation, persistency in the environment, acute toxicity, chronic toxicity, or synergistic propensities; and

(2) In the judgment of the Regional Administrator, there is a substantial likelihood that the discharger will succeed on the merits of its appeal; and

(3) The discharger files any bond or other appropriate security which is required by the Regional Administrator to assure timely compliance with the requirements from which a variance is sought in the event that the appeal is unsuccessful.

(d) Stays for variances or modifications other than section 301(g) will be granted or denied pursuant to § 124.61.

§ 124.55 Special provisions for modifying the secondary treatment requirement under section 301(h).

(a) Where it is clear on the face of a section 301(h) application that the discharger is not entitled to a modification, the application shall be denied.

(b) In the case of all other section 301(h) applications the Administrator, or a person designated by the Administrator may either:

(1) Give written authorization to an applicant to submit information required by Part 125, Subpart G or the final application by a date certain, not to exceed 9 months, if:

(i) The applicant proposes to submit new or additional information and the applicant demonstrates that:

(A) The applicant made consistent and diligent efforts to obtain such information prior to submitting the final application;

(B) The failure to obtain such information was due to circumstances beyond the control of the applicant; and

(C) Such information can be submitted promptly; or

(ii) The applicant proposes to submit minor corrective information and such information can be submitted promptly; or

(2) Make a written request of an applicant to submit additional information by a date certain, not to exceed 9 months, if such information is necessary to issue a tentiative determination under § 124.114(g).

All additional information authorized or requested under this paragraph which is timely received, shall be considered part of the original application.

(c) Applications for modifications under section 301(h) shall be processed independently of any pending

application for the issuance or reissuance of a permit requiring the applicant to meet effluent limitations based on secondary treatment under section 301(b)(1)(B).

(d) No modified permit shall be issued granting a section 301(h) modification unless the appropriate State officials have concurred or waived concurrence pursuant to § 124.24. In the case of a permit issued to an applicant in an approved State, the State Director may:

(1) Revoke any existing permit as of the effective date of the EPA-issued modified permit; and

(2) Co-sign the modified permit, if the Director has indicated an intent to do so in the written concurrence.

(e) Appeals of determinations under section 301(h) shall be governed by Part 124, Subpart I.

§ 124.56 Special procedures for decisions on thermal variances (section 316(a)).

(a) Except as provided in § 124.53 the only issues connected with issuance of a particular permit on which EPA will make a final Agency decision before the final permit is issued under § 124.61 are whether alternative effluent limitations would be justified under section 316(a) and whether cooling water intake structures will use the best available technology under section 316(b). Applicants who wish an early decision on these issues should request it and furnish supporting reasons at the time their applications are filed under § 124.51(b)(6). The Regional Administrator will then decide whether or not to grant it. If it is granted, both the early decision on section 316 (a) or (b) issues and the grant of the balance of the permit shall be considered permit issuance under these regulations, and shall be subject to the same requirements of public notice and comment and the same opportunity for an evidentiary hearing.

(b) If the Regional Administrator, on review of the administrative record, determines that the information necessary to decide whether or not an alternative effluent limitation under section 316(a) should be granted to a source is not likely to be available by the time a decision on permit issuance must be made, the Regional Administrator may issue a permit under § 124.61 for a term of up to five years. This permit shall require that the point source achieve the effluent limitations initially proposed for the control of the thermal component of the discharge no later than the date otherwise required by applicable legal requirements. However, the permit shall also afford the permittee an opportunity to file a demonstration under section 316(a) after conducting such studies as are required under Part 125, Subpart H.

[*Comment:* A new discharger may not commence operation in violation of the thermal effluent limitations which are initially proposed unless and until the section 316(a) variance request is finally approved.]

(c) Any hearing scheduled under paragraph (a) shall be publicized as required by § 124.41 and shall be scheduled enough in advance of the final compliance date specified in the permit to allow the permittee to take necessary measures to comply by that date in the event its request for modification of thermal limits is eventually denied after the hearing is concluded.

(d) Whenever the Regional Administrator defers the determination under section 316(a), any determination under section 316(b) may be deferred.

Subpart G—Issuance and Effective Date of Permit

§ 124.61 Issuance and effective date of permit; stays.

(a)(1) After the close of the public comment period (including any public hearing period) required by § 124.42 on a draft permit, the Regional Administrator shall prepare and issue a final permit and shall serve notice as provided in § 124.80(c) of that action of the applicant, and on each person who has submitted written comments or requested notice of the issuance of the final permit. This notice shall include reference to the procedures available to contest the permit terms under § 124.74 *et seq.*

[*Comment:* A statement signed by a person in the Regional Office that an attached list of persons were mailed the notice of issuance of the final permit is sufficient to meet the requirements of § 124.80(c). The mailed notice need not be sent certified mail.]

(b) Any final permit issued under paragraph (a) constitutes final action of EPA, when it becomes effective under paragraph (c) unless a request for an evidentiary hearing under § 124.75 or a panel hearing under § 124.114 is granted.

(c) Except as provided in paragraphs (d), (e) and (f), a permit or modification shall become effective 30 days after the service of notice of the final permit under paragraph (a), unless a later effective date is specified in the permit.

(d) If a request for an evidentiary hearing is granted under § 124.75 or § 124.111(a)(3) regarding the initial permit issued for a new source or a new discharger, or if a petition for review of the denial of a request for an evidentiary hearing with respect to such a permit is timely filed with the Administrator under § 124.101, the applicant shall be without a permit for the proposed new source or new discharge, pending final Agency action under § 124.101.

(e)(1) If a request for a hearing is granted in whole or in part under § 124.75 or § 124.111(a)(3) regarding a permit for an existing source, or if a petition for review of the denial of a request for an evidentiary hearing with respect to such a permit is timely filed with the Administrator under § 124.101, the force and effect of the contested provisions of the final permit shall be stayed and shall not be subject to judicial review under section 509(b) of the Act, pending final Agency action under § 124.101. The Regional Administrator shall serve notice, in accordance with § 124.75, on the discharger and all parties identifying the terms of the final permit which are not contested and therefore are enforceable obligations of the discharger.

(2) Where effluent limitations are contested, but the underlying control technology is not, the notice shall identify the installation of the technology in accordance with the permit compliance schedules (if uncontested) as an uncontested, enforceable obligation of the permit.

(3) Where a combination of technologies is contested, but a portion of the combination is not contested, such portion shall be identified as uncontested if compatible with the combination of technologies proposed by the requester.

(4) A term or condition, otherwise uncontested, shall not be identified as uncontested if it is inseverable from a contested term or condition.

(5) Uncontested terms and conditions shall become enforceable 30 days after the date of such notice, provided, however, that if a request for an evidentiary hearing on a term or condition was denied and the denial is appealed under § 124.101, then such term or condition shall become enforceable upon the date of the notice of the Administrator's decision on the appeal if the denial is affirmed, or shall be stayed, in accordance with this section, if the Administrator reverses the denial and grants the evidentiary hearing on such permit term.

(6) Uncontested terms and conditions shall include:

(i) Permit requirements for which an evidentiary hearing has been requested but the hearing has been denied;

(ii) Preliminary design and engineering studies or other requirements necessary to achieve the

final permit term or conditions which do not entail substantial expenditures;

(iii) Permit conditions which will have to be met regardless of which party prevails at the evidentiary hearing;

(iv) Where the discharger proposed a less stringent level of treatment than that contained in the final permit, any permit conditions appropriate to meet the levels proposed by the discharger, if the measures required to attain such less stringent level of treatment are consistent with the measure required to attain the limits proposed by the Agency; and

(v) Construction activities such as segregation of waste streams or installation of equipment which would partially meet the final permit terms or conditions and could also be used to achieve the discharger's proposed alternative terms and conditions.

(7) If at any time after a hearing is granted and after the Regional Administrator's notice under paragraph (1), it becomes clear that a permit requirement is no longer contested, any party may request the Presiding Officer to issue an order identifying the requirements as uncontested. The requirement identified in such order shall become enforceable 30 days after the issuance of the order.

(f) Where an evidentiary hearing is granted under § 124.75 on an application for a renewal of an existing permit, all provisions of the existing permit, as well as uncontested provisions of the new permit, shall continue in full force and effect until final Agency action under § 124.101. (See § 122.12(b)]. Upon written request from the applicant, the Regional Administrator may modify the existing permit to delete requirements which unnecessarily duplicate uncontested provisions of the new permit.

[*Comment:* The following examples demonstrate the application of § 124.61(e) and (f):

Example 1: The discharger requests and is granted an evidentiary hearing on its contention that the EPA's proposed effluent limitation for total suspended solids (TSS) at level X is too stringent and should be relaxed to level Y. Treatment technology A attains level Y whereas technology A plus B is necessary for level X. In this case, the discharger's obligation to install technology A is effective 30 days after service of the notice under § 124.75(b) and this obligation is not stayed by virtue of the contest as to the need for additional technology B. The discharger would be required to comply with all portions of the compliance schedule relating to design, construction and attainment of technology A, but would obtain a stay of such provisions with respect to technology B. This is true even if the schedule does not separate the two technologies. The discharger must of course also perform all basic work such as segregation of waste streams, site preparation, monitoring, reporting, and initial construction because this will be necessary regardless of the outcome of the contest. The additional obligations of technology B are stayed.

Example 2: The same facts as in Example 1 except that a public interest group has also requested and been granted participation in the evidentiary hearing. The group contends that TSS level X is too lenient and should be tightened to level Z. Treatment technology C, which is inconsistent with both A and B technologies, is required for level Z. In this case the discharger's obligation to install technologies A, A and B, or C are all stayed. The discharger's obligations to perform basic work such as segregation of waste streams, site preparation, monitoring, reporting, and perhaps initial construction are not stayed because they are unaffected by the contest.

Example 3: The discharger requests an evidentiary hearing on two issues: that the permits total suspended solids (TSS) limit and pH limit are each too strict. The Regional Administrator grants the evidentiary hearing on the TSS issue but denies it on the pH claim. The TSS and pH technologies are independent and severable and the discharger does not appeal the denial of hearing on the pH claim. In this case the discharger's obligation to install the pH control technology is not stayed and becomes effective 30 days after service of the Regional Administrator's notice under § 124.75(b). If the underlying technology for the TSS limit is at issue, the TSS limitation is stayed. However, as described in Examples 1 and 2, the discharger's obligations to perform all work unaffected by the stay (e.g., segregation of waste streams, site preparation, initial construction, etc.) are not stayed.

Example 4: The same facts as in Example 3 except that the equipment required for attaining the pH limit is achieved by the installation of the TSS equipment. In this case the Regional Administrator may determine that the pH permit term is inseverable from the TSS contest and thus the limits for both parameters would be stayed by virtue of the hearing on TSS, although as noted in the preceding examples, the discharger's obligations to perform all work unaffected by the stay are not stayed. Note however, that if the pH limit is achievable in an inexpensive and temporary alternative such as additional chemical treatment in the discharger's existing equipment, then the Regional Administrator may determine that the pH permit term is severale and refuse to stay the pH term.

Example 5: The same facts as in Example 3 except that the discharger appeals (to the Administrator) the Regional Administrator's denial of the evidentiary hearing on Issue No. 2 (the pH limit). In this case the pH limitation is also stayed (with the exceptions noted in the preceding examples) at least until the Administrator's decision on such appeal. If the Administrator affirms the denial of the evidentiary hearing on the pH limit then upon service of notice under § 124.75(b) the stay terminates. If the Administrator reverses and thus grants the evidentiary hearing on the pH term then the stay continues until final Agency action.

(g) When issuing a finally effective permit under Subpart I, the Regional Administrator shall extend the permit compliance schedule to the extent required by a stay under this section; provided that no such extension shall be granted which would:

(1) Result in the violation of an applicable statutory deadline; or

(2) Cause the permit to expire more than five years after issuance under § 124.61(a).

[*Comment:* Extensions of compliance schedules will not automatically be granted for a period equal to the period the stay is in effect for an effluent limitation. For example, if both the Agency and the discharger agree that a certain treatment technology is required by the Act where guidelines do not apply, but a hearing is granted to consider the effluent limitations which the technology will achieve, requirements regarding installation of the underlying technology will not be stayed during the hearing. Thus, unless the hearing extends beyond the final compliance date in the permit, it will not ordinarily be necessary to extend the compliance schedule. However, where application of an underlying technology is challenged, the stay for installation requirements relating to that technology would extend for the duration of the hearing.]

(h) For purposes of judicial review under section 509(b) of the Act, final administrative action on a permit does not occur unless and until a party has requested and exhausted its Administrative remedies under Subpart H and I and §124.101. Any party which neglects or fails to seek review under § 124.101 thereby waives its opportunity to exhaust available Agency remedies.

§ 124.62 Final environmental impact statement.

No final permit for a new source shall be issued until at least 30 days after the date of issuance of a final Environmental Impact Statement if one is required under 40 CFR § 6.916.

§ 124.63 Response to comments.

(a) At the time any final permit is issued, the Director shall also prepare a response to comments for that permit. This response to comments shall contain:

(1) A specific indication of which provisions of the draft permit have been changed in the final permit, and the reasons for the change; and

(2) A brief description of and response to all significant comments on the draft permit raised during the public comment period, or during any hearing.

(b) For EPA-issued permits any documents cited in the response to

comments shall be included in the administrative record for the final permit as defined in § 124.64.

[*Comment:* If new points are raised or new material supplied during the public comment period, EPA may document its response to those matters by adding new material to the administrative record.]

§ 124.64 Administrative record for final permit issued by EPA.

(a) Decisions to issue a final permit under § 124.61 shall be made on the basis of the administrative record defined in this section.

(b) The administrative record for any final permit shall consist of the administrative record for the draft permit and

(1) All comments received during the public comment period required by § 124.42;

(2) The tape or transcript of any hearing(s) held under § 124.42;

(3) The response to comments required by § 124.63;

(4) Any final Environmental Impact Statement;

(5) Other documents contained in the supporting file for the permit, including correspondence, telephone and meeting memoranda, compliance reports, etc.; and

(6) The final permit.

These documents shall be added to the record as soon as feasible after their receipt or publication by the Agency.

(c)(1) This section applies to all final permits where the draft permit was subject to the administrative record requirements of § 124.35.

(2) Whether or not a draft permit was formulated or final permit was issued subject to this Subpart, the Regional Administrator, at any time prior to the rendering of an initial decision in an evidentiary hearing on that permit, may withdraw the permit in whole or in part and formulate a new draft permit under § 124.31 addressing the portions so withdrawn. The new draft permit shall proceed through the same process of public comment and opportunity for a public hearing, etc. as would apply to any other draft permit subject to this Part. Any portions of the permit which are not withdrawn and which are not stayed under § 124.61 shall remain in effect.

(d) Material readily available at the issuing Regional Office or published material which is generally available, and which is included in the administrative record under the standards of this section or of § 124.63 ("Response to Comments"), does not need to be physically included in the same file as the rest of the record as long as it is specifically referenced in the fact sheet or statement of basis or in the response to comments.

Subpart H—Evidentiary Hearings for EPA-Issued Permits

§ 124.71 Applicability.

The regulations in this Subpart govern all evidentiary hearings conducted by EPA under section 402 of the Act, except as otherwise provided in Subpart I. An evidentiary hearing is available to challenge any permit issued under § 124.61 except for a general permit. Persons affected by a general permit may not challenge the terms and conditions of a general permit; but may instead apply for an individual permit under § 124.11 as authorized in § 122.48 and then request an evidentiary hearing on the issuance or denial of an individual permit.

§ 124.72 Definitions.

For the purpose of this Subpart H and I, the following definitions are applicable:

(a) "Judicial Officer" means a permanent or temporary employee of the Agency appointed as a Judicial Officer by the Administrator under these regulations and subject to the following conditions:

(1) A Judicial Officer shall be a licensed attorney. A Judicial Officer shall not be employed in the Office of Enforcement or the Office of Water and Waste Management, and shall not participate in the consideration or decision of any case in which he or she performed investigative or prosecutorial functions.

(2) The Administrator may delegate any authority to act in an appeal of a given case under this Subpart to a Judicial Officer who, in addition, may perform other duties for EPA, provided that that delegation shall not preclude a Judicial Officer from referring any motion or case to the Administrator when the Judicial Officer decides referral would be appropriate. The Administrator, in deciding a case, may consult with and assign the drafting of preliminary findings of fact and conclusions and/or a preliminary decision to any Judicial Officer.

(b) "Party" means the EPA trial staff under § 124.78 and any person whose request for a hearing under § 124.74 or whose request to be admitted as a party or to intervene under §§ 124.79 or 124.117 has been granted.

(c) "Presiding Officer" means an Administrative Law Judge appointed under 5 U.S.C. § 3105 and designated to preside at the hearing.

(d) "Regional Hearing Clerk" means an employee of the Agency designated by a Regional Administrator to establish a repository for all books, records, documents and other materials relating to hearings under this Subpart. A Regional Hearing Clerk may be the same person as the Record Clerk required by § 124.35.

§ 124.73 Filing and submission of documents.

(a) All submissions authorized or required to be filed with EPA under this Subpart shall be filed with the Regional Hearing Clerk, unless the regulations provide otherwise. Submissions shall be considered filed on the date on which they are mailed or delivered in person to the Regional Hearing Clerk.

(b) All such submissions shall be signed by the person making the submission, or by an attorney or other authorized agent or representative.

(c)(1) All data and information referred to or in any way relied upon in any such submissions shall be included in full and may not be incorporated by reference, unless previously submitted as part of the administrative record in the same proceeding, except for State or Federal statutes and regulations, judicial decisions published in a national reporter system, officially issued EPA documents of general applicability, and any other material which is generally available or of peripheral relevance, in which case the party relying on it shall file a written undertaking to make copies available as directed by the Regional Administrator or the Presiding Officer.

(2) If any part of the material submitted is in a foreign language, it shall be accompanied by an English translation verified under oath to be complete and accurate, together with the name, address, and a brief statement of the qualifications of the person making the translation. Translations of literature or other material in a foreign language shall be accompanied by copies of the original publication.

(3) Where relevant data or information is contained in a document also containing irrelevant matter, either the irrelevant matter shall be deleted and only the relevant data or information shall be submitted or the relevant portions shall be briefly indicated.

(4) The failure to comply with the requirements of this section or any other requirement in this Subpart may result in the exclusion from consideration of any portion of the submission which

fails to comply. If the Regional Administrator or the Presiding Officer, on motion by any party or *sua sponte*, determines that a submission fails to meet any requirement of this Subpart, the Regional Administrator or Presiding Officer shall direct the Hearing Clerk to return the submission with a copy of the applicable regulations indicating those provisions not complied with in the submission. The party proposing to submit any materials previously rejected shall have 14 days to correct the errors and resubmit, unless the Regional Administrator or the Presiding Officer determines that there is good cause to allow a longer time.

(d) The filing of a submission shall not mean or imply that it in fact meets all applicable requirements or that it contains reasonable grounds for the action requested or that the action requested is in accordance with law.

(e) The original of all statements and documents containing factual material, data, or other information shall be signed in ink and shall state the name, address and the representative capacity of the person making the submission. The person signing shall comply with the signature and certification procedures of § 122.5.

§ 124.74 Requests for evidentiary hearing.

(a) Within 30 days following the service of notice of the Regional Administrator's issuance of a final permit under § 124.61, any interested person may submit a request to the Regional Administrator under paragraph (b) for an evidentiary hearing to reconsider or contest the terms of that permit. If such a request is submitted by a person other than the permittee, the person shall simultaneously serve a copy of the request on the permittee.

(b) In accordance with § 124.76, such requests shall state each legal or factual question alleged to be at issue, and their relevance to the permit decision, together with a designation of the specific factual areas to be adjudicated and the hearing time estimated to be necessary for that adjudication. Information supporting the request or other written document relied upon to support the request shall be submitted as required by § 124.73 unless it is already in the administrative record required by § 124.64.

[*Comment:* This paragraph allows the submission of requests for evidentiary hearings even though both legal and factual issues may be raised, or only legal issues may be raised. In the latter case, because no factual issues were raised, the Regional Administrator would be required to deny the request. However, on review of the denial, the Administrator is authorized by § 124.101(a)(1) to review policy or legal conclusions of the Regional Administrator. EPA is requiring an appeal to the Administrator even of purely legal issues involved in a permit decision to ensure that the Administrator will have an opportunity to review any permit before it will be final and subject to judicial review.]

(c) Such requests shall also contain:

(1) The name, mailing address and telephone number of the person making such request;

(2) A clear and concise factual statement of the nature and scope of the interest of the requester;

(3) The names and addresses of all persons whom the requester represents; and

(4) A statement by the requester that, upon motion of any party, or *sua sponte* by the Presiding Officer and without cost or expense to any other party, the requester shall make available to appear and testify, the following:

(i) The requester;

(ii) All persons represented by the requester; and

(iii) All officers, directors, employees, consultants and agents of the requester and the persons represented by the requester.

(5) Specific references to the contested permit terms and conditions, as well as suggested revised or alternative permit terms and conditions (not excluding permit denial) which, in the judgment of the requester, would be required to implement the purposes and policies of the Act.

(6) In the case of challenges to the application of control or treatment technologies identified in the statement of basis or fact sheet, identification of the basis for the objection, and the alternative technologies or combination of technologies which the requester believes are necessary to meet the requirements of the Act.

(7) Specific identification of each of the discharger's obligations which should be stayed if the request is granted. If the request contests more than one permit term or condition then each obligation which is proposed to be stayed must be referenced to the particular contested term warranting the stay.

(d) The Regional Administrator (upon notice to all persons who have already submitted hearing requests) may extend the time allowed for submitting hearing requests under this section for good cause.

§ 124.75 Decision on request for a hearing.

(a) Following the expiration of the time allowed by § 124.74 for submitting a request for an evidentiary hearing, the Regional Administrator shall determine whether the request shall be granted, denied or granted in part and denied in part. The Regional Administrator shall grant a request either in whole or in part only if the request conforms to the requirements of § 124.74 and sets forth material issues of fact relevant to the issuance of the permit.

(b) If the Regional Administrator grants a request for an evidentiary hearing, in whole or in part, the Regional Administrator shall state and identify the permit terms and conditions which have been contested by the requester and for which the evidentiary hearing has been granted. Permit terms and conditions which are not contested or for which the Regional Administrator has denied the hearing request shall not be affected by or considered at, the evidentiary hearing. The Regional Administrator shall specify these terms and conditions in writing and serve notice in accordance with § 124.61(e).

(c) If the Regional Administrator grants a request for an evidentiary hearing in whole or in part, in regard to a particular proposed permit, then any other request for an evidentiary hearing in regard to that permit shall be treated as a request to be a party and the Regional Administrator shall grant any such request which meets the requirements of paragraph (a) of this section.

(d) If a request for a hearing is denied in whole or in part, the Regional Administrator shall briefly state the reasons. That denial is then subject to review by the Administrator under § 124.101.

§ 124.76 Obligation to raise issues and submit evidence before a final permit is issued.

No evidence shall be submitted by any party to a hearing under this Subpart that was not submitted to the administrative record required by § 124.64 unless good cause is shown for the failure to submit it. No issues shall be raised by any such party that were not submitted to the administrative record required by § 124.64 unless good cause is shown for the failure to submit them. Good cause includes the case where the party seeking to raise the new issues, or introduce new information, shows that it could not reasonably have ascertained the issues or made the information available within the time required by § 124.43.

§ 124.77 Notice of the grant of a hearing.

Public notice of the grant of an evidentiary hearing regarding a permit shall be given as provided in § 124.41(h) and in addition by mailing a copy to all persons who commented on the draft permit or submitted a request for a hearing. Before the issuance of such notice the Regional Administrator shall designate the Agency trial staff and the members of the decisional body (as defined in § 124.78).

§ 124.78 Ex parte communications.

(a)(1) No interested person outside the Agency or member of the Agency trial staff shall make or knowingly cause to be made to any members of the decisional body an *ex parte* communication relevant to the merits of the proceedings.

(2) No member of the decisional body shall make or knowingly cause to be made to any interested person outside the Agency or member of the Agency trial staff an *ex parte* communication relevant to the merits of the proceedings.

(3) A member of the decisional body who receives or who makes or knowingly causes to be made a communication prohibited by this subsection shall file with the Regional Hearing Clerk, for the public record of the hearing, all such written communications or memoranda stating the substance of all such oral communications together with all written responses and memoranda stating the substance of all oral responses.

(b) Upon receipt by any members of the decision making body of an *ex parte* communication knowingly made or knowingly caused to be made by a party in violation of this section, the person presiding at the stage of the hearing then in progress may, to the extent consistent with justice and the policy of the Act require the party to show cause why its claim or interest in the proceedings should not be dismissed, denied, disregarded or otherwise adversely affected on account of such violation.

(c) The prohibitions of this section begins to apply upon issuance of the notice of the grant of a hearing under § 124.77 or § 124.116. This prohibition terminates at the date of final Agency action.

(d) For purposes of this section, the following definitions shall apply:

(1) "Agency trial staff" means those Agency employees, whether temporary or permanent, who have been designated by the Agency under § 124.77 or § 124.116 as available to investigate, litigate and present the evidence, arguments and position of the Agency in the evidentiary hearing or non-adversary initial licensing hearing. Appearance as a witness does not necssarily require a person to be designated as a member of the Agency trial staff;

(2) "Decisional body" means any Agency employee who is or may reasonably be expected to be involved in the decisional process of the proceeding including the Administrator, Judicial Officer, Presiding Officer, the Regional Administrator (if he does not designate himself as a member of the Agency trial staff) and any of their direct support staff participating in the decisional process. In the case of a nonadversary initial licensing proceeding, the decisional body shall also include the panel members whether or not permanently employed by the Agency;

(3) "*Ex parte* communication" means any communication written or oral relating to the merits of the proceeding between the decisional body and an interested person outside the Agency or the Agency trial staff where such communication was not originally filed or stated in the administrative record or in the hearing. *Ex parte* communications do not include:

(i) Communications between Agency employees other than between the Agency trial staff and the members of the decisional body;

(ii) Discussions between the decisional body and either

(A) Interested persons outside the Agency; or

(B) The Agency trial staff;

If all parties have received prior written notice of such proposed communications and have been given the opportunity to be present and participate therein.

(iii) Communications between Agency employees including trial staff but not the decisional body and any persons outside the Agency including interested persons outside the Agency.

(4) "Interested person outside the Agency" includes the permit applicant, any person who filed written comments in the proceeding, any person who requested the hearing, any person who requested to participate or intervene in the hearing, any participant or party in the hearing and the attorney of record for such persons.

§ 124.79 Additional parties and issues.

(a) Any person may submit a request to be admitted as a party within 15 days after the date of mailing, publication or posting of notice of the grant of an evidentiary hearing, whichever occurs last. The Presiding Officer shall grant such requests as meet the requirements of § 124.74 and § 124.76. Such request must specifically identify those issues already raised which the requester seeks to address at the hearing.

(b) After the expiration of the time prescribed in paragraph (a) any person may file a motion for leave to intervene as a party. This motion must meet the requirements of §§ 124.74 and 124.76 and set forth the grounds for the proposed intervention provided, however, that no factual or legal issues in addition to those raised by timely hearing requests may be proposed except for good cause. Any motion to intervene must also contain a verified statement showing good cause for the failure to file a timely request to be admitted as a party. The Regional Administrator, or the Presiding Officer if one has been assigned, shall grant such motion only upon an express finding on the record that:

(1) Extraordinary circumstances justify granting the motion;

(2) The intervener has consented to be bound by:

(i) Prior written agreements and stipulations by and between the existing parties; and

(ii) All orders previously entered in the proceedings; and

(3) Intervention will not cause undue delay or prejudice the rights of the existing parties.

§ 124.80 Filing and service.

(a) An original and one (1) copy of all written submissions relating to an evidentiary hearing filed after the notice of hearing is published shall be filed with the Regional Hearing Clerk.

(b) The party filing any submission shall serve a copy of such submission upon the Presiding Officer and each party of record. Service shall be by mail or personal delivery.

(c) Every submission shall be accompanied by an acknowledgement of service by the person served or proof of service in the form of a statement of the date, place, time, and manner of service and the names of the persons served, certified by the person who made service.

[*Comment:* A signed statement that an attached list of persons were mailed the submission is sufficient to meet the requirements of this paragraph. Certified mail is not required.]

(d) The Regional Hearing Clerk shall maintain and furnish to any person upon request, a list containing the name, service address and telephone number of all parties and their attorneys or duly authorized representatives.

§ 124.81 Assignment of administrative law judge.

No later than the date of mailing, publication or posting of the notice of a grant of an evidentiary hearing, whichever occurs last, the Regional Administrator shall refer the proceeding to the Chief Administrative Law Judge who shall make an assignment of an Administrative Law Judge to serve as Presiding Officer for the hearing.

§ 124.82 Consolidation and severance.

(a) The Administrator, Regional Administrator or Presiding Officer, has the discretion to consolidate, in whole or in part, two or more proceedings to be held under this Subpart, whenever it appears that a joint hearing on any or all of the matters in issue would expedite or simplify consideration of the issues and that no party would be prejudiced thereby. Consolidation shall not affect the right of any party to raise issues that might have been raised had there been no consolidation.

(b) If the Presiding Officer determines consolidation is not conducive to an expeditious, full and fair hearing, any party or issues may be severed and heard separately.

§ 124.83 Prehearing conferences.

(a) The Presiding Officer, *sua sponte*, or at the request of any party, may direct the parties or their attorneys or duly authorized representatives to appear at a specified time and place for one or more conferences before or during a hearing, or to submit written proposals or correspond for the purpose of considering any of the matters set forth in paragraph (c) of this section.

(b) The Presiding Officer shall allow a reasonable period before the hearing begins for the orderly completion of all prehearing procedures and for the submission and disposition of all prehearing motions. Where the circumstances warrant, the Presiding Officer shall call a prehearing conference to inquire into the use of available procedures contemplated by the parties and the time required for their completion, to establish a schedule for their completion, and to set a tentative date for beginning the hearing.

(c) In conferences held, or in suggestions submitted, under paragraph (a), the following matters may be considered:

(1) The necessity or desirability of simplification, clarification, amplification or limitation of the issues.

(2) The admission of facts and of the genuineness of documents, and the possibility of stipulations with respect to facts.

(3) The consideration of and ruling upon objections to the introduction into evidence at the hearing of any written testimony, documents, papers, exhibits, or other submissions proposed by a party, except that the administrative record required by § 124.64 shall be received in evidence subject to the provisions of § 124.85(d)(2). Notwithstanding the foregoing, at any time before the end of the hearing any party may make, and the Presiding Officer shall consider and rule upon, motions to strike testimony or other evidence other than the administrative record on the grounds of relevance, competency or materiality.

(4) The identification of matters of which official notice may be taken.

(5) The establishment of a schedule which includes definite or tentative times for as many of the following as are deemed necessary and proper by the Presiding Officer:

(i) The submission of narrative statements of position on each factual issue in controversy;

(ii) The submission of written testimony and documentary evidence (e.g., affidavits, data, studies, reports and any other type of written material) in support of such statements; or

(iii) Written requests to any party for the production of additional documentation, data, or other information relevant and material to the facts in issue.

(6) The grouping of participants with substantially like interests for purposes of eliminating duplicative or repetitive development of the evidence and making and arguing motions and objections.

(7) Such other matters as may expedite the hearing or aid in the disposition of the matter.

(d) At a prehearing conference or within some reasonable time set by the Presiding Officer, each party shall make available to all other parties the names of experts and other witnesses it expects to call. At its discretion or at the request of the Presiding Officer, a party may include a brief narrative summary of any witness's anticipated testimony. Copies of any written testimony, documents, papers, exhibits, or materials which a party expects to introduce into evidence, and the administrative record required by § 124.64, shall be marked for identification as ordered by the Presiding Officer. Witnesses, proposed written testimony and other evidence may be added or amended only upon a finding by the Presiding Officer that good cause existed for failure to introduce the additional or amended material within the time specified by the Presiding Officer. Agency employees and consultants shall be made available as witnesses by the Agency to the same extent that production of such witnesses is required of other parties under § 124.74(c)(4). (See also § 124.85(b)(16)).

(e) The Presiding Officer shall prepare a written prehearing order reciting the actions taken at the prehearing conference and setting forth the schedule for the hearing, unless a transcript has been taken and accurately reflects these matters. The order shall include a written statement of the areas of factual agreement and disagreement and of the methods and procedures to be used in developing the evidence and the respective duties of the parties in connection therewith. This order shall control the subsequent course of the hearing unless modified by the Presiding Officer for good cause shown.

§ 124.84 Summary determination.

(a) Any party to an evidentiary hearing may move with or without supporting affidavits and briefs for a summary determination in his or her favor upon all or any part of the issues being adjudicated on the basis that there is no genuine issue of material fact for determination. Any such motion shall be filed at least 45 days before the date set for the hearing, except that upon good cause shown such motion may be filed at any time before the close of the hearing.

(b) Any other party may, within 30 days after service of the motion, file and serve a response to it or a counter-motion for summary determination. When a motion for summary determination is made and supported, a party opposing the motion may not rest upon mere allegations or denials but must show, by affidavit or by other materials subject to consideration by the Presiding Officer, that there is a genuine issue of material fact for determination at the hearing.

(c) Affidavits shall be made on personal knowledge, shall set forth facts that would be admissible in evidence and shall show affirmatively that the affiant is competent to testify to the matters stated therein.

(d) The Presiding Officer has the discretion to set the matter for oral argument and call for the submission of proposed findings, conclusions, briefs or memoranda of law. The Presiding Officer shall rule on the motion not more than 30 days after the date responses to the motion are filed under paragraph (b) of this section.

(e) If all issues of material fact are decided on a motion for summary determination, no hearing will be held and the Presiding Officer shall thereupon prepare an initial decison under § 124.89. If the motion for summary determination is denied or if only a partial summary determination is granted, the Presiding Officer shall issue a memorandum opinion, and order, interlocutory in character, and the hearing will proceed on the remaining issues. Appeals from interlocutory rulings are governed by § 124.90.

§ 124.85 Hearing procedure.

(a)(1) The permit applicant always bears the burden of persuading the Agency that a permit authorizing pollutants to be discharged should be issued and not denied. This burden does not shift.

(2) The Agency has the burden of going forward to present an affirmative case in support of any challenged term or condition of a final permit.

[*Comment:* In many cases the documents contained in the administrative record, in particular the fact sheet or statement of basis and the response to comments should adequately discharge this burden.]

(3) Any hearing participant who, by raising material issues of fact, contends:

(i) That particular terms, conditions or requirements in the permit are improper or invalid, and who desires either:

(A) The inclusion of new or different terms, conditions or requirements; or

(B) The deletion of such terms, conditions or requirements; or

(ii) That the denial or issuance of a permit is improper or invalid, shall have the burden of going forward to present an affirmative case upon the issues.

(b) The Presiding Officer shall have the authority and duty to conduct a fair and impartial hearing, to take action to avoid unnecessary delay in the disposition of the proceedings, to maintain order and all powers necessary to these ends, including the power to:

(1) Establish the date, time and place of hearings and conferences;

(2) Establish the methods and procedures to be used in the development of the evidence;

(3) Prepare, after considering the views of the participants, written statements of areas of factual disagreement among the participants;

(4) Hold conferences to settle, simplify, determine or strike any of the issues in a hearing, or to consider other matters that may facilitate the expeditious disposition of the hearing;

(5) Administer oaths and affirmations;

(6) Regulate the course of the hearing and govern the conduct of participants;

(7) Examine witnesses;

(8) Identify and refer issues for interlocutory decision under § 124.90;

(9) Rule on, admit, exclude, or limit evidence;

(10) Establish the time for filing motions, testimony and other written evidence, briefs, findings, and other submissions;

(11) Rule on motions and other procedural matters pending before him, including but not limited to motions for summary determination in accordance with § 124.84;

(12) Order that the hearing be conducted in stages in cases where the number of parties is large or the issues are numerous and complex;

(13) Take any action not inconsistent with the provisions of this subpart for the maintenance of order at the hearing and for the expeditious, fair and impartial conduct of the proceeding;

(14) Provide for the testimony of opposing witnesses to be heard simultaneously or for such witnesses to meet outside the hearing to resolve or isolate issues or conflicts;

(15) Order that trade secrets be treated as confidential business information in accordance with § 124.131; and

(16) Allow such cross-examination as may be required for a full and true disclosure of the facts. No cross-examination shall be permitted on questions of law or policy, or regarding matters (such as the validity of effluent limitations guidelines) that are not subject to challenge in an NPDES proceeding. No Agency witnesses shall be required to testify or be made available for cross-examination on such matters. In determining whether cross-examination shall be permitted the Presiding Officer shall consider whether it is likely to result in clarifying or resolving a disputed issue of fact material to the decision, and whether the issue can be more economically clarified in other ways. The party seeking cross-examination has the burden of demonstrating that this standard has been met.

(c) All direct and rebuttal evidence at an evidentiary hearing shall be submitted in written form, unless, upon motion and good cause shown, the Presiding Officer determines that oral presentation of the evidence on any particular fact will materially assist in the efficient identification and clarification of the hearing issues. Written testimony shall be prepared in narrative form. To the extent that testimony is to be submitted in writing, the Presiding Officer may set dates for the filing of such evidence with the Regional Hearing Clerk as follows:

(1) The participant with the burden of going forward to present an affirmative case upon an issue (as defined in § 124.85(a) of these regulations) shall file direct testimony first.

(2) All participants other than the participants specified in the preceding subsection shall file their direct testimony on said issue not later than 20 days after the date of the filing of the testimony under the preceding subsection.

(3) All rebuttal testimony shall be filed no later than 30 days after the date of the filing of testimony under paragraph (c)(1) of this section.

(d)(1) The Presiding Officer shall admit all relevant, competent and material evidence, except evidence that is unduly repetitious. Evidence may be received at any hearing even though inadmissible under the rules of evidence applicable to judicial proceedings. The weight to be given evidence shall be determined by its reliability and probative value.

(2) The administrative record defined by § 124.64 shall be admitted and received in evidence. Any party may move that a sponsoring witness be provided for a portion or portions of the administrative record. The Presiding Officer, upon finding that the standards for cross-examination of § 124.85(b)(3) have been met and that the administrative record taken as a whole indicates legitimate doubt about such portion of the record, shall grant such motion and direct the appropriate party to produce such witness. If a sponsoring witness cannot be provided, the Presiding Officer may reduce the weight afforded the appropriate portion of the record as a factual statement accordingly.

[*Comment:* Receiving the administrative record into evidence automatically serves several purposes: (1) It documents the prior course of the proceeding; (2) it provides a record of the views of affected persons for consideration by the agency decisionmaker; and (3) it provides factual material for use by the decisionmaker. Subject to § 124.76, parties are free to contest the factual portions of the administrative record in the hearing, and to argue that portions of it should not be given weight unless sponsored by a witness who will be available for cross-examination.]

(3) Whenever any evidence or testimony is excluded by the Presiding Officer as inadmissible, all such evidence or testimony existing in written form shall remain a part of the record as an offer of proof. The party seeking the admission of oral testimony

may make an offer of proof, which shall consist of a brief statement on the record describing the testimony excluded.

(4) Where two or more parties have substantially similar interest and positions, the Presiding Officer may limit the number of attorneys or other party representatives who will be permitted to cross-examine and to make and argue motions and objections on behalf of such parties. Attorneys may, however, engage in cross-examination relevant to matters not adequately covered by previous cross-examination.

(5) Rulings of the Presiding Officer on the admissibility of evidence or testimony, the propriety of cross-examination, and other procedural matters shall appear in the record and shall control further proceedings, unless reversed as a result of an interlocutory appeal taken under § 124.90.

(6) All objections shall be made promptly or be deemed waived. Parties shall be presumed to have taken exception to an adverse ruling. No objection shall be deemed waived by further participation in the hearing.

(e) Parties may at any time stipulate to relevant facts or to settlement. However, all settlements to which the Agency is a party must be approved by the EPA Deputy Assistant Administrator for Water Enforcement in accordance with § 124.133.

§ 124.86 Motions.

(a) Any party may make a motion, (including a motion to dismiss a particular claim or a contested issue), to the Presiding Officer about any matter relating to the proceeding. All motions shall be filed and served as provided in § 124.80 except those made on the record during an oral hearing before the Presiding Officer.

(b) Within 10 days after service of any written motion, any party to the proceeding may file a response to the motion. The time for response may be shortened to three days or extended for an additional ten days by the Presiding Officer for good cause shown.

(c) Notwithstanding § 122.15, any party may file with the Presiding Officer a motion seeking to apply to the permit any regulatory or statutory requirement issued or made available after the issuance of the permit under § 124.61. The Presiding Officer shall grant any motion to apply a new statutory requirement unless he or she finds it contrary to legislative intent. The Presiding Officer may grant a motion to apply a new regulatory requirement where appropriate to carry out the purposes of the Act, and where no party would be unduly prejudiced thereby.

§ 124.87 Record of hearings.

(a) All orders issued by the Presiding Officer, transcripts of oral hearings or arguments, written statements of position, written direct and rebuttal testimony, and any other data, studies, reports, documentation, information and other written material of any kind submitted in the proceeding shall be a part of the record of the hearing, and shall be available except as provided in § 124.131 to the public in the office of the Regional Hearing Clerk promptly upon receipt in that office.

(b) Evidentiary hearings shall be either stenographically reported verbatim or tape recorded, and thereupon transcribed. After the hearing, the reporter shall file with the Regional Hearing Clerk (i) the original of the transcript, and (ii) the exhibits received or offered into evidence at the hearing.

(c) The Regional Hearing Clerk shall promptly notify each of the parties of the filing of the certified transcript of proceedings. Any party who desires a copy of the transcript of the hearing may obtain a copy of the hearing transcript from the Regional Hearing Clerk upon payment of costs.

(d) The Presiding Officer shall allow witnesses, parties, and their counsel an opportunity to submit such written proposed corrections of the transcript of any oral testimony taken at the hearing, pointing out errors that may have been made in transcribing the testimony, as are required to make the transcript conform to the testimony. Except in unusual cases, no more than thirty days shall be allowed for submitting such corrections from the day a complete transcript of the hearing becomes available.

§ 124.88 Proposed findings of fact and conclusions; brief.

Within 45 days after the certified transcript is filed, any party may file with the Regional Hearing Clerk proposed findings of fact and conclusions and a brief in support thereof, each containing appropriate reference to the record. A copy of any such findings, conclusions and brief shall be contemporaneously served upon every other party and the Presiding Officer. The Presiding Officer, for good cause shown, may extend the time for filing the proposed findings and conclusions and/or the brief. The Presiding Officer may allow reply briefs.

§ 124.89 Decisions.

(a) The Presiding Officer shall review and evaluate the record, including the proposed findings and conclusions, any briefs filed by the parties and any interlocutory decisions pursuant to § 124.90 and shall issue and file his initial decision with the Regional Hearing Clerk. The Regional Hearing Clerk shall immediately serve copies of the initial decision upon all parties (or their counsel of record) and the Administrator.

(b) The initial decision of the Presiding Officer shall automatically become effective thirty (30) days after its service unless within such time:

(1) A party files a petition for review by the Administrator pursuant to § 124.101; or

(2) The Administrator *sua sponte* files a notice that he or she will review the decision pursuant to § 124.101.

§ 124.90 Interlocutory appeal.

(a) Except as provided in this section, appeals to the Administrator may be taken only under § 124.101. Appeals from orders or rulings may be taken under this section only if the Presiding Officer, upon motion of a party, certifies those orders or rulings to the Administrator for appeal on the record. Requests to the Presiding Officer for certification must be filed in writing within ten days of service of notice of the order, ruling, or decision and shall state briefly the grounds relied on.

(b) The Presiding Officer may certify an order or ruling for appeal to the Administrator if:

(1) The order or ruling involves an important question on which there is substantial ground for difference of opinion; and

(2) Either:

(i) An immediate appeal of the order or ruling will materially advance the ultimate completion of the proceeding, or,

(ii) A review after the final order is issued will be inadequate or ineffective; and,

(3) Such an appeal is necessary to prevent exceptional delay, expense or prejudice to any party.

(c) To the extent an appeal under this section involves issues of law, the Administrator shall refer those issues to the General Counsel for determination subject to his or her approval.

(d) If the Administrator decides that certification was improperly granted, he or she shall decline to hear the appeal. The Administrator shall accept or decline all interlocutory appeals within 30 days of their submission; if the Administrator takes no action within

that time, the appeal shall be considered dismissed. When the Presiding Officer declines to certify an order or ruling to the Administrator for an interlocutory appeal, it may be reviewed by the Administrator only upon appeal from the initial decision of the Presiding Officer, except when the Administrator determines upon motion of a party and in exceptional circumstances, that to delay review would not be in the public interest. Such motion shall be made within five days after receipt of notification that the Presiding Officer has refused to certify an order or ruling forr interlocutory appeal to the Administrator. Ordinarily, the interlocutory appeal will be decided on the basis of the submissions made to the Presiding Officer. The Administrator may, however, allow briefs and oral argument.

(e) The Presiding Officer may stay the proceeding pending a decision by the Administrator upon an order or ruling certified by the Presiding Officer for an interlocutory appeal, or upon the denial of such certification by the Presiding Officer. Only in exceptional circumstances shall proceedings be stayed.

(f) The failure to request an interlocutory appeal shall not foreclose a party from taking exception to an order or ruling in an appeal under § 124.101.

§ 124.101 Appeal to the Administrator.

(a)(1) Within 30 days after service of an initial decision, or the denial in whole or in part of a request for an evidentiary hearing, any party or requester, as the case may be, may appeal any matter set forth in such initial decision or denial or in any adverse order or ruling to which the party objected during the hearing, by filing with the Administrator notice of appeal and a petition for review. Proof of service upon all parties shall accompany such filing. The petition shall include a statement of the supporting reasons for such exceptions and, where appropriate, a showing that the initial decision contains:

(i) A finding of fact or conclusion of law which is clearly erroneous, or

(ii) An exercise of discretion or policy which is important and which the Administrator should, in his discretion, review.

(2) Within 15 days after service of a petition for review under paragraph (a)(1), any other party to the hearing in question may file a responsive petition.

(3) Policy or legal conclusions made in the course of denying a request for an evidentiary hearing may be reviewed and changed by the Administrator in an appeal under this section.

(b) Within 30 day of an initial decision or denial of an evidentiary hearing the Administrator may, *sua sponte*, review such decision. Within seven (7) days after the Administrator has decided under this section to review an initial decision or the denial of an evidentiary hearing, notice of that decision shall be served by mail upon all affected parties and the Regional Administrator.

(c) Within a reasonable time following the filing of the petition for review, the Administrator shall issue an order either granting or denying the petition for review. When the Administrator grants a petition for review or determines under paragraph (b) to review a decision, the Administrator may notify the parties that only certain issues shall be briefed.

(d) Notwithstanding the grant of a petition for review or a determination under paragraph (b) to review a decision, the Administrator may summarily affirm without opinion an intitial decision or the denial of an evidentiary hearing.

(e) To the extent an appeal under this section involves issues of the law, the Administrator shall refer those issues to the General Counsel for determination subject to his or her approval.

(f) A petition to the Administrator under paragraph (a) for review of any initial decision or the denial of an evidentiary hearing is, under 5 U.S.C. § 704, a prerequisite to the seeking of judicial review of the final decision of the Agency.

(g)(1) If a party timely files a petition for review or if the Administrator *sua sponte* orders review, then, for purpose of judicial review under section 509(b) of the Act, final Agency action on an issue occurs after EPA review procedures are exhausted and the Administrator's decision is issued and is implemented as follows:

(i) If the Administrator denies review or summarily affirms without opinion as provided in § 124.101(d) then the initial decision or denial becomes effective upon the service of notice of such decision.

(ii) If the Administrator issues a decision without remanding the proceeding then the final permit, redrafted as required by the Administrator's decision, shall be reissued and served upon all parties to such appeal in accordance with paragraph (g)(2) of this section.

(iii) If the Administrator issues a decision remanding the proceeding then final Agency action occurs upon completion of the remanded proceeding, including any Administrator appeals to the Administrator therefrom.

(2) For purposes of judicial review under section 509(b) of the Act, final Agency action occurs ten days after a final permit is issued. After Agency review procedures are exhausted a final permit shall be prepared and issued by the Regional Administrator:

(i) When the Administrator issues notice to the parties that review has been denied if review is denied;

(ii) When the Administrator issues a decision if review is not denied and the Administrator does not remand the proceedings; or

(iii) Upon the completion of remand proceedings if the proceedings are remanded unless the Administrator's remand order specifically provides that appeal of the remand decision will be required in order to exhaust administrative remedies.

(h) The petitioner may file a brief in support of the petition within 21 days after the Administrator has granted a petition for review. Any other party may file a responsive brief within 21 days of service of a brief in support of the petition. The petitioner may file a reply brief within 14 days of service of the responsive brief and any person may file an *amicus* brief for the consideration of the Administrator. If the Administrator determines, *sua sponte*, to review an initial Regional Administrator's decision or the denial of an evidentiary hearing, the Administrator shall notify the parties of the briefing schedule.

(i) Review by the Administrator of an initial decision or the denial of an evidentiary hearing shall be limited to issues specified under paragraph (a) of this section, except after notice to all parties, the Administrator may raise and decide other matters which he or she considers material on the basis of the record.

Subpart I—Non-Adversary Procedures for Initial Licensing

§ 124.111 Applicability.

(a) Except as set forth in this Subpart, this Subpart applies in lieu of, and to the complete exclusion of, Subparts E through H in the following cases:

(1) In all proceedings for the issuance of a modified permit under section 301(h) of the Act, except that in such proceedings the terms "Administrator or a person designated by the Administrator" shall be substituted in this Subpart for the term "Regional Administrator"; and

(2) In any proceedings for the issuance of any other permit which constitutes "initial licensing" under the

Administrative Procedure Act, where the Regional Administrator elects to apply this Subpart and explicitly so states in the public notice of the draft permit.

(b) The parties to an evidentiary hearing that would otherwise be held under Subpart H may agree to conduct that hearing in accordance with this Subpart. Any applicant for an NPDES permit which is not an initial license may request, when requesting an evidentiary hearing under § 124.74, that its application be processed under the procedures of this Subpart. If the Regional Administrator agrees with this request, and if a hearing is granted, the notice of the hearing shall be issued under § 124.116 shall include a statement that the permit will be processed under the procedures set forth in this Subpart unless a written objection is received within 30 days. If no such objection is received, the application shall be processed in accordance with §§ 124.117–124.121 of this Subpart, except that any reference to a draft permit shall be taken as referring to the final permit. If an objection is received, Subparts F through H shall be applied instead.

(c) "Initial licensing" includes both the first grant of an NPDES permit to a discharger that has not previously held an NPDES permit and the first decision on any variance applied for by a discharger.

§ 124.112 Relation to other subparts.

The following provisions of Subparts E through H apply to proceedings under this Subpart:

(a) § 124.54 "Terms requested by the Corps of Engineers and other Government Agencies."

(b) § 124.62 "Final environmental impact statement."

(c) § 124.65 "Early decision on certain permit conditions."

(d) § 124.66 "Deferral of decision on certain permit conditions."

(e) § 124.72 "Definitions."

(f) § 124.73 "Filing."

(g) § 124.78 *"Ex parte* communications."

(h) § 124.80 "Filing and service."

(i) § 124.82 "Consolidation and severance."

(j) § 124.85(a) (burden of proof);

(k) § 124.86 "Motions."

(l) § 124.87 "Record of hearings."

(m) § 124.90 "*Interlocutory appeal.*"

§ 124.113 Public notice regarding draft permits and permit conditions.

Public notice of the formulation of a draft permit under this Subpart shall be given as provided in § 124.41(i). At the discretion of the Regional Administrator, the comment period specified in this notice may include an opportunity for a public hearing under § 124.42.

§ 124.114 Hearings.

(a) By the close of the comment period set forth in § 124.113 (§ 124.41(i)), any person may request the Regional Administrator to hold a panel hearing on the draft permit by submitting a written request containing the following:

(1) A brief statement of the interest of the person requesting the hearing;

(2) A statement of any objections to the draft permit;

(3) A statement of the issues which such person proposes to raise for consideration at such hearing; and

(4) Statements meeting the requirements of § 124.74(c)(1)–(5).

(b) Whenever (1) a written request satisfying the requirements of paragraph (a) of this section has been received and presents genuine issues of material fact, or (2) the Regional Administrator determines *sua sponte* that a hearing under this Subpart is necessary or appropriate, the Regional Administrator shall serve written notice of the determination on each person requesting such hearing and the applicant, and shall provide public notice of the determination in accordance with § 124.41(j). If the Regional Administrator determines that a request filed under paragraph (a) of this section does not comply with the requirements of paragraph (a) or does not present genuine issues of fact, the Regional Administrator may deny the request for the hearing and shall serve written notice of such determination on all persons requesting the hearing.

(c) The Regional Administrator may decide before a draft permit is formulated that a hearing should be held under this Part. In such a case the notice issued under § 124.113 shall so state and shall contain the information required by § 124.41(j).

§ 124.115 Effect of denial or absence of request for hearing.

If no request for a hearing is made under § 124.114, or if all such requests are denied under that section, the draft permit shall be treated procedurally as if it were a recommended decision issued under § 124.124 of this Subpart, except that for purposes of § 124.125 and § 124.126 the term "hearing participant" or "person who participated in the hearing" shall be construed to mean the applicant and any person who submitted comments under § 124.41(i)

§ 124.116 Notice of hearing.

Upon granting a request for a hearing under § 124.114 the Regional Administrator shall promptly publish a notice of the hearing as required under § 124.41(j). The mailed notice shall include a statement which indicates whether the Presiding Officer or the Regional Administrator will issue the recommended decision.

§ 124.117 Request to participate in hearing.

(a) Each person desiring to participate in any hearing noticed under this section, shall file a motion to participate with the Regional Hearing Clerk by the deadline set forth in the notice of the grant of the hearing. The request shall include:

(1) A brief statement of the interest of the person in the proceeding;

(2) A brief outline of the points to be addressed;

(3) An estimate of the time required; and

(4) Statements meeting the requirements of § 124.74(c)(1)–(5).

(5) If the request is submitted by an organization, a non-binding list of the persons to take part in the presentation.

(b) As soon as practicable, but in no event later than two weeks before the scheduled date of the hearing, the Presiding Officer shall make a hearing schedule available to the public and shall mail it to each person who requested to participate in the hearing.

§ 124.118 Submission of written comments on draft permit.

(a) No later than 30 days before the scheduled start of the hearing (or such other date as may be set forth in the notice of hearing), each party shall file all of its comments on the draft permit, based on information in the administrative record and any other information which is or reasonably could have been available to that person. All comments shall include any affidavits, studies, data, tests, or other materials relied upon for making any factual statements in the comments.

(b)(1) Written comments filed under paragraph (a) of this section shall constitute the bulk of the evidence submitted at the hearing. Oral statements at the hearing should be brief and in the nature of argument. They should be restricted either to points that could not have been made in written comments, or to emphasizing points which are made in the comments, but which the participant believes can be more effectively argued in the hearing context.

(2) Notwithstanding the foregoing, within two weeks prior to the deadline specified in paragraph (a) of this section for the filing of comments, any party who has filed a request to participate in the hearing may move to submit all or part of its comments orally at the hearing in lieu of submitting written comments and the Presiding Officer shall, within one week, grant such motion if the Presiding Officer finds that such person will be prejudiced if required to submit such comments in written form.

(c) Parties to any hearing may submit written material in response to the comments filed by other participants under paragraph (a) of this section at the time they appear at the panel stage of the hearing under § 124.120.

§ 124.119 Presiding Officer.

(a)(1) Upon the granting of a request for a hearing the Regional Administrator shall, as soon as practicable, request that the Chief Administrative Law Judge assign an Administrative Law Judge as Presiding Officer. The Chief Administrative Law Judge shall thereupon make such assignment.

(2) If all parties to the hearing waive in writing their statutory right to have an Administrative Law Judge preside at the hearing, the Regional Administrator shall name a lawyer permanently or temporarily employed by the Agency and without prior connection with the proceeding to serve as Presiding Officer.

(b) It shall be the duty of the Presiding Officer to conduct a fair and impartial hearing. The Presiding Officer shall have the authority:

(1) Conferred by § 124.85(b)(1)–(15), § 124.83(b) and (c); and

(2) To receive relevant evidence, provided that all comments under § 124.118, the record of the panel hearing under § 124.120, and the administrative record, as defined in § 124.35 (or in the case of voluntary use of these procedures under § 124.111(a)(3), the administrative record for the final permit under § 124.64) shall be received in evidence.

§ 124.120 Panel hearing.

(a) A Presiding Officer shall preside at each hearing held under this Subpart. An EPA panel shall also take part in the hearing. The panel shall consist of three or more temporary or permanent EPA employees having special expertise in areas related to the hearing issue, at least two of whom shall not have taken part in preparing the draft permit. If appropriate for the evaluation of new or different issues presented at the hearing, the panel membership may change or may include persons not employed by EPA.

(b) At the time of the hearing notice pursuant to § 124.116, the Regional Administrator shall designate the persons who shall serve as panel members for the hearing and the Regional Administrator shall file with the Regional Hearing Clerk the name, address and area of expertise of each person so designated. The Regional Administrator may also designate EPA employees who will provide staff support to the panel but who may or may not serve as panel members. Such designated person shall be subject to the *ex parte* rules in § 124.78. The Regional Administrator may also designate Agency trial staff as defined in § 124.78 for the hearing.

(c) At any time before the close of the panel hearing, the Presiding Officer, after consultation with the panel, may request that any person having knowledge concerning the issues raised in the hearing and not then scheduled to participate therein appear and testify at the hearing.

(d) The panel members may question any person participating in the panel hearing. Cross-examination by persons other than panel members shall not be permitted at this stage of the proceeding except where the Presiding Officer determines, after consultation with the panel, that such cross-examination would expedite consideration of the issues. However, the parties may submit written questions to the Presiding Officer for the Presiding Officer to ask the participants, and the Presiding Officer may, after consultation with the panel, and at his or her sole discretion, ask these questions or permit a panel member to ask them.

(e) Within ten days after the close of the hearing, any of the participants shall submit such additional written testimony, affidavits, information or material as such participant deems relevant or which the panel may request of such participant. These additional submissions shall be filed with the Regional Hearing Clerk and shall be a part of the hearing record.

§ 124.121 Opportunity for cross-examination.

(a) Any participant in a panel hearing may submit a written request to cross-examine on any issue of material fact. The motion shall be submitted to the Presiding Officer within 15 days after a full transcript of the panel hearing is filed with the Regional Hearing Clerk and shall specify:

(1) The disputed issue(s) of material fact regarding which cross-examination is requested. This shall include an explanation of why the questions at issue are factual, rather than of an analytical or policy nature, the extent to which they are in dispute in light of the record made up to that stage, and the extent to which they are material to the decision on the application; and

(2) The person(s) a participant desires to cross-examine, and an estimate of the time necessary. This shall include a statement as to why the cross-examination will result in resolving the issue of material fact involved.

(b) After receipt of all motions for cross-examination under paragraph (a), the Presiding Officer, after consultation with the hearing panel, shall promptly issue an order either granting or denying each such request. If any request for cross-examination is granted, the order shall specify:

(1) The issues on which cross-examination is granted;

(2) The persons to be cross-examined on each issue;

(3) The persons allowed to conduct cross-examination;

(4) Time limits for the examination of witnesses by each cross-examiner; and

(5) The date, time and place of the supplementary hearing at which cross-examination shall take place.

In issuing this ruling, the Presiding Officer may determine that one or more participants have the same or similar interests and that to prevent unduly repetitious cross-examination, they should be required to choose a single representative for purposes of cross-examination. In such a case, the order shall simply assign time for cross-examination by that single representative without identifying the representative further. If said participants with the same or similar interests shall fail to designate such single representative, then the Presiding Officer shall divide the assigned time among the representatives of such participants or issue such other order as justice may require.

(c) The Presiding Officer and to the extent possible, the members of the hearing panel shall be present at the supplementary hearing. During the course of the hearing, the Presiding Officer shall have authority to modify any order issued under paragraph (b) of this section. A record will be made under § 124.87.

(d)(1) No later than the time set for requesting cross-examination, a hearing participant may request that alternative methods of clarifying the record (such as the submission of additional written information) be used in lieu of or in

addition to cross-examination. The Presiding Officer shall issue an order granting or denying such request at the time he issues (or would have issued) an order under paragraph (b) of this section. If the request is granted, the order shall specify the alternative provided and any other relevant information (e.g., the due date for submitting written information).

(2) In passing on any request for cross-examination submitted under paragraph (a) of this section, the Presiding Officer may, as a precondition to ruling on the merits of such request, require alternative means of clarifying the record to be used whether or not a request to do so has been made under the immediately preceding paragraph. The person requesting cross-examination shall have one week to comment on the results of utilizing such alternative means, following which the Presiding Officer, as soon as practicable, shall issue an order granting or denying such person's request for cross-examination.

(e) The provisions of § 124.85(d)(2) apply to proceedings under this Subpart.

§ 124.122 Record for final permit.

(a) The record on which the final permit shall be based in any proceeding under this Subpart (other than a proceeding by consent of the parties under § 124.111(a)(3)) consists of:

(1) The administrative record compiled under § 124.35;

(2) Any material submitted under § 124.78 relating to *ex parte* contacts;

(3) All notices issued under § 124.113;

(4) All requests for hearings, and rulings on those requests received or issued under § 124.114;

(5) Any notice of hearing issued under § 124.116;

(6) Any request to participate in the hearing received under § 124.117;

(7) All comments submitted under § 124.118, any motions made under that section and the rulings on them, and any comments filed under § 124.113(b)(9);

(8) The full transcript and other material received into the record of the panel hearing under § 124.120;

(9) Any motions for, or rulings, on cross-examination filed or issued under § 124.121;

(10) Any motions for, orders for and the results of, any alternatives to cross-examination under § 124.121; and

(11) The full transcript of any cross-examination held.

(b) In any proceedings under this Subpart involving a permit which is not an initial license and which are conducted under § 124.111(a)(3), the record for decision shall consist of:

(1) The administrative record under § 124.64;

(2) All requests for hearing submitted under § 124.74, and all rulings on those requests; and

(3) The items specified in subparagraph in subparagraphs (a)(4) though (a)(11) of this section.

§ 124.123 Filing of brief, proposed findings of fact and conclusions of law and proposed modified permit.

Unless otherwise ordered by the Presiding Officer, each party may, within 20 days after all requests for cross-examination are denied or after a transcript of the full hearing including any cross-examination becomes available, submit proposed findings of fact; conclusions regarding material issues of law, fact, or discretion; a proposed modified NPDES permit (if such person is urging that the draft permit should be modified); and a brief in support thereof; together with references to relevant pages of transcript and to relevant exhibits. Within 10 days thereafter each party may file a reply brief concerning matters contained in opposing briefs and containing alternative findings of fact; conclusions regarding material issues of law, fact, or discretion; and a proposed modified permit. Oral argument may be held at the discretion of the Presiding Officer on motion of any party or *sua sponte*.

§ 124.124 Recommended decision.

The person named to prepare the decision shall, as soon as practicable after the conclusion of the hearing, evaluate the record of the hearing and prepare and file a recommended decision with the Regional Hearing Clerk. That person may consult with, and receive assistance from, any member of the hearing panel in drafting the recommended decision, and may delegate the preparation of the recommended decision to the panel or to any member or members of it. This decision shall contain findings of fact, conclusions regarding all material issues of law, and a recommendation as to whether and in what respects the draft permit shall be modified. After the recommended decision has been filed, the Regional Hearing Clerk shall serve a copy of such decision on each party and upon the Administrator.

§ 124.125 Appeal from or review of recommended decision.

Within 30 days after service of the recommended decision, any party may take exception to any matter set forth in such decision or to any adverse order or ruling of the Presiding Officer to which such party objected, and may appeal such exceptions to the Administrator as provided in § 124.101, except that references in § 124.101 to "initial decision" will mean recommended decision under § 124.124.

§ 124.126 Final decision.

As soon as practicable after all appeal proceedings have been completed, the Administrator shall issue a final decision. Such final decision shall include findings of fact; conclusions regarding material issue of law, fact, or discretion, as well as reasons therefor; and a modified NPDES permit to the extent appropriate. It may accept or reject all or part of the recommended decision. The Administrator may delegate some or all of the work of preparing this decision to a person or persons without substantial prior connection with the matter. The Administrator or a person designated by the Administrator may consult with the Presiding Officer, members of the hearing panel or any other EPA employee in preparing the final decison. The Hearing and Record Clerk shall file a copy of the decision on all hearing participants.

§ 124.127 Final decision if there is no review.

If no party appeals a recommended decision to the Administrator, and if the Administrator does not elect to review it, the recommended decision is deemed the final decision of the Agency upon the expiration of the time for filing any appeals.

Subpart J—Miscellaneous

§ 124.131 Public access to information.

(a) All permit applications, effluent data, certifications issued under section 401 of the Act and Subpart C of this Part, comments of all governmental agencies on a permit application, and draft permits and fact sheets prepared shall be available to the public without restriction.

(b) Access to other information shall be governed by the provisions of 40 CFR Part 2.

§ 124.132 Delegation of authority; time limitations.

(a) The Administrator may delegate to a Judicial Officer any or all of his or her authority to act under this Subpart.

(b) The failure of the Administrator, Regional Administrator or Presiding Officer to do any act within the time periods specified herein shall not be construed as a waiver or in derogation of any rights, powers or authority of the

United States Environmental Protection Agency.

(c) Upon a showing by any party that it has been prejudiced by a failure of the Administrator, Regional Administrator, or Presiding Officer to do any act within the time periods specified herein, the Administrator, Regional Administrator, or Presiding Officer, as the case may be, may grant such party such relief of a procedural nature (including extension of any time for compliance or other action) as may be appropriate.

§ 124.133 EPA headquarters' approval of stipulation or consent agreement.

No evidentiary hearing under Subpart H or non-adversary initial licensing hearing under Subpart I may be resolved, settled or decided, in either whole or substantial part, by the stipulation or consent of the parties thereto, unless and until the stipulation or consent agreement is approved and signed by the Deputy Assistant Administrator for Water Enforcement. No stipulation or consent without such approval and signature shall bind EPA or have any force or effect or be filed in any proceeding.

§ 124.134 Additional time after service by mail.

Whenever a party or interested person has the right or is required to do some act or take some proceeding within a prescribed period after the service of notice or other paper upon him or her by mail, three days shall be added to the prescribed time.

§ 124.135 Effective date of Part 124.

(a) All provisions of this Part shall apply to any permit were the draft permit was included in a public notice after October 12, 1979.

(b) All the provisions of Subpart H other then § 124.76 and the provisions of §§ 124.83(c) and 124.85(d)(1) for automatic receipt of the administrative record into evidence shall apply to all hearings for which the notice of hearing is issued after [60 days after date of issuance] *provided* that the Presiding Officer at any such proceeding may vary or suspend any of the terms of these regulations in any hearing that begins before January 1, 1980, to avoid inconvenience or injustice.

(c) Section 124.64(c)(2) provides a mechanism by which EPA may in effect make permits issued before the effective date of this Part subject to its provisions.

7. Part 125 is revised to read as follows:

PART 125—CRITERIA AND STANDARDS FOR THE NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM

Subpart A—Criteria and Standards for Imposing Technology-Based Treatment Requirements Under Section 301(b) of the Act

Sec.
125.1 Purpose and scope.
125.2 Definitions.
125.3 Technology-based treatment requirements in permits.

Subpart B—Criteria for Issuance of Permits to Aquaculture Projects

125.10 Purpose and scope.
125.11 Criteria.

Subpart C—Criteria for Extending Compliance Dates for Facilities Installing Innovative Technology Under Section 301(k) of the Act [Reserved]

Subpart D—Criteria and Standards for Determining Fundamentally Different Factors Under Sections 301(b)(1)(A), 301(b)(2) (A) and (E), and 307(b) of the Act

125.30 Purpose and scope.
125.31 Criteria.
125.32 Method of application.

Subpart E—Criteria for Granting Economic Variances From Best Available Technology Economically Achievable Under Section 301(c) of the Act [Reserved]

Subpart F—Criteria for Granting Water Quality Related Variances Under Section 301(g) of the Act [Reserved]

Subpart G—Criteria for Modifying the Secondary Treatment Requirement Under Section 301(h) of the Act [Reserved]

Subpart H—Criteria for Determining Alternative Effluent Limitations Under Section 316(a) of the Act.

125.70 Purpose and scope.
125.71 Definitions.
125.72 Early screening of applications for section 316(a) variances.
125.73 Criteria and standards for the determination of alternative effluent limitations under section 316(a).

Subpart I—Criteria Applicable To Cooling Water Intake Structures Under Section 316(b) of the Act [Reserved]

Subpart J—Criteria for Extending Compliance Dates Under Section 301(i) of the Act

125.90 Purpose and scope.
125.91 Definition.
125.92 Requests for permit modification and issuance under section 301(i)(1) of the Act.
125.93 Criteria for permit modification and issuance under section 301(i)(1) of the Act.
125.94 Permit terms and conditions under section 301(i)(1) of the Act.
125.95 Requests for permit modification or issuance under section 301(i)(2) of the Act.
125.96 Criteria for permit modification or issuance under section 301(i)(2) of the Act.
125.97 Permit terms and conditions under section 301(i)(2) of the Act.

Subpart K—Criteria and Standards for Best Management Practices Under Section 304(e) of the Act

125.100 Purpose and scope.
125.101 Definition.
125.102 Applicability of best management practices.
125.103 Permit terms and conditions.
125.104 Best management practices programs.

Subpart L—Criteria and Standards for Imposing Conditions for the Disposal of Sewage Sludge Under Section 405 of the Act [Reserved]

Subpart M—Ocean Dumping Criteria Under Section 403 of the Act [Reserved]

Authority: Clean Water Act, as amended by the Clean Water Act of 1977, 33 U.S.C. 1251 et seq.

Subpart A—Criteria and Standards for Technology-Based Treatment Requirements Under Sections 301(b) and 402 of the Act

§ 125.1 Purpose and scope.

This Subpart establishes criteria and standards for the imposition of technology-based treatment requirements in permits under section 301(b) of the Act, including the application of EPA promulgated effluent limitations and case-by-case determinations of effluent limitations under section 402(a)(1) of the Act.

§ 125.2 Definitions.

Unless otherwise noted, the definitions in Parts 122, 123, and 124 apply to this Part.

§ 125.3 Technology-based treatment requirements in permits.

(a) *General.* Technology-based treatment requirements under section 301(b) of the Act represent the minimum level of control that must be imposed in a permit issued under section 402 of the Act. (See §§ 122.14 and 122.15 for a discussion of additional or more stringent effluent limitations and conditions.) Permits shall contain the following technology-based treatment requirements in accordance with the following statutory deadlines;

(1) For POTW's, effluent limitations based upon:

(i) Secondary treatment—from date of permit issuance; and

(ii) The best practicable waste treatment technology—not later than July 1, 1983; and

(2) For dischargers other than POTW's except as provided in § 122.47(d), effluent limitations requiring:

(i) The best practicable control technology currently available (BPT)—from date of permit issuance;

(ii) For conventional pollutants, the best conventional pollutant control technology (BCT)—not later than July 1, 1984;

(iii) For all toxic pollutants referred to in Committee Print No. 95–30, House Committee on Public Works and Transportation, the best available technology economically achievable (BAT) — not later than July 1, 1984;

(iv) For all toxic pollutants other than those listed in Committee Print No. 95–30, effluent limitations based on the BAT not later than three years after the date such effluent limitations are incorporated into an NPDES permit; and

(v) For all pollutants which are neither toxic nor conventional pollutants, effluent limitations based on BAT not later than three years after the date such effluent limitations are incorporated into an NPDES permit, or July 1, 1984, whichever is later, but in no case later than July 1, 1987.

(b) *Statutory variances and extensions.* (1) The following variances from technology-based treatment requirements are authorized by the Act and may be applied for under § 124.51;

(i) For POTW's, a section 301(h) marine discharge variance from secondary treatment (Subpart G);

(ii) For dischargers other than POTW's;

(A) A section 301(c) economic variance from BAT (Subpart E);

(B) A section 301(g) water quality related variance from BAT (Subpart F); and

(C) A section 316(a) thermal variance from BPT, BCT and BAT (Subpart H).

(2) The following extensions of deadlines for compliance with technology-based treatment requirements are authorized by the Act and may be applied for under § 124.51:

(i) For POTW's a section 301(i) extension of the secondary treatment deadline (Subpart J);

(ii) For dischargers other than POTW's:

(A) A section 301(i) extension of the BPT deadline (Subpart J); and

(B) A section 301(k) extension of the BAT deadline (Subpart C).

(c) *Methods of imposing technology-based treatment requirements in permits.* Technology-based treatment requirements may be imposed through one of the following three methods:

(1) Application of EPA-promulgated effluent limitations developed under section 304 of the Act to dischargers by category or subcategory. These effluent limitations are not applicable to the extent that they have been remanded or withdrawn. However, in the case of a court remand, determinations underlying effluent limitations shall be binding in permit issuance proceedings where those determinations are not required to be reexamined by a court remanding the regulations. In addition, dischargers may seek fundamentally different factors variances from these effluent limitations under § 124.51 and Subpart D of this Part.

(2) On a case-by-case basis under section 402(a)(1) of the Act, to the extent that EPA-promulgated effluent limitations are inapplicable. The permit writer shall apply the appropriate factors listed in section 304 of the Act, and shall consider:

(i) The appropriate technology for the category or class of point sources of which the applicant is a member, based upon all available information (including EPA draft or proposed development documents or guidance); and

(ii) Any unique factors relating to the applicant.

[*Comment:* These factors must be considered in all cases, regardless of whether the permit is being issued by EPA or an approved State.]

(3) Through a combination of the methods in paragraphs (c) (1) and (2) of this section. Where promulgated effluent limitations guidelines only apply to certain aspects of the discharger's operation, or to certain pollutants, other aspects or activities are subject to regulation on a case-by-case basis in order to carry out the provisions of the Act.

(d) Technology-based treatment requirements are applied prior to or at the point of discharge.

(e) Technology-based treatment requirements cannot be satisfied through the use of "non-treatment" techniques such as flow augmentation and in-stream mechanical aerators. However, these techniques may be considered as a method of achieving water quality standards on a case-by-case basis when:

(1) The technology-based treatment requirements applicable to the discharge are not sufficient to achieve the standards;

(2) The discharger agrees to waive any opportunity to request a variance under sections 301 (c), (g) or (h) of the Act; and

(3) The discharger demonstrates that such a technique is the preferred environmental and economic method to achieve the standards after consideration of alternatives such as advanced waste treatment, recycle and reuse, land disposal, changes in operating methods, and other available methods.

(f) Technology-based effluent limitations shall be established under this Subpart for solids, sludges, filter backwash, and other pollutants removed in the course of treatment or control of wastewaters in the same manner as for other pollutants.

Subpart B—Criteria for Issuance of Permits to Aquaculture Projects

§ 125.10 Purpose and scope.

(a) These regulations establish guidelines under sections 318 and 402 of the Act for approval of any discharge of pollutants associated with an aquaculture project.

(b) The regulations authorize, on a selective basis, controlled discharges which would otherwise be unlawful under the Act in order to determine the feasibility of using pollutants to grow aquatic organisms which can be harvested and used beneficially. EPA policy is to encourage such projects, while at the same time protecting other beneficial uses of the waters.

(c) Permits issued for discharges into aquaculture projects under this Subpart are NPDES permits and are subject to the applicable requirements of Parts 122, 123 and 124. Any permit shall include such conditions (including monitoring and reporting requirements) as are necessary to comply with those Parts. Technology-based effluent limitations need not be applied to discharges into the approved project except with respect to toxic pollutants.

§ 125.11 Criteria.

(a) No NPDES permit shall be issued to an aquaculture project unless:

(1) The Director determines that the aquaculture project:

(i) Is intended by the project operator to produce a crop which has significant direct or indirect commercial value (or is intended to be operated for research into possible production of such a crop); and

(ii) Does not occupy a designated project area which is larger than can be economically operated for the crop under cultivation or than is necessary for research purposes.

(2) The applicant has demonstrated, to the satisfaction of the Director, that the use of the pollutant to be discharged to the aquaculture project will result in an increased harvest of organisms under

culture over what would naturally occur in the area;

(3) The applicant has demonstrated, to the satisfaction of the Director, that if the species to be cultivated in the aquaculture project is not indigenous to the immediate geographical area, there will be minimal adverse effects on the flora and fauna indigenous to the area, and the total commercial value of the introduced species is at least equal to that of the displaced or affected indigenous flora and fauna;

(4) The Director determines that the crop will not have a significant potential for human health hazards resulting from its consumption;

(5) The Director determines that migration of pollutants from the designated project area to water outside of the aquaculture project will not cause or contribute to a violation of water quality standards or a violation of the applicable standards and limitations applicable to the supplier of the pollutant that would govern if the aquaculture project were itself a point source. The approval of an aquaculture project shall not result in the enlargement of a pre-existing mixing zone area beyond what had been designated by the State for the original discharge.

(b) No permit shall be issued for any aquaculture project in conflict with a plan or an amendment to a plan approved under section 208(b) of the Act.

(c) No permit shall be issued for any aquaculture project located in the territorial sea, the waters of the contiguous zone, or the oceans, except in conformity with guidelines issued under section 403(c) of the Act.

(d) Designated project areas shall not include a portion of a body of water large enough to expose a substantial portion of the indigenous biota to the conditions within the designated project area. For example, the designated project area shall not include the entire width of a watercourse, since all organisms indigenous to that watercourse might be subjected to discharges of pollutants that would, except for the provisions of section 318 of the Act, violate section 301 of the Act.

(e) Any modifications caused by the construction or creation of a reef, barrier or containment structure shall not unduly alter the tidal regimen of an estuary or interfere with migrations of unconfined aquatic species.

[*Comment:* Any modifications described in this paragraph which result in the discharge of dredged or fill material into navigable waters may be subject to the permit requirements of section 404 of the Act.]

(f) Any pollutants not required by or beneficial to the aquaculture crop shall not exceed applicable standards and limitations when entering the designated project area.

Subpart C—Criteria for Extending Compliance Dates for Facilities Installing Innovative Technology Under Section 301(k) of the Act—[Reserved]

Subpart D—Criteria and Standards for Determining Fundamentally Different Factors Under Sections 301(b)(1)(A), 301(b)(2) (A) and (E), and 307(b) of the Act.

§ 125.30 Purpose and scope.

(a) This Subpart establishes the criteria and standards to be used in determining whether effluent limitations or standards alternative to those required by promulgated EPA effluent limitations guidelines or standards under sections 301, 304, and 307(b) of the Act (hereinafter referred to as "national limits") should be imposed on a discharger because factors relating to the discharger's facilities, equipment, processes or other factors related to the discharger are fundamentally different from the factors considered by EPA in development of the national limits. This Subpart applies to all national limits promulgated under sections 301, 304 and 307(b) of the Act, except for those contained in 40 CFR Part 423 (steam electric generating point source category).

(b) In establishing national limits, EPA takes into account all the information it can collect, develop and solicit regarding the factors listed in sections 304(b), 304(g) and 307(b) of the Act. In some cases, however, data which could affect these national limits as they apply to a particular discharge may not be available or may not be considered during their development. As a result, it may be necessary on a case-by-case basis to adjust the national limits, and make them either more or less stringent as they apply to certain dischargers within an industrial category or subcategory. This will only be done if data specific to that discharger indicates it presents factors fundamentally different from those considered by EPA in developing the limit at issue. Any interested person believing that factors relating to a discharger's facilities, equipment, processes or other facilities related to the discharger are fundamentally different from the factors considered during development of the national limits may request a fundamentally different factors variance under § 124.51(b)(1). In addition, such a variance may be proposed by the Director in the draft permit (see § 123.22(a)(2)(ii)).

§ 125.31 Criteria.

(a) A request for the establishment of effluent limitations under this Subpart (fundamentally different factors [1] variance) shall be approved only if:

(1) There is an applicable national limit which is applied in the permit and specifically controls the pollutant for which alternative effluent limitations or standards have been requested; and

(2) Factors relating to the discharge controlled by the permit are fundamentally different from those considered by EPA in establishing the national limits; and

(3) The request for alternative effluent limitations or standards is made in accordance with the procedural requirements of Part 124.

(b) A request for the establishment of effluent limitations less stringent than those required by national limits guidelines shall be approved only if:

(1) The alternative effluent limitation or standard requested is no less stringent than justified by the fundamental difference; and

(2) The alternative effluent limitation or standard will ensure compliance with sections 208(e) and 301(b)(1)(C) of the Act; and

(3) Compliance with the national limits (either by using the technologies upon which the national limits are based or by other control alternatives) would result in:

(i) A removal cost wholly out of proportion to the removal cost considered during development of the national limits; or

(ii) A non-water quality environmental impact (including energy requirements) fundamentally more adverse than the impact considered during development of the national limits.

(c) A request for alternative limits more stringent than required by national limits shall be approved only if:

(1) The alternative effluent limitation or standard requested is no more stringent than justified by the fundamental difference; and

(2) Compliance with the alternative effluent limitation or standard would not result in:

(i) A removal cost wholly out of proportion to the removal cost considered during development of the national limits; or

(ii) A non-water quality environmental impact (including energy requirements) fundamentally more

adverse than the impact considered during development of the national limits.

(d) Factors which may be considered fundamentally different are:

(1) The nature or quality of pollutants contained in the raw waste load of the applicant's process wastewater;

[*Comment:* (1) In determining whether factors concerning the discharger are fundamentally different, EPA will consider, where relevant, the applicable development document for the national limits, associated technical and economic data collected for use in developing each respective national limit, records of legal proceedings, and written and printed documentation including records of communication, etc., relevant to the development of respective national limits which are kept on public file by EPA. (2) Waste stream(s) associated with a discharger's process wastewater which were not considered in the development of the national limits will not ordinarily be treated as fundamentally different under paragraph (a). Instead, national limits should be applied to the other streams, and the unique stream(s) should be subject to limitations based on section 402(a)(1) of the Act. See § 125.2(c)(2).]

(2) The volume of the discharger's process wastewater and effluent discharged;

(3) Non-water quality environmental impact of control and treatment of the discharger's raw waste load;

(4) Energy requirements of the application of control and treatment technology;

(5) Age, size, land availability, and configuration as they relate to the discharger's equipment or facilities; processes employed; process changes; and engineering aspects of the application of control technology;

(6) Cost of compliance with required control technololgy.

(e) A variance request or portion of such a request under this section shall not be granted on any of the following grounds:

(1) The infeasibility of installing the required waste treatment equipment within the time the Act allows.

[*Comment:* Under this section a variance request may be approved if it is based on factors which relate to the discharger's ability ultimately to achieve national limits but not if it is based on factors which merely affect the discharger's ability to meet the statutory deadlines of sections 301 and 307 of the Act such as labor difficulties, construction schedules, or unavailability of equipment.]

(2) The assertion that the national limits cannot be achieved with the appropriate waste treatment facilities installed, if such assertion is not based on factor(s) listed in paragraph (d) of this section;

[*Comment:* Review of the Administrator's action in promulgating national limits is available only through the judicial review procedures set forth in section 509(b) of the Act.]

(3) The discharger's ability to pay for the required waste treatment; or

(4) The impact of a discharge on local receiving water quality.

(f) Nothing in this section shall be construed to impair the right of any State or locality under section 510 of the Act to impose more stringent limitations than those required by Federal law.

§ 125.32 Method of application.

(a) A written request for a variance under this Subpart shall be submitted in duplicate to the Director in accordance with Part 124 Subpart F.

(b) The burden is on the person requesting the variance to explain that:

(1) Factor(s) listed in § 125.31(b) regarding the discharger's facility are fundamentally different from the factors EPA considered in establishing the national limits. The requester should refer to all relevant material and information, such as the published guideline regulations development document, all associated technical and economic data collected for use in developing each national limit, all records of legal proceedings, and all written and printed documentation including records of communication, etc., relevant to the regulations which are kept on public file by the EPA;

(2) The alternative limitations requested are justified by the fundamental difference alleged in paragraph (b)(1) of this section; and

(3) The appropriate requirements of § 125.31 have been met.

Subpart E—Criteria for Granting Economic Variances from Best Available Technology Economically Achievable Under Section 301(c) of the Act—[Reserved]

Subpart F—Criteria for Granting Water Quality Related Variances Under Section 301(g) of the Act—[Reserved]

Subpart G—Criteria for Modifying the Secondary Treatment Requirement Under Section 301(h) of the Act—[Reserved]

Subpart H—Criteria for Determining Alternative Effluent Limitations Under Section 316(a) of the Act

§ 125.70 Purpose and scope.

Section 316(a) of the Act provides that:

"With respect to any point source otherwise subject to the provisions of section 301 or section 306 of this Act, whenever the owner or operator of any such source, after opportunity for public hearing, can demonstrate to the satisfaction of the Administrator (or, if appropriate, the State) that any effluent limitation proposed for the control of the thermal component of any discharge from such source will require effluent limitations more stringent than necessary to assure the projection [sic] and propagation of a balanced, indigenous population of shellfish, fish and wildlife in and on the body of water into which the discharge is to be made, the Administrator (or, if appropriate, the State) may impose an effluent limitation under such sections on such plant, with respect to the thermal component of such discharge (taking into account the interaction of such thermal component with other pollutants), that will assure the protection and propagation of a balanced indigenous population of shellfish, fish and wildlife in and on that body of water."

This Subpart describes the factors, criteria and standards for the establishment of alternative thermal effluent limitations under section 316(a) of the Act in permits issued under section 402(a) of the Act.

§ 125.71 Definitions.

For the purpose of this Subpart:

(a) "Alternative effluent limitations" means all effluent limitations or standards of performance for the control of the thermal component of any discharge which are established under section 316(a) and this Subpart.

(b) "Representative important species" means species which are representative, in terms of their biological needs, of a balanced, indigenous community of shellfish, fish and wildlife in the body of water into which a discharge of heat is made.

(c) The term "balanced, indigenous community" is synonymous with the term "balanced, indigenous population" in the Act and means a biotic community typically characterized by diversity, the capacity to sustain itself through cyclic seasonal changes, presence of necessary food chain species and by a lack of domination by pollution tolerant species. Such a community may include historically non-native species introduced in connection with a program of wildlife management and species whose presence or abundance results from substantial, irreversible environmental modifications. Normally, however, such a community will not include species whose presence or abundance is attributable to the introduction of pollutants that will be eliminated by compliance by all sources with section

301(b)(2) of the Act; and may not include species whose presence or abundance is attributable to alternative effluent limitations imposed pursuant to section 316(a).

§ 125.72 Early screening of applications for section 316(a) variances.

(a) Any initial application for a section 316(a) variance shall include the following early screening information:

(1) A description of the alternative effluent limitation requested;

(2) A general description of the method by which the discharger proposes to demonstrate that the otherwise applicable thermal discharge effluent limitations are more stringent than necessary;

(3) A general description of the type of data, studies, experiments and other information which the discharger intends to submit for the demonstration; and

(4) Such data and information as may be available to assist the Director in selecting the appropriate representative important species.

(b) After submitting the early screening information under paragraph (a), the discharger shall consult with the Director at the earliest practicable time (but not later than 30 days after the application is filed) to discuss the discharger's early screening information. Within 60 days after the application is filed, the discharger shall submit for the Director's approval a detailed plan of study which the discharger will undertake to support its section 316(a) demonstration. The discharger shall specify the nature and extent of the following type of information to be included in the plan of study: biological, hydrographical and meteorological data; physical monitoring data; engineering or diffusion models; laboratory studies; representative important species; and other relevant information. In selecting representative important species, special consideration shall be given to species mentioned in applicable water quality standards. After the discharger submits its detailed plan of study, the Director shall either approve the plan or specify any necessary revisions to the plan. The discharger shall provide any additional information or studies which the Director subsequently determines necessary to support the demonstration, including such studies or inspections as may be necessary to select representative important species. The discharger may provide any additional information or studies which the discharger feels are appropriate to support the demonstration.

(c) Any application for the renewal of a section 316(a) variance shall include only such information described in paragraphs (a) and (b) of this section and § 124.73(c)(1) as the Director requests within 60 days after receipt of the permit application.

(d) The Director shall promptly notify the Secretary of Commerce and the Secretary of the Interior, and any affected State of the filing of the request and shall consider any timely recommendations they submit.

(e) In making the demonstration the discharger shall consider any information or guidance published by EPA to assist in making such demonstrations.

(f) If an applicant desires a ruling on a section 316(a) application before the ruling on any other necessary permit terms and conditions, (as provided by § 124.57), it shall so request upon filing its application under paragraph (a) of this section. This request shall be granted or denied in the discretion of the Director.

[*Comment:* At the expiration of the permit, any discharger holding a section 316(a) variance should be prepared to support the continuation of the variance with studies based on the discharger's actual operation experience.]

§ 125.73 Criteria and standards for the determination of alternative effluent limitations under section 316(a).

(a) Thermal discharge effluent limitations or standards established in permits may be less stringent than those required by applicable standards and limitations if the discharger demonstrates to the satisfaction of the director that such effluent limitations are more stringent than necessary to assure the protection and propagation of a balanced, indigenous community of shellfish, fish and wildlife in and on the body of water into which the discharge is made. This demonstration must show that the alternative effluent limitation desired by the discharger, considering the cumulative impact of its thermal discharge together with all other significant impacts on the species affected, will assure the protection and propagation of a balanced indigenous community of shellfish, fish and wildlife in and on the body of water into which the discharge is to be made.

(b) In determining whether or not the protection and propagation of the affected species will be assured, the Director may consider any information contained or referenced in any applicable thermal water quality criteria and thermal water quality information published by the Administrator under section 304(a) of the Act, or any other information he deems relevant.

(c)(1) Existing dischargers may base their demonstration upon the absence of prior appreciable harm in lieu of predictive studies. Any such demonstrations shall show:

(i) That no appreciable harm has resulted from the normal component of the discharge (taking into account the interaction of such thermal component with other pollutants and the additive effect of other thermal sources to a balanced, indigenous community of shellfish, fish and wildlife in and on the body of water into which the discharge has been made; or

(ii) That despite the occurrence of such previous harm, the desired alternative effluent limitations (or appropriate modifications thereof) will nevertheless assure the protection and propagation of a balanced, indigenous community of shellfish, fish and wildlife in and on the body of water into which the discharge is made.

(2) In determining whether or not prior appreciable harm has occurred, the Director shall consider the length of time in which the applicant has been discharging and the nature of the discharge.

Subpart I—Criteria Applicable to Cooling Water Intake Structures Under Section 316(b) of the Act [Reserved]

Subpart J—Criteria for Extending Compliance Dates Under Section 301(i) of the Act

§ 125.90 Purpose and scope.

Under sections 301(i)(1) and (2) of the Act, extensions of the 1977 statutory deadline for compliance with certain treatment requirements may be granted by the Director through permit issuance or modification. This Subpart establishes criteria for granting these extensions and the method for incorporating these extensions into permits issued under section 402(a) of the Act.

§ 125.91 Definition.

For purposes of this Subpart, "construction" includes any one of the following: preliminary planning to determine the feasibility of treatment works; engineering, architectural, legal fiscal, or economic investigations or studies, surveys, designs, plans, working drawings, specifications, procedures, or other necessary actions, erection, building, acquisition, alteration, remodeling, improvement, or extension of treatment works, or the inspection or supervision of any of the foregoing items

provided that completion of the facility and attainment of operational level by no later than July, 1, 1983, is a reasonable expectation.

§ 125.92 Requests for permit modification and issuance under section 301(i)(1) of the Act.

Any owner or operator of a publicly owned treatment works (POTW) that requires construction to achieve limitations under sections 301(b)(1)(B) or 301(b)(1)(C) of the Act may request modification or issuance of a permit extending the date for compliance with these limitations in accordance with the provisions of § 124.51(c).

§ 125.93 Criteria for permit modification and issuance under section 301(i)(1) of the Act.

No request for a permit modification or issuance under section 301(i)(1) shall be granted unless the Director finds that the POTW requires construction to achieve limitations under sections 301(b)(1)(B) or 301(b)(1)(C) of the Act and did not complete construction for either of the following reasons:

(a) The issuance of a notice to proceed under a construction contract for any segment of Step 3 project work (or if notice to proceed is not required, the execution of the construction contract) occurred before July 1, 1977, but construction could not physically be completed by July 1, 1977, despite all expeditious efforts of the POTW (see initiation of construction as defined in 40 CFR § 35.905 for Step 3); or

(b) Federal financial assistance was not available, or was not available in time for construction required to achieve these limitations, and the POTW did not in any significant way contribute to this unavailability or delay.

§ 125.94 Permit terms and conditions under section 301(i)(1) of the Act.

(a) All permits modified or issued by the Director under section 301(i)(1) of the Act shall contain at a minimum the following permit terms and conditions:

(1) the shortest reasonable schedule of compliance for achievement of limitations under sections 301(b)(1) (B) and (C) but in no event later than July 1, 1983. This schedule shall be based upon the earliest date that Federal financial assistance will be available and construction can be completed and on any additional information submitted by the POTW or otherwise available.

(i) When a facility plan has been approved in accordance with 40 CFR 35, Subpart E, this schedule shall contain dates certain for the completion of actions leading toward the attainment of statutory treatment limitations.

(ii) When the POTW has not completed Step 1 of the construction grants process in accordance with 40 CFR 35, Subpart E, this schedule shall contain a date certain for the submission of a facility plan (completion of Step 1) upon which date the permit should be set to expire. In this case, in order to assure compliance by the POTW by July 1, 1983, the following requirements must be met:

(A) Certification by the State, based on its one or five year project priority list developed pursuant to 40 CFR 35.915(c), that funding will be available in time to ensure compliance by July 1, 1983; and

(B) Reporting once a year (if necessary) by the POTW as to its progress in obtaining Federal funding.

[*Comment:* EPA recognizes that the date for submission of the facility plan may not take into account all the uncertainties of the Step 1 planning process. Because of the uncertainties inherent in the Step 1 planning process, EPA recommends that section 301(i)(1) requests (and permit issuance) for projects that are presently in Step 2 or 3 should be acted on *before* requests from projects in Step 1. When Federal funding in the form of a Step 2 construction grant award is made available, and the Step 1 permit has expired, the permit is to be reissued containing a date certain schedule derived from the facility plan and coordinated with the State Project Priority List.]

(2) A statement ensuring compliance with requirements under sections 201 (b) through (g) of the Act consistent with the terms of the POTWs construction grant.

(3) Abatement practices and interim effluent limitations reflecting optimum operation and maintenance of the existing facilities. These shall include:

(i) Adequate operator staffing and training;

(ii) Adequate laboratory and process controls; and

(iii) Effluent limitations derived from reports of operation and maintenance inspections conducted by EPA or the State, or other guidance.

[*Comment:* Only in exceptional circumstances should in-depth plant evaluations be conducted, e.g., when existing information does not represent the true capabilities of the plant.]

(4) Interim effluent limitations reflecting other non-capital intensive measures for increased pollution control. This shall include any possible minor facility modifications such as piping changes, additional metering and instrumentation or the use of skimming and vacuuming equipment. When an existing POTW is currently violating limitations imposed under section 301(b)(1)(C) of the Act, interim effluent limitations shall be established to minimize adverse water quality impact; these limitations shall not be made less stringent or allow more pollutants to be discharged than are currently being discharged during the term of an extension granted under section 301(i)(1) of the Act.

(b) If a POTW has industrial users, any permit issued or modified by the Director under section 301(i)(1) shall contain any terms and conditions necessary to ensure compliance with 40 CFR 403.

§ 125.95 Requests for permit modification or issuance under section 301(i)(2) of the Act.

Any owner or operator of a point source other than a POTW that will not achieve the requirements of sections 301(b)(1)(A) and 301(b)(1)(C) of the Act because it was scheduled to discharge into a POTW that is presently unable to accept the discharge without construction, may request modification or issuance of a permit extending the date of compliance with these limitations in accordance with the provisions of § 124.51(b).

§ 125.96 Criteria for permit modification or issuance under section 301(i)(2) of the Act.

No request for a permit modification or issuance under section 301(i)(2) of the Act shall be granted unless the Director finds that the discharger has failed to achieve the requirements of sections 301(b)(1)(A) and 301(b)(1)(C) of the Act because it was scheduled to discharge into a POTW that is presently unable to accept the discharge without construction, and:

(a) The discharger has indicated an intent to discharge into the POTW before July 1, 1977, in one of the following ways:

(1) The discharger was issued a permit before July 1, 1977, based upon a discharge into a POTW;

(2) The discharger had a binding contractual obligation before July 1, 1977, [enforceable against the discharger) to discharge into a POTW. Contracts which can be terminated or modified without substantial loss and contracts for feasibility, engineering and design studies do not constitute a contractual obligation under this paragraph.

(3) A construction grant application made by the POTW before July 1, 1977, clearly demonstrated that the discharger was to discharge into the POTW; or

(4) Engineering plans, architectural plans or working drawings prepared for

the POTW before July 1, 1977, clearly demonstrated the discharger was to discharge into the POTW. Plans and drawings, such as those accompanying a bona fide application for a Federal construction grant, are sufficient only to the extent that they were truly representative of the intent of the discharger and the POTW;

(b) The Director finds that the discharger has acted in good faith in its efforts to effectuate discharge into the POTW and to minimize or abate pollution prior to discharge into the POTW. This shall include the following findings:

(i) Failure of the discharger to meet the July 1, 1977, deadline was for reasons beyond its control;

(ii) A history of a high degree of commitment to meet the requirements of the Act as manifested by cooperation with the State or EPA in attempting to resolve disputed issues;

(iii) No history of unjustified delay;

(iv) No past serious or intentional violations of the Act; and

(v) All reasonable measures are being taken to expedite compliance.

[*Comment:* The Director may also consider whether the discharger has operated its facilities competently and responsibly and the exent to which the discharger has completed the necessary prerequisites to having its waste treated by the POTW.]

(c) The POTW will be in operation and available to the discharger July 1, 1983;

(d) The POTW will be able to meet secondary treatment and water quality standard effluent limitations by July 1, 1983, after receiving the waste from the discharger;

(e) The discharger and the POTW have entered into an enforceable contract providing that:

(i) The discharger agrees to discharge its waste to the POTW;

(ii) The POTW agrees to accept and treat that waste by a date certain; and

(iii) The discharger agrees to pay all user charges and industrial cost recovery charges required under section 204 of the Act; and

(f) In the case of a discharge into an existing POTW, such POTW has been granted an extension under section 301(i)(1) of the Act.

§ 125.97 Permit terms and conditions under section 301(i)(2) of the Act.

All permits modified or issued by the Director under section 301(i)(2) of the Act shall contain at a minimum the following permit terms and conditions:

(a) The shortest reasonable schedule of compliance leading to discharge into the POTW, not to extend beyond the earliest date practicable for compliance, or beyond the final compliance date of any extension granted to the appropriate POTW under section 301(i)(1) of the Act, but in no event later than July 1, 1983. This schedule shall be based upon the earliest date by which the appropriate POTW can receive the waste from the discharger and the discharger can complete the necessary prerequisites to having its waste treated by that POTW.

(b) Achievement of effluent limitations and standards under sections 301(b)(1)(A) and 301(b)(1)(C) of the Act by the same final date in the schedule established in paragraph (a) of this section in the event that the permittee does not discharge its wastes to the POTW by the date established under paragraph (a) of this section.

(c) Abatement practices and interim effluent limitations reflecting optimum operation and maintenance of the discharger's existing facilities. These shall include:

(1) Effective performance of facility design removals;

(2) Adequate operator staffing and training; and

(3) Adequate laboratory and process control.

(d) Interim effluent limitations reflecting other non-capital intensive measures for increased pollution control.

(e) Requirements to meet applicable toxic effluent standards and prohibitions after they are promulgated under section 307(a) of the Act.

(f) Requirements to ensure compliance with:

(1) Pretreatment requirements imposed by the POTW pursuant to any extension granted to the POTW under section 301(i)(1);

(2) Any State or local pretreatment requirements; and

(3) Pretreatment standards as promulgated under section 307(b) of the Act.

[*Comment:* The legislative history cites the following example: "[I]f an industry is planning on participating in a municipal system which will not be available until January 1983, that industry would still have to install and operate pretreatment facilities within the time specified for compliance at the time the applicable pretreatment standard was promulgated and in no event later than three years from the date of said promulgation. Thus, if the pretreatment regulations are promulgated March 1, 1979, and require compliance within two years, that industry would be required to comply by March 1, 1981," H.R. Rep. No. 95-830, 95th Cong., 1st Sess., 12712 (daily ed. Dec. 6, 1977).]

(g) Any water conservation requirements necessary to carry out the provisions of the Act or imposed by the POTW pursuant to the contract executed between the discharger and the POTW.

[*Comment:* The existence of such a contract is a prerequisite to granting an extension under section 301(i)(2)(B) of the Act and § 125.96(e).]

Subpart K—Criteria and Standards for Best Management Practices Authorized Under Section 304(e) of the Act

§ 125.100 Purpose and scope.

This Subpart describes how best management practices (BMPs) for ancillary industrial activities under section 304(e) of the Act shall be reflected in permits, including best management practices promulgated in effluent limitations under section 304 and established on a case-by-case basis in permits under section 402(a)(1) of the Act. Best management practices authorized by section 304(e) are included in permits as requirements for the purposes of sections 301, 302, 306, 307, or 403 of the Act, as the case may be.

§ 125.101 Definition.

"Manufacture" means to produce as an intermediate or final product, or by-product.

§ 125.102 Applicability of best management practices.

Dischargers who use, manufacture, store, handle or discharge any pollutant listed as toxic under section 307(a)(1) of the Act or any pollutant listed as hazardous under section 311 of the Act are subject to the requirements of this Subpart for all activities which may result in significant amounts of those pollutants reaching waters of the United States. These activities are ancillary manufacturing operations including: materials storage areas; in-plant transfer, process and material handling areas; loading and unloading operations; plant site runoff; and sludge and waste disposal areas.

§ 125.103 Permit terms and conditions.

(a) Best management practices shall be expressly incorporated into a permit where required by an applicable EPA promulgated effluent limitations guideline under section 304(e);

(b) Best management practices may be expressly incorporated into a permit on a case-by-case basis where determined necessary to carry out the provisions of the Act under section 402(a)(1). In issuing a permit containing BMP

requirements, the Director shall consider the following factors:

(1) Toxicity of the pollutant(s);

(2) Quantity of the pollutant(s) used, produced, or discharged;

(3) History of NPDES permit violations;

(4) History of significant leaks or spills of toxic or hazardous pollutants;

(5) Potential for adverse impact on public health (e.g., proximity to a public water supply) or the environment (e.g., proximity to a sport or commerical fishery); and

(6) Any other factors determined to be relevant to the control of toxic or hazardous pollutants.

(c) Best management practices may be established in permits under paragraph (b) of this section alone or in combination with those required under paragraph (a) of this section.

(d) In addition to the requirements of paragraphs (a) and (b) of this section, dischargers covered under § 125.102 shall develop and implement a best management practices program in accordance with § 125.104 which prevents, or minimizes the potential for, the release of toxic or hazardous pollutants from ancillary activities to waters of the United States.

§ 125.104 Best management practices programs.

(a) BMP programs shall be developed in accordance with good engineering practices and with the provisions of this Subpart.

(b) The BMP program shall:

(1) Be documented in narrative form, and shall include any necessary plot plans, drawings or maps;

(2) Establish specific objectives for the control of toxic and hazardous pollutants.

(i) Each facility component or system shall be examined for its potential for causing a release of significant amounts of toxic or hazardous pollutants to waters of the United States due to equipment failure, improper operation, natural phenomena such as rain or snowfall, etc.

(ii) Where experience indicates a reasonable potential for equipment failure (e.g., a tank overflow or leakage), natural condition (e.g., precipitation), or other circumstances to result in significant amounts of toxic or hazardous pollutants reaching surface waters, the program should include a prediction of the direction, rate of flow and total quantity of toxic or hazardous pollutants which could be discharged from the facility as a result of each condition or circumstance;

(3) Establish specific best management practices to meet the objectives identified under paragraph (b)(2) of this section, addressing each component or system capable of causing a release of significant amounts of toxic or hazardous pollutants to the waters of the United States;

(4) The BMP program:

(i) May reflect requirements for Spill Prevention Control and Countermeasure (SPCC) plans under section 311 of the Act and 40 CFR Part 151, and may incorporate any part of such plans into the BMP program by reference;

[*Comment:* EPA has proposed section 311(j)(1)(c) regulations (43 FR 39276) which require facilities subject to NPDES to develop and implement SPCC plans to prevent discharges of reportable quantities of designated hazardous substances. While Subpart K requires only procedural activities and minor construction, the proposed 40 CFR 151 (SPCC regulations) are more stringent and comprehensive with respect to their requirements for spill prevention. In developing BMP programs in accordance with Subpart K, owners or operators should also consider the requirements of proposed 40 CFR 151 which may address many of the same areas of the facility covered by this Subpart.]

(ii) Shall assure the proper management of solid and hazardous waste in accordance with regulations promulgated under the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act of 1976 (RCRA) (40 U.S.C. 6901 *et seq).* Management practices required under RCRA regulations shall be expressly incorporated into the BMP program; and

(iii) Shall address the following points for the ancillary activities in § 125.102:

(A) Statement of Policy;

(B) Spill Control Committee;

(C) Material Inventory;

(D) Material Compatibility;

(E) Employee Training;

(F) Reporting and Notification Procedures;

(G) Visual Inspections;

(H) Preventive Maintenance;

(I) Housekeeping; and

(J) Security.

[*Comment:* Additional technical information on BMPs and the elements of a BMP program is contained in a publication entitled "NPDES Best Management Practices Guidance Document." Copies may be obtained by written request to Edward A. Kramer (EN-336), Office of Water Enforcement, Environmental Protection Agency, Washington, D.C. 20460.]

(c)(1) The BMP program must be clearly described and submitted as part of the permit application. An application which does not contain a BMP program shall be considered incomplete. Upon receipt of the application, the Director shall approve or modify the program in accordance with the requirements of this Subpart. The BMP program as approved or modified shall be included in the draft permit (§ 124.31). The BMP program shall be subject to the applicable permit issuance requirements of Part 124, resulting in the incorporation of the program (including any modifications of the program resulting from the permit issuance procedures) into the final permit.

(2) Proposed modifications to the BMP program which affect the discharger's permit obligations shall be submitted to the Director for approval. If the Director approves the proposed BMP program modification, the permit shall be modified in accordance with § 122.31, *provided* that the Director may waive the requirements for public notice and opportunity for hearing on such modification if he or she determines that the modification is not significant. The BMP program, or modification thereof, shall be fully implemented as soon as possible but not later than one year after permit issuance, modification, or revocation and reissuance unless the Director specifies a later date in the permit.

[*Comment:* A later date may be specified in the permit, for example, to enable coordinated preparation of the BMP program required under these regulations and the SPCC plan required under 40 CFR 151 or to allow for the completion of construction projects related to the facility's BMP or SPCC program.]

(d) The discharger shall maintain a description of the BMP program at the facility and shall make the description available to the Director upon request.

(e) The owner or operator of a facility subject to this Subpart shall amend the BMP program in accordance with the provisions of this Subpart whenever there is a change in facility design, construction, operation, or maintenance which materially affects the facility's potential for discharge of significant amounts of hazardous or toxic pollutants into the waters of the United States.

(f) If the BMP program proves to be ineffective in achieving the general objective of preventing the release of significant amounts of toxic or hazardous pollutants to those waters and the specific objectives and requirements under paragraph (b) of this section, the permit and/or the BMP program shall be subject to modification to incorporate revised BMP requirements.

Subpart L—Criteria and Standards for Imposing Conditions for the Disposal of Sewage Sludge Under Section 405 of the Act [Reserved]

Subpart M—Ocean Dumping Criteria Under Section 403 of the Act [Reserved]

PART 402—COOLING WATER INTAKE STRUCTURES [DELETED]

8. 40 CFR Part 402 is deleted.

PART 403—GENERAL PRETREATMENT REGULATIONS FOR EXISTING AND NEW SOURCES OF POLLUTION.

9. 40 CFR Part 403 is amended as follows:

A. The Table of Contents is amended by revising the heading for § 403.11 to read as follows:

* * * * *

§ 403.11 Approval procedures for POTW pretreatment programs and revision of categorical pretreatment standards.

* * * * *

B. Section 403.7 is amended by revising paragraph (e)(3) to read as follows:

§ 403.7 [Amended]

* * * * *

(e) * * * (3) The Regional Administrator may agree, in the Memorandum of Agreement under 40 CFR 123.7, to waive the right to review and object to Submissions for authority to revise discharge limits under this section. Such an agreement shall not restrict the Regional Administrator's right to comment upon or object to permits issued to POTWs except to the extent permitted under 40 CFR 123.7(b)(3)(i)(D).

* * * * *

C. Section 403.8 is amended by revising the first sentence of paragraph (f)(2)(vii) to read as follows:

§ 403.8 [Amended]

* * * * *

(f) * * * (2) * * * (vii) Comply with the public participation requirements of 40 CFR Part 25 in the enforcement of National Pretreatment Standards.

* * * * *

§ 403.9 [Amended]

D. Section 403.9(d) is deleted and §§ 403.9(e) and (f) are redesignated as §§ 403.9(d) and (e), respectively.

§ 403.10 [Amended]

E. Section 403.10(d)(1) is amended by deleting the words "set forth in § 403.10(b)" from the first and second sentences.

F. Section 403.10 is amended by revising paragraph (f)(1) to read as follows:

* * * * *

(f) * * * (1) Legal Authority. The Attorney General's Statement submitted in accordance with paragraph (g)(1)(i) shall certify that the Director has authority under State law to operate and enforce the State pretreatment program to the extent required by this Part and by 40 CFR 123.32. At a minimum, the Director shall have the authority to:

* * * * *

G. Section 403.10 is amended by revising paragraph (g)(1) to read as follows:

* * * * *

(g)(1)(i) A statement from the State Attorney General (or the Attorney for those State agencies which have independent legal counsel) that the laws of the State provide adequate authority to implement the requirements of this Part. The authorities cited by the Attorney General in this statement shall be in the form of lawfully adopted State statutes and regulations which shall be in full force and effect before the time of approval of the State pretreatment program.

(ii) Copies of all State statutes and regulations cited in the above statement.

* * * * *

H. Section 403.10 is amended by revising paragraph (g)(3) to read as follows:

* * * * *

(g) * * *

(3) Any modifications or additions to the Memorandum of Agreement (required by 40 CFR 123.7) which may be necessary for EPA and the State to implement the requirements of this Part.

* * * * *

I. Section 403.10 is amended by revising paragraph (h)(2) to read as follows:

* * * * *

(h) * * *

(2) Commence the program revision process set out in 40 CFR 123.61. For purposes of that section all requests for approval of State pretreatment programs shall be deemed substantial program modifications. A comment period of at least 30 days and the opportunity for a hearing shall be afforded the public on all such proposed program revisions.

* * * * *

J. Section 403.10(i) is amended by substituting the words "this Part" for the words "paragraph (g) of this section" in both places they appear.

K. The heading of § 403.11 is revised to read as follows:

§ 403.11 Approval Procedures for POTW Pretreatment Programs and Revision of Categorical Pretreatment Standards.

L. Section 403.11 is amended by revising the first sentence to read as follows:

"The following procedures shall be followed in approving or denying requests for POTW Pretreatment Program approval:"

* * * * *

M. Section 403.11 is amended by deleting all references to § 403.10(f) and (g).

N. Section 403.11(a) is amended by changing the reference in two places from "§ 403.9(e) and (f)" to "§ 403.9(d) and (e)."

O. Section 403.11(b)(1)(i) is amended by deleting from the first sentence the words "shall be published in the Federal Register in the case of a State Submission and"

P. Section 403.11(b)(1)(i)(A) is deleted and subparagraphs (B) and (C) are redesignated to (A) and (B) respectively.

Q. Section 403.11 is amended by revising subparagraph (b)(1)(i)(B), (formerly (b)(1)(i)(C)), to read as follows:

* * * * *

(b) * * *

(1) * * *

(i) * * *

(B) Publication of a notice of request for approval of the Submission in the largest daily newspaper within the jurisdiction(s) served by the POTW.

* * * * *

R. Section 403.11 is amended by substituting the words "30 days" wherever the words "45 days" appear.

S. Section 403.11(b)(2)(ii) is amended by deleting the words "a State or."

T. Section 403.11(e) is amended by deleting the words "or Director."

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APPENDIX
DECISION-LOGICS

APPENDIX
DECISION LOGIC

OVERVIEW

A decision logic has been developed for this manual to graphically illustrate the entire NPDES permit process. It is presented in three parts:

- Figure A-1 NPDES Permit Process
- Figure A-2 Subpart H - Evidentiary Hearing Procedures
- Figure A-3 Subpart I - Nonadversary Procedures in Initial Licensing

These diagrams afford a convenient guide to the many elements and steps of the permit issuance and review process. Through reference to instruction symbols, the user is directed to the appropriate hearing format for the permit in question.

It is anticipated that this decision logic presentation will be useful to EPA staff involved in the NPDES program, as a checklist to gauge their own performance and as a ready reference to illustrate the NPDES process to persons who are not as familiar with it.

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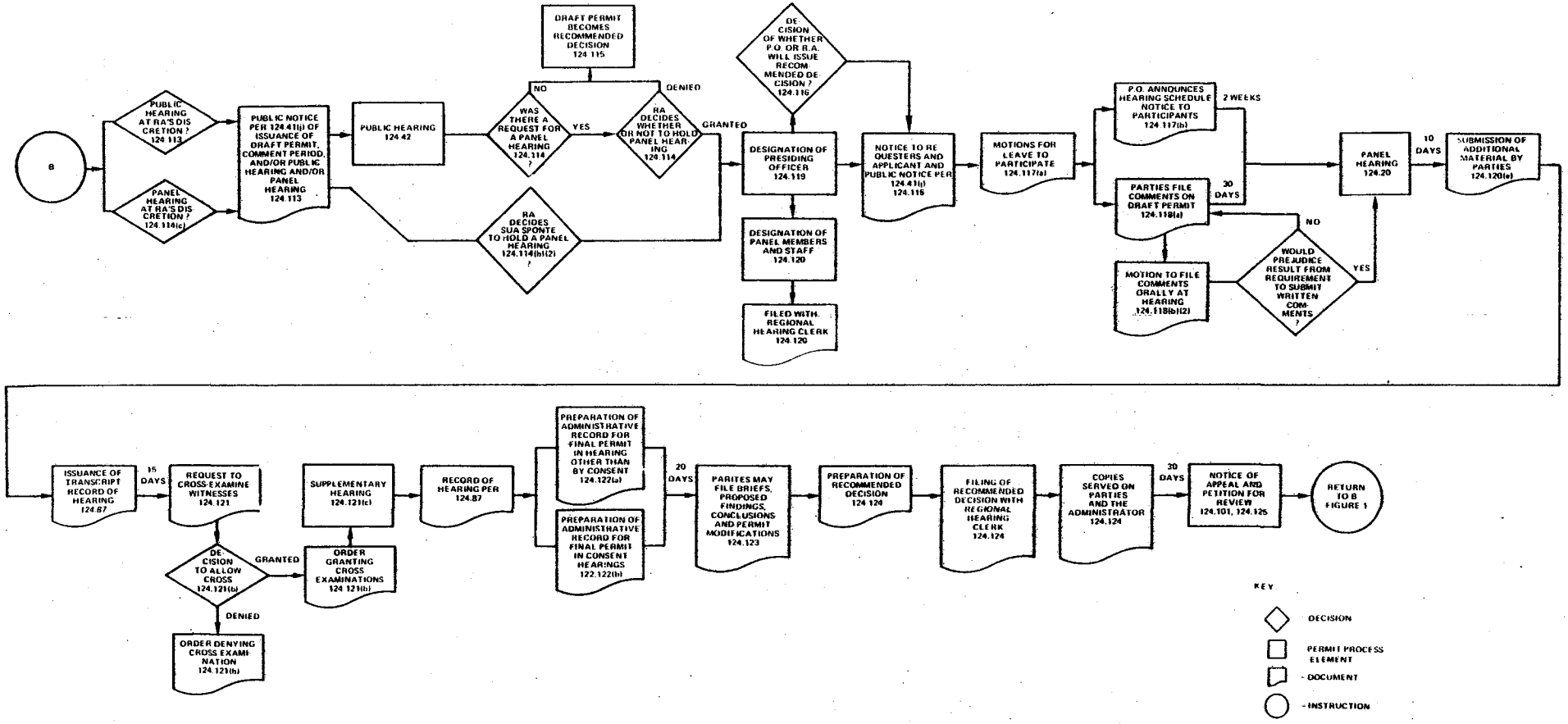

FIGURE 8-1. SUBPART 1-NONADVERSARY PROCEDURES FOR INITIAL LICENSING

Full size version in Appendix (page A-4)

INDEX

INDEX

Administrative record
  for draft permits, II-10, III-1, III-2, III-11, III-12, VI-2, VI-8, A-2
  for final permits, III-2, VI-1 through VI-6, VI-8, A-2
Appeals to the Administrator, II-6, A-2
Application process, II-1 through II-3, II-8 through II-15, A-1, A-2
Applications, II-1 through II-15
  case-by-case determination, II-10, II-11
  from new sources, II-8, II-9

Delegation of authority, IX-1, IX-4
Denial of permits, II-1, II-2, II-11
Draft permits, II-1 through II-3, II-5, II-9, II-10, II-12 through II-14, III-1 through III-12

Evidentiary hearing, II-4, II-5, II-6, II-11, VII-1 through VII-29, IX-1, IX-6, IX-11, A-1, A-3
Ex parte communications, IX-1, IX-2, IX-8, IX-9, IX-10

Final permits, II-1, II-3 through II-6, VI-1 through VI-8, A-2
Forms, see List of Forms, vii

General permits, IX-1, IX-6, IX-7
Grouping parties, IX-1, IX-2, IX-8

Information
  for attorneys, I-2 through I-13, II-2, V-5 through V-10, VI-3, VI-4, VII-1 through VII-29, VIII-1 through VIII-15, IX-5, IX-8
  for permit writers, I-2 through I-13, II-2, II-3, III-1 through III-12, IV-3, IV-4, V-2, V-5 through V-10, VI-3, VI-4, VII-1 through VII-29, VIII-1 through VIII-15, IX-5, IX-6 through IX-13
  public access to, IX-1, IX-3, IX-4
  for regional hearing clerks and record clerks, I-8 through I-11, II-3, IV-2, VI-3, VI-4, VII-1 through VII-29, VIII-1 through VIII-15, IX-5, IX-8
Interlocutory appeal, VII-1 through VII-4

Modification requests, II-9, II-10, II-14, V-1 through V-10
  appeals, V-4
  applications, V-2, V-5 through V-10
  effect on permit, V-3
  procedures for various requests, V-5 through V-10

New sources, IX-1 through IX-13
  applications from, II-8, II-9
Nonadversary hearings, II-4, II-5, VIII-1 through VIII-15, A-1, A-4

Prehearing conference, VII-1, VII-2, VII-7
Production or exchange of documents and data, IX-1, IX-8

Public comment, II-1, II-3, IV-1, IV-3, IV-4, IV-9, IV-12
  procedures, IV-1, IV-3, IV-4, IV-9, IV-12
  reopening of comment period, IV-4
Public hearings, II-1, II-3, IV-1, IV-3 through IV-7
Public notice, II-1, II-3, IV-1 through IV-12
  forms, see List of Forms, vii
  methods for circulating notice, IV-2, IV-5 through IV-12
  procedures, IV-1 through IV-12

Revocation and reissuance, II-9, II-10

Service, IX-1, IX-2, IX-5
  extension of time, IX-5
Settlements, IX-1, IX-5
State certification, II-1, II-2, II-12, II-13, II-14
  change in state law, II-13
Statement of basis, III-1, III-2, III-3, III-4, VII-6
Stipulations, VII-2, VII-27, VII-28, IX-2

Termination of permits
  requests, II-9, II-10
  procedures, II-9, II-10, II-11
Time limitations
  EPA's failure to comply, IX-4

Variance, V-1 through V-10
  appeals, V-1, V-4
  applications, V-1, V-2, V-5 through V-10
  effect on permit, V-3
  procedures for various requests, V-5 through V-10