ENVIRONMENTAL PROTECTION AGENCY

[40 CFR Parts 122, 123, 124]

[FRL 1225-1]

Consolidated Permit Regulations: RCRA Hazardous Waste; SDWA Underground Injection Control; CAA Prevention of Significant Deterioration; CWA National Pollutant Discharge Elimination System; and Section 404 Dredge or Fill Programs

AGENCY: Environmental Protection Agency.

ACTION: Proposed rule.

SUMMARY: This rule establishes consolidated permit program requirements governing the Hazardous Waste Management program under the Resource Conservation and Recovery Act (RCRA), the Underground Injection Control (UIC) permit program under the Safe Drinking Water Act (SDWA), the National Pollutant Discharge Elimination System (NPDES) under the Clean Water Act (CWA), and the Prevention of Significant Deterioration (PSD) program under the Clean Air Act, for three primary purposes:

(1) To consolidate program requirements for the RCRA and SDWA programs with those already established for the NPDES program.

(2) To establish, for the first time, requirements for State programs under the RCRA, UIC and Section 404 programs.

(3) To consolidate permit issuance procedures for EPA-issued Prevention of Significant Deterioration permits under the Clean Air Act with those for the RCRA, UIC, NPDES and State 404 programs.

DATES: Comments must be received by September 12, 1979.

Public hearings to discuss and to receive comments on the proposed Consolidated Permit regulations, the proposed Underground Injection Control regulations (proposed at 44 FR 23738, April 20, 1979) under the Safe Drinking Water Act, and on the Consolidated Permit Application Forms, will be held in four cities, over three days in each city. The meetings are scheduled for the following places:

July 16, 17 *, 18, 1979, Dallas, Texas.
July 23, 24 *, 25, 1979, Washington, DC.
July 26 *, 27, 28, 1979, Chicago, Illinois.
July 30, 31 *, August 1, 1979, Seattle, Washington.

ADDRESSES: Interested persons may participate in this proposed rulemaking by submitting comments to Edward A. Kramer (A-2) Permits Division (EN-336), Office of Water Enforcement, Environmental Protection Agency, 401 M Street, S.W., Washington, D.C. 20460. Due to the length and complexity of the regulations, all comments should be organized by page and section number. Because a number of program offices will be involved in the review of comments received, EPA requests that *four* copies of comments be submitted. A copy of all comments received will be available for review during normal business hours at the Environmental Protection Agency, Public Information Reference Unit, Room 2922, 401 M Street, SW, Washington, DC 20460.

Four public hearings have been scheduled at the following locations:

July 16, 17 *, 18, 1979, Northpark, Inn, 9300 North Central Expressway, Dallas, Texas.

July 23, 24 *, 25, 1979, HEW Auditorium, 330 Independence Avenue, S.W., Washington, DC.

July 26 *, 27, 28, 1979, Water Tower Hyatt, 800 North Michigan Avenue, Chicago, Illinois.

July 30, 31 *, August 1, 1979, EPA—Region X, 1200 6th Avenue, Seattle, Washington.

The format for each of the hearings will be the same. Each day in a series will be devoted to a separate subject: Day 1 will cover the proposed Part 146 UIC technical regulations, Day 2 and Day 3 will cover the proposed consolidated regulations, the application form, and proposed changes to the NPDES permit program regulations on application requirements. The evening session will cover all subjects. Following registration there will be a short presentation by EPA officials concerning the topic of that day's hearings, an opportunity for anyone in the audience to make a statement, and a question and answer session.

A court reporter will be present at each of the public hearings. Official transcripts will be available at cost.

Anyone requesting an evening session or wishing to make an oral statement at the Consolidated Permit Regulations and Application Form hearings should notify in writing, specifying the hearing and the city in which they are interested: Ms. Judith Shaffer, Permits Division (EN-336), U.S. Environmental Protection Agency, 401 M Street, SW, Washington, D.C. 20460.

Anyone wishing to make an oral statement at the hearings on the UIC regulations should notify in writing, specifying the hearing and the city in which they wish to make the statement: Ms. Sharon Gascon, Office of Drinking Water (WH-550), U.S. Environmental Protection Agency, 401 M Street, SW, Washington, D.C. 20460.

Pamphlets describing the proposed regulations and their impact on the various programs are available from the Environmental Protection Agency, Public Information Center (PM-215), 401 M St., SW, Washington, DC 20460. Please order by title and code.

- A Guide to New Regulations for NPDES (C-1).
- A Guide to the Underground Injection Control Program (C-2).
- A Guide to Consolidated Permit Programs (C-3).
- A Guide for States on Consolidated Permit Programs (C-4).
- A Guide to the Hazardous Waste Management Program (C-5).
- A Guide to the Dredge or Fill Permit Program (C-6).
- A Guide to the Consolidated Permit Application Form (C-7).

FOR FURTHER INFORMATION CONTACT: Edward A. Kramer (A-2), Office of Water Enforcement (EN-336), U.S. Environmental Protection Agency, Washington, D.C. 20460, (202) 755-0750.

SUPPLEMENTARY INFORMATION:

Background

The proposed rules integrate program descriptions, State program requirements and procedures for decision-making for four EPA regulatory programs: (1) the Hazardous Waste Management Program established under the Resource Conservation and Recovery Act (RCRA), (2) the Underground Injection Control (UIC) Program established under the Safe Drinking Water Act (SDWA), and (3) the National Pollutant Discharge Elimination System (NPDES) and 404 (Dredge or Fill) program established under the Clean Water Act (CWA). Also consolidated are permit issuance procedures for EPA-issued Prevention of Significant deterioration (PSD) permits under the clean Air Act. (CAA).

These proposed regulations are an important element of an Agency-wide effort to consolidate and make uniform procedures and requirements applicable to EPA and State-administered programs.

Work began in the early Fall of 1978 to consolidate permit program regulations for one existing program—the National Pollutant Discharge Elimination System (NPDES) under the Clean Water Act, and two new programs—the Hazardous Waste Management program under the Resource Conservation and Recovery Act (RCRA) and the Underground

* Day and evening sessions.

Injection Control (UIC) program under the Safe Drinking Water Act. State program requirements under the section 404 Dredge or Fill program of the Clean Water Act were also included. In October of 1978, the Administrator established a Permits Consolidation Task Force to examine the benefits, costs and possible extent and range of permit consolidation that could be undertaken by EPA. The Task Force completed its examination and concluded in its Report to the Administrator that consolidation of permit activities could result in significant benefits for the environment, the regulated public and EPA. One of the Task Force recommendations to the Administrator was the continuation of development of consolidated permit program regulations, particularly procedural regulations, for the RCRA hazardous waste management, UIC, NPDES and 404 programs. The Task Force also recommended that procedures for issuance of Air PSD permits should be the same as those for the four above programs, where procedural requirements are shared.

These proposed regulations are the first step in EPA's effort to consolidate permit programs. The proposal focuses on consistency and unification, to the extent possible, between RCRA, UIC, and NPDES program definitions and descriptions, State program requirements and permit issuance procedures. The proposed regulations also consolidate State program requirements under section 404 of CWA (permits for discharges of dredged or fill material), and EPA permit issuance procedures for Air PSD program.

Draft consolidated application forms are published with these proposed regulations, so as to enable a more complete review of EPA's Permits Consolidated efforts. The Agency also intends to move in the direction of issuing a single consolidated permit for a facility that requires multiple EPA permits, which would cover all EPA permit requirements for the facility.

As the first expression of this process, the Agency has developed a single form for applying for permits under the Consolidated Permit regulations. This form appears as a notice for public comment in a separate part of today's Federal Register. The Consolidated Application form consists of a single part to collect general information from all applicants, followed by separate program-specific parts which collect information needed to issue permits under each program. Today's notice includes the general information part and parts for hazardous waste permits under RCRA and for certain water discharges under NPDES. The parts for the other permit programs will be developed in the near future, and will be incorporated into the consolidated application form when they are ready.

A set of NPDES regulations is also being proposed today as part of the Consolidated Application form package. These proposed NPDES regulations, which are closely tied to the proposed application form, are numbered to correspond with the Consolidated Permit regulations and the two should be read together. The preamble to the proposed conforming regulations contains a detailed discussion of the new NPDES application form requirements and their place in the entire NPDES permitting process.

Although nothing in these regulations would require States to undertake a reorganization of environmental permitting functions, EPA encourages States to begin or continue efforts toward "one-stop" permitting, or other forms of permit program consolidation.

The Agency anticipates a number of benefits to the environment, the regulated community, the general public and its own institutional efficiency in the Permits Consolidation effort:

- *Environmental Benefits:* Consolidation of procedures, regulations and permit review functions should result in more comprehensive management and control of wastes or residuals, and elimination of gaps in managing these wastes.
- *Regulatory Burden Reduction:* The use of uniform procedures and program requirements among EPA permit programs should result in more consistent and predictable requirements for the regulated community, and should reduce the costs of complying with multiple program requirements. The use of common program regulations, and future use of a single application form for EPA-issued permits should reduce the paperwork and increase efficiency in processing permits.
- *Institutional Benefits:* The Agency has already experienced greater coordination, sharing of information, and resolution of inconsistencies and overlaps among the various programs during the development of these proposed regulations. By October, 1979, the Agnecy will be establishing centralized permit-writing units in the Regions.
- *Public Participation Benefits:* Procedures and opportunities for public participation in permit program decisions and in State program approvals will became more uniform and predictable under these regulations. This should facilitate public involvement in the implementation of the RCRA, UIC, NPDES and 404 programs.
- *Resource Benefits:* EPA expects that consolidation of permit programs should result in some reduction in overall Agency permitting resource needs over the next few years, measured against what the expanding scope of EPA permit programs would otherwise require, particularly as implementation of the RCRA and UIC programs begins and the consolidated application form is utilized. If States adopt similar approaches, resource benefits could also be felt at the State level.

Organization of Proposed Regulations

The proposed regulations will revise 40 CFR 122, 123 and 124, presently used for NPDES program regulations. These Parts of the Code of Federal Regulations are being used because they already provide the skeleton for organizing permit regulations, namely:

Part 122—Program Descriptions.

Part 123—State Program Requirements.

Part 124—Procedures for Decision-making.

To structure the proposed regulations in an understandable format, parts 122, 123 and 124 have been organized into Subparts. Subpart A of each Part applies to each permit program included in that Part. Subsequent Subparts set forth program-specific requirements for the individual programs.

Although the Agency has attempted to unify and consolidate these proposed regulations, statutory and programmatic considerations preclude complete uniformity. Thus, to review the regulations for a particular program, one must read both the general subpart plus the applicable specific subpart.

In adopting the proposed format, the Agency considered various alternative formats for combining requirements for the covered programs. The Agency solicits comments on the proposed format and any alternative approaches.

The Agency recognizes that these regulations are long and complicated. However, if each program were to publish separate regulations, they would be approximately 40 percent larger in total. This savings has resulted from the formulation of generally applicable requirements for all programs.

Summary of Proposed Regulations

Proposed Part 122—Establishes program definitions and basic program requirements for the RCRA, UIC, NPDES and 404 programs. Part 122 also provides certain requirements for State programs,

to the extent Part 123 explicitly references Part 122 requirements. This Part spells out in detail who must apply for a permit; 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 other requirements.

Proposed Part 123—Establishes the requirements for State programs. Each of the programs described in Part 122 may be administered by any State, in lieu of EPA, that has received the approval of the Administrator. In addition of the hazardous waste, UIC and NPDES programs, Part 123 governs State section 404 permit programs for discharges of dredged or fill material. After receiving the approval of the Administrator a State may issue section 404 permits, in lieu of the United States Army Corps of Engineers, in so called "Phase II and III" waters (sometimes referred to as traditionally non-navigable waters). In addition, Part 123 contains the procedures for State program approval, revision and withdrawal.

Proposed Part 124—Establishes the procedures to be followed in making permit decisions under the RCRA hazardous waste, UIC, PSD and NPDES permit programs, including procedures to enable public participation in permit decisions, consultation with State and Federal agencies, procedures for consolidated review and issuance of two or more permits to the same facility or activity, and mechanisms for appeal from permit decisions. Most requirements in Part 124 are only applicable where EPA is the permit-issuing authority. Part 123 requires States to comply with some of the Part 124 provisions, such as the public participation aspects of permit issuance.

Relationships Between Programs

The programs covered in these regulations overlap one another in two different ways. The first type of overlap occurs where different activities associated with a single source require permits under two or more of the programs covered by these regulations. For example, a facility may store hazardous waste in surface facilities, inject some of its waste into the ground, and have a discharge of other waste into surface waters. The basic reason for proposing these consolidated regulations is to assure that permit decisions are consistent, and that the procedures for permit issuance are efficient and coherent.

The second type of overlap occurs where the same activity is regulated under two or more of the statutes authorizing these regulations. For example, disposal of hazardous waste by well injection must have a permit under section 3005(a) of RCRA, a permit under section 1421(b) of SDWA and, if located in a State with an approved NPDES program, a permit under section 402(b)(1)(D) of the CWA. The following is a discussion of the approaches the Agency is proposing in this second area:

UIC/NPDES—Under section 402(b)(1)(D) of the CWA approved State NPDES programs are required to "control the disposal of pollutants into wells." The UIC program, likewise, requires States to establish programs for controlling well injections. EPA believes that these two requirements are complementary and that a single permit issued by a State to a well injector can satisfy the requirements of both acts.

Although EPA has required NPDES States to demonstrate the legal authority to issue permits for well disposal, it has never specified how States should exercise this authority. No technical requirements have been established under the NPDES program for well disposal; States are merely required to exercise their authority "to protect the public health and welfare and to prevent the pollution of ground and surface waters." EPA believes that the legal authority possessed by NPDES States can serve as the nucleus for development of State UIC programs. Therefore, in many instances, these States will be able to develop UIC programs without any further action by their State legislatures. Once a State develops regulations and other program components in accordance with UIC regulations under Part 146 (proposed at 44 FR 2378 (April 20, 1979)), and receives the approval of the Administrator under Part 123, a State-issued permit for well injection should satisfy both CWA and SDWA requirements.

UIC/RCRA—The UIC program imposes requirements on all well injection, while the hazardous waste program under RCRA imposes requirements on treatment, storage and disposal of hazardous waste. When materials which are hazardous wastes for purposes of the RCRA program are injected into a well, that well falls within the definition of a Hazardous Waste Management Facility (HWM) facility and, consequently, is subject to regulation under both programs.

To avoid any possible duplication and inconsistency in regulation, EPA proposes to regulate hazardous waste injection wells under the UIC program because it is specifically oriented toward underground injection as a technique of disposal. EPA believes that the degree of environmental protection afforded by the UIC regulations meets the requirements of RCRA. EPA has taken several actions to assure that hazardous waste is adequately covered under the UIC program. In cases where a site has both an injection well and surface facilites that treat, store or dispose of hazardous wastes, the surface facilities will be subject to a hazardous waste management program permit. The appropriate RCRA requirements will be applied through that mechanism. In cases where a well receives wastes accompanied by a manifest, the UIC controls will apply exclusively. Those controls, however, will incorporate the RCRA requirements for notification, manifest, recordkeeping and reporting.

However, any pits, ponds, lagoons, storage tanks or other surface facilities associated with an injection well that are used to treat of store hazardous waste are still required to obtain a RCRA permit. For further discussion of this approach, see the preamble to Subpart B of Part 122 of these regulations.

Another particular concern of the Agency was that the imposition of controls over hazardous waste under RCRA might make underground disposal of such waste more economically attractive in States that were not yet listed as requiring a UIC program. Under the UIC program, State program requirements are only triggered once a State has been listed by EPA. EPA has therefore decided to implement UIC controls over well injections on the same schedule as the RCRA hazardous waste program. All the remaining unlisted States will be listed by May of 1980 as needing a UIC program.

The UIC Program also proposes to ban all Class IV wells (i.e., wells owned or operated by generators of hazardous wastes or by hazardous waste management facilities that inject into or above underground sources of drinking water). Since the operators of these wells are subject to RCRA requirements, they will have to notify EPA under section 3010 of RCRA. The initial inventory of Class IV wells will be developed through the notification process under RCRA.

NPDES/RCRA—Publicly owned treatment works(POTW) which receive wastes defined as hazardous under the RCRA program are also point sources subject to the NPDES permit program of secion 402 of the CWA. This creates the possibility of duplicative regulation of

the same activity. In an effort to avoid this result, EPA is proposing a "permit by rule" under the RCRA program for publicly owned treatment works (POTW) which receives hazardous wastes and are regulated by the NPDES program. Under this proposal, POTW's would be "deemed to have a permit" for purposes of RCRA if the facility has an NPDES permit and if it adheres to the notification requirements of section 3010 of RCRA, as well as the manifest, recordkeeping and reporting requirements of 40 CFR Part 250 under sections 3001–3004 of RCRA. EPA believes that this approach accomplishes the protective goals of RCRA in a way which eliminates much of the administrative burden which parallel regulation would cause. For further discussion of this approach, see the preamble to Subpart B of Part 122.

Applicability of NEPA to the Consolidated Permit Programs

With the exception of EPA-issued permits for new sources, none of the permitting requirements under these regulations is subject to requirements of the National Environmental Policy Act (NEPA), 43 U.S.C. section 4332(2)(E). NPDES permits, other than for new sources as defined in section 306 of CWA, are removed from NEPA by the terms of section 511(c) of CWA. That section expressly exempts from NEPA requirements all actions taken by the Administrator pursuant to CWA, except issuance of permits to new sources and construction grants for publicly owned treatment works. PSD permits under the CAA are similarly exempted by statute from NEPA. See Energy Supply and Environmental Coordination Act of 1974, section 4(c)(1), 15 U.S.C. 793(c)(1).

EPA permits for hazardous waste facilities under RCRA are also not subject to the formal requirements of NEPA. The courts have recognized that Federal regulatory action taken by an agency with recognized environmental expertise, when circumscribed by extensive procedures, including public participation for evaluation environmental issues, constitutes the functional equivalent of NEPA's requirements. See *Portland Cement Assoc.* v. *Ruckelshaus,* 486 F.2d 375 (D.C. Cir. 1973), cert. den., 417 U.S. 921 (1974); *Maryland* v. *Train,* 415 F. Supp. 166, 122 (D. MD. 1976). EPA has determined that the procedures regarding EPA's issuance of RCRA permits clearly satisfy that standard.

The Agency also anticipates that the functional equivalence principle will apply to EPA-issued UIC permits, and that such permits are similarly exempt from formal NEPA requirements.

Finally, NEPA requirements do not apply to State-issued permits. *Chesapeake Bay Foundation, Inc.* v. *United States,* 453 F. Supp. 122 (E.D. Va. 1978).

The Agency believes that the proposed regulations will have a positive environmental impact by providing more comprehensive environmental review of facilities which require EPA permits under the NPDES, PSD, RCRA or UIC permit programs, particularly where two or more of these permits may be required for the same facility or activity. We believe that the possible transfer of various programs to State responsibility will not affect the stringency of program administration. The State programs must meet Federal Standards in order to receive Federal approval, and they will be subject to Federal oversight. While transfer of aspects of the 404 program to the States will eliminate the NEPA requirement for some 404 permits, it is unclear whether this transfer will lead to narrowed environmental review of the subject activities, since States are free to adopt a more stringent approach to regulation and many States have their own EIS-type requirements.

Previous Publication of Regulations for RCRA, UIC, and NPDES Programs

Portions of these proposed regulations have appeared previously in the Federal Register in either proposed or final form. Comments on any prior proposal will *not* automatically be considered part of the record of this proposal. Commenters should resubmit such comments as comments on this proposal if they want to make sure that EPA will consider them.

RCRA Program: Under the RCRA program, Guidelines for State Hazardous Waste Programs were proposed as Part IV of the February 1, 1978, Federal Register (43 FR 4366). These consolidated regulations contain changes which reflect comments on the February 1978, proposed guidelines. Because the consolidated regulations may surface issues on which the public has not had a chance to comment, the consolidated regulations are a reproposal of the RCRA Section 3006 guidelines.

UIC Program: Regulations for the UIC program were originally proposed on August 31, 1976, as 40 CFR Part 146. In response to numerous public comments, EPA has made significant changes in the regulations and has reproposed them for further public comment. (See 44 FR 23738 (April 20, 1979)). Many elements of the UIC program are now being proposed for inclusion in Parts 122, 123 and 124, while the technical criteria and standards by which the Director of an EPA or State-administered UIC program makes decisions continue to remain in Part 146.

NPDES Program: Subparts D of the proposed Parts 122 and 123, and Subparts D, E and F of proposed Part 124 are virtually identical to each of the contents of the NPDES Parts 122–124 which were recently promulgated. These NPDES regulations were made final after a comment period of 90 days during which over 500 comments were received. The comments were fully considered by the Agency, and the final NPDES regulations now occupy Parts 122–124. The consolidated permit program regulations, when finally promulgated, will incorporate and take the place of the final NPDES regulations in Parts 122–124. There are some minor changes to the Final NPDES regulations which occurred in the process of generalizing requirements for all programs in Subpart A. In addition, there are several new provisions applicable to the NPDES program, such as procedures for the withdrawal of State programs under Part 123, and new permit modification and confidentiality of information provisions under Part 122. These changes are highlighted in this preamble discussion.

Technical Requirements for RCRA, UIC, and NPDES Programs

Technical requirements and criteria which apply to decision-making under these three programs have been developed separately from Parts 122–124. These regulations set the standards for the actual contents of permits under the three programs and provide some of the technical bases for determining the adequacy of State programs and individual permit decisions.

RCRA Program: For the RCRA permit program, Parts 122–124 should be read, where appropriate, in conjunction with technical standards proposed under 40 CFR Part 250 on December 18, 1978, (43 FR 58946–59028) under sections 3001, 3002 and 3004 of RCRA prescribing (1) criteria for identifying and listing hazardous wastes, identification methods, and a hazardous waste list, (2) standards for generators of such waste for recordkeeping, labeling, containerizing and using a manifest, and (3) performance standards for hazardous waste management facilities including human health and environmental protection levels and design and operating standards as well as recordkeeping, monitoring, reporting,

contingency plans and training and financial responsibility requirements. These proposals together with those under section 3003, (April 28, 1978, FR 18506–18512), section 3005 (40 CRF Parts 122 and 124), section 3006 (40 CFR Part 123), section 3008 (August 4, 1978, FR 34738–34747), and section 3010 (July 11, 1978, FR 29908–29916) of RCRA and that of the Department of Transportation (May 25, 1978, FR 22626–22634) under the Hazardous Materials Transportation Act constitute the hazardous waste regulatory program under subtitle C of RCRA.

UIC Program: Technical criteria and standards for Underground Injection Control Programs under the SDWA were proposed as 40 CFR Part 146, on April 20, 1979 (44 FR 23738).

NPDES Program: NPDES criteria for decision-making will be located in 40 CFR Part 125, which was recently promulgated. In addition, effluent guidelines used in setting permit effluent limitations are located in 40 CFR Subchapter N.

404 Program: Interim final guidelines detailing the environmental concerns to be considered in evaluation of section 404 Permit applications (i.e., the section 404(b)(1) guidelines are set forth in 40 CFR Part 230; however revised guidelines will soon be proposed to amend Part 230. Procedures under section 404(c) for use of EPA's authority to prohibit or restrict disposal sites are detailed in 40 CFR Part 231 and regulations covering activities under section 208(b)(4) of CWA will be in 40 CFR Part 130..

Part 122

What does this Part do?

Subpart A of Part 122 provides both general and program-specific definitions for the EPA administration of RCRA hazardous waste, SDWA underground injection control, and CWA NPDES programs. In addition, all Subparts of Part 122 describe basic program elements for the three programs, including application requirements, standard permit conditions, permittee monitoring and reporting requirements and other requirements. Both the general Subpart (A) and the appropriate individual Subpart (B-D) must be consulted for a full description of any program.

Certain of these requirements are made applicable, as indicated in Part 123, to State programs which operate in lieu of EPA programs after receiving EPA approval. In the case of section 404, State programs operate in lieu of the Corps of Engineers program in so-called "Phase II and III" waters.

Subpart A

The major elements of Part 122, Subpart A are:

Program definitions (§ 122.3). Definitions for the RCRA, UIC, NPDES and 404 programs are set forth in § 122.3. Definitions applicable to all programs appear under "General Definitions," and those applicable only to a particular permit program are set forth separately.

Wherever possible, common definitions have been provided for the four programs. In some cases, where different definitions must be employed due to the differing statutory requirements, differences between definitions for two or more programs are highlighted. For instance, the definitions of "State" and "person" under the three Acts are necessarilydifferent and are highlighted in § 122.3(a).

Both the RCRAand UIC programs propose to use a similar definition of "underground sources of drinking water" or "underground drinking water source" (USDW). Any aquifer or its portion qualifies as an USDW if:

(1) It is currently in use as a source of drinking water;

(2) It produces water with fewer than 10,000 mg.1 of total dissolved solids (TDS); or

(3) It is designated as an USDW by the Administrator or State (as appropriate).

Under the UIC program, however, flexibility is granted in the application of the definition to recognize those situations where the aquifer or its portion may technically meet the definition but in fact has no real potential to serve as a drinking water source. Therefore, in those instances where the aquifer or its portion does not currently and will not in the future serve as a source of drinking water, it need not be designated if:

(i) It is mineral, oil or geothermal energy producing;

(ii) It is situated at a depth or location which makes recovery of water for drinking water purposes economically or technologically impractical; or

(iii) It is so contaminated that it would be economically or technologically impractical to render the water fit for human consumption.

To balance the flexibility provided, the UIC program will require the designations of USDW's to be made after public hearing and subject to approval by the Administrator.

The RCRA program does not propose a similar degree of flexibility in the application of the definition. It is the Agency's judgment that where hazardous wastes are concerned, a stricter level of protection is prudent. Since little discretion is available, the HWM program also does not propose to require public hearings or review by the Administrator.

Both the NPDES and section 404 programs employ the concepts of best management practices (BMP's) and general permits. Because of the differences in the regulatory programs, differing definitions are applicable to these concepts (no definition of "general permit" is given for purposes of NPDES although EPA is considering formulating one). The public is invited to comment on whether it is appropriate to develop unified definitions for these concepts.

Signatories to permit program forms (§ 122.5). These regulations require that permit applications, except those for Class II wells under the UIC program, must be signed by a principal executive officer of at least the level of vice-president or equivalent official for partnerships or public facilities. Permit applications for Class II wells, reports required under Part 122, and certain requests for information forms may be signed by a duly authorized representative. Applications for permits for Class II wells under the Underground Injection Control program are distinguished from other applications due to the large numbers of small and physically dispersed Class II wells associated with oil and gas operations involving the injection of fluids. All signatories for permit program forms must represent that they have made sufficient inquiries to certify the truth of any statements made in the forms.

Duration of Permits; Continuation of Expiring Permits; Transferability of Permits (§ 122.6). This section establishes requirements for the duration of RCRA, UIC, 404 and NPDES permits, the continuation of expiring EPA-issued permits, and requirements that must be met by permittees who transfer ownership of their facilities.

NPDES and section 404 permits are required under the Clean Water Act to have fixed terms not to exceed five years. Neither RCRA nor the SDWA establish specific permit terms for hazardous waste or underground injection control permits. Section 122.6 proposes that RCRA and UIC permits may be issued with terms up to the life of the permitted facility. A lifetime permit was selected for these facilities so as to enable them to obtain more favorable financing, to avoid continuous facility siting problems and to save paperwork burdens on EPA or State permit writers. NPDES and 404 permits

will continue to be issued for terms that do not exceed five years. However, to insure a regular review of permits particularly where a RCRA, UIC, or 404 permit is issued to a facility or activity that requires an NPDES permit, review of each permit issued for a given facility or activity is required each time another permit for the same facility is modified, reissued or terminated. This review will thus coincide with the NPDES reissuance cycle and will be conducted for purposes of considering whether modification or revocation and reissuance of any other permit(s) is warranted. These proposed periodic reviews are mandatory on both EPA and approved States.

After reviewing a permit, a decision whether or not to modify the permit will be made by the EPA Regional Administrator or the State Director. Reasons for modifying a permit would include new information about human health or environmental risks, changes in the national standards, and changes in the type or volume of hazardous waste(s), injected fluids or pollutants. Facility siting will not be considered at the time of permit modification unless new information or standards indicate a threat to human health or the environment exists which was unknown at the time of permit issuance or unless new data has been developed since the time the permit was granted.

Regardless of whether another permit expires or is modified or terminated, review of single UIC or RCRA permits for a given facility is required in any event at least every five years and upon public request where information is submitted which indicates that grounds for permit modification exist.

The Agency solicits public comment on this approach to ensure comprehensive, regular review of permits. In particular, the Agency solicits comment on an alternative that was considered and rejected during the development of these regulations. Under this alternative, where multiple permits are required for a single activity or facility, all permits would be set to expire at the same time. Where only a single permit under any program is required, it would be subject to review and reissuance at the time that an additional permit under another program is required in the future. This option would assure that a comprehensive review of the permit(s) from the standpoint of all programs is accomplished concurrently and on a regular basis. It would insure regular review of multiple permit and public participation during the issuance/reissuance process because of the built-in expiration and reissuance of permits. In addition, this option would enable continuing EPA review of State-issued permits for the same facility or activity, if the requirement were made applicable to States.

Review and Modification or Revocation and Reissuance of Permits. Section 122.9 covers both modification and revocation and reissuance of permits. These are alternative means of accomplishing very similar results. Either action can be chosen by the State Director or the Regional Administrator as a means of changing the terms of a permit, if cause exists under § 122.9(e). In general, however, the Director would choose to revoke an existing permit and reissue a new permit when permit terms and conditions are to be extensively changed, or where the remaining term of the existing permit is short and it would be to the advantage of the permittee to obtain a new permit with a longer term. This latter situation will involve primarily the shorter term NPDES and 404 permits, since most, if not all, UIC and RCRA permits will be set for the life of the facility. Additional program-specific provisions for modification of NPDES permits are contained in Subpart D. Most modifications under this section require compliance with §§ 124.5 and 124.7, which require the issuance of a draft permit for permit modifications, thus initiating the public review process under Part 124. Such modifications are processed in the same manner as permits, except that public comment is sought only on the proposed modifications. However, certain minor modifications under § 122.9(g) do not require compliance with § 124.5, unless the modifications would render the permit less stringent or unless contested by the permittee. These minor modifications take effect immediately when issued, and do not require the preparation of a draft permit or public notice and comment. In addition, Section 404 permit modifications will be processed according to procedures set forth in Part 123, Subpart E.

Termination of permits. Section 122.10 specifies conditions under which permits will be terminated for cause by the permitting authority. While revocation and reissuance is a mechanism for changing permit terms and conditions in light of changed conditions, termination is essentially an enforcement mechanism. The term "termination", as it is used in Part 122, includes permit suspension or revocation under section 3008 of RCRA. Procedures for termination of RCRA permits are provided in 40 CFR Part 22 (proposed 43 FR 34738 (August 4, 1978)).

Conditions applicable to all permits (§ 122.11). Section 122.11 specifies general conditions applicable to all permits under the RCRA, UIC, NPDES and 404 programs. Additional specific conditions are also included in Subparts B–D, unique to the individual permit programs.

Schedules of Compliance. Section 122.12 specifies requirements for schedules of compliance leading to expeditious compliance with program requirements. For NPDES permits, these schedules of compliance lead the permittee to compliance with the CWA's statutory treatment deadline requirements, as well as other program requirements. For permits under the RCRA, UIC and 404 programs, schedules of compliance will be used to set timetables for expeditious compliance with program requirements. These schedules are required, under proposed § 122.12(a), to set interim compliance dates where the total schedules exceed nine months. Permittees are required to provide written notice to the Director of the permittee's compliance or noncompliance with interim or final requirements. For most EPA-issued permits this notice must be provided within 14 days of each interim or final date. However, UIC permits issued by EPA will require such notice within 30 days. This variation in the notice requirements for UIC permits results from an effort to make the UIC program requirements in these proposed regulations consistent with those that were proposed as Part 146 on April 20, 1979 (44 FR 23738). However, EPA requests comments on the most appropriate time for providing such notice, and whether the notice requirements for all programs should be the same.

In addition, proposed § 122.12 allows approved State programs to choose different intervals for interim compliance dates, and up to 30 days for providing written notice following an interim or final compliance date. Comments on this approach are also solicited.

Section 122.12 also provides for two alternate schedules of compliance in cases where an EPA permittee may choose to terminate operations rather than meet permit requirements. One schedule reflects the dates for the proposed termination of operations, and the other reflects dates for compliance with all permit requirements. Very specific requirements for these alternate schedules are proposed for NPDES permits issued by EPA, because NPDES permits are subject to statutory deadline requirements under the CWA. However,

because the UIC and RCRA programs are expected to encounter situations in which alternate schedules will be necessary to assist both the Regional Administrator and the permittee in making the decision to terminate operations or meet compliance, alternate schedule provisions are also provided for these programs. Comments are solicited on the use of alternate schedules for the UIC and RCRA programs.

Recording and Reporting of Monitoring Results. Section 122.14 establishes general requirements applicable to all permittees for the recording and reporting of monitoring results to the permitting authority.

Noncompliance Reporting (§ 122.15). This section outlines the general requirements for noncompliance reporting that must be met by both EPA Regional offices and approved States. Reports are required on a quarterly basis for major permits under the three programs, and on an annual basis for minor permits. Additional or more specific reporting requirements are provided in Subparts B–D.

Confidentiality of Information (§ 122.16). This section provides for claims of confidentiality by persons submitting information to EPA under these regulations. Such claims will be processed in accordance with the procedures set out in 40 CFR Part 2. Paragraph (b) describes forms, documents and other materials will not be given confidential treatment.

Relationship of Subpart A to the Final NPDES Regulations, Part 122

Certain elements of the NPDES program have been modified slightly in Subpart A of Part 122, as a result of the consolidation with the RCRA and UIC programs. Among these changes are the following:

Review and Modification or Revocation and Reissuance of Permits (§ 122.9)

Under these proposed Consolidated regulations, NPDES permits must be reviewed to determine whether cause exists for modification or revocation and reissuance every time that another permit for the same facility or activity is modified, revoked and reissued, or terminated, and when information is presented to the Director indicating that cause exists for action under § 122.9(e). The final NPDES regulations did not require this kind of review by the Director. (See § 122.31 of the NPDES regulations.)

Conditions Applicable to all Permits (§ 122.11)

The standard conditions spelled out in § 122.11 of these proposed consolidated regulations are very similar to those contained in § 122.14 of the final NPDES regulations; however, in certain cases the language has been adjusted to better reflect all programs. Additional conditions in § 122.68 uniquely applicable to NPDES permits are identical to their counterparts in the final NPDES regulations, § 122.14.

Confidentiality of Information (§ 122.16)

The confidentiality of information section is an expansion of provisions contained in § 124.131 of the final NPDES regulations (Public Access to Information), and incorporates references to the procedures of 40 CFR Part 2, for processing claims for confidential treatment.

Subpart B

Subpart B of Part 122 sets forth specific requirements for Hazardous Waste Management Programs to supplement the general requirements of Subpart A. This section will discuss those specific requirements after a brief description of EPA's overall efforts to implement Subtitle C of RCRA.

Subtitle C of RCRA creates a "cradle-to-grave" control system for the management of hazardous waste including appropriate monitoring, recordkeeping and reporting. Section 3001 requires EPA to define criteria and methods for identifying and listing hazardous wastes. Wastes which are identified or listed as hazardous by these means are then included in the management control system established under sections 3002 through 3006 and 3010. Those wastes which are not identified or listed will be governed by the requirements of Subtitle D of RCRA for the management of municipal solid waste.

Section 3002 requires EPA to define the standards applicable to hazardous waste generators. Section 3002 also requires establishment of a manifest system to track hazardous wastes from their generation to their ultimate disposition in a permitted treatment, storage or disposal facility.

Section 3003 requires EPA to define standards applicable to transporters of hazardous wastes to insure proper management of hazardous wastes during transportation. The Agency is exploring opportunities for integrating this program with proposed and existing Department of Transportation regulations on the transportation of hazardous materials.

Section 3004 requires EPA to develop performance standards for the location, design, construction and operation of hazardous waste treatment, storage and disposal facilities. Facilities, whether on or off the site of hazardous waste generation are covered by these standards and are required to obtain permits. Section 3004 standards comprise the criteria against which applications for permits will be evaluated.

Section 3005 requirements, as proposed in Part 124 of these regulations establish the procedures for obtaining a permit to construct and/or operate a hazardous waste treatment, storage or disposal facility.

Section 3006 requires EPA to issue guidelines for State programs and procedures by which States may seek authorization to carry out the hazardous waste program in lieu of the EPA-administered program. Regulations to implement section 3006 are proposed in Part 123.

Section 3010 regulations establish procedures by which any person generating or transporting hazardous waste, or owning or operating a facility for storage, treatment, and/or disposal of hazardous waste, must notify EPA of this activity within 90 days of promulgation of regulations defining a hazardous waste (section 3001). Section 3010 provides that no hazardous waste subject to Subtitle C regulation may be transported, treated, stored or disposed, unless this notification is timely given to EPA.

Table I appearing below cross references the numbered sections of RCRA to the Subpart designations to be used in the regulations:

Table I

Solid Waste Disposal Act (as amended) Subtitle C Numbering System

40 CFR Part 250, Subpart A (proposed at 43 FR 58946–58968 (Dec. 18, 1978))—Section 3001 Standards for Criteria, Identification, and Listing of Hazardous Waste.

40 CFR Part 250, Subpart B (proposed at 43 FR 58969–58981 (Dec. 18, 1978))—Section 3002 Standards Applicable to Generators.

40 CFR Part 250, Subpart C—(proposed at 43 FR 18506–18512 (April 28, 1978))—Section 3003 Standards Applicable to Transporters.

40 CFR Part 250, Subpart D (proposed at 43 FR 58982–59028 (Dec. 18, 1978))—Section 3004 Standards for Owners and Operators of Treatment, Storage and Disposal Facilities.

40 CFR Part 122 and 124 Subparts A and B—Section 3005 Permits for Treatment, Storage and Disposal of Hazardous Waste.

40 CFR Part 123 Subparts A and B—Section 3006 Guidelines for Authorized State Programs.

40 CFR Part 250, Subpart G—(proposed at 43 FR 29908–29916 (July 11, 1978)—Section 3010 Preliminary Notification of Hazardous Waste Activities.

Application for a permit (§ 122.23)

The information requirements for a RCRA Hazardous Waste Management Facility permit will be divided into two parts (A and B). This approach is being taken in order to expedite and simplify the permit issuing process so that existing facilities may comply with the statutory requirement for attaining "interim" status [section 3005(e) of RCRA]. Additional discussion on this approach is included later in this Preamble. Section 122.23 of these regulations specifies the information that will be required in each part of the application and is discussed briefly here.

The Agency is now preparing the necessary forms that will be needed, as part of the effort to consolidate the application forms for the RCRA, NPDES and UIC programs. These forms appear as a notice for public comment elsewhere in today's Federal Register.

Part A of the application requirements is reflected in two sections (Forms 1 and 3) of the consolidated application form. These information requirements include: submission of a U.S. Geological Survey topographical map of the general area where the facility is located; a description of the hazardous waste handled and a brief description of how it will be handled; the annual quantity of each hazardous waste handled; and copies of all available drawings and specifications for the facility.

Part B of the application requires submission of detailed data concerning the geology, hydrology and engineering aspects of the HWM facility. A master plan including a detailed facility map also must be submitted. In addition, detailed information concerning such factors as financial responsibility, employee training, contingency plans, operation plans and closure plans, and plans for air and water monitoring must be submitted in enough detail to allow the permitting authority to determine if the RCRA section 3004 standards are met.

A separate application form will not be developed for Part B as part of the Consolidated Application form due to the detailed nature of the information required. In supplying Form B information, applicants must comply with the information requirements of this Subpart.

Existing facilities must submit Part A within 180 days of the date of promulgation of the regulations under section 3001 of RCRA [40 CFR Part 250, Subpart A). This requirement will be satisfied by submitting Form 1 and Form 3 of the Consolidated Application forms. This information will be used to determine the priority for requesting the submission of Part B for final determination of the permit application. For new facilities, both Part A and B application requirements must be submitted together, at least 180 days before physical construction is scheduled to start.

Permitting Requirements—General

With some exceptions (discussed later), any person who owns or operates or proposes to own or operate a facility for the treatment, storage or disposal of hazardous wastes as identified or listed in proposed 40 CFR 250, Subpart A, must obtain a RCRA hazardous waste management facility ("HWM facility") permit. Owners/operators of existing HWM facilities must meet this requirement by submitting Part A of the application requirements within 180 days of promulgation of 40 CFR Part 250, Subpart A and by submitting Part B and the remainder of the required information upon request of the permitting authority. Owners/operators of new HWM facilities must submit both parts of the information requirements no later than 180 days before the scheduled physical construction date for the facility for which the permit is sought. Part A will provide the Director with general information on the various HWM facilities in his/her area. Part B will furnish more detailed data necessary to bring the permitting effort to a conclusion.

EPA is today proposing this two-part application process with separate filing dates for existing facilities for the following reasons: First, the ready information which Part A (Forms 1 and 3 of the Consolidated Application Forms) will supply (See § 122.23(c)) will enable the State Director or the Regional Administrator to establish a system of priority review for HWM permits. He or she can review Part A forms to determine which facilities warrant prompt attention under 40 CFR Part 250, Subpart D (Standards for Owners and Operators of Hazardous Waste Treatment, Storage and Disposal Facilities) and can then require an earlier submission of Part B of these applicants. Hence, permits could be issued earlier to the facilities which are in greatest need of regulation. Because EPA expects that approximately 30,000 existing facility permits will have to be issued, it foresees a 5 year period for issuing all permits. Given this span of time, EPA believes this attempt to issue permits on a priority basis to be the most effective and efficient use of limited resources.

Second, the immediate submission of Part A which should not entail lengthy preparation on the part of owners and operators, will satisfy the "permit application" requirement for obtaining interim status under section 3005(e) of RCRA. Third, a later submission of Part B assures that the detailed information upon which permit decisions will be based is complete and current.

The owner/operator of an existing HWM facility is required to submit Part B of the permit application on the date established by the Director. The Director must give the owner/operator at least six months notice of the date for submission of Part B (§ 122.23(a)(2)). Submitting Part B on time will assure that a facility with interim status maintains interim status during permit review; conversely, failure to submit Part B on time will result in loss of interim status. Part B of the permit application, which must be signed by a appropriate official (§ 122.5), will not be considered to be submitted until all of the required information is supplied, except that the Director may waive submission of certain information upon request as authorized in § 122.23(d)(7).

With respect to determining which permit applications will receive priority review and action, the Director shall consider several factors. These factors include the amount and nature of the hazardous waste handled by the facility, the apparent adequacy of the facility's design and operation, and the environmental sensitivity of the geographic area in which the facility to be permitted is located.

A permit application for a new HWM facility must be submitted at least 180 days before the date on which physical construction is expected to begin [§ 122.25(b)]. Actual time for processing of applications and for issuing of permits will vary depending on the degree of complexity and extent of public participation involved. Since physical construction of a new facility cannot begin until a final permit has been issued, the burden is on the applicant to submit an application far enough in advance of the physical construction date to enable the Director to satisfy all of the review requirements of the regulations and not jeopardize the planned construction dates. Within 30 days of receipt of an application, the

Director must determine whether the application is complete.

Establishing Permit Terms and Conditions

EPA is proposing to allow "minor" modifications to existing permits issued under RCRA that may be appropriate under limited circumstances, as stated in § 122.24, at the discretion of the Director. This limited modification shall only be granted if: (1) the Director has determined that a particular HWM facility is capable of handling the type or volume of waste proposed in the modification without violating any other terms and conditions of the section 3004 standards of RCRA, and (2) the HWM facility can demonstrate that it will receive these proposed wastes in a manner that cannot be anticipated through contract provisions or by other means available at the time of initial permit issuance.

The Director shall issue public notice in accordance with § 124.11 prior to or at the time of approving any minor modification. By requiring a public notice to be issued and the requirement that all applicable section 3004 standards be met, EPA believes that human health and the environment will be adequately protected while, at the same time, any unnecessary paperwork required of permit applicants will be reduced. Comments on this approach are solicited.

Permitting Requirements—Special Categories

These proposed regulations would not impose the detailed permit requirements of Subpart B upon several categories of HWM facilities, where EPA is the permit-issuing authority. Two classes of facilities, health care facilities and experimental facilities, would be required to obtain a "special permit" in lieu of the regular permit described above. Three other classes of facilities, special waste facilities, publicly owned treatment works accepting wastes under a manifest or other delivery document, and barges or other vessels accepting waste under a manifest or delivery document for ocean disposal, would be regulated under a "permit by rule" mechanism. Finally, injection wells which dispose of hazardous wastes and certain solid waste management facilities which accept small amounts of hazardous wastes would not fall under the permitting requirements of these regulations. States approved by EPA to administer hazardous waste programs are also authorized, but *not* required, to regulate such facilities in the same manner as EPA.

Special Permits—Health Care Facilities (§ 122.25(a))

Certain departments of hospitals and veterinary hospitals routinely produce wastes which fall under the broad definition of "hazardous waste" as set forth in proposed 40 CFR Part 250, Subpart A. These facilities when storing or otherwise treating such waste on their premises will be considered as HWM facilities. In most cases, however, health care facilities are closely regulated by existing State laws. EPA has concluded that detailed permitting requirements under RCRA are unnecessary for health care facilities which are complying with State law.

Specifically, these regulations require health care facilities which are operating under and complying with a comprehensive and enforced State law to submit only an abbreviated application. The application would describe the type of facility and would provide certain operational information, including certification that the facility is operating under a State license. If the application satisfies the requirements of this Subpart, EPA would issue a special permit. Because State law would be adequately controlling the treatment and storage of hazardous waste by the facility, the permit would impose no additional express controls.

Special Permits—Experimental Facilities (§ 122.25(b))

EPA is also proposing to issue special permits for "experimental facilities", i.e., facilities which are or would be engaged in technology advancing activities which are intended to improve the state-of-the-art for hazardous waste treatment, storage or disposal. As with health care facilities, the applications which owners/operators of experimental facilities should submit should be easy to prepare and limited in informational requirements. EPA is proposing the special permit mechanism for experimental facilities for two reasons. First, EPA seeks to encourage inquiry into new and innovative ways to handle hazardous wastes. Relieving some of the administrative prerequisites to operating such a facility may facilitate that end. Secondly, and equally important is the distinct possibility that the Part 250, Subpart D standards, which are designed primarily for typical containment facilities, might not apply functionally to facilities implementing a new technology for hazardous waste management. It would not be sensible to force an innovative facility to comply with informational or other requirements not suited to its design.

Of course, these facilities will be required to comply with all of the applicable standards of Part 250, Subpart D. Additionally, the regulations limit the term of such permits to one year (with an additional one year extension under certain conditions) and establish requirements for submission of full-evaluation reports.

Permit by Rule—Special Waste Facilities (§ 122.26(a))

Proposed 40 CFR Part 250, § 250.46, creates a special category for owners and operators of facilities which treat, store or dispose of "special wastes." Special wastes are hazardous portions of certain large volume wastes on which the Agency has limited information. These large volume wastes are cement kiln dust, utility waste (fly ash, bottom ash, and scrubber sludge) phosphate rock mining waste, benefication and processing waste, uranium mining wastes, other mining waste, and gas and oil drilling muds and oil production brines. In Part 250, Subpart D, EPA is proposing to exempt these facilities from compliance with generally applicable requirements in favor of certain special standards (40 CFR 250.46–1 through 6). EPA intends to propose comprehensive standards for these facilities when sufficient information on which to base a regulatory program becomes available.

Because the generally applicable performance standards do not apply to special waste facilities, EPA has determined that imposing the full permitting burden on members of this class serves no useful purpose. Consequently, in its place EPA is proposing to require only a "permit by rule." A permit by rule would simply mean that the owner or operator of a special waste facility would be deemed to have a permit, without having to submit any application for it, if the facility complied with the special waste facility standards of 40 CFR 250.46. After data is available to the Agency, this regulatory approach would be modified as appropriate.

Permit by Rule—Publicly Owned Treatment Works and Ocean Disposal Vessels (§ 122.26 (b) and (c))

EPA is also proposing to use the permit by rule mechanisms for two other HWM facilities, publicly owned treatment works which accept hazardous wastes under a hazardous waste manifest or other delivery document, and barges or other vessels which receive hazardous wastes under a manifest or delivery document for purposes of ocean disposal.

Similar to the situation of the special waste facilities, use of the permit by rule mechanism should save owners and operators of these types of HWM facilities from paperwork burdens which accompany the task of preparing and submitting permit applications.

EPA is eliminating the affirmative requirement to secure a permit for these facilities because they are currently regulated under other EPA water pollution control programs. Publicly Owned Treatment Works (POTW's) fall under the National Pollutant Discharge Elimination System (NPDES) permit system of the Clean Water Act and ocean dumping vessels come under the permit system of the Marine Protection, Research, and Sanctuaries Act. These ongoing programs should provide a degree of environmental protection equivalent to that of Part 250. In recognition of this fact, Part 250, Subpart D, specifically exempts both of these types of HWM facilities from its requirements (40 CFR 250.40(e), 43 FR 58996 (Dec. 18, 1978)).

Thus, a POTW or ocean disposal vessel would be deemed to have a permit if it operates in accordance with the NPDES and Ocean Dumping permits and if the owner or operator complies with the notification, manifest, recordkeeping and reporting requirements.

Underground Injection Wells Permitting

These regulations propose to relieve the activity of injecting hazardous waste into underground injection wells from RCRA permitting requirements. As in the case of POTW's and ocean disposal vessels, injection wells are technologically dissimilar to more conventional HWM facilities and, therefore, many performance standards of Part 250, Subpart D, are functionally inapplicable. Also, as in the case of POTW's and ocean disposal vessels, underground injection wells fall under an alternate Federal regulatory program. Consequently, Part 250, Subpart D, has been made specifically inapplicable to underground injection wells (40 CFR 250.46(e)).

The alternate regulatory program is the underground injection control (UIC) program of Title C of the Safe Drinking Water Act, which is proposed for public comment in these regulations and in 40 CFR Part 146 (proposed at 44 FR 23738 (April 20, 1979)). The UIC program requires that all hazardous waste injection wells comply with its minimum standards. Injection wells, including those injecting hazardous wastes, are exclusively regulated by those minimum standards. Thus, in an instance where one site contains surface facilities which treat, store or dispose of hazardous wastes, as well as a hazardous waste injection well, the surface facilities will be required to comply with the requirements of the RCRA program only and the injection well will be required to comply solely with the requirements of the UIC program.

But, in order to assure that these parallel regulatory efforts work together, the UIC program has included in 40 CFR 146.09 a subset of standards from the RCRA program regarding notification, reporting, recordkeeping and the manifest system. Injection wells which inject hazardous wastes, as a general matter, must comply with these RCRA-originated standards to assure that the informational system of that program successfully tracks all hazardous wastes.

In instances where the RCRA informational system requirements have already been met, for example, when the wastes received by the well are supplied by an on-site surface facility which has already complied with these requirements under the RCRA program, the well operator need not comply with the requirements a second time. Wastes received by such wells would not be "accompanied by a minifest or other delivery document" as stipulated in § 146.09.

The pemit by rule mechanism is not needed because compliance with the notification, recordkeeping, reporting and manifest requirements of Part 250, Subpart D is provided in the UIC regulations themselves. The Agency has done so in 40 CFR 146.09; the permit by rule, thus, has become operationally unnecessary.

The Agency is well aware that section 3005(a) of RCRA asserts a broad permitting requirement for all HWM facilities. Despite this language, EPA is making a concerted effort to streamline its procedures and does not want to impose non-beneficial and duplicative regulations which seemingly do not further the goals of the statute. The Agency solicits comments on the adequacy of environmental protection which these alternate regulatory programs offer, on the appropriateness of establishing "special permits", "permits by rule", or the alternate mechanism to cover UIC wells, and on the legal and practical implications of the entire effort.

Solid Waste Disposal Facilities Which Receive Small Amounts of Hazardous Wastes

These regulations also exempt from RCRA permitting requirements certain solid waste disposal facilities which receive hazardous wastes in small quantities. These facilities are those which receive wastes exclusively from persons subject to 40 CFR 250.29 (proposed at 43 FR 58979, Dec. 18, 1978). Persons under § 250.29 are those who produce and dispose of no more than 100 kilograms (approximately 220 pounds) of hazardous waste in any one month; any retailer disposing of hazardous waste (other than waste oil); and certain farmers who dispose of pesticides and follow specified operating procedures.

40 CFR 250.40(c)(5) exempts these facilities from meeting any of the section 3004 standards for HWM facilities because they will be regulated as solid waste disposal facilities under Subtitle D of RCRA. Moreover, the relatively small amounts of hazardous wastes which these facilities would receive would not change their overall character as solid waste disposal facilities; nor would these facilities in any way provide an insufficient level of protection to human health and the environment (see preamble to 40 CFR Subpart D, 43 FR 58985). Thus, in the definitional section (§ 122.3(b)) of Subpart A of this Part, EPA is proposing to remove this class of facility from the scope of the term "hazardous waste management facility."

Interim Status (§ 122.23)

Section 3005(e) of RCRA provides a mechanism for existing facilities to continue receiving hazardous wastes prior to obtaining a permit under these regulations. That mechanism is "interim status." Under the terms of section 3005(e), a facility with interim status "shall be treated as having been issued a permit until such time as final administrative dispostion of such application is made, unless the Administrator or other plaintiff proves that final administrative disposition of such application has not been made because of the failure of the applicant to furnish information reasonably required or requested in order to process the application." To qualify for interim status, a facility must have complied with the notification requirements of section 3010 of RCRA, and must have submitted Part A of the permit application. Moreover, during the interim status period, facilities must comply with a limited set of operating procedures (see 40 CFR 250.40(c)). EPA interprets Congressional intent, in providing interim status, as a means for allowing the continued receipt and handling of hazardous wastes by HWM facilities during the "start-up" period of

the RCRA program. Therefore, existing facilities which are participating in the program would not be subject to the general prohibition against treating, storing or disposing of hazardous wastes in the absence of a permit.

Because these regulations do not require site-specific permits for three classes of facilities (special waste facilities, certain POTW's, and ocean dumping vessels) these three classes of facilities need not submit a Part A application (Forms 1 and 3 of the Consolidated Application Forms) to qualify for interim status. EPA is proposing this approach because it would be contradictory for the agency to ease a requirement to avoid regulatory overlap on the one hand, and, then, to simply reinstitute the requirement for another reason. Consequently, for these classes of facilities, EPA intends to consider the submission of notification under section 3010 as satisfying the "permit application requirement" of section 3005(e). Section 3010 notifications supply the same information, although in lesser detail, as do Part A applications. More importantly, however, allowing interim status to these facilities is in keeping with the intentions of Congress.

These regulations also adjust the scope of coverage of section 3005(e) interim status. The statute specifically extends interim status, upon satisfaction of the prerequisites, to all HWM facilities in existence on the date of enactment of RCRA. EPA is extending the option to obtain interim status to HWM facilities in existence on the date of promulgation of regulations under section 3001 of RCRA. Again, EPA believes that this adjustment implements the intent of the legislation. Congress intended that the flow of wastes would not be interrupted during the start-up of the Federal progam. Indeed, the continued availability of disposal sites to take ever-increasing amounts of hazardous wastes can be termed realistically as a public health necessity. If EPA were to disallow the continued receipt of hazardous wastes by post-enactment facilities for all or a portion of the anticipated five years it will take to fully implement the permitting program, it could seriously disrupt ongoing hazardous waste control efforts. To do so would contradict the entire premise of the statute.

Moreover, it would be inequitable to interrupt operations of HWM facilities for which all possible steps to comply with new regulatory requirements have been taken.

EPA specifically requests comment on this implementation of section 3005(e).

Major Facilities (§ 122.3(b))

One of the primary administrative tasks which EPA will undertake once these regulations come into effect is the systematic review of permit applications received by approved States and of draft hazardous waste permits prepared by approved States. EPA will undertake this effort to assure routine compliance with these regulations and Part 250. However, it became apparent early during preparation of these regulations that this review function could overwhelm the Agency—approximately 30,000 RCRA permits will be issued under these provisions in the next five years. Consequently, recognizing administrative limitations on its review function, EPA does not intend to review permit applications and draft permits for facilities subject to a State program which are small, non-complex, and non-controversial. Instead, it intends to review these documents as they relate to "major" facilities. EPA will consider a facility to be "major" if it handles, or would handle, more than 5,000 metric tons of hazardous wastes per year. Permits for major facilities must be accompanied by fact sheets containing relevant information on the facility; permits for non-major facilities must be accompanied by a less detailed "statement of basis." (See §§ 124.8 through 124.9.)

EPA considers the use of a tonnage cutoff figure to establish the "major" character of a facility to be the most telling and straightforward way of reliably and simply accomplishing the objective. EPA considered other means of doing this, but found them less preferable. For example, EPA considered basing this determination on an analysis of the relative hazard of wastes received by each facility. As was discussed in the preamble to EPA's regulations defining "hazardous waste", (Part 250, Subpart A), the Agency was unsuccessful in this effort.

EPA requests comments from the public on the use of a volume criterion to distinguish major and non-major facilities. Moreover, EPA request comment on the selection of 5,000 metric tons per year as the criterion. EPA believes that use of this figure should result in review of facilities which truly warrant close attention. As EPA's data indicates that the median HWM facility handles about 1,100 metric tons of hazardous waste annually, EPA anticipates that, under this criterion, it would review approximately 10 percent of permit applications and draft permits processed by States.

EPA, however, recognizes that its information on the relative sizes of HWM facilities is incomplete. Because the utility of the 5,000 metric ton criterion is largely dependent upon the actual capacities of existing HWM facilities, the Agency intends to continue investigating its appropriateness. Information from the regulated community and other interested persons in this regard is solicited.

Other Environmental Factors

During the development of these regulations, the Agency recognized that certain "secondary" environmental impacts from factors including roadway traffic to and from facilities, access routes to facilities, noise, dust, odor, aesthetics, etc., were not amendable to control through the RCRA section 3004 standards nor by these regulations. Thus, these regulations do not address these general environmental issues. The Agency did consider the following options before deciding not to propose regulations in this area:

1. Require that an Environmental Impact Statement (EIS) be prepared. EPA has determined that the permitting process under section 3005 is not subject to the EIS requirement of section 102(2)(c) of the National Environmental Policy Act. A legal memorandum on this point has been prepared and will be made available upon request. The permitting process as specified in Part 124 of these regulations fully allows and encourages involvement of the public in section 3005 decision making. The Agency also has determined that the regulation of secondary environmental impacts is outside the scope of authority granted to the Agency by RCRA: States and local authorities can more suitably regulate these impacts.

2. Require applicants for permits to analyze the impact of the environmental factors outline above, and to submit a "Supplementary Environmental Analysis" (SEA) with the application for a permit. The SEA would be a part of the application, would be made public, and would be addressed during the permit application review process.

3. Same as Option 2, except EPA in granting permits to facilities would insert conditions in such permits based on the impact analyses of the SEA.

4. Require applicants for permits to certify that all State and local laws and ordinances regarding the environmental factors outlined above will be complied with.

Comments on these options, or suggestions for other options or approaches to this issue are solicitied.

Emergency Authorization (§ *122.28*)

These regulations also provide the Director with emergency authority to respond appropriately to immediate hazards to the environment or to human health. They provide that, in such event, the Director may issue a temporary authorization to a permitted facility, not to exceed 90 days, to accept hazardous wastes not covered by a permit. The authorization may be oral or written. If oral authorization is given, it must be followed within five days with a written order. Emergency authorization can be rescinded at any time. EPA has included this proposed emergency authorization because it believes that the Director should have broad discretion to respond in a measured and effective way to emergency situations. The Agency requests comments on the propriety and scope on this emergency authority.

Subpart C—The UIC Program

Congress has authorized EPA in sections 1421–1424 of the Safe Drinking Water Act to establish by regulation: (1) minimum requirements for effective State UIC programs; and (2) a procedural mechanism whereby States may obtain EPA approval to operate all or part of such programs. Were States do not obtain EPA approval, EPA is empowered to establish and operate programs for those States.

As a result of the consolidation of the NPDES and RCRA programs with the UIC program, EPA examined the overlaps inherent in the three programs' statutory authority as described above. As a result, the Agency has decided to regulate injection wells primarily under the UIC program. Comments are solicited on the propriety of the Agency's assigning primary jurisdiction over underground injection control to the UIC program.

In addition, any well that injects hazardous waste could be regulated under RCRA. In those cases, also the Agency has chosen to regulate such wells under the UIC program and to apply certain RCRA requirements (e.g., closing of the manifest cycle) through the UIC regulations.

At one point in developing these regulations, EPA contemplated subjecting only wells that injected into, through or above underground sources of drinking water to these regulations. However, even wells which do not inject into, through or above underground sources of drinking water may cause fluid to move underground in such a fashion as to contaminate such sources. The Agency decided that the proper approach would be initially to bring all wells into the regulatory system so that every injection activity could be publicly known. Each well may then be classified properly, (see discussion below) resulting in requirements that the well injection practice be regulated or banned entirely or, where appropriate, not controlled at all.

Comments are solicited on the above approach. In addition, the Agency seeks data on off-shore injection operations and information on special problems that control of off-shore injection wells may pose, if any.

Listing of States

The UIC program becomes operative in a State only after the State has been listed by EPA under section 1422 of SDWA as needing a UIC program, and either the State obtains EPA approval of its program or EPA establishes a program for that State. State program requirements and approval procedures are set forth in Part 123.

On September 25, 1978, EPA listed 22 States as needing a UIC program: Arizona, Arkansas, California, Colorado, Florida, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Michigan, Mississippi, New Mexico, New York, Ohio, Oklahoma, Pennsylvania, Texas, Utah, West Virginia and Wyoming. See 43 FR 43420 (September 25, 1978). Since that time, Maryland has petitioned to be listed.

The Agency had initially intended to focus its efforts on these listed States and to phase in other States gradually. The purpose was to focus Agency resources and grant funds upon areas which appeared to have the most urgent need for such programs. However, as a result of its consolidation efforts, the Agency became aware of potentially different timetables for the listing of States under the UIC program and the establishment of RCRA programs in those States. States are expected to begin operating approved hazardous waste programs in mid-1980. This raises the possibility that some disposers of hazardous waste will seek to avoid RCRA requirements by injecting hazardous waste underground in unlisted States. To ensure consistency of coverage, the Agency has decided to list the remaining unlisted States in two stages by May of 1980.

Designation of Underground Drinking Water Sources (§ 122.33)

As part of developing its UIC program, the State must designate those aquifers which are to be protected as underground drinking water sources and those which are not. The criteria for designation are contained in Part 146, and are explained in detail in the Preamble discussion on Subpart A of this Part.

Section 122.33 specifies procedures for State designation of aquifers. All aquifers will automatically be designated as underground drinking water sources unless specifically excluded. Any exclusion must define the excluded area in geographic terms, rather than by name, to ensure that injectors have adequate notice as to whether or not they will be injecting above, into or through a designated underground drinking water source.

Classes of wells (§ 122.34)

The injection wells covered by the UIC regulations are divided into the following five classes:

(a) Class I includes industrial and municipal disposal wells and nuclear storage and disposal wells that inject below all underground sources of drinking water in the area.

(b) Class II includes all injection wells associated with oil and gas storage and production.

(c) Class III includes all special process injection wells, for example, those involved in the solution mining of minerals, *in situ* gasification of oil, shale, coal etc., and the recovery of geothermal energy.

(d) Class IV includes wells used by generators of hazardous wastes or hazardous waste management facilities to inject into or above underground sources of drinking water.

(e) Class V includes all other injection wells.

Due to basic differences in function and/or environmental effects of the above classes of wells, they are treated differently in many respects, as explained below.

Once a State UIC program is effective, all new Class I, II and III injection wells must obtain a permit to begin operation. All existing wells in these three Classes (except existing enhanced recovery and hydrocarbon storage wells) must also obtain permits within five years of the effective date of the program according to priority schedule to be established by the permitting authority.

Existing wells requiring a permit must be authorized by rule until the permit is applied for and processed. Such rules must apply the appropriate monitoring, reporting and abandonment requirements set forth in 40 CFR 146. Existing enhanced recovery and hydrocarbon storage wells may be authorized by rule for the life of the facility. These rules are to apply essentially the same requirements as permits under Class II. However, while

each permit is to establish a specific compliance schedule, rules are to set forth a general timetable for the attainment of applicable requirements.

To obtain a permit, owners or operators of wells must submit applications to the Director in accordance with the requirements of Subpart C of Part 122. Because most of the information relied upon by the Director to write a permit is in many cases already contained in State Files, only a few basic items of information must be contained in an application to a Director of a State-administered UIC program unless the Director requests further information (either because State files are incomplete or because the Director wishes to update the information). In the case of EPA-administered programs, the application must contain all the information which the Director needs to write the permit. Part 146 (proposed at 44 FR 23738 (April 20, 1979)) sets forth the information which a Director must consider when writing a permit.

A well may be covered by an area rather than an individual permit. To qualify for an area permit, the wells must be:

(1) Under the control of a single person;

(2) Of the same type (e.g., Frasch process, enhanced recovery, or salt water disposal);

(3) Within a single well field, project or site;

(4) Injecting into the same zone or aquifer; and

(5) Covered by the same application for a permit.

The requirements which apply to an individually permitted well apply equally to a well authorized by an area permit. However, under an area permit, new wells may be authorized administratively as long as they are under the control of the person holding the area permit, are essentially of the same construction and are intended for the same purposes as existing wells.

EPA requests comment on the advisability of the use of area permits. In particular, comment is solicited on whether the conditions (e.g., the use of "well field") have been properly framed to provide the intended relief from environmentally unproductive administrative burdens.

Section 122.42 contains two additional requirements of the UIC program. First, the permittee must notify the Director of his or her intention to cease operation and follow the Director's prescribed procedures for abandoning the well. Second, the permittee must maintain fiscal responsibility in some form to close, plug and abandon the well in a manner which does not endanger underground drinking water sources.

Temporary Authorization

The Agency has identified two types of situations where it may be necessary to authorize underground injection temporarily before permit-issuance procedures may be carried out.

The first situation is where an imminent hazard to human health or the environment may occur unless immediate injection is authorized. One example might be a spill or leak which would result in significant releases of hazardous wastes to the environment. While the Agency cannot predict all of the situations where this may occur, it has concluded that a temporary authorization should be available under the circumstances defined in these proposed regulations.

The other situation is where oil and gas production would be delayed, resulting in loss of such natural resources, unless reinjection of brine if immediately authorized. Temporary authorization in this situation is consistent with sections 1421(b)(2) and 1422(c), which provide that the UIC program may not interfere with oil and gas production except as necessary to protect underground sources of drinking water. The Agency proposes to allow temporary authorization in the above situation, provided that timely application for a permit could not have been made, and that the injection will not cause fluid movement to underground sources of drinking water.

Comments are solicited on both types of temporary authorizations. Are they well defined? Should certain criteria be added or deleted? Should temporary authorization be added for other situations?

Class IV wells

Class IV wells are expected to involve the injection of hazardous waste into or above underground drinking water sources, a practice which is inherently unsafe. Unlike the case of deep disposal wells, it is not possible to prevent endangerment of underground drinking water sources by establishing construction and operation requirements. EPA proposes, therefore, that existing class IV wells will be inventoried and closed, and that injection into new class IV wells will be prohibited.

Existing class IV wells are proposed to be authorized by rule until the time of their closure.

Comments are solicited on the Agency's proposed approach to class IV wells.

Class V wells

There are many types of class V wells, and Agency studies indicate the existence of perhaps a 250,000–500,000 such wells in the United States. The Agency is not presently in a position to determine which wells are safe or unsafe, and whether some of these wells should be either regulated or phased out. As a result, Directors of UIC programs will be required to inventory class V wells within their States, provide EPA with assessments of the impact of these wells, and recommend possible means of regulating them. If necessary, EPA will then amend these regulations to cover class V wells in a manner which will prevent endangerment of underground drinking water sources. In the meanwhile, immediate action will be required to address those wells that pose a significant risk to human health.

Class V wells will be authorized by rule pending amendment of these regulations to regulate such wells.

Comments are solicited on the need to regulate particular types of class V wells and how to do so. In particular, EPA solicits comments on whether special procedures for regulating class V wells should be provided.

Subpart D—Specific Requirements Applicable to the NPDES Program

Subpart D of Part 122 contains requirements which are identical to the final NDPES regulation, Part 122, as well as certain application requirements from final NPDES Part 124.

Part 123

What does this Part do?

This Part establishes the requirements for State NPDES, UIC, RCRA, (hazardous waste) and section 404 (discharges of dredged or fill material) programs and the process for approval, revision and withdrawal of State programs. While State programs are established and operated under State law, approved CWA, RCRA, or SDWA State programs implement Federal law. A permit issued by a State under State law after the program has been approved satisfies the Federal permit requirement.

Part 123 is divided into a general subpart (Subpart A) and program specific subparts (Subparts B–E). The requirements of Subpart A are generally applicable to all four of the State Programs covered by this Part. The other Subparts provide requirements

additional to those of Subpart A. Since EPA does not issue section 404 permits (these are issued by the Corps of Engineers in the absence of an approved State program), Part 122 does not contain a Subpart E. Part 123 Subpart E, therefore, contains the additional permit processing requirements applicable to State 404 programs.

Subpart A

Purpose and scope (§ 123.1). This section notes that Part 123 is related to, among others, Parts 122 and 124. However, only those sections of Parts 122 and 124 which are adopted by reference in Part 123 are applicable to State programs. Part 123 lists all the requirements applicable to State programs. In addition, applicable portions of Part 122 may, in turn, adopt requirements derived from other Parts of this Chapter.

The approach of the statutes authorizing the programs covered by this Part is that the Federal government should set minimum standards, with any State being given the freedom to impose any more stringent approach it deems appropriate. The only exception to this is in the hazardous waste program where Congress determined that the need for consistency between the States outweighs any one State's interest in hazardous waste regulation. This exception has been narrowly construed and is discussed further in the preamble discussion of Subpart B.

State programs are developed and implemented under State law. While this Part sets minimum requirements for State programs, it generally does not require that State authorities be worded or structured the same as the applicable Federal authorities. Nonetheless, the Agency encourages States to incorporate by reference, to the extent allowable under State law, Federal requirements, especially those which are technical in nature.

Elements of a program submission (§ 123.3). This section lists the contents of a complete State application for program approval. Each of the elements must be received by EPA before the formal statutory review starts. Each of the laws authorizing the State programs covered by this Part limits the time for EPA review of a State application for authorization. Therefore, it is necessary that EPA have complete information, organized in a particular way, about the State program before formal review commences. States are encouraged to consult with EPA in developing the submission.

Attorney General's Statement (§ 123.5). In understanding the requirements of State law, EPA gives great weight to the interpretations made by the State's Attorney General. Indeed, the Attorney General's Statement is necessary for EPA to adequately judge the legal basis for the State programs. EPA will develop a model Attorney General's Statement format for each of the programs.

Memorandum of Agreement with Regional Administrator (§ 123.6). The Memorandum of Agreement (MOA) between EPA and a State defines the basic working relationship between the agencies, thereby avoiding confusion and legal uncertainty which might otherwise exist.

The MOA may not be used as a substitute for adequate legal authority. While it may be appropriate for a State to give, in the MOA, its assurance that it will abide by certain requirements, the authority to do so must be present in State law.

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 program 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 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 one of the means by which EPA assures that State issued permits are consistent with the requirements of the appropriate Act and implementing regulations. Because of this, any proposed change to an MOA must be reviewed and agreed to the Administrator to assure it is consistent with the requirements of this Part.

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 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 agreed to by the Administrator.

Operational Requirements (§ 123.8). This section sets out, by cross referencing applicable sections of Parts 122 and 124, certain operational aspects of State permit programs. To demonstrate compliance with these sections, States do not need authorities identical to EPA's. Compliance may be shown by any set of authorities which enable the State Director to meet these requirements or requirements which are more stringent. Where these regulations require that certain activities be covered by permit, a State authority to regulate the activity by rule will not be approved.

Compliance evaluation programs (§ 123.9). States must have a systematic program for evaluating compliance with permit conditions and other program requirements. These programs must have the ability to evaluate reports submitted by permittees, to conduct inspection and to investigate evidence of violations submitted by the public.

Enforcement authority (§ 123.10). This section proposes that States should have an array of enforcement tools available. These must include a procedure for immediately responding to emergency situations endangering public health, injunctive relief, civil penalties and criminal fines. Each of these remedies is available to EPA where it is administering the program and States must have equivalent authorities.

The requirements for the programs vary slightly because each of the Federal acts have different provisions for EPA enforcement. For example, establishing the degree of criminal intent of the violator is a necessary element of any criminal prosecution. This section provides that the degree of criminal intent which the State must establish shall be no greater than that in the appropriate Act for EPA prosecution.

Likewise, the penalty amounts recoverable by the State shall be at least the same as those recoverable by EPA. See Table II.

Table II

Sanction	Maximum penalty amount			Intent		
	RCRA	UIC	NPDES/404	RCRA	UIC	NPDES/404
Civil penalty	$25,000	$5,000	$10,000	None	None	None.
Criminal fine	25,000—doubled for second offense.	10,000	25,000—doubled for second offense.	Knowingly	Willfully	Negligently.
Criminal fine for false reporting/tampering.	25,000	10,000	10,000	Knowingly	Willfully	Negligently.

EPA proposed to require States to have the maximum penalty amounts at least the same as those listed in Table I. States are encouraged to comment on this requirement. In particular, EPA is interested in finding out which States have existing programs which are unable to meet these requirements, what enforcement remedies are available to those States and what other legislative changes, if any, must be made by those States to meet the requirements of this Part.

The State need not always adopt the same terminology on degree of criminal intent. For example, if the burden of proof for establishing "criminal negligence" in State court is equivalent to that for establishing "negligence" in a criminal proceeding in Federal court, such State authority satisfies the requirements of this section.

Each of the three Acts implemented by these regulations provide citizens with the right to initiate legal action in Federal court to enforce permit requirements. This right exists even when a permit program is administered by a State after approval by EPA. The three Acts also provide citizens with the right to intervene in enforcement actions brought by EPA. However, EPA has concluded that requiring States to allow citizens to intervene in State enforcement actions is neither necessary to foster public involvement in permit enforcement nor required by law. Accordingly, these regulations do not provide that States must provide for citizen intervention in enforcement actions brought by States in State courts. Although there is some possibility than an inadequate State effort could thwart effective citizen involvement in enforcement of State issued permits, EPA believes that the opportunity for citizens to being enforcement actions in Federal courts makes that risk minimal. Comment on this point is invited. For further information on citizen involvement in enforcement, see the preamble to the recently promulgated NPDES permit program regulations (44 FR 32854).

Approval process (§ 123.12). The process for approving State programs was not stated in Subpart A because of the differences which exist between the statutes involved. Therefore, these are set out in the individual program subparts.

Withdrawal (§§ 123.14 and 123.15). These sections set forth the proposed criteria and process for withdrawal of State programs including the requirements for voluntary relinquishment of Federal program responsibility by a State. The criteria set out in § 123.14 are an elaboration of the criteria set out in each of the applicable Federal statutes.

It should be noted that program withdrawal is an extreme remedy which is likely to be employed only where all other efforts to insure that a State program complies with this Part have failed.

§ *123.15(a)* sets out the basic process for voluntary relinquishment of Federal program responsibility by a State. It provides for a 180-day advance notice by the State accompanied by a plan for the orderly transfer of necessary information. It further provides for 30 days advance public notice of the transfer. These provisions may be modified by agreement.

§ *123.15(b)* sets out a formal hearing process for withdrawing State programs (other than UIC programs, which are covered in Subpart C). This process may be initiated by the Administrator on his or her own motion or in response to a formal petition from any interested person. In order to avoid the need for the Agency to develop a new set of formal hearing procedures, this paragraph adopts by reference certain provisions from the regulations of Part 22 of this Chapter. (Part 22 regulations were proposed on August 4, 1978, 43 FR 34730, and will be promulgated shortly in essentially the form proposed. All citations are to the proposed version.)

Relationship of Subpart A to the Final NPDES Regulations

Certain elements of the NPDES program have been modified or added to in Subpart A, as a result of consolidation with the other programs. Comments are welcome on these changes or additions. For example, the criteria and process for withdrawal of State programs, including NPDES and section 404 programs, are new to these regulations. In addition, the proposed requirement that States have at least the same penalty amounts as EPA is a change from the existing requirement.

Subpart B

Subpart B of Part 123 establishes additional substantive and procedural requirements for State hazardous waste management programs under section 3006(a) of RCRA. This Subpart controls both "Authorization" and "Interim Authorization" of State programs under sections 3006 (b) and (c) of RCRA, respectively. Proposed Guidelines for State Hazardous Waste Programs were published as Part IV of the February 1, 1978 Federal Register (43 FR 4366). They are reproposed here.

EPA's response to several recurring substantial comments, received concerning the February 1, 1978, proposal, and discussions of certain program decisions, are set forth below.

Under section 3009 of RCRA, States may not impose any requirements less stringent than those under Subtitle C of RCRA. However, some latitude will be allowed in the degree of stringency of the State's criteria and standards during the interim authorization period. When "full" authorization (hereafter called "authorization") is approved under section 3006(b), the State's standards and criteria must be no less stringent than those promulgated by EPA under sections 3001–3005 of RCRA. See Table I.

For example, as a condition for such authorization, EPA expects such State programs to control at least the same universe of hazardous wastes as the Federal program. This may be accomplished most easily by adopting EPA's criteria and listings under section 3001 of RCRA, although such an adoption is not a requirement for authorization. See proposed 40 CFR Part 250, Subpart A, as referenced in Table I.

The State program also must control at least the same universe of generators and transporters and contain standards that are at least as stringent as those of the Federal program under sections 3002 and 3003 of RCRA, including recordkeeping, labeling, use of appropriate containers, reporting and management of a waste tracking (manifest) system using the Federal manifest format. See proposed 40 CFR Part 250, Subparts B and C, as referenced in Table I.

Finally, the State program must control at least the same universe of treatment, storage and disposal facilities and must not compromise the human health and environmental standards under section 3004 of RCRA. The adequacy of the State's general facility standards treatment, storage and disposal facility standards and special waste standards will be evaluated against those issued by EPA under section 3004 in order to determine if the State program is equivalent to the Federal program. See proposed 40 CFR Part 250, Subpart D, as referenced in Table I.

In addition, a State's past performance in responding to situations involving hazardous waste which may present an endangerment to health or the environment will be considered by EPA in deciding whether to approve State hazardous waste programs.

Comments or suggestions on the evaluation of the equivalence of State programs are solicited. One option under consideration is to require States to adopt the Part 250 regulations.

Another alternative requirement for authorization of a State hazardous waste program would be to require States to issue all hazardous waste permits under their jurisdiction within a set time frame, such as three or four years. EPA estimates that complete permit issuance without such a requirement will probably take at least seven years. On the other hand, State resources are limited, and the imposition of such a requirement could deter some States from seeking approval of their programs. Comments are solicited on this problem, and on alternative approaches.

Concurrent enforcement authority is provided EPA under § 3008(a)(2) of RCRA in States with either type of authorization. EPA can use this enforcement authority and will not hesitate, under appropriate circumstances, to enforce directly against any facility or activity violating the Federal standards.

Manifests. To satisfy the operational requirements specified in § 123.39, a State need not have an operating system for controlling manifests during the period of interim authorization. However, a State must have adequate legislative authority and should be capable of commencing routine operation of the manifest system, reporting, and recordkeeping immediately after full authorization. It is important for the regulated community to note that although the manifest system control is not a requirement for interim authorization, manifests must nevertheless be prepared and used in a State with interim authorization. In conjunction with the management of the information reported through the manifest system, the Agency is developing an Automated Data Processing (ADP) system which will be made available to the States. Use of the ADP system by the States is optional.

Free Movement of Hazardous Wastes. A decision by the United States Supreme Court (*City of Philadelphia* v. *New Jersey,* No. 77-404, June 23, 1978), invalidated New Jersey's ban on the importation of wastes for disposal on the grounds that it imposed an undue restraint on interstate commerce. Based on this decision, it is reasonable to assume that other present and future interstate waste importation bans would likewise be struck. The Agency, therefore, has chosen to propose a provision in these regulations which would deny authorization to any State with such a ban.

Furthermore, States should note that section 112 of the Hazardous Materials Transportation Act (HMTA) of 1974 (Pub. L. 93-633) prohibits a State (or its political subdivisions) from imposing requirements which are inconsistent with the Federal Department of Transportation (DOT) regulations. In addition, HMTA authorizes DOT to preempt any State requirement if such requirement places an unreasonable burden on commerce. DOT, however, can only preempt State regulations for which DOT has existing authority and standards. State regulations are not preempted if they afford an equal or greater level of protection to the public and do not unreasonably burden commerce. If preemption occurs, *only the standard* that places a burden on commerce would be preempted, *not the entire program.*

Partial Authorization. Approximately three-quarters of the comments received on partial authorization provision, which were included in the February 1, 1978 proposal, were opposed to partial authorization on the grounds that it would be burdensome and confusing to the regulated community. EPA understands these concerns and has decided not to include the "partial authorization" provision in this proposed rule. The Agency intends to enter into cooperative agreements with States to allow States to participate fully in the program as administered by EPA until such time as the State becomes eligible for authorization. Similar arrangements with several States have worked well for the NPDES program.

Interim Authorization. Section 3006(c) of RCRA (as recently amended by Pub. L. 95-609) provides for a "interim authorization" of State programs for up to two years "beginning on the date six months after the [*actual*] date of promulgation of regulations under sections 3002 through 3005." (Emphasis added.) This interim authorization could be granted to States with a hazardous waste program *substantially equivalent* to the Federal program existing "pursuant to State law before the date ninety days after the [*actual*] date of promulgation of regulations" under sections 3002 through 3005 (Emphasis added). The recent amendment to RCRA (Pub. L. 95-609) allows the cutoff dates for the existence of State legislation and the onset of the interim authorization period to be related to the promulgation of the bulk of EPA's other Subtitle C regulations. Consequently, the phasing of the application for and initiation of interim authorization is now based on the actual promulgation date of regulations under section 3001 of RCRA, since EPA intends to use this section as the "trigger" for the Federal program. States are encouraged to begin evaluation of their legislation and regulations and to assess the adequacy of their programs. However, EPA will not be able to formally act on applications until after the promulgation of section 3001 regulations (40 CFR 250, Subpart A), due to the lack of a reference point against which EPA can judge a program. In granting interim authorization, EPA will require the State to prepare an "authorization plan" which will describe the additions or modifications to the State programs, including changes needed in State legal authority and a time schedule to achieve changes, so as to enable the State to become eligible for authorization.

The intent of RCRA as expressed in the legislative history of RCRA, was to allow States to develop and implement hazardous waste programs equivalent (not necessarily identical) to the Federal program, thus utilizing the police power of the States rather than creating another Federal bureaucracy to implement RCRA. (House Report No. 94-1491, September 9, 1979, p. 30.) State primacy is a common theme running through the legislative history. (Op. cit., pp. 5, 6, 24 and 29.) Interim authorization was specifically established under section 3006(c) in order to facilitate State assumption of the program. The requirement for interim authorization of "substantially equivalent" State programs was used "* * * (1) so that existing progress in the area of State hazardous waste law does not come to

an abrupt halt, as has been the situation with the passage of other environmental laws, and (2) to give such States that have begun developing or implementing a hazardous waste program sufficient time to bring such program into conformity with the Federal minimum standards." (Op. cit., p. 29). However, Congress neither defined what a "substantially equivalent" State program was, nor gave further directives as to how EPA was to set such "Federal minimum standards" without disrupting the progress of existing hazardous waste programs.

EPA's proposed approach to this problem (see § 123.12) is as follows: In order to implement RCRA's legislative intent of not disrupting the progress of existing programs, EPA's proposed *minimum* Federal standards for determining "substantial equivalence" (and therefore suitability for interim authorization) would require the States to implement (i.e., regulate and enforce) controls over at least either on-site or off-site disposal of hazardous wastes. (See § 123.32). Note that this is a *minimum* requirement and that during the two-year period States *must implement all* statutory and regulatory hazardous waste management authorities they possess. (For example, States with interim authorization which have the necessary authorities in existence to implement a manifest system and/or control of treatment and/or storage facilities *must do so.* See § 123.34(a)(2)).

Since it is clear that Congress intended this interim period to provide a "grace" period to the States to develop a program suitable for authorization of a full program, the major difference between "equivalent" (section 3006(b)) and "substantially equivalent" (section 3006(c)) State hazardous waste management programs is that the latter program would reflect some of the limitations of existing statutory authority at the State level. Similarly, the degree of stringency of a given regulation may, during this interim period, be less than Federal standards. This temporary relazation from strict "equivalence" to "substantial equivalence" and the corresponding latitude in degree of stringency for the interim period, EPA believes to be consistent with the intent of Congress to facilitate the entry by the maximum number of States into the interim hazardous waste management program, and ultimately, into a full program.

In the wake of such incidents as Love Canal, public pressure for State primacy is increasing. Many States are increasing their commitment of resources and developing programs; at this time, it appears to be more prudent for EPA to be as flexible as possible in order to build on existing State programs, than to hamper their development. The proposed approach should result in a greater degree of protection of public health and the environment than if EPA had to conduct the hazardous waste program in a large number of States.

Before reaching this conclusion, the Agency gave special consideration to two alternatives as requirements for interim authorization. The first was to require States to have authority to control either the on-site or off-site disposal of hazardous waste, while the second was to require authority for broader control. Analysis of current State legislative authority indicates that the first alternative would allow significantly greater State participation in the hazardous waste programs than would the second. Furthermore, it is expected that it will be easier for a State with interim authorization to upgrade its program than it would be for an unauthorized State to take over a full program. On the other hand, there could be a significant risk to public health and the environment in requiring States to control disposal but not treatment or storage. However, it is likely that the degree of protection of public health and the environment which States could offer by carrying out programs controlling disposal while building the other elements would exceed the degree of protection which EPA could offer in attempting to implement a large number of full programs in unauthorized States with limited resources.

Although EPA recognizes that control of treatment and storage facilities, full control of all disposal facilities, and other elements necessary for authorization of a full program (such as implementation of the manifest tracking system) are essential in a full comprehensive program of hazardous waste management, the vast majority of the environmental damage has resulted from improper disposal. EPA also recognizes that the proposed approach does involve some risk that direct control of certain portions of the complete hazardous waste management program could be deferred for as much as two years (the maximum duration of the interim authorization period). For example, according to data based on *national* averages, 80 percent of the quantity of hazardous wastes generated is disposed on-site. These on-site disposal facilites amount for about 90 percent of the total number of disposal facilities in the nation. Current information available to EPA on the status of State legislation and regulations in the 30 States which generate most of the hazardous wastes, indicates that as many as three of these States lack statutory or regulatory authority to control on-site disposal and as many as seven States lack statutory or regulatory authority to control treatment and/or storage. Similar problems might be encountered in the remaining smaller States.

The risk of non-regulation, however, is tempered by several factors. During the first six months after promulgation of section 3001 regulations, EPA will be reviewing proposed State programs as well as conferring "interim status" under section 3005(e) to *all* HWM facilities (see previous discussion of "interim status" under the RCRA portion of the Part 122 preamble). Receipt of the information necessary to confer "interim status" to facilities under section 3005(e) will provide EPA the basis for making an assessment of which facilities may be actual or potential violators of Federal standards under the section 3004 regulations (which call for an extensive set of requirements to be met. (see the interim status facility standards of 40 FR 250.40(c) proposed December 18, 1978, at 43 FR 58995). EPA is empowered by section 3008(a) of RCRA to take direct enforcement action against all hazardous waste management facilities or activities on a case-be-case basis regardless of the type of State authorization conferred. In especially egregious circumstances, EPA also can enforce under the imminent hazard provisions of section 7003 of RCRA. Finally, although direct State oversight of the manifest system is not a requirement for interim authorization, EPA can use its enforcement powers to follow up on noncompliance with national manifest requirements. (See previous discusion of "manifests" under RCRA portion of Part 123 in this Preamble).

Based on current information, it is expected that very few States will be in a position to undertake the full hazardous waste program when the Subtitle C regulations are promulgated. Additionally, some of those States which already have, or which will have, some type of hazardous waste programs when the regulations are promulgated would prefer to control the program from the beginning, rather than assuming a program that has been initiated by or operated concurrently with EPA. The proposed approach will minimize the disruption and uncertainty caused by changing administration of the program.

Comments are requested on the possible alternatives for EPA regulation of activities that are not regulated by the State during the interim authorization period. EPA recognizes the potential problems with this arrangement. This concept resembles that of "Partial Authorization", which EPA rejected for the reasons described above. Ths new concept also has drawbacks. First, the regulated community has strenuously contended that a single entity should carry out the entire program in a given State, arguing that a sharing of responsibility would result in confusion and duplication of effort for the agencies, and greatly increased complexity for regulated firms. Second, the availability of this arrangement could encourage some States capable of qualifying for authorization, to take over only selected program elements. Third, the delineation of responsibilities between the Region and the State would undoubtedly be a lengthy and difficult process. Finally, the existence of this arrangement could remove some of the incentive for strenuous State efforts toward authorization. However, this alternative would assure more comprehensive control of all hazardous waste facilities during the interim authorization period.

Comments are also requested on the alternatives of requiring control of all disposal, or additional elements of the requirements for full authorization under RCRA, and the impact this would have on State participation.

Federal Role After Program Approval. Many comments were received concerning the Federal role after a State has been authorized as outlined in the February 1, 1978 proposal. EPA has primary responsibility under RCRA for protecting public health and the environment and is charged with developing a consistent and effective national program to meet this responsibility. Thus, in authorizing State programs EPA's prime concern is to ensure that the State program is at least as effective in controlling at least the same universe of hazardous wastes as does the Federal program. The purpose of EPA's oversight activities, subsequent to authorization of a State program, is to ensure that State programs are being operated in accordance with these regulations.

Federal oversight of State programs is conducted in a number of ways. The Agency has encountered much interest and comment from States and others on three specific aspects: reporting, review of permits, and facility inspections.

With regard to reporting, the Agency has chosen to reduce the number and complexity of the reports required in these regulations. Quarterly reports that will be required are: a list of major facilities out of compliance, and a summary of international shipments of wastes. For States with Interim Authorization a semi-annual report on progress toward attaining authorization will be required. Finally, an annual report, including a list of permit actions completed and summary information on wastes managed (quantities, types, method of management) is also required. It should be recognized that EPA has a responsibility to develop and maintain a national data base on the generation and management of hazardous wastes. It may be necessary to negotiate additional reporting requirements in the Memorandum of Agreement in particular cases, such as in a State with an unproven program. The Memorandum of Agreement is a more flexible document than these regulations, and can be changed to accommodate expected changes in the need for nationally significant information.

Concerning review of permits, the Agency could not possibly review all permits issued by a State, nor is such a review necessary or desirable. Therefore, EPA will only review a sufficient number of permit applications and draft permits to assure that the State permit program is being operated in a sound manner consistent with the requirements of these regulations. Accordingly, these regulations require that authorized States forward to EPA copies of permit applications, and draft permits for major facilities only. (The definition for "major" facilities is discussed earlier in the preamble). Normally, the number of draft pemits or permit applications reviewed by EPA should amount to about 10 percent of the total number of permits processed. In some cases, where a history of sound program administration by a State exists; EPA may agree to reduce this level of review even further. In others, for example, where a State program is new and inexperienced, the Regional Administrator may choose to review some minor permits as well. In either case, such agreements should be contained in the Memorandum of Agreement.

These regulations in § 123.38 specify the bases on which EPA will comment on permit applications and draft permits. Reasons for each comment will be given as well as recommendations for actions to be taken by the State Director to address each comment. The State Director is also provided with the opportunity to respond to EPA's comments.

In regard to EPA's conducting inspections of facilities, § 123.37 specifies the provisions which will be included in the Memorandum of Agreement, normally including notification before EPA conducts inspections, and opportunity for States to investigate situations where EPA has reason to believe that violations may be occurring.

Comments are solicited on the practicality and impact of these and other oversight procedures.

National Enforcement Information System. EPA is aware of the need to centralize reported information concerning hazardous wastes by both the Agency and authorized States. It is necessary for enforcement compliance monitoring purposes to have a single system which contains all this information. Therefore, EPA is considering requiring, as a condition of authorization, that each State applying for such authorization either (1) agree to insert its reporting data directly into EPA's national ADP system (discussed earlier in the preamble under *Manifests*) or (2) allow EPA to so input the data for the State. The National ADP system is being designed so that any such State may use this system for its own purpose. Comments are solicited on the advantages and disadvantages of such a requirement.

Subpart C

Subpart C sets forth additional requirements for State programs as well as the procedures EPA will use in taking the required approval, disapproval or partial approval actions on UIC programs under sections 1422(b) and (c) of SDWA.

Elements of an Approvable State UIC program. In order to obtain EPA approval for primacy, a State must demonstrate the ability, adequate legal authority and resources to implement the following program elements:

- Designate underground sources of drinking water within the State;
- Develop and maintain an inventory of injection wells;
- Issue permits or rules that incorporate requirements of Part 146;
- Issue permits which include conditions that incorporate UIC requirements for monitoring, recordkeeping and reporting by the permittee;
- Conduct a program of enforcement, inspection and surveillance of injection well facilities.

EPA-approval. The Administrator is to approve, disapprove or partially

approve State participation in the UIC program within 90 days of the receipt of a complete State application by the State. Prior to ruling on the application, EPA must also provide the opportunity for public comment and hearings..

A State need not develop a regulatory program for a type of injection well that does not exist in that State. In such case, however, the States must show it has adequate legal authority to initiate a control program should such wells seek to operate in the State in the future. Comments are solicited on this approach. EPA is particularly concerned whether States could develop a control program quickly enough to issue proper regulations where a new type of well injection operation commences in a State.

Unlike the other programs covered by this Part, EPA may in its discretion, approve a State UIC program in part. In the case of partial approval, the Agency's intention is to approve only a complete program by type of well. In other words, EPA would authorize a State to regulate, for example, Frasch process mines or hydrocarbon storage wells if it had the necessary legal authority and were prepared to carry out the full range of regulatory requirements applicable to such wells. However, the Agency does not intend to approve a portion of a State program if the program provides only for partial regulation, i.e., it provided for State issuance of permits to Frasch process wells but left enforcement up to EPA. The Agency believes that this approach is sensible from an administrative point of view and is least confusing to the regulated community and public. Comments are solicited on the advisability of this approach.

Finally, it should be noted that the 1977 amendments to the Safe Drinking Water Act have clarified State authority over Federal facilities within its boundaries (sections 1477(a) and 1422(b)(1)(D) of SDWA). Nonetheless, management of wells on Indian lands remains an EPA responsibility unless the State has adequate authority to implement the program (SDWA section 1477(c)).

In cases where the State is developing an application for primacy, EPA intends to promulgate the UIC program for which it is responsible (i.e., on Indian lands) at the same time as the approved State program becomes effective. In cases where a State program is disapproved, EPA will promulgate a UIC program within 90 days from disapproval in whole or in part. If a State informs EPA that the State does not intend to adopt a UIC program, EPA will promulgate the whole UIC program for the State within one year (270 days plus 90 days approval process) of the effective date of these regulations or of 40 CFR Part 146 (proposed at 44 FR 23738 (April 20, 1979)), whichever is later.

Oversight—EPA has a statutory duty to oversee State UIC Programs. To enable EPA to carry out this responsibility, Part 123 requires States to provide to the Agency the following;

- Access to State files and documents;
- Annual reports;
- Quarterly reports on the compliance status of major wells;
- A mid-course review after the first year of program operation to assess the requirement to perform corrective action in the area of review. The State analysis will be used by EPA to assess the associated costs and environmental benefits, and may result in appropriate changes in the requirement.

In addition, under SDWA the Agency is given the authority to enforce against program violations if the State fails to enforce adequately.

Procedures for the withdrawal of approval from a State program provide the State with the opportunity to present its case that withdrawal is not warranted. If the Administrator has cause to believe that a State is not in compliance with the SDWA or these regulations, he must give the State 30 days of notice to demonstrate its compliance. If not satisfied, the Administrator must convene a public hearing not less than 60 days after notice of the hearing. If, after the hearing, the Administrator concludes that the State is not in compliance, he must notify the State of the particulars. The State then has 90 days to give up the program or come into compliance. This process for withdrawal is different from the withdrawal process for the other programs covered by Part 123 because of the difference in the statutes involved.

Subpart D

This Subpart sets forth requirements which are unique to the NPDES which supplement the Subpart A requirements. For a further discussion of the NPDES requirements see the preamble to those regulations.

Subpart E

The first 14 sections (§§ 123.9–123.104) of this Subpart were promulgated in Part 123 of the NDPES regulations and, like Subpart D, are discussed in the preable to those regulations. The only exceptions are § 123.98, transmission of information to EPA, which has been changed and § 123.99, which is now contained, in changed form, in § 123.110. The remaining sections (§§ 123.105–123.112) are being proposed for the first time and were to be promulgated as Part 126 until the decision was made to incorporate it into these consolidated regulations. There will be no Part 126.

Although the final NDPES regulations specify that State section 404 programs must designate one agency to be responsible for issuing permits (§ 123.4(b)(1)), the Agency is reconsidering this position and invites further comment on this requirement (§ 123.95(a)). In particular, the Agency would like to receive comments on whether such a requirement would interfere with State efforts to coordinate and consolidate their own permit programs.

The following are major provisions of Subpart E:

Application procedures § 123.105. The specific information required of all applicants is discussed, as well as general application procedures. Public notice must be published for all permit applications, except when a draft permit must be prepared, and all permit denials. Since, in most instances, EPA and the public will review only permit applications, detailed application information is required.

Draft permits. Section 123.98(c) provides that the State section 404 programs may circulate permit applications for public and EPA review and comment, in most instances. However, in some cases the State will be required to reach a tentative determination and formulate a draft permit (where the tentative determination is to issue a permit) for public and EPA review and comment. (It should be noted that all the other programs covered by these proposed consolidated regulations are required to formulate draft permits in all cases.)

Draft State 404 permits are required for:

(1) Discharges which may affect the waters of another State;

(2) Major discharges;

(3) Discharges into critical areas such as National Parks and Wildlfe refuges;

(4) General permits; and

(5) Discharges containing toxic pollutants in toxic amounts and hazardous substances in reportable quantities.

Comments are solicited on this list (which is also the list of activities for which EPA will not waive its right to review State permits). In particular, EPA would appreciate comments on the following issues:

(1) What discharges should be considered "major"? In this regard EPA is considering acreage limitations which might vary in different parts of the country. Other discharges may be considered major based on different criteria.

(2) Should the list of critical areas be expanded to include others?

(3) Are the criteria that toxic pollutants be present in *toxic amounts* and hazardous substances in *reportable quantities* proper? EPA believes that a cut-off is necessary since many discharges which contain trace quantities of these substances are not of concern. In addition, the criteria must be clearly defined and workable. On this basis, EPA rejected formulations of this language which were couched in terms of "significant" of "substantial" since these may not be readily meaningful in the context of a particular discharge.

Waivers. EPA solicits comments on the extent to which the Agency should continue to receive permit applications and permits from a State for those discharges the Agency has waived review.

General permits. Procedures for public notice of proposed general permits, review of proposed permits, issuance and enforcement are included in § 123.106.

Coordination procedures. The State Director must assure coordination of permit with appropriate Federal and Federal-State water-related planning and review processes, as required by section 404(h)(1)(H) of CWA. Requirements for implementing such coordination are in § 123.110.

Review procedures. All permit applications or draft permits are subject to review by EPA and the public (although under § 123.92 EPA may waive such review in many cases). During the review process, the Regional Administrator provides opportunity for comment by the Corps of Engineers, the Fish and Wildlife Service and the National Marine Fisheries Service, as well as from other interested Federal agencies, and these must be considered in his or her review.

Waters Subject to State Regulation

Under section 404(g)(1) of CWA, the Corps of Engineers will, in all cases, retain jurisdiction over disposl of dredged or fill material into those waters of the United States, together with their adjacent wetlands, that are subject to the ebb and flow of the tide and/or are presently used, or may be susceptible to use for interstate transport or foreign commerce. A State may apply for a section 404 authority to regulate all other waters within the State. As a prerequisite for program approval (§ 123.93) an agreement is required between the State and the Corps of Engineers, which sets forth a description of those waters over which the Corps of Engineers will retain jurisdiction, and those waters over which the State will have jurisdiction.

Major Issues

(1) An earlier formulation of these regulations provided for preparation by the States of a draft and proposed permit prior to Federal review. Several reviewers expressed concern that processing procedures, and in particular, the processing schedule for permits, were unnecessarily lengthy and complex. EPA's specific concerns (based on comments received) included:

(a) The three-stage process would substantially extend the time required to process applications. The 1977 amendments to the CWA, together with its legislative history, establish a strong sense of Congressional insistence on the elimination of unnecessary delay in section 404 permit processing.

(b) Due to the nature of activities regulated under section 404, EPA believes that public participation and right to comment will usually be adequate if the permit application is circulated rather than a draft permit.

The proposed regulation has been redrafted to eliminate the "draft permit" and the "proposed permit" stages in most instances, except as described above, and thus to provide for public and agency review input during a single continuous period that normally will not exceed 90 days from receipt of the permit application. Safeguards were added to ensure that permit applications are complete. To ensure that there is adequate basis for review of specific projects provision was made for the Regional Administrator to require submission of additional information, including a draft or proposed permit where appropriate. EPA believes that this process more nearly accords with the overall Congressional emphasis on timely processing of section 404 permit applications, and is consistent with meaningful review. However, this approach differs from the other programs under this part, which require preparation of a draft permit in all cases as a basis for public comment. Comments on this issue are solicited.

(2) By far the most controversial issue raised in the review of this proposed regulation was the interpretation of section 404(f)(1)(A) of the Clean Water Act, as treated in § 123.107 of the proposal. Section 404(f)(1)(A) provides that discharges of dredge or fill material in connection with certain activities enumerated in section 404(f)(1)(A) through (F) are not subject to regulation under the 404 program, with the caveat in section 404(f)(2) that any discharge of such material incidental to any activity having as its purpose to bring an area of navigable waters into a use to which it was not previously subject, where the flow or circulation of navigable water may be impaired or the reach of such waters may be reduced, will require a 404 permit.

The background and legislative history of section 404(f)(1)(A) is exceedingly complex and has led to several schools of thought on what the section really means. At one extreme, proponents of a liberal interpretation argue that section 404(f)(1)(A) exempts all, or virtually all, discharges of dredged or fill material associated in any way with agricultural, silvicultural, and ranching activities, except where such activities are recaptured by section 404(f)(2). Under this view, neither the word "normal" nor the specific activities listed significantly limit the scope of the exemption. A more moderate view is that the word "normal" is intended to signify that the exempted farming, silvicultural, and ranching activities must be established and ongoing, and that the exemption only extends to the particular activities named in the statute or other activities of similar character. At the other extreme, proponents of a conservative interpretation take the view that section 404(f)(1)(A) refers to activites which do *not* involve discharges (either because no earth is moved, there is no point source, or no waters of the United States are involved), and that such activities are not merely exempt (e.g., still subject to (f)(2), but rather are excluded entirely from regulation under section 404. Under this view, activities which are not excluded will always need a permit. There are several variations of these interpretations which incorporate components of both the exclusion and exemption approaches and construe the listed activites in various ways. The interpretation of section 404(f) is exceptionally complex, especially since no one view is consistent with both the literal language of the statute and all the often ambiguous and conflicting legislative history.

These regulations follow a middle ground. Section 123.107 specifies that any discharge "that may result from" the named activities "is not prohibited by or otherwise subject to regulation," except when recaptured by the provisions of section 404(f)(2). The proposed

regulation defers to the language of the statute, which when taken literally, clearly contemplates that discharges of dredge or fill material may occur in conjunction with the activities listed in (f)(1)(A). The practical effect of this language is to assure that such activities are not subject to the permit requirement, whether or not any actual discharge or dredge or fill material is associated with them. Consistent with section 404(f)(2), however, the regulation precludes any such exemption where an activitiy involves the discharge of materials containing any section 307(a) toxic substance; or, any discharge incidental to an activity which converts waters of the Untied States to new uses, where flow or circulation may impaired or the reach of the waters reduced.

The proposed regulations interpret the exemption in 404(f)(1)(A) as applicable only to the activities *named* in the statute and other activities of essentially the same character as those named. This interpretation derives from the "such as" language of (f)(1)(A), which in EPA's view, precludes the extension of the exemption for "normal farming, silvicultural, and ranching activities" to activities that are unlike those named. Support for this position is seen in paragraphs (C) and (D) of subsection (f), which provide for specific farming and silvicultural exemptions in addition to those in (f)(1)(A). If (f)(1)(A) intended an across-the-board exemption for agricultural, silvicultural, or ranching practices, there would have been no need for the additional specific exemptions of (f)(1) (D) and (E).

Part 124—Procedures for Decision-making

What Does This Part Do?

Proposed Part 124 establishes the procedures EPA will use in issuing RCRA, UIC, PSD and NPDES permits either separately or in combination with each other. It sets the framework for receiving permit applications, writing draft permits, soliciting public comment on them, and issuing the final permit. Where NPDES permits are concerned, this Part also contains the procedures for conducting evidentiary hearings. These include both procedures for the traditional evidentiary hearing (Subpart E) and special procedures for "initial licensing" (Subpart F). (As discussed below, EPA believes that evidentiary hearings are not required for issuance or modification of RCRA, UIC and PSD permits.) Some of the requirements of this Part are made applicable by Part 123 to States with approved permit programs.

In addition, this Part includes procedures for issuing permits implementing the "prevention of significant deterioration" (PSD) provisions of the Clean Air Act. These procedures are very similar to those presently contained in 40 CFR 52.21(r). No parallel requirements have been included in Parts 122 and 123 because the established mechanisms for approving State programs under the Clean Air Act are somewhat different from those for approving other permit programs. Consolidating the procedures is the aspect of consolidation with most immediate benefit to those affected; EPA will explore the possibility of more comprehensive consolidation in the future.

Subpart A

Basic Permit Issuance Procedures

Under the permitting procedures established by the Part, permits must first be applied for in accordance with permit application requirements set forth in Part 122, (or 40 CFR 52.21 in the case of PSD permits). After receipt of a complete application a draft permit will be prepared under § 124.6. This permit must be accompanied by a "fact sheet," for "major" permits, explaining the basis for the draft permit in some detail under § 124.9. A "statement of basis" must be prepared for all other permits under § 124.8. Because there are practical limits to EPA's ability to explain each of the permits it issues in comprehensive detail, the discussion in the fact sheet or statement of basis should be proportional to the importance of the issues involved and the degree of controversy surrounding them. Modifications to permits and processed as draft permits in accordance with § 124.6, under the requirements of § 124.5 and § 124.7, except or minor modifications as described under § 122.9(g).

Under § 124.10, an "administrative record" must be assembled, containing appropriate supporting documents. When the draft permit has been formulated and public notice is issued under § 124.11, §§ 124.12 and 124.13 provide for a comment period and, in suitable cases, a public hearing. This process will provide a forum for any interested persons to bring forward any comments or questions they may have about the draft permit or its supporting materials. After the comment period has closed, EPA will prepare and issue the final permit under § 124.17. It will be accompanied by a response to all the significant comments received under § 124.19. This response to comments plus any additional supporting material will constitute a final administrative record for the final permit under § 124.20. When the final permit has been issued, there will be an opportunity under § 124.21 for discretionary review of RCRA, UIC and PSD permits by the Administrator. In the case of NPDES permits, there will also be an opportunity for an evidentiary hearing and opportunity for appeal to the Administrator following the evidentiary hearing under Subpart E or F.

A few of the provisions of Part 124, particularly those affording basic public participation in permit issuance, are applicable to State programs (except for State PSD programs). States must prepare a draft permit, provide public notice and opportunity for a hearing and allow the public 30 days to comment on the draft permit before final permit issuance. A statement of basis or fact sheet (for major permits) is also required.

Hearing Requirements for RCRA, UIC, PSD and NPDES Programs

The procedures for issuing RCRA, UIC and PSD permits are relatively more simple than those for NPDES permits both because the programs are newer and because the underlying statutes are not as detailed as the applicable provisions of the Clean Water Act. The major difference between the procedures for these three programs and those for the NPDES program is that no provision for the traditional form of evidentiary hearing is made for RCRA, UIC or PSD permits, while a full evidentiary hearing (under Subpart E or F) is required for NPDES permits.

Three Courts of Appeals have held that the Clean Water Act requires an evidentiary hearing before NPDES permits can be issued. However, these decisions rested largely on specific interpretations of the language of the Clean Water Act, and EPA does not believe that the other three statutes contain analogous provisions. To the extent the decisions expressed a broader concern for reasoned and documented decision-making, EPA shares that concern and believes there are alternative and preferable ways of satisfying it.

Unlike the Clean Water Act, the Resource Conservation and Recovery Act does not explicitly require any "hearing" at all before issuing permits. Section 3008(b) of RCRA provides what EPA interprets to be an adjudicatory hearing for permit revocation, but neither this section nor any other

provides any procedures for permit issuance.*

Similarly, there is no requirement in section 1422 of the Safe Drinking Water Act that any hearing is a prerequisite to EPA issuance of a UIC permit. Where Congress intends that a hearing must precede issuance of a permit, the intention is manifest in the language of the Act, as in the requirement for a hearing on the record for State permitting under section 1421(c)(2) (temporary permits) and section 1424 (interim permits). Additionally, since section 1421(b)(1) of SDWA authorizes State regulation of underground injection by rule as well as by permit, Congress could not have intended for informal rulemaking procedures to apply to the former, but trial-type procedures to apply to the latter.

Section 165 of the Clean Air Act does require a hearing before PSD permits are issued, but the text of the statute makes clear that a formal adjudicatory hearing was not intended. See 165(a)(2). No person who commented in the extensive rulemaking leading up to promulgation of EPA's current PSD regulations alleged that the statute required a formal hearing.

When the statute does not require any hearing at all, the traditional rule of thumb is that evidentiary procedures are not required even for licensing. EPA takes the silence of these statutes on necessary EPA permitting procedures (or the explicit rejection of adjudicatory hearings, in the case of PSD), as an invitation to the agency to develop permitting procedures that are expeditious and informal and still satisfy the requirements of due process and sound administrative procedure. Accordingly, EPA has developed the procedures in these proposed regulations which are described below. These should be enough to allow a thorough ventilating of the facts and policy choices at issue in any permit proceeding.

Coordination of One Permit Program With Another

A major purpose of these regulations is to provide as much coordination as feasible between the permit programs covered. To some extent, this should be accomplished simply by the parallel structure of these regulations in general, and of the common procedures in Part 124 in particular. In addition, these regulations provide several specific mechanisms for closer integration of permit decisions:

Under § 124.4, facilities or activities which will need a permit under more than one of the programs covered will be able to delay filing the applications due first in order to consolidate them with the application due last, by providing EPA with written notice of intent to delay the filing date. Part A applications under the RCRA program are excluded from this provision because the submission of a Part A RCRA application triggers interim status under section 3005 of RCRA, and interim status is only available for a limited period. PSD applications are also excluded from this provision. Because EPA is currently allocating increment on a first-come, first-served, basis (43 FR 26401, June 19, 1978), postponement of a source's application date could cause delay in processing later applications from other sources. This provision could also present an opportunity for abuse by applicants seeking unfairly to reserve increment in the future and to escape the requirements imposed for construction of a source that would affect certain non-attainment areas after July 1, 1979. Such an applicant could attempt to unfairly reserve increment and escape the July 1 deadline by claiming that since its full application had properly been postponed under this section, it should be treated as having been filed earlier. EPA specifically solicits comments on this exclusion of the PSD program. EPA solicits comments on this general approach, and whether there are certain other categories of permit applications that should not be delayed for purposes of consolidation.

The regulations provide explicitly for joint issuance of draft permits for a facility or activity which requires permits under more than one statute, joint comment periods, and joint hearings. Where EPA is issuing all the permits, it may elect to choose this consolidated route at any time. Where responsibility is divided between EPA and a State, the regulations encourage such joint proceedings by mutual agreement. EPA solicits comments on this approach, and whether there are certain other categories of permit applications that should not be delayed for purposes of consolidation.

These regulations also prescribe ways to coordinate the traditional evidentiary hearing portions of the NPDES procedures with the "hybrid" procedures that will be used to make RCRA, UIC and PSD permit decisions. Briefly, they allow the initial comment proceedings on the draft permit to become formal when that might avoid the need for a subsequent evidentiary hearing, and allow NPDES evidentiary hearings to consider matters relating to RCRA, UIC and PSD permit decisions which are indissolubly linked to the decision on the NPDES permit. They thus provide some limited flexibility to shift the consideration of issues back and forth between the two stages as circumstances dictate. Although stays based on cross-effects are possible under certain limited circumstances under § 124.18, the general pattern will be that RCRA and UIC permits will not be stayed while an evidentiary hearing on an NPDES permit issued to the same source is in progress. However, a stay of contested PSD permit term(s) is unavailable under proposed § 124.18. Review of a PSD permit is uniquely dependent on the resolution of earlier PSD applications because of the first-come, first-served allocation scheme being employed by EPA for these permits. The stay provisions of § 124.18 might seriously impede the ability of EPA to process later PSD applications expeditiously.

Where the new "initial licensing" procedures for NPDES permits can be used, a much greater degree of procedural consolidation should be possible. Here the regulations provide that all permits which have been consolidated with the NPDES permit shall simply be passed through the same procedures as the NPDES permit. EPA explicitly invites comment on whether this approach might "overjudicialize" the process of issuing RCRA, UIC or PSD permits, and on alternative approaches that might be acceptable.

Relationship of Subpart A to the Final NPDES Regulations, Part 124

The final NPDES regulations that were recently promulgated contain a number of requirements that are similar, but not identical, to those required for all three programs in Subpart A. Changes to the Part 124 procedures for the NPDES program are the result of an effort to provide uniform procedures for the issuance of permits that accommodate the programmatic and statutory requirements of all three permit programs. These changes include:

Consolidation of Applications. NPDES permit applications can now be consolidated under § 124.5 with permit applications for other programs, and application deadlines may be delayed for purposes of this consolidation.

Statement of Basis and Fact Sheet. The statement of basis required for

* One pre-proposal comment argued that the reference to "order" in section 3008(b) make a hearing necessary since the granting of an initial license may be an "order" under the APA. However, the term is clearly used in section 3008 as a synonym for the "compliance orders" described in paragraph (a), and nothing more. See, e.g., section 3008(c), which is entitled "Requirements of Compliance Orders" and then immediately uses "order" as a synonym.

NPDES permits under the Consolidated regulations is the same as that required under the final NPDES regulations (§ 124.33). However, the requirements for fact sheets required for major NPDES permits have been changed slightly to enable the establishment of common requirements. The changes were mostly in the nature of providing more general requirements than those applicable to NPDES fact sheets in the final NPDES regulations. Certain additional unique NPDES requirements for fact sheets are provided in Subpart D, and these are identical to those required under the final NPDES regulations.

Public Hearings. The public hearing requirements in § 124.13 of the consolidated regulations are considerably more detailed than those provided under the final NPDES regulations (see § 124.42), and contain additional requirements that are designed to provide procedural safeguards for the issuance of RCRA, UIC and PSD permits, which do not require evidentiary hearings. NPDES permits must nonetheless be subject to subsequent evidentiary hearings under Subpart E of these regulations where NPDES permit provisions are contested. Where related permit provisions are contested under NPDES, RCRA, UIC or PSD permits for the same facility or activity, these provisions may be consolidated in the NPDES evidentiary hearing to facilitate decision-making on the related issues.

Subpart B—Specific Procedures Applicable to RCRA Permits

One additional requirement for RCRA permits is provided in Subpart B. Public notice of the receipt of a permit application for a major hazardous waste management facility is required under § 124.31, in addition to the public notice of the issuance of a draft permit required under § 124.11. This additional notice will provide both States and the general public with early notice of a request to permit a hazardous waste management facility and should facilitate coordination with State programs regarding the issuance of a permit to a facility located in that State. The permitting and siting of these facilities is expected to be controversial in some areas of the country, and this section seeks to ensure full public participation in the permit decision process.

In addition, a summary of significant permit applications may be prepared and will be made available upon request.

Subpart C—Specific Procedures Applicable to PSD Permits

Incorporation of the PSD permit requirements into this Part is not meant to change the structure of the program currently set forth at 40 CFR 52.21. The procedures set forth at 40 CFR 52.21(r), which is the analogous provision of that section, are very similar to the ones in Subpart A.

One specific provision has been included in this Subpart. It provides that PSD applications from small sources shall be processed expeditiously under the existing Part 52 regulations.

In the past, determinations by EPA that a source was required to apply for a PSD permit have been litigated as final agency action. EPA believes that in most cases such litigation represents an avoidable waste of judicial time and conflicts with the principles of administrative primary jurisdiction. Accordingly, the approach implicitly adopted by these regulations is that the determination that a source must apply for a PSD permit is not reviewable when it is made. Instead, the source may challenge that threshold determination during the permit issuance process and a final decision will be made at the time of the final decision of other issues.

In some cases such as those in which the threshold determination raises purely legal issues, this course may not be appropriate. In most cases the Regional Administrator will be able to designate the threshold determination as final action subject to immediate judicial review by publishing it in the Federal Register. See section 307(b) of the Clean Air Act.

Subparts D, E and F—Specific Procedures Applicable to NPDES Permits

These Subparts contain a number of additional requirements for NPDES permit processing that are largely unique to the Clean Water Act and the NPDES program, including evidentiary hearing procedures. They incorporate without substantive change requirements contained in the final NPDES regulations that were recently promulgated.

Note.—The final regulations for Parts 122–124 will include a plan to evaluate it within five years of implementation. The plan will describe criteria for assessing the degree of success of the regulations. The sources of data that will be used to evaluate the regulations under these criteria, and the resources anticipated as necessary to gather and analyze the data and conduct the reviews.

The Environmental Protection Agency has determined that this document, except for the UIC and RCRA provisions, does not constitute a major regulation requiring preparation of an economic impact statement under Executive Order 12044.

Analyses of the environmental, economic and regulatory impacts of the entirety of Subtitle C, RCRA, Hazardous Waste Management (including the RCRA programs in Parts 122–124 proposed) and on the UIC program are being or have been performed.

Drafts of the Environmental Impact Statement and the Economic Impact Analysis on the RCRA program are available by contacting:

Ed Cox, Solid Waste Information Office, Environmental Protection Agency, 26 West St. Clair Street, Cincinnati, Ohio 42500 (513–684–8491).

In addition, copies of these RCRA documents are available for review in the EPA Library Reading Room, Room 2404, Waterside Mall, 401 M Street, SW., Washington, D.C., and in the EPA Regional Office libraries. Comments on these documents must be received on or before September 12, 1979. Final versions of these documents will be issued at the time of promulgation of the RCRA Part 250 regulations.

Comments and the following supporting documents on the UIC program will be available for public inspection and copying at a reasonable fee during normal business hours at the Environmental Protection Agency, Public Information Reference Unit, Room 2922, 401 M Street, S.W. Washington, D.C. 20460. Copies of the supporting documents will also be available for inspection and copying in the Library at the ten EPA Regional Offices.

The supporting documents are:

1. "Analysis of Costs Underground Injection Control Regulations, Class I and Class III."

2. "Methods and Costs for Inventory and Assessment of Injection Wells Covered Under Classes IV and V."

3. "Estimated Cost of Compliance, Proposed Underground Injection Control Program Regulations, Class II Wells."

4. "Draft Environmental Impact Statement-State Underground Injection Control Program, Proposed Regulation."

5. "Supplement to Draft EIS, Reproposed Regulations."

Dated: June 4, 1979.

Douglas M. Costle,

Administrator.

1. It is proposed to revise Parts 122, 123 and 124 as follows:

PART 122—PROGRAM DESCRIPTIONS: THE HAZARDOUS WASTE PERMIT PROGRAM; THE UNDERGROUND INJECTION CONTROL PROGRAM; THE NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM; AND THE 404 DREDGE OR FILL PROGRAM

Subpart A—General Program Requirements

Subpart B—Additional Requirements for Hazardous Waste Programs Under the Resource Conservation and Recovery Act

Subpart C—Additional Requirements for UIC Programs Under the SDWA

Subpart D—Additional Requirements for National Pollutant Discharge Elimination System Programs Under Clean Water Act

Authority: Resource Conservation and Recovery Act, 42 USC 6901 et seq.; Safe Drinking Water Act, 42 USC 300f et seq.; and Clean Water Act, 33 USC 1251 et seq.

Subpart A—General Program Requirements

§ 122.1 Purpose and scope.

(a) The regulations in this Part define three permit programs administered by EPA. They apply to the permit programs as they are administered by approved States, to the extent incorporated by reference in Part 123. These permit programs are:

(1) The Hazardous Waste Permit Program (the RCRA Program) under section 3005 of the Solid Waste Disposal Act as amended by the Resource Conservation and Recovery Act of 1976 (Pub. L. 94-580, as amended by Pub. L. 95-609) (RCRA);

(2) The Underground Injection Control Program (the UIC Program) under section 1421 of the Safe Drinking Water Act (Pub. L. 93-523, as amended by Pub. L. 95-190) (SDWA); and

(3) The National Pollutant Discharge Elimination System (the NPDES Program) under sections 318, 402 and 405(a) of the Clean Water Act (Pub. L. 92-500, as amended by Pub. L. 95-217 and Pub. L. 95-576) (CWA).

(b) These regulations also apply to State section 404 programs under CWA as set out in Part 123.

(c) The consolidation of these permit programs into one set of regulations is authorized by sections 101(f) and 501(a) of the CWA, sections 1006 and 2002 of RCRA, and section 1450 of SDWA.

(d) The regulations in Parts 123, 124, 125, 146 and 250 also apply to the RCRA, UIC, NPDES and section 404 permit programs in the following manner:

(1) Part 123 describes the requirements for State participation in these programs;

(2) Part 124 describes the procedures for issuing permits. These procedures apply in their entirety to EPA and in part to approved States as described in Part 123; and

(3) Subchapter N of this Chapter and Parts 125, 146, and 250 describe technical criteria and standards for determinations under the NPDES, UIC and RCRA programs, respectively. They apply to both EPA and State programs. The technical criteria of 40 CFR Part 230 apply to State section 404 programs.

(e) The regulations in this Part and in Parts 123 and 124 establish the requirements for public participation in the State permit issuance process and in the approval of State RCRA, UIC, NPDES, and 404 programs. These requirements carry out the purposes of the public participation requirements of 40 CFR Part 25, and supercede the requirements of that Part as they apply to actions contained under Parts 122, 123 and 124.

§ 122.3 Definitions.

The following definitions apply to this Part and to Parts 123, 124 and 125. Terms not defined in this Part shall have the meaning given by the appropriate Act.

(a) General definitions

"Administrator" means the Administrator of the United States Environmental Protection Agency, or his/her designee.

"Application" means the EPA standard national forms for applying for a permit, including any subsequent additions, revisions or modifications to the form; or forms approved by EPA for use in approved States, including any approved modifications or revisions.

"Appropriate Act and/or Regulations" means the Clean Water Act (CWA); the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act (RCRA); the Safe Drinking Water Act (SDWA); the Clean Air Act (CAA); and applicable regulations

promulgated under these laws. This term is used to describe the application of general requirements to specific program activities under one or more of the above laws, as appropriate.

"Approved program" means a State program which has been submitted to and approved by EPA under Part 123 and the appropriate Act. An "approved State" is one administering an "approved program."

"Aquifer" means a geological formation, group of formations, or part of a formation that is capable of yielding useable quantities of groundwater.

"CWA" 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.*

"Contaminant" means any physical, chemical, biological or radiological substance or matter in water. "Contaminant" includes, but is not limited to or by, the term pollutant, as defined in this Part.

"Director" means the Regional Administrator, or the State Director, as defined in this section, as the particular context may require.

[*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 an NPDES permit prior to the approval of a State program, EPA may retain jurisdiction over that permit after program approval, see § 123.71 and § 123.91. In such cases, the term "director" means the Regional Administrator and not the State Director.]

"Environmental Protection Agency" ("EPA") means the United States Environmental Protection Agency.

"Facility or activity" means any facility or activity (including land or appurtenances thereto) that is subject to regulation under the RCRA, UIC, or NPDES programs.

"Ground water" means water in the saturated zone beneath the land surface.

"Hazardous waste" has the meaning given in section 1004(5) of RCRA as further defined and identified in 40 CFR Part 250, Subpart A, § 250.13 and .14 (proposed at 43 FR 58955–9).

"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 under the appropriate Act and regulations.

"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 CWA. The term includes any State or interstate program which has been approved by the Administrator.

"Owner or Operator" means the owner or operator of any facility or activity subject to regulation under the RCRA, UIC, NPDES or 404 programs.

"Permit" means a permit or equivalent control document that complies with all of the requirements and procedures of this part and Parts 123 and 124, issued by EPA or an approved State. In Part 124, references to "permit" may include permit modification, revocation or denial.

"Person" means an individual, corporation, partnership, association, State or municipality or Federal agency. Under RCRA and CWA, "person" also means a commission, political subdivision of a State, or interstate body. Under RCRA only, "person" also means a trust, firm or joint stock campany; and under SDWA only, "person" also means a company or federal agency, and includes officers, employees, and agency of any corporation, company, association, State municipality, or Federal agency.

"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 and 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 of ground or surface water resources.

[*Comment:* The legislative history of the CWA indicates that "radioactive materials" as included within the definition of "pollutant" in section 502 of the CWA means only radioactive materials which are not encompassed in the definition of source, byproduct, or special nuclear materials defined by the Atomic energy Act (AEA(of 1954, as amended, and regulated under the AEA. Examples of radioactive materials not covered by the AEA and, therefore, included within the term "pollutant" or radium and accelerator produced isotopes. See *Train* v. *Colorado Public Interest Research Group, Inc.* 426 U.S. 1 (1976).]

"Publicly owned treatment works" or "POTW" means a treatment works as defined in section 212 of the Clean Water Act (CWA), which is owned by a State or municipality (as defined under § 122.3(d)), excluding any sewers or other conveyances not leading to a facility providing treatment.

"Regional Administrator" means the Regional Administrator of the appropriate Regional Office of the Environmental Protection Agency or the delegated representative of the Regional Administrator.

"Regulated activity" or "Activity subject to regulation" means any activity subject to regulation under the RCRA, UIC, or NPDES programs.

"RCRA" means the Solid Waste Disposal Act as amended by the Resource Conservation and Recovery Act of 1976 (Pub. L. 94–580, as amended by Pub. L. 95–609).

"SDWA" means the Safe Drinking Water Act (Pub. L. 95–523, as amended by Pub. L. 95–1900).

"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 the appropriate Act and regulations.

"Secretary" means the Secretary of the Army, acting through the Chief of Engineers.

"Site" means the land or water area upon which a facility or activity is physically located or conducted, including but not limited to adjacent land used for utility systems, as repair, storage, shipping or processing areas, or other areas incident to the controlled facility or activity.

"State" means any of the 50 States, the District of Columbia, Guam, the Commonwealth of Puerto Rico, the Virgin Islands, American Samoa, the Trust Territory of the Pacific Islands (except in the case of RCRA), and the Northern Mariana Islands (except in the case of (CWA).

"State Director" means the chief administrative officer of a State agency or interstate agency approved under Part 123 by EPA to administer a State program, or the delegated representative of the State Director. If responsibility 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.

"Stratum" means a single sedimentary bed or layer, regardless of thickness, that consists of approximately the same kind of rock material. Strata is the plural of stratum.

"Total dissolved solids" ("TDS") means the total dissolved (filterable) solids as determined by use of the method promulgated at 40 CFR 136.3, Table I. (The method is described in EPA's "Methods for Chemical Analysis of Water and Wastes, 1974," pages 266–267.)

"Underground Drinking Water Source" or "Underground Source of Drinking Water," except as specified in § 146.04 means:

(1) An aquifier or its portion supplying drinking water for human consumption;

(2) An aquifer or its portion in which the groundwater contains less than 10,000 mg/1 total dissolved solids; or

(3) An aquifer or its portion designated as such by the Administrator or the Director;

[*Comment:* Both the RCRA and UIC programs will use this definition of underground source of drinking water (USDW). However, under the UIC program latitude is given to the responsible authority in designating USDW's (see §§ 122.33 and 146.04). As a balance to this latitude, designations under the UIC program must be made after public hearing and are subject to the approval of the Administrator.]

(b) Definitions applicable to RCRA program requirements

"Application, Part A" means that part of the application which a RCRA permit applicant must complete to qualify for interim status under section 3005(e) of RCRA and for consideration for a permit.

[*Comment:* Part A of the application consists of Form 1 (General Information) and Form 3 (Hazardous Waste Information Summary) as proposed in today's Federal Register as "Public Notice of the Consolidated Application Form."]

"Application Part B" means that part of the application which a RCRA permit applicant must complete to be considered for a permit.

[*Comment:* ERA is not proposing a specific form for Part B of the permit application.]

"Authorization" means authorization, or approval by EPA of a State program which has met the applicable requirements of section 3006(b) of RCRA and Part 123, Subparts A and B.

"Close Out" means the point in time at which Hazardous Waste Management facility owners/operators discontinue accepting hazardous waste for treatment, storage or disposal.

[*Comment:* This definition has been changed from the one included in 40 CFR Part 250, Subpart 250.41 (proposed at 43 FR 58996 (December 18, 1978)) so as to clearly indicate that close-out begins when the facility discontinues accepting hazardous wastes. Comments received on this provision, as well as those submitted on the Part 250 definition of "close-out", will be considered together and will be conformed when these regulations are finally promulgated.]

"Closure" means tha act of securing a Hazardous Waste Management facility pursuant to the requirements of 40 CFR Part 250, § 250.43–7 (proposed at 43 FR 59004 (December 18, 1978)).

"Delivery Document" means a shipping paper (bill of lading, waybill, dangerous cargo manifest, or other shipping document) used in lieu of the original manifest to fulfill the recordkeeping requirements of 40 CFR Part 250, § 250.33 (proposed at 43 FR 18510 (April 28, 1978)).

"Disposal" means the discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste or hazardous waste into or on any land or water so that such solid waste or hazardous waste or any constituent thereof may enter the environment or be emitted into the air or discharged into any waters, including groundwaters.

A "Disposal facility" means any Hazardous Waste Management facility which disposes of hazardous waste.

"Existing HWM facility" means a Hazardous Waste Management facility which was in operation or under physical construction, on or before the date of promulgation of the regulations under § 3001 of RCRA, 40 CFR 250, Subpart A, (proposed at 43 FR 58954 (December 18, 1978)).

"Generator" means any person or Federal agency whose act or process produces hazardous waste identified or listed under 40 CFR Part 250, § 250.13 and .14 (proposed at 43 FR 58955–9 (December 18, 1978), provided, however, that certain producers may or may not be generators depending on whether they meet the criteria specified in 40 CFR Part 250, § 250.29 (proposed at 43 FR 58979 (December 18, 1978)).

A "Hazardous Waste Management facility" ('HWM facility') means any facility, land and appurtenances thereto used for the treatment, storage, and/or disposal of hazardous waste, except that solid waste disposal facilities which receives hazardous wastes only from persons subject to 40 CFR 250.29 shall not be considered HWM facilities.

[*Comment:* Persons subject to 40 CFR 250.29 are those who produce and dispose of no more than 100 kilograms (approximately 220 pounds) of hazardous wastes in any one month, retailers who dispose of hazardous wastes other than waste oil, and farmers who dispose of pesticides which are hazardous and who follow certain specified operating procedures.]

"In operation" means Hazardous Waste Management facilties that are actively treating, storing, or disposing of hazardous waste.

"Interim authorization" means authorization or approval by EPA of a State program which has met the applicable requirements of section 3006(c) of RCRA and Part 123, Subparts A and B.

The term "Major Hazardous Waste Management facility" means a facility used for the treatment, storage or disposal of hazardous waste at a rate equal to or greater than 5,000 metric tons per year.

[*Comment:* This definition is used in conjunction with the reqiuirements for EPA's review of State issued permits in § 123.38, the issuance of public notices in § 124.11, and the issuance of fact sheets in § 124.9, and shall not be construed to mean that any of the application procedures or public hearing procedures are waived for any facility.]

"New HWM facility" means a Hazadous Waste Management facility which does not meet the definition of an existing facility as defined in this section.

"Off-site" means any site that does not meet the definition of "on-site" as defined in this section.

"On-site" means on the same or geographically contiguous property. Two or more pieces of property which are geographically contiguous and are divided by public or private rights(s)-of-way are considered a single site.

"Physical construction" means excavation, movement of earth, erection of forms or structures, the purchase of equipment or any other activity involving the actual preparation of the Hazardous Waste Management facility.

"Storage" means the containment of hazardous waste, either on a temporary basis or for a period of years, in such a manner as not to constitute disposal of such hazardous wastes.

"Storage facility" means Hazardous Waste Management facility which stores hazardous waste, except for generators who store their own wastes on-site for less than 90 days for subsequent transport off-site, in accordance with regulations in 40 CFR Part 250, § 250.20(c)(2) (proposed at 43 FR 58976 (December 18, 1978)).

"Transporter" means a person or Federal Agency engaged in the transportation of hazardous waste by air, rail, highway or water.

"Treatment" means any method, technique, or process, including neutralization, designed to change the physical, chemical, or biological character or composition of any hazardous waste so as to neutralize such waste or so as to render such waste nonhazardous, safer for transport, amenable for recovery, amenable for storage or reduced in volume. Such term includes any activity or processing designed to change the physical form or chemical composition of hazardous waste so as to render it nonhazardous.

"Treatment facility" means any Hazardous Waste Management facility which treats hazardous waste.

(c) Definitions applicable to UIC program requirements

"Approval in part" means action by the Administrator which authorizes a State to administer a UIC program covering less than all types of injection wells within the State. In order to be approved in part, the State program must meet all the requirements of Part 123 for those injection wells for which authorization is given.

[*Comment:* States which have not received full approval are not eligible to receive program grants under section 1443 of SDWA.]

"Area of review" means the area surrounding an injection well which is described according to the criteria set forth in § 146.06.

"Effective date of a UIC program" means the date that a State UIC program is approved or the date that a UIC program is established by the Administrator.

"Existing injection wells" means all injection wells other than new injection wells as defined in this section.

"Fluid" means material or substance which flows or moves whether semisolid, liquid, sludge or any other form or state.

"Injection well" means a well into which injection occurs, including the following types of injection wells (which are divided into the classes in § 122.34):

(1) "Air conditioning return flow well" means a well used to return to the supply aquifer the water used for heating or cooling in a heat pump.

(2) "Cesspool" means an underground device with an open bottom and often with perforated sides that receives wastes.

[*Comment:* The UIC requirements will *not* apply to single family residential cesspools.]

(3) "Cooling water return flow well" means a well used to inject water previously used for cooling.

(4) "Disposal well" means a well used for the disposal of waste into a subsurface stratum.

(5) "Drainage well" means a well used to drain surface fluid, primarily storm runoff, into a subsurface stratum.

(6) "Dry well" means a well that is used for the injection of wastes into the unsaturated zone above an underground drinking water source.

(7) "Enhanced recovery injection well" means a well used to inject fluids for the purpose of facilitating recovery of oil or natural gas.

(8) "Frasch process well" means a well used for the production of sulfur by the Frasch process.

(9) "Geothermal well" means a well used to inject fluids to extract heat from the earth's interior.

(10) "Hydrocarbon storage well" means: (i) a well used to inject hydrocarbons into an underground formation or reservoir for the purpose of storage or (ii) a well for the injection of fluids for the purpose of recovery of stored hydrocarbons.

(11) "In situ gasification well" means a well used for the injection of air and/or fuels to gasify by partial combustion fossil fuel such as coal, tar sands and oil shale.

(12) "Industrial waste disposal well" means a well used for the disposal of waste fluids from an industrial facility into a subsurface stratum.

(13) "Municipal disposal well" means a well used for the disposal of effluent or sludge from a municipal wastewater collection, storage or treatment facility into a subsurface stratum.

(14) "Nuclear disposal or storage well" means a well used for the injection of nuclear materials or wastes into a subsurface stratum, whether for temporary storage or ultimate disposal.

(15) "Produced fluid disposal well" means a well used for the injection of water or other fluids which are brought to the surface in connection with oil or natural gas production into a subsurface stratum other than the oil producing formation.

(16) "Recharge well" means a well used to artificially replenish the water in an aquifer.

(17) "Salt water intrusion barrier well" means a well used to inject water into a fresh water aquifer to prevent the intrusion of salt water into the fresh water.

(18) "Sand backfill well" means a well used to inject a mixture of water and sand, mill tailings or other solids into mined out portions of subsurface mines.

(19) "Septic system well" means (i) a well used to inject the waste or effluent from a multiple dwelling, community or regional septic tank; or (ii) a multiple dwelling, community or regional cesspool; or (iii) a septic tank system well used to dispose of hazardous wastes; but does not mean individual residential waste disposal systems.

(20) "Solution mining well" means (i) a well used to inject fluid containing leaching chemicals to effectuate in-situ leaching and subsequent recover of metals such as copper and uranium, or (ii) a well used for the injection of water or other fluids for the purpose of recovering minerals such as sodium chloride, potash and phosphate.

(21) "Subsidence control well (not for the purpose of oil and gas recovery)" means a well used to inject fluids into a non-oil gas producing zone to reduce or eliminate subsidence associated with the overdraft of fresh water.

"Listed State" means a State listed by the Administrator under section 1422 of the SDWA as needing a State UIC program.

"New injection wells" means those wells which begin injection after a UIC program applicable to such wells becomes effective in the State.

"Underground injection" means the subsurface emplacement of fluids by well injection.

"Well injection" means the subsurface emplacement of fluids (except drilling muds, cement and similar construction materials) through a bored, drilled or driven well; or through a dug well, where the depth of the dug well is greater then the largest surface dimension.

(d) Definitions applicable to NPDES program requirements

"Applicable standards and limitations" means all State, interstate and Federal standards and limitations to which a discharge or a related activity is subject under the CWA, including, but not limited to, effluent limitations, water quality standards, standards of performance, toxic effluent standards for prohibitions, best management practices, and pretreatment standards under sections 301, 302, 303, 304, 306, 307, 308, 403 and 405 of CWA.

"Best management practices" ("BMPs") include treatment requirements, operating and maintenance procedures, schedules of activities, prohibitions of activities, and other management practices to control plant site runoff, spillage or leaks, sludge or waste disposal, or drainage from raw material storage. BMPs may be imposed in addition to or in the absence

of effluent limitations, standards, or prohibitions.

"Contiguous zone" means the entire zone established by the United States under article 24 of the Convention on the Territorial Sea and the Contigous Zone.

"Direct discharge" means the discharge of a pollutant or the discharge of pollutants.

"Discharge" when used without qualification includes a discharge of a pollutant and a discharge of pollutants.

"Discharge of a pollutant" and "discharge of pollutants" each means: (i) Any addition of any pollutant or combination of pollutants to navigable waters from any point source, or

(ii) 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 discharges 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.

"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 national forms may be modified to substitute the State Agency name, address, logo and other similar information, as appropriate, in place of EPA's]

"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.

"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."

"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 CWA.

"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, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, natural ponds, 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 of 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 impoundments of waters otherwise defined as navigable waters under this paragraph;

(5) Tributaries of waters indentified in paragraphs (1)–(4) of this section, including adjacent wetlands; and

(6) Wetlands adjacent to waters identified in paragraphs (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 prevalance of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.

(7) *Provided,* That treatment ponds or lagoons designed to meet the requirements of the CWA (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 water."]

"New discharger" means any building, structure, facility or installation (1) which on October 18, 1972, had never discharged pollutants and (2) which has never received a finally effective NPDES permits and (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 sources".

"New source" means any building, structure, facility or installation from which there is or may be a discharge of pollutants, the construction of which commenced:

(i) After promulgation of standards of performance under section 306 of the CWA which are applicable to such source, or

(ii) After proposal of standards of performance under section 306 of the CWA which are applicable to such source, but only if the standards are promulgated within 120 days of their proposal.

[*Comment:* See § 122.81 for the criteria and standards to be used in determining whether a source has begun construction within the meaning of this definitions, for the types of construction activities which result in new sources or new discharges, and for the effect of a new source determination.]

"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.

"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.

"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 CWA, 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.

"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.

"Variance" means any mechanism or provision under section 301 or 316 of CWA and Part 125, or in the applicable effluent limitation guidelines which

allow modification to or waivers of the effluent limitation requirements of CWA. 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 CWA, where appropriate.

"Waters of the United States"means navigable waters, as defined in this section.

(e) Definitions applicable to section 404 program requirements

"Best Management Practices" ("BMPs") means methods, measures, practices or design and performance standards to prevent or reduce the pollution of waters of the United States. BMPs include but are not limited to schedules of activities, prohibitions of practices, and maintenance procedures. BMPs developed by State section 404 Agencies must insure compliance with the section 404(b)(1) environmental guidelines, (40 CFR 230), and effluent limitations and prohibitions under section 307(a), and water quality standards.

"Cultivating" means physical means of soil treatment employed within established agricultural and silvicultural lands upon planted farm or forest crops to aid and improve their growth, quality and yield.

"Discharge of dredged material" means any addition of dredged material into waters of the United States. The term includes, without limitation, the addition of dredged material into waters of the United States and the runoff or overflow from a contained land or water disposal area. Discharges of pollutants into waters of the United States resulting from the subsequent onshore processing of dredged material that is extracted for any commercial use (other than fill) are not included within this term and are subject to section 402 of the Clean Water Act even though the extraction and deposit of such material may also require a permit from the Corps of Engineers.

"Discharge of fill material" means the addition of fill material into waters of the United States. The term generally includes without limitation, the following activities in waters of the United States: placement of fill that is necessary for the construction of any structure; the building of any structure or impoundment requiring rock, sand, dirt, or other materials for its construction; site-development fills for recreational, industrial, commercial, residential, and other uses; causeways or road fills; dams and dikes; artificial islands; property protection and/or reclamation devices such as riprap, groins, seawalls, breakwaters, and revetments; beach nourishment; levees; fill for structures such as sewage treatment facilities, intake and outfall pipes associated with power plants and subaqueous utility lines; and artificial reefs.

"Disposal site" means that portion of the waters of the United States enclosed within fixed boundaries consisting of a water surface area (when present), a volume of water (when present), and a substrate area. In the case of wetlands on which water is not present, the disposal site consists of the wetlands surface area. Fixed boundaries may consist of fixed geographic point(s) and associated dimensions, or of a discharge point and specific associated dimensions.

"Dredged material means material that is excavated or dredged from waters of the United States.

"Fill material" means any material used for the primary purpose of replacing any water of the United States with dry land or of changing the bottom elevation of a waterbody. The term does not include any pollutant discharged into the water primarily to dispose of waste, as that activity is regulated under section 402 of CWA. The Director, in consultation with the section 402 permitting authority, will make determinations as to the primary purpose of proposed activities.

[*Comment:* In some instances the proposed activity will require both a section 402 and a section 404 permit. (e.g., diking an area of waters of the United States to fill it with municipal wastes.) Where this is the case, every attempt should be made to jointly process the permit application, including joint public notices and public hearings if necessary. Consideration is presently being given to changing the primary purpose test. Should this occur the above comment will no longer be applicable.]

"General permit" means either a State permit or a Corps of Engineers Army permit that is issued under section 404 of CWA after notice and opportunity for public hearing, on a local State, Regional or nationwide basis to authorize any discharges of dredged or fill material from clearly described categories of activities involving discharges of dredged or fill material that are similar in nature, will cause only minimal adverse environmental effects when performed separately, and will have only minimal cumulative adverse effects on the environment.

"Harvesting" means physical measures employed directly upon farm, or forest crops to bring about their removal from farm lands or forest land, but does not include the construction of farm or forest roads.

"Impoundment" means a standing body of open water created by artificially blocking or restricting the flow or circulation of a water of the United States. As used in this regulation, the term does not include artificial lakes or ponds created by excavating and/or diking dry land areas to collect and retain water for such purposes as stock watering, irrigation, settling basins, cooling, or rice growing, and actually used for such purposes.

"Minor drainage" means construction and maintenance of facilities for the removal of excess soil moisture from drylands (uplands). It includes ditching and tiling incidental to the planting, cultivating, protecting, or harvesting of crops. The connection of such drainage ways from uplands to the waters of the United States is considered to be minor drainage. The discharge of dredged or fill material incidental to connecting an upland drainageway to water of the United States, adequate to the purpose of removing excess soil moisture incidental to the above activities is minor drainage. The term does not include discharges incidental to the construction of ditches or other drainage features which converts any water of the United States to farming, ranching, or silvicultural uses, nor does it include discharges incidental to the drainage of a forested wetland to convert it to any type of nonwetland forest.

"Navigable waters" and "Wetlands" are defined under the NPDES program definitions.

"Plowing" means all forms of primary tillage, including moldboard, chisel, or wide-blade, plowing, discing, harrowing; and similar physical means utilized on established farm land for the breaking up, cutting, turning over, or stirring of soil to prepare it for the planting of crops. The term does not include the redistribution of spoil, rock sand, or other superficial materials in a manner which changes any area of the waters of the United States to dryland. For example, the redistribution of surface materials by blading, grading, or other means to fill in wetland areas will require a permit whenever the affected areas lie within the waters of the U.S.

"Seeding" means the manual or mechanical sowing of seed and placement of seedlings for the production of farm or forest crops and includes the placement of soil beds for seeds or seedlings on established farm lands and forest lands.

"State regulated waters" means those waters of the United States in which the Corps of Engineers will suspend the

issuance of section 404 permits upon approval of a State's section 404 permit program by the Administrator under section 404(h). These waters shall be identified in the Memorandum of Agreement between the State and the Secretary as required by § 122.93.

[*Comment:* CWA section 404(g)(1) requires that the Secretary retain jurisdiction, for purposes of section 404 over the following waters:

(1) Waters which are subject to the ebb and flow of the tide;

(2) Those waters which are presently used, or are susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce shoreward to their ordinary high water mark; and

(3) Wetlands adjacent to waters in (1) and (2).]

§ 122.4 State authorities.

Nothing in Parts 122–124 precludes more stringent State regulation of any activity covered by these Parts, except as provided for the RCRA program in § 123.33(c).

§ 122.5 Signatories to permit program forms.

(a) All permit applications, except for those submitted for Class II wells for the UIC program (see paragraph (b) below), 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 municipality, State, Federal or other public agency, by either a principal executive officer or ranking elected official.

(b) All reports required by permits or otherwise required by the Director, other requests for information made by the Director, and all permit applications submitted for Class II wells under § 122.36 for the UIC program shall be signed by a person designated in paragraph (a), or by 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 regulated activity originates, e.g., a plant manager, superintendent or person of equivalent responsibility;

(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 Director by submitting a copy of a new written authorization which meets the requirements of paragraph (b) (1) and (2).

(d) Any person signing a document under paragraph (a) or (b) of this section 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 that based on my inquiry of those individuals immediately responsible for obtaining the information, I believe that 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:* Permit applications are being revised to incorporate this statement. Where a program document does not contain the statement, the certification must accompany the appropriate document.]

(e) This section is applicable to approved State programs (see § 123.8). States may adopt language that is equivalent to but not identical to, the certification statement in paragraph (d), if such equivalent language is approved by the Regional Administrator.

§ 122.6 Application for a permit.

(a) Any person who conducts or who proposes to conduct an activity for which a permit is required under this Part shall complete, sign, and submit an application to the Director as described in § 122.23, 122.36 and 122.64.

§ 122.7 Permit issuance; effect of a permit.

(a) The permit issuance process is initiated by the receipt of a complete application by the Director.

(b) 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 law or regulations, or (3) preempt any duty to obtain State or local assent required by law for the authorized activity.

(c) Any permittee who wishes to continue a regulated activity after the expiration date of a permit must apply for a new permit under the applicable sections of this Part, Part 124, and in the case of section 404 permits, Part 123, Subpart E.

§ 122.8 Duration of permits; continuation of expiring permits; transferability of permits.

(a) NPDES and section 404 permits shall be issued for a term not to exceed five years. Permits of less than five (5) years duration may be issued in appropriate circumstances (for example, see § 122.69). Except as provided in paragraph (c), the term of an NPDES permit shall not be extended beyond five years from its original date of effectiveness by modification, extension or other means.

(b) RCRA and UIC permits shall be issued for a period not to exceed the designed operating life of the facility (in the case of new facility) or the remainder of the designed operating life of the facility (in the case of an existing facility), except as provided in § 122.25(b) (RCRA Experimental Special Permits).

(c) *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 § 122.23, § 122.36, or § 122.64; 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 this paragraph remain fully effective and enforceable.

(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 owner or operator would then be required to cease the activities authorized by the permit or be subject to enforcement action for operating without a permit.

(d) States authorized to administer the RCRA, UIC or NPDES programs 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 activity or facility is operating without a permit from the time the EPA-issued permit expires to the time that the State-issued permit is effective.

(e) *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, wastewater, or hazardous waste characteristics or a change or potential change in any circumstances that the permitting authority believes will affect the conditions or restrictions in the permit.]

§ 122.9 Review and modification or revocation and reissuance of permits.

(a) The Director shall review each issued UIC or RCRA permit at least once every five years to determine whether the permit should be modified or revoked and reissued for one or more of the causes listed in paragraph (e) of this section.

[*Comment:* The purpose of paragraph (a) is to ensure that RCRA and UIC permits are subject to comprehensive review at specified times and modification or revocation and reissuance as may be desirable to better carry out the statutory purpose(s). Accordingly, the Director is as free to propose and adopt permit modifications for a life-term permit as the result of such a review as he would be to propose and adopt new permit terms as the result of the expiration and reissuance of a fixed term permit. Permit modifications for cause during the term of a permit are also possible where cause exists under paragraph (e).]

(b) Where permits under two or more programs under this Part are issued for a single facility or activity, the Director shall review all the permits issued for that facility or activity whenever any one of the permits is reviewed pursuant to paragraph (a), or any one of the permits expires pursuant to § 122.8 or is terminated under § 122.10. The purpose of this review shall be to determine whether the permit should be modified or revoked and reissued for one or more of the causes listed in paragraph (e) of this section. The permit shall specify a date for review under this section whenever the date of expiration of another permit for the same facility or activity is available.

(c) The Director may review an issued permit at any time and shall review an issued permit on the request of any person who presents information which, if valid, would constitute cause for a modification or revocation and reissuance under paragraph (e) of this section.

(d) The Director may base his/her review on any or all of the following:

(1) Information submitted by the permittee in periodic reports;

(2) Information collected by the Director in inspections of the permitted facility;

(3) Information requested of the permittee, including all or part of the information which the Director might otherwise request in an application for the issuance or reissuance of a permit; or

(4) Any other pertinent information that the Director may obtain.

(e) Cause for modification or revocation and reissuance exists:

(1) Where there are material and substantial alterations or additions to the permitted operation which are not covered by the effective permit; provided that for NPDES permits, such alterations or additions do not constitute a replacement of the process or production equipment of an existing source, converting it to a new source under § 122.81.

[*Comment:* Such alterations or additions include but are not limited to material or substantial changes in the quantity (increase or decrease) or composition of the wastes, fluids or pollutants injected, discharged, treated, disposed or stored; changes in the injection, discharge, treatment, disposal or storage methods or other operational methods employed, production changes, relocation or combination of discharge points, changes in the nature or mix of products produced.

Certain reconstruction activities may cause the new source provisions for NPDES permits under § 122.81 to become applicable to the permittee. In such cases, the new source permit issuance procedures of § 122.64 and § 124.61 shall be followed instead of the modification or revocation and reissuance process and an EIS may be required for an EPA-issued new source permit.]

(2) Where the existence of any factor(s) which, if properly and timely brought to the attention of the Director, would have justified the application of different permit terms and conditions, but only if the requester show that such factors arose after the final permit was issued.

(3) Where the standards and/or regulations on which the permit was based have been changed by promulgation of amended standards and/or regulations or judicial decision after the permit was issued, except that NPDES permits may be modified during their terms for such reasons only to the extent set forth in § 122.73;

(4) Where an existing permittee proposed a change of ownership or control of the permitted activity or facility, and the Director determines under § 122.8 that modification or revocation and reinssuance is appropriate;

(5) Where modification, revocation and reissuance or termination of another permit issued to the same facility or activity requires a modification or revocation and reissuance of the permit;

(6) Where the permit fails to apply any applicable requirements under the appropriate Act or regulations, which are in effect prior to the effective date of permit issuance; and

(7) For NPDES and section 404 permits only, where cause exists for termination under § 122.10 or § 122.74.

[*Comment:* The Director will generally base his/her decision on whether to modify, instead of revoking and reissuing a permit, where cause exists under paragraph (e) of this section, on the extent of the anticipated changes and on the length of the remaining term of the permit. For instance, where the remaining permit term is only two years, it may be desirable to revoke the existing permit and issue another permit incorporating the changes. See also § 122.69 for certain circumstances when NPDES permits will be revoked and reissued.]

(f) Except as provided for minor modifications under paragraph (g) of this section the modification or revocation and reissuance of permits under this section shall comply with § 124.5 and § 124.7.

(g) The following minor permit modifications shall not require public notice and opportunity for hearing under § 124.5 or § 124.7, unless they would render 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, provided the change would not exceed 120 days or would not interfere with attainment of a final compliance date; and

(4) A change in ownership or operational control of a facility where the Director determines that no major change of the permit is necessary under § 122.8(d).

(5) To the extent authorized under § 122.24, changes in quantities or types of wastes treated, disposed or stored which are within the capacity of the facility as permitted and, in the judgment of the Director, would not interfere with the operation of the facility or its capacity to meet conditions prescribed in the permit.

(6) To the extent authorized under § 122.24, changes in treatment, disposal or storage methods or operations which, in th judgement of the Director, are equivalent to or better than those on which their permit is based.

(7) Extension of the term of a State section 404 permit so long as the extension does not conflict with § 122.8(a).

(h) Minor modifications as defined in paragraph (g) of this section shall become immediately effective or effective on a date specified by the Director.

§ 122.10 Termination of permits.

(a) An issued permit may be terminated, in whole or in part, during its term for cause as specified in this section.

(b) Cause for termination includes:

(1) Violation of any term or condition of the permit or requirement of the appropriate Act by the permittee;

(2) Failure of the permittee to disclose fully all relevant facts or misrepresentation of any relevent facts by the permittee in the application or during the permit issuance process;

(3) Information indicating that the permitted activity poses a threat to human health or the environment;

(4) A change in ownership or control of a source which has a permit where required by the Director in accordance with § 122.8(e); or

(5) Other good cause.

[*Comment:* Termination under this section includes the suspension or revocation of a permit under section 3008 of RCRA. Procedures for termination or suspension and revocation of RCRA permits are provided in 40 CFR Part 22 (proposed at 43 FR 34739 (August 4, 1978).]

§ 122.11 Conditions applicable to all permits.

The following conditions apply to all permits and shall be incorporated into all permits either expressly or 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) The permittee must comply with all terms and conditions of the permit whether they are directly stated or incorporated by reference.

[*Comment:* Any failure in compliance constitutes a violation of the appropriate Act and constitutes grounds for an enforcement action.]

(b) The permit shall be reviewed at times specified in § 122.9(a), (b) and (c), and may be modified, revoked and reissued or terminated during its term for cause as described in § 122.9(e) and § 122.10.

(c) Any permittee who knows or has any reason to believe that any activity has occurred or will occur which would constitute cause for modification or revocation and reissuance under § 122.9(e) must report his/her plans or such information to the Director so that the Director can decide whether action to modify or revoke and reissue a permit under § 122.9 will be required. The Director may require submission of a new application.

(d) Unless and until a permit is modified or revoked and reissued, a permittee must comply with the terms and conditions of the existing permit whether or not that existing permit would allow the permittee to begin the activity described in paragraph (c) of this section.

(e) The permittee shall allow the Director or an authorized representative, upon the presentation of credentials and such other document as may be required by law:

(1) Enter upon the permittee's premises where a regulated facility or activity is conducted or located, or where records must be kept under the terms and conditions of the permit;

(2) Have access to and copy, at reasonable times, any records or labels that must be kept under the terms and conditions of the permit;

(3) Inspect at reasonable times any facilities, equipment (including monitoring equipment) or operations regulated under the permit; and

(4) Sample at reasonable times any substances which the permittee is required to monitor under the permit, including any discharge of pollutants, hazardous wastes, and injected fluids.

(5) Sample at reasonable times any substances at any monitoring point which the permittee is required to monitor under the permit.

[*Comment:* This subparagraph includes both the sampling of pollutants, wastes and fluids which are discharged, treated, stored, disposed or injected and also the monitoring of surrounding environment, e.g., the sampling of adjacent parts of aquifers by use of monitoring wells.]

(f) The permittee shall furnish to the Director copies of records required to be kept under the terms and conditions of the permit upon request within a reasonable time, as specified in § 122.14.

(g) The permittee shall at all times maintain in good working order and operate efficiently all facilities and systems of treatment or control (and related appurtenances) which are installed or used by the permittee 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 terms or conditions of a RCRA, UIC, or 404 permit, or the maximum daily or average weekly discharge limitations or standards of an NPDES permit, the permittee shall provide the Director with the following information:

(i) A description of the noncompliance and cause of noncompliance;

(ii) The period of noncompliance, including exact dates and times; and/or, if not corrected, the anticipated time the noncompliance is expected to continue;

(iii) Steps taken and/or planned to reduce, eliminate and prevent recurrence of the noncompliance; and

(2) The information required under subparagraph (1) shall be provided as follows:

(i) In the case of noncomplying activities which could constitute a threat to human health, welfare or the environment, the Director may require that the information required by subparagraph (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 the information must be provided within five days of the time the permittee becomes aware of the circumstances covered by this paragraph. This requirement shall not apply to NPDES discharges subject to subparagraph (2)(ii).

[*Comment:* The Director may require a permittee to report noncompliance within 24 hours under paragraph (h)(2)(i) when the noncompliance involves CWA section 311 pollutants, toxic pollutants or pollutants which could cause a threat to public drinking water supplies; or, in the event of a release or discharge of hazardous waste, a fire or an explosion from a HWM facility that has the potential for damaging human health or the environment, the permittee shall report such an incident immediately after discovering it as required in 40 CFR Part 250, § 250.43–3(c).]

(ii) In the case of any discharges from an NPDES-permitted facility subject to any applicable toxic pollutant effluent standard under section 307(a), the information required by subparagraph (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 NPDES permittee becomes aware of the circumstances covered by this paragraph.

(3) 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.

(4) In all cases not covered by subparagraph (2), information required under subparagraph (1) shall be provided in accordance with the requirements of § 122.15.

(i) The permittee shall take all reasonable steps to minimize any adverse impact on the environment resulting from noncompliance with the permit.

(j) The permittee shall halt or reduce its business activities whenever and to the extent necessary to maintain compliance with the terms of a permit.

(k) The permittee shall at all times comply with the requirements for testing, monitoring, recordkeeping, and reporting as specified in the permit and in applicable regulations. The permittee shall not falsify, tamper with or knowingly render inaccurate any monitoring device or method referred by the permit or regulations; or knowingly make a false statement, representations, or certification, in any document or record required under the permit or by regulations.

§ 122.12 Schedules of compliance.

(a) The permit shall specify a schedule of compliance leading to expeditious compliance, where appropriate.

[*Comment:* For NPDES permits, schedules of compliance are required where necessary to achieve compliance with applicable standards and limitations and other requirements. NPDES 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 § 122.81(d)(4). Schedules of compliance shall require compliance as soon as possible, but in no case later than the applicable statutory deadline under the CWA.]

(1) Except as provided in paragraph (b) and (d), if a permit establishes a schedule of 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.

(i) In no event shall more than 9 months elapse between interim dates.

(ii) If the time necessary for completion of any interim requirements (such as the construction of a control facility) is more than 9 months and is not readily divisible into stages for completion, the permit shall specify interim dates for the submission of reports of progress toward completion of the interim requirements and indicate a projected completion date.

[*Comment:* Examples of interim requirements include: 1) let a contract for construction of required facilities; 2) commence construction of required facilities; 3) complete construction of required facilities; and 4) submit a complete Step 1 construction grant (for POTW's).]

(2) Except as provided in paragraph (d), no later than 14 days following each interim date and the final date of compliance, the permettee shall provide the Director with written notice of the permittee's compliance or noncompliance with the interim or final requirements.

(3)(i) The Director, upon request of the permittee, may modify, in accordance with § 122.9, a schedule of compliance in an issued permit if he/she determines good and valid cause exists for such revision, such as an act of God, strike, flood, or materials shortage or other events over which the permittee has little or no control or remedy. However, in no case shall an NPDES compliance schedule be modified to extend beyond an applicable CWA statutory treatment deadline.

(ii) In the case of a POTW which has received a grant under section 202(a)(3) of CWA, to fund 100% of the costs to modify or replace facilities constructed with a grant for innovative and alternative wastewater technology under section 202(a)(2), the schedule of compliance for an NPDES permit 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 CWA statutory deadline for compliance.

(b) Where an applicant for an EPA-issued UIC or RCRA permit chooses to cease conducting regulated activities rather than taking steps to meet permit control requirements, the Director may establish two alternative schedules of compliance in the permit:

(1) A schedule leading to termination and/or proper closure in accordance with regulations under the appropriate Act or regulations by the predicted termination or closure date. If at any time the permittee chooses *not* to terminate his/her regulated activities and cease conducting regulated activities according to this schedule, the steps required under subparagraph (2) below shall be met; and

(2) A schedule which would result in compliance with the appropriate Act and regulations. In no event shall a permittee be authorized to operate without complying with this schedule, even where the permittee actually terminates his/her operations and later resumes these or other operations.

(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 CWA 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 (iii), (i.e., a milestone event for commencement of construction of control equipment); and

(ii) A subsequent schedule leading to termination of the divide discharge by a date which is no later than the statutory deadline;

(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 permitee has made a decision pursuant to paragraph (3)(i), it shall:

(A) Follow the schedule required by paragraph (3)(ii) if the decision is to terminate its discharge; or

(B) Follow the schedule required by paragraph (3)(iii) 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 not 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 his/her direct discharge of pollutants shall be evidenced by a Board of Director's resolution which has been made public or by such other means as EPA determines evidence 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.]

(6) Where a source recommences discharge after terminating operations, or where an indirect source commences direct discharge to navigable waters, any permit issued to such source shall require the source to meet all applicable standards and limitations as specified in § 122.81(d)(4).

(d)(1) Where agreed to in the Memorandum of Agreement, an approved State program may use intervals of up to one year (rather than 9 months) for establishing interim requirements under subparagraph (a)(1).

(2) State programs may provide for up to 30 days (rather than 14 days) for reporting compliance or non-compliance with interim or final requirements under subparagraph (a)(2).

§ 122.13 Establishing permit terms and conditions.

Permit terms and conditions shall be established in permits as set out in Subpart B through D, as appropriate.

§ 122.14 Recording and reporting of monitoring results and compliance by permittees.

(a) All permits shall include:

(1) Requirements concerning the proper use, maintenance, and installation, where appropriate, of monitoring equipment or methods (including biological monitoring methods where appropriate), and

[Comment: Generally installation of monitoring equipment is not required under the UIC program.]

(2) Required monitoring frequency, type and intervals sufficiently frequent to yield data which are representative of the monitored activity, including, where appropriate, continuous monitoring.

(b) Samples and measurements taken for the purposes of this Part shall be representative of the volume, weight, pressure or nature of the monitored activity;

(c) The permittee shall maintain records of all such monitoring information (including all original strip chart recordings for continuous monitoring instrumentation and calibration and maintenance records). Such records shall be retained by the permittee for three years. This period of retention shall be extended automatically during the course of any unresolved litigation regarding the regulated activity or regarding control standards applicable to the permittee; or as requested by the Director. Such records shall include:

(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.

(d) Permittees shall report the results of any monitoring specified in the permit to the Director on an EPA-approved form as often as required by the permit, but in no case less than once per year. Reporting frequency requirements will be based upon the minimum intervals specified in Subparts B–D, and, in addition, upon the impact of the regulated activity.

[Comment: NPDES permittees must report monitoring results on a Discharge Monitoring Report (DMR). NPDES permittees need not submit data on internal process of waste streams, or data collected by third parties unless it indicates a violation, but shall be identified as a supplement to the DMR.]

(e) The permittee shall provide the Director with written notice of the permittee's compliance or noncompliance with the interim and final compliance schedule requirements in accordance with § 122.12(a)(2) and (b)(2).

§ 122.15 Noncompliance reporting.

Reports shall be prepared and submitted by the Director as detailed below and in §§ 122.27, 122.43, 122.72 and 123.113.

(a) *Quarterly Report.* Narrative reports of noncompliance by major RCRA, UIC, NPDES and section 404 permittees shall be submitted using the following format:

(1) Name, location, and permit number of each noncomplying permittee;

(2) A brief description and date of each instance of noncompliance. Instances of noncompliance may include one or more of the following:

(i) Failure to complete construction elements;

(ii) Failure to complete or provide compliance schedule reports;

(iii) Noncompliance with applicable standards and limitations;

(iv) Failure to provide effluent, or other monitoring reports as required by the permit; and

(v) Deficient reports.

(3) A brief description and date(s) of action(s) taken by the Director to ensure compliance;

(4) Status of the instance of noncompliance with the date of the action or resolution; and

(5) Any information which tends to explain or mitigate an instance of noncompliance or to explain actions by the Director.

(b) *Annual Reports.* (1) Statistical reports shall be submitted on minor RCRA, UIC and NPDES permittees, where compliance has been reviewed by the Director, indicating number of noncomplying minor permittees, number of enforcement actions, and number of changes in permit status.

(2) Additional information for RCRA, UIC, NPDES and section 404 programs is detailed in §§ 122.27, 122.43, 122.72 and 123.113.

[*Comment:* For the distinction between "major" and "minor" permittees under RCRA see § 122.3(b) (definition of "major HWM facility"). The distinction between "major" and "minor" permittees for NPDES, UIC and section 404 is established in EPA's annual operating guidance for the EPA Regional Offices and the States.]

(c) Reports required under this section from the State Director shall be submitted to the Regional Administrator, and reports from the Regional Administrator shall be submitted to EPA Headquarters.

§ 122.16 Confidentiality of information.

(a) Except as provided in paragraph (b), any information submitted to EPA pusuant to these regulations may be claimed as entitled to confidential treatment by the submitter. Any such claim must be asserted at the time of submission in the manner prescribed on the application form or instructions or, in the case of other submissions, by stamping the words "confidential business information" on each page containing such information. If no claim is made at the time of submission, EPA may make the information available to the public without further notice. If a claim is asserted, the information will be disclosed only in accordance with the procedures in Part 2 of this title.

(b) The following information may not be accorded confidential treatment;

(1) The name and address of any permittee;

(2) Permits, draft permits, fact sheets, comments received by the permit issuing authority with respect to draft or proposed permits and statements of basis;

(3) In the case of section 402 and 404 permits under CWA, permit applications and effluent data; and

(4) In the case of UIC permits, any information applications and effluent data.

Subpart B—Additional Requirements for Hazardous Waste Programs Under the Resource Conservation and Recovery Act

§ 122.21 Purpose and scope.

(a) The requirements in this Subpart contain the specific elements and permit conditions for the RCRA hazardous waste permit program. They apply to EPA, and to approved States to the extent set forth in part 123. In case of inconsistencies between this Subpart and Subpart A of this Part, this Subpart is controlling.

(b) Six months after the date of promulgation of regulations under section 3001 of RCRA, 40 CFR 250, Subpart A (proposed at 43 FR 58954 (December 18, 1978)), the storage, treatment and disposal of hazardous waste is unlawful unless owners/operators of existing Hazardous Waste Management facilities have notified EPA under 40 CFR 250 Subpart G § 250.800 (proposed at 43 FR 2991 (July 11, 1978)), and have submitted a permit application in accordance with this Subpart and Part 124.

(c)(1) Any hazardous waste storage pits, ponds, or lagoons and/or storage tanks and any distribution systems which are associated with an underground injection well that receives hazardous waste(s) must obtain a RCRA permit.

(2) Any one/shore hazardous waste treatment or storage facilities associated with an ocean disposal operation must obtain a RCRA permit.

(3) Any surface impoundment associated with a wastewater treatment plant, other than a POTW, that treats and/or stores hazardous waste must obtain a RCRA permit for that part of the facility up to the point of discharge.

[*Comment:* See 40 CFR Part 250.45–3 (proposed at 43 FR 59011 (December 18, 1978)).]

(4) Any on-site treatment, storage, or disposal facilities for managing hazardous wastes resulting from treatment or control of wastewaters by a wastewater treatment plant, other than a POTW, must obtain a RCRA permit.

§ 122.22 Law authorizing hazardous waste control program.

Sections 3001 through 3005 of RCRA authorize EPA to promulgate regulations establishing a Federal hazardous waste management program. Section 3006 of RCRA authorizes EPA to promulgate guidelines for State assumption and operation of the hazardous waste management program (with EPA approval) in lieu of a Federal program.

[*Comment:* Regulations under Sections 3001, 3002, and 3004 are published at 40 CFR 250, Subparts A, B, and D, (proposed at 43 FR 58946 (December 18, 1978)). Regulations under Section 3003 are published at 40 CFR 250, Subpart C, (proposed at 43 FR 18506 (April 28, 1978)). Regulations under Section 3010 are published at 40 CFR 250, Subpart G, (proposed at 43 FR 29908 (July 11, 1978)).]

§ 122.23 Application for a permit.

(a) Any person who owns or operates an "existing HWM facility" as defined in § 122.3 of this Part, shall:

(1) Notify as required by 40 CFR Part 250, Subpart G (proposed at 43 FR 29911 (July 11, 1978)); and

(2) Submit Part A of the permit application within six months after the date the regulations under 40 CFR Part 250, Subpart A (proposed at 43 FR 58946 (December 18, 1978)) are promulgated, in order to qualify for interim status under RCRA. To satisfy the application deadline of this subsection, and to qualify for interim status under RCRA, an applicant shall submit only the information required in Part A of the application, or in the case of an application for a special HWM facility permit under § 122.25, the application shall contain the requirements specified in the appropriate subsection of § 122.25. The Director shall advise the applicant of the receipt of Part A of the application. This advisement shall signify the beginning of interim status if the application was timely submitted. A date for submission of Part B of the application shall be established by the Director at a later date. The Director shall provide at least six months notice for the submission of Part B of the application. Failure to submit an adequate Part B of the application by the date established by the Director shall result in automatic loss of interim status on such date.

[*Comment:* Owners or operators of existing HWM facilities under interim status who elect to modify these facilities must nevertheless meet the requirements of 40 CFR Part 250, Subpart D (proposed at 43 FR 59994 (December 18, 1978)) at the time that a permit is issued for the facility. Any modification made during interim status is therefore subject to the review of the Director at the time of permit issuance and is undertaken at the risk that additional changes to the facility will be required in order to meet the requirements of 40 CFR Part 250, Subpart D.]

(b) Owners/operators of new HWM facilities shall submit both a Part A and a Part B application at least 180 days before physical construction is expected to commence. No physical construction shall commence until a final permit is issued. In the case of an application for a special HWM facility permit under § 122.25, the application shall contain the requirements specified in the appropriate subsection of § 122.25.

(c) Part A of the Application shall include the following as a minimum:

(1) Name, title and address of the applicant; name and address of the facility;

(2) A description of the boundaries of the HWM facility, including a topographic map of the area for a distance of one mile (1.6km) beyond the boundaries of the HWM facility as required in the permit application forms. This map shall correspond to a 7½ minute series map published by the U.S. Geological Survey. If a 7½ minute series

map is not available, a 15 minute series map may be substituted.

(3) A detailed description of the hazardous waste to be handled at the HWM facility (name and common code) by its Department of Transportation (DOT) proper shipping name (49 CFR Part 172), § 172.101 (proposed at 43 FR 22631 (May 25, 1978)). If the DOT proper shipping name "NOT OTHERWISE SPECIFIED" (NOS) is used, the EPA name (as identified in 40 CFR Part 250, § 250.14 (proposed at 43 FR 58957–9 (December 18, 1978)) must be included after the DOT proper shipping name NOS. If no EPA name exists, then only the DOT proper shipping name NOS shall be used;

(4) The hazard class of each waste as identified or listed under DOT hazard class (49 CFR Part 172), § 172.101 (proposed at 43 FR 22631 (May 25, 1978)) or by the EPA characteristics (as identified in 40 CFR Part 250, § 250.13 (proposed at 43 FR 58955–7 (December 18, 1978)) if the DOT hazard class is not applicable. If the DOT hazard class "OTHER REGULATED MATERIAL" (ORM) is used, the EPA characteristic or property, as identified in 40 CFR Part 250, § 250.13 (proposed at 43 FR 58955–7 (December 18, 1978)) must be used after the DOT hazard class ORM;

(5) The annual quantity of each hazardous waste to be treated, stored or disposed by volume or weight, in either the metric or the English system;

(6) A brief description of how the hazardous waste is to be treated, stored or disposed of at the HWM facility; and

(7) For an existing HWM facility, copies of all available drawings and specifications for the HWM facility, its processes and equipment.

(d) Part B of the Application shall include the following as a minimum:

(1) A master plan for the HWM facility, including a topographic map with a scale of one inch (2.5 cm) equal to not more than 200 feet (60.8 m) and a contour interval not greater than five feet (1.5 m) for the area within one thousand feet (304 m) of the boundaries of the HWM facility and indicating any five-hundred-year flood prone areas. The master plan shall include a detailed description of:

(i) For a new HWM facility, or for modification to an existing facility, any structures, buildings, equipment and machinery to be used at the HWM facility including site preparation plans, design plans and specifications for treatment, storage or disposal facilities;

(ii) A detailed plan of operation and maintenance, including operating conditions, projected hours of operation, security and access control, plans for covering and compaction, plans for controlling odor, air, surface water and/or groundwater pollution, plans for controlling leachate production, plans for vector control and control of burrowing animals, and other related items;

(iii) The planned life of the HWM facility based on projected use and the expansion potential and plans for the use or disposition of the HWM facility after closure;

(iv) The contingency plan for emergency situations, including the procedures, equipment and facilities to be used, a listing of the fire departments, ambulance services, hospitals, and other emergency services that will serve the facility and the response time, the person responsible for implementing the contingency plan, the on-site plan for fire control, spill prevention control and countermeasure plans under section 311 of CWA, best management practices under sections 304(c) and 402(a)(1) of CWA (see 40 CFR Parts 125 and 151), and 40 CFR Part 250, § 250.43–3 (proposed at 43 FR 59001–2 (December 18, 1978));

(v) The plan for closure of the HWM facility, including the estimated cost of closure, post closure expenses, proposals for controlling access, steps that are planned to control leachate production; and the plan for maintenance of the HWM facility after final closure for disposal operations;

(vi) The plan for visual inspections of the HWM facility conditions and for monitoring air, surface water, and groundwater pollution, including the period after closure;

(vii) The plan for segregation of incompatible wastes and how wastes will be placed or located within the treatment, storage, or disposal facility; and

(viii) The plan for conducting trial burns at incinerator facilities as required under 40 CFR Part 250, § 250.45–1 (proposed at 43 FR 59008 (December 18, 1978)).

(2) A detailed description of site geology of the area within one thousand feet (304 m) of the boundaries of the HWM facility, including a description of physiography, soil depth and types including chemical and physical properties; and a detailed description of the geologic column including intrusive bodies, fluids, fractures, faults, joints, and fracture traces. Where access to adjacent properties for obtaining geological data is not reasonably available, data available from public sources may be substituted.

(3) For HWM disposal facilities and HWM surface impoundment facilities, a detailed description of the site hydrology and the hydrology of the area within one thousand feet (304 m) of the boundaries of the facility, including known or recorded springs, depth to ground water, thickness, extent, characteristics of aquifers, perched water zones, porosity and permeability of soils, directions and rate of flow of groundwater, recharge and discharge areas, drainage patterns and divides, distance to surface water, location of public, livestock, and private water supplies, background quality of groundwater as specified in 40 CFR Part 250, § 250.43–8(c)(1) (proposed at 43 FR 59005 (December 18, 1978)) and other related items. Where access to adjacent properties for obtaining hydrological data is not reasonably available, data available from public sources may be substituted.

(4) A description of the climate in the area, including average annual rainfall, average annual evapotranspiration rates, average annual wind speed, prevailing wind direction, and other factors that may affect water or air pollution.

(5) Position or job descriptions covering the persons responsible for the operation of the HWM facility, including education, training, and work experience requirements and a description of the training program to be used to prepare persons to operate and maintain the facility in a safe and environmentally adequate manner.

(6) A listing of the applicant's performance bonds, insurance carriers and policies, trust instruments, escrow accounts or other instruments which constitute continued financial responsibility in accordance with standards in 40 CFR Part 250, § 250.43–9 (proposed at 43 FR 59006–7 (December 18, 1978)).

(7) The Director, upon the written request of the applicant, may waive certain of the application requirements in Part B of the Application if he/she determines that the information is not applicable to the facility and is not needed to establish compliance with the standards in 40 CFR 250.42 and 250.43 (proposed at 43 FR 58999 (December 18, 1978)). A request for a waiver of certain Part B application information shall be submitted in writing by the applicant and shall state why the specified information is not needed to determine compliance with the standards in 40 CFR 250.42 and 250.43 (proposed at 43 FR 58999 (December 18, 1979)). The Director shall grant or deny the waiver request in writing, including a statement of the reasons for the decisions.

[*Comment:* Examples of where such waivers may be granted include the waiver of site geological information for facilities that only incinerate hazardous waste and dispose of any residues off-site, and site geological information for above-ground storage tanks that are not associated with any other treatment, storage, or disposal HWM facilities.]

(8) The Director shall determine whether or not an application of permit is complete and shall notify the applicant in writing of such determination within 30 days of receipt of such application. The application shall not be considered as submitted to the Director until it is in complete form.

(9) Where an approved State is the permit-issuing authority, the application must contain at least the information required under this section, paragraph (c), and paragraph (d) unless waived under § 122.23(d)(7).

§ 122.24 Establishing permit terms and conditions.

In addition to the terms and conditions specified in Subpart A of this Part, any RCRA permit shall include the following terms and conditions:

(a) Each of the applicable requirements specified in 40 CFR 250.43, 250.44, 250,45 and 250.46 (proposed at 43 FR 58999–59016 (December 18, 1978)), except where an alternative requirement is established and included in the permit in accordance with 40 CFR 250.43, 250.44, 250.45 and 250.46;

(b) Such additional requirements as the Director deems nesessary to comply with the human health and environmental standards in 40 CFR 250.42 (proposed at 43 FR 58999 (December 18, 1978.)) .

(c) Requirements alternative to those established in the regulations in accordance with the variance criteria incorporated in the notes in 40 CFR 250.43–45 (proposed at 43 FR 58999–59016 (December 18, 1978)).

(d) Provisions for minor modification to a permit under § 122.9(g) (5) and (6), where appropriate. The Director shall issue a public notice in accordance with § 124.11 prior to or at the time that he/she approves such minor modification.

(1) Minor modifications may be made under this paragraph only where the Director determines that a particular HWM facility has the capacity and equipment necessary to handle a variety of different types of hazardous waste without violating any other permit terms and conditions or the requirements specified in 40 CFR 250.43, 250.44, 250.45 and 250.46 (proposed at 43 FR 58999–59016 (December 18, 1978)), and where the facility can demonstrate that it will receive different quantities and/or types of hazardous wastes on an unpredictable basis.

(2) In modifying the permit under this paragraph, the Director may limit the types and/or quantities of hazardous wastes that can be the subject of minor modifications under § 122.9(g) (5) and (6).

[*Comment:* Provisions for minor modifications under this paragraph and § 122.9(g) (5) and (6) are not intended to be generally included in RCRA permits, but are appropriate only under certain limited circumstances as specified in this paragraph, and at the discretion of the Director. This paragraph does not apply where the types or quantities of wastes can be anticipated through contract provisions or by other means, making it possible to include provisions covering such wastes in the initial permit. Modifications not covered by this paragraph must comply with the applicable requirements of §§ 122.9, 124.5 and 124.7.]

(e) No HWM facility shall commence treatment, storage or disposal of hazardous waste in a modified or newly constructed facility until such construction or modification is complete; and

(1) The permittee has submitted to the Director a certified letter signed by the permittee and a registered professional engineer in the State where the facility is located, stating clearly that construction or modification of the facility has compiled with the permit, and in the case of incinerator facilities, a trial burn and result analysis has been completed and is submitted to the Director; and

(2) The Director has inspected the modified or newly constructed facility and finds that the facility is in compliance with all terms of the permit; provided that, the Director has notified the permittee, within *ten (10)* days of receipt of such letter, of his/her intent to inspect; and

(3) The Director authorizes commencement of treatment, storage, or disposal of hazardous waste.

(f) Where an approved State is the permit-issuing authority, the permit must establish such terms and conditions as are necessary to provide a degree of control and protection of human health and the environment equivalent to that required under this section.

§ 122.25 Special HWM facility permits.

(a) *Health Care Facility Special Permit.* (1) A person who owns or operates a health care facility which treats or stores hazardous waste may apply for a health care facility special permit if the following conditions are satisfied:

(i) The Health care facility is licensed under a State licensing law and such license requires compliance with requirements for the storage, sterilization, inceneration, or treatment of all hazardous waste generated;

(ii) The State licensing law and control program provides for the adequate enforcement of the program by withholding or withdrawing the license of the health care facility where compliance with license requirements is not being achieved;

(iii) If incineration is used, the incinerator is operated under the terms and conditions of a license issued under applicable State law; and

(iv) The person owning or operating the health care facility submits a certification of compliance with an issued license signed by the appropriate State licensing official.

(2) An applicant for a health care facility special permit shall submit the following information:

(i) The name and address of the facility;

(ii) Certification signed by the appropriate State licensing authority specifying that the facility has an effective license and is in compliance with such license; and

(iii) A list of the hazardous wastes covered by the State license.

(3) The licensing law requirements of a State shall be judged against the applicable RCRA 3004 standards, 40 CFR 250, Subpart D (proposed at 43 FR 58982 (December 18, 1978)) to determine if an equivalent degree of control is provided.

(4) Whenever the conditions of subparagraph (1) are not being met, the health care facility loses eligibility for a special permit under this section.

[*Comments:* (1) Health care facilities include hospitals as defined by SIC Codes 8062 and 8069 and veterinary hospitals as defined by SIC Codes 0741 and 0742. See 40 CFR 250.14(b)(1)(i) (proposed at 43 FR 58958 (December 18, 1978)).

(2) Under § 123.39, States are authorized, but not required, to issue special facility permits in the same manner and covering the same facilities as those covered by EPA under this section.]

(b) *Experimental Special Permit.* (1) The Director may grant an experimental special permit to a person for the treatment, storage, or disposal of hazardous waste using advanced technology where the Director determines that such technology will significantly improve the state-of-the-art for hazardous waste treatment, storage or disposal.

(2) An applicant for an experimental special permit shall submit all of the

applicable information specified in § 122.23(c) and (d) and such other information as the Director may require including plans for the immediate termination of all acitvities if intended results are not achieved.

(3) In granting an experimental special permit, the Director shall require the submission of an evaluation of test results and shall set a specific date for its termination which shall not exceed one (1) year. An extension of no more than one additional year may be granted by the Director upon written request from the permittee, including the submission of such information as the Director may require, including a full evaluation of any test results from the facility for the period of operation.

[Comment: Under § 123.39, States are authorized, but not required, to issue experimental special permits in the same manner and covering the same facilities as those covered by EPA under this section.]

§ 122.26 Permits by rule.

(a) *Permit by Rule for HWM Facility Accepting Special Waste.* A facility which treats, stores, or disposes only special wastes and does not comingle different types of special wastes, as listed in 40 CFR 250.46 (proposed at 43 FR 59015 (December 18, 1978)], shall be considered as having a permit for the treatment, storage or disposal of such wastes if the owner/operator of the facility complies with all the applicable requirements for control of special wastes, as specified in 40 CFR 250.46, including the notes thereunder, (proposed at 43 FR 59015 (December 18, 1978)), and notifies EPA In accordance with 40 CFR Part 250, Subpart G (proposed at 43 FR 29908 (July 11, 1978)).

[*Comment:* Special wastes are: Cement Kiln Dust; Utility Waste (fly ash, bottom ash, scrubber sludge); Phosphate Rock Mining, Beneficiation, and Processing Waste; Uranium Mining Waste; Other Mining Waste; and Gas and Oil Drilling Muds and Oil Production Brines. These wastes, typically, are generated in large volumes and some portions are expected to be classified as hazardous under the Section 3001 standards. The Agency, however, has very little information on the composition, characteristics, and the degree of hazards posed by these wastes. Therefore, the Agency is proposing to remove the provision requiring facilities to obtain site-specific permits. Moreover, EPA requests comments on alternate approaches, such as the use of either a general permit (applicable to many sites, rather than only one site), or of special site-specific permits of the type proposed in § 122.25 of this Subpart. Finally, the Agency requests comments on the applicability of these approaches to assessing equivalency of State programs as required under Part 123].

[*Comment:* Under § 123.39, States are authorized, but not required, to issue permits by rule in the same manner and covering the same facilities or circumstances as those covered by EPA under this section.]

(b) *Permit by Rule for Ocean Disposal Barges or Vessels.* A barge or other vessel which accepts hazardous waste for ocean disposal shall be deemed to have an HWM facility permit if the following conditions are met:

(1) The owner or operator of the barge or vessel is authorized to ocean dump such waste under an ocean dumping permit issued to him or her under 40 CFR Subchapter H;

(2) The owner or operator of the barge or vessel complies with the terms of his or her ocean dumping permit; and

(3) The owner or operator of the barge or vessel complies with the following hazardous waste treatment, storage and disposal facility regulations, as applicable:

(i) 40 CFR Part 250, Subpart G (notification);

(ii) 40 CFR 250.43–5(a), (manifest system);

(iii) 40 CFR 250.43–5(b)(6)(recordkeeping); and

(iv) 40 CFR 250.43–5(c)(5)(i)–(iii)(A)–(F), (H); and (c)(6) (reporting).

[*Comments:* (1) Shoreside facilities of ocean disposal operations which handle hazardous wastes will require regular RCRA permits. However, disposal vessels which dump wastes into the ocean are adequately regulated by the Marine Protection, Research and Sanctuaries Act, as amended, 33 U.S.C. 1420 *et seq.* Even so, to assure the smooth operation of the manifest system, such facilities will have to comply with manifest, recordkeeping and reporting requirements.

(2) Under 123.39, States are authorized, but not required, to issue permits by rule in the same manner and covering the same facilities or circumstances as those covered by EPA under this section.]

(c) *Permit by Rule for Publicly Owned Treatments Works (POTWs).* A publicly owned treatment works (POTW) which accepts for treatment hazardous waste shall be deemed to have a HWM facility permit if the following conditions are met:

(1) The POTW has an NPDES permit;

(2) The POTW complies with the terms of its NPDES permit;

(3) The waste meets all Federal, State and local pretreatment requirements which would be applicable to such waste if it was being discharged into the POTW through a sewer, pipe or similar conveyances; and

(4) The owner/operator of the POTW complies with the following hazardous waste treatment, storage and disposal facility regulations, as applicable:

(i) 40 CFR Part 250, Subpart G (notification);

(ii) 40 CFR 250.43–5(a) (manifest systems);

(iii) 40 CFR 250.43–5(b)(6) (recordkeeping); and

(iv) 40 CFR 250.43–5(c)(5) (i)–(iii) (A)–(F), (H); and (c)(6) (reporting).

[*Comments:* (1) General pretreatment regulations are found at Part 403 of this Chapter and specific pretreatment requirements for industrial categories are found generally in Subchapter N of this Chapter (Effluent Guidelines and Standards). An industry generating hazardous waste and shipping waste to a POTW must provide all the treatment which would be required if the industry were discharging the waste directly into the treatment system. POTWs which receive wastes that may be classified as "hazardous" but which are solid or dissolved materials in domestic sewage do not come under these regulations because sections 1004(5) and 1004(27) of RCRA exclude these materials from the definition of "hazardous wastes." These POTWs are controlled under the NPDES system of the Clean Water Act. However, for those POTWs which receive hazardous waste for which a manifest or other delivery document is required, compliance with the manifest system, recordkeeping and reporting requirements is necessary to assure the smooth operation of the manifest system.

(2) Under § 123.39, States are authorized, but not required, to issue permits by rule in the same manner and covering the same facilities or circumstances as those covered by EPA under this section.]

§ 122.27 Reporting requirements.

In addition to the reporting requirements of § 122.15, the Director shall prepare the following reports:

(a) *Quarterly international shipment reports.* The Director shall submit two copies of a report within four weeks of the last day of March, June, September and December. The report shall contain a compilation of shipments which originated during the reporting quarter and were sent from generators and owners and operators of treatment, storage, and disposal facilities within the State to a location outside the jurisdiction of the United States. Such reports shall contain the generator or HWM facility identification code, name, address, and the information required by 40 CFR 250.23(c) (2)–(7) (proposed at 43 FR 58978 (December 18, 1978)).

(b) *Annual program reports.* The Director shall prepare two copies of a program report within four weeks of the last day of September. The report shall contain information (in a manner and form prescribed by the Administrator) on generators, transporters, the permit status of regulated facilities, and summary information on the quantities and types of hazardous wastes

generated, transported, stored, treated and disposed during the preceding year.

(c) Reports required under this section from the State Director shall be submitted to the Regional Administrator, and reports from the Regional Administrator shall be submitted to EPA Headquarters.

§ 122.28 Emergency authorization.

Notwithstanding any other provision of this Part or Part 124, in the event of an immediate hazard to human health or the environment (as determined by EPA, other Federal agencies or State or local authorized officials) the Director may issue temporary authorization to a permitted HWM facility to allow treatment, storage or disposal of hazardous waste not covered by a permit. Such authorization:

(a) May be oral or written. If oral, it shall be followed within 5 days by written authorization;

(b) Shall not exceed 90 days in duration;

(c) Shall clearly specify wastes to be received, and the manner and location of their treatment, storage or disposal;

(d) May be revoked by the Director at any time if he/she determines that revocation is appropriate to protect human health and the environment; and

(e) Shall be accompanied by a public notice published according to methods provided in § 124.11(a)(2) and specifying the:

(1) Name and address of the office granting the emergency authorization;

(2) Name and location of the permitted HWM facility;

(3) Brief description of the wastes involved;

(4) Brief description of the action authorized and reasons for authorizing it; and

(5) Duration of the authorization.

[*Comment:* Under § 123.39, States are authorized, but not required, to grant temporary authorization in the same manner and covering the same facilities or circumstances as those covered by EPA under this section.]

Subpart C—Additional Requirements for UIC Program Under the SDWA

§ 122.31 Purpose and scope.

(a) The regulations in this Subpart set forth the specific requirements for the UIC program. Additional general requirements have been set forth in Subpart A. In case of inconsistencies between this Subpart and Subpart A, this Subpart is controlling.

(b) SDWA provides for authorization of underground injections in listed States by permit or, where provided for by these regulations, by rule. This Subpart defines the types of activities subject to authorization by permit or rule, and sets forth the specific elements applicable to either type of authorization.

[*Comment:* References to Part 146, the technical regulations for the UIC program, appear frequently in this Subpart. These technical regulations were proposed on April 20, 1978 (44 FR 23738).]

§ 122.32 Law authorizing UIC program.

(a) Section 1421 of SDWA requires the Administrator to propose and promulgate regulations establishing (1) minimum requirements for UIC programs and (2) a procedural mechanism whereby States may obtain EPA approval to operate such programs.

(b) Section 1422 of SDWA requires the Administrator to list in the Federal Register "each State for which in his judgment a State underground injection control program may be necessary to assure that underground injection will not endanger drinking water sources" and to establish by regulation a program for EPA administration of UIC programs in the absence of a State program in a listed State.

(c) Section 1423 of SDWA provides procedures for EPA enforcement of UIC requirements where the State fails to enforce those requirements.

(d) Section 1445 of SDWA authorizes (1) such recordkeeping, reporting, and monitoring requirements "as the Administrator may reasonably require by regulation to assist him in establishing regulations under this title," and (2) a "right of entry and inspection to determine compliance with this title, including for this purpose, inspection, at reasonable times, of records, files, papers, processes, controls, and facilities * * *."

(e) Section 1450 of the SDWA authorizes the Administrator "to prescribe such regulations as are necessary or appropriate to carry out his functions" under SDWA.

§ 122.33 Designation of underground drinking water sources.

(a) The Director shall identify (by narrative description, illustrations, maps or other means) all aquifers or parts of aquifers which are not underground sources of drinking water, in accordance with the criteria contained in § 146.04. The Director shall propose this designation and provide opportunity for comment and a public hearing on it. All aquifers not so identified shall be designated underground sources of drinking water.

(b) Aquifers identified under paragraph (a) shall be described in geographic and/or geometric terms (such as vertical and lateral limits and gradient) which are clear and definite.

[*Comment:* Aquifers not identified under paragraph (a) of this section may be described by use of maps, where such information is available, or by narrative description. Identifications of aquifers in accordance with paragraph (a) should be accompanied by narrative descriptions of why those aquifers do not qualify for designation as underground sources of drinking water.]

(c) Where a UIC program is administered by a State, designation and identification by the State Director under this section shall be subject to the approval of the Administrator at the time of program approval under Part 123.

[*Comment:* Designation and identification subsequent to program approval shall be treated as program modifications under § 123.6(b)(8).]

§ 122.34 Classification of injection wells.

The Director shall classify injection wells as follows:

(a) Class I: Industrial and municipal disposal wells and nuclear storage and disposal wells which inject beneath the lowermost stratum containing an underground source of drinking water.

(b) Class II: Well injection of produced water or other fluids which are brought to the surface in connection with oil or natural gas production, well injection of fluids for enhanced recovery of oil or natural gas and well injection of fluids for storage of hydrocarbons.

(c) Class III: Well injection of fluids for special processes such as mining of sulfur by the Frasch process, well injection for solution mining of uranium, salt, potash, copper and other minerals, and well injection for in situ gasification of oil shale, coal, lignite, tar sands and other similar fuel sources, and well injection to recover gas thermal energy.

(d) Class IV: Wells used by generators of hazardous wastes and owners or operators of hazardous waste management facilities (as defined in § 122.3(b)) to inject into or above strata containing underground drinking water sources.

(e) Class V: Injection wells not included in Classes I, II, III or IV (examples are recharge wells such as subsidence control wells, air conditioning or cooling water return flow wells, and drainage wells; and waste disposal wells such as sand backfill wells, non-residential septic system wells, dry wells, and industrial and municipal waste disposal wells).

§ 122.35 Authorization of underground injection by rule.

(a) *Types of underground injections which may be authorized by rule.* The Director may authorize underground injections by rule in the following instances:

(1) Underground injection into all existing class I, II (except existing enhanced recovery and hydrocarbon storage) and III wells may be authorized by rule for a period up to 5 years from the effective date of the UIC program. All class I, II and III wells except enhanced recovery and hydrocarbon storage wells must be issued permits within five years in accordance with the permitting schedule established by the Director. All such authorizations by rule shall require compliance with the applicable monitoring, reporting and abandonment requirements of Part 146 as soon as possible but no later than one year after the authorization by rule.

(2) Underground injections into existing enhanced recovery and hydrocarbon storage wells may be authorized by rule, rather than by permit, for the life of the well. All such authorizations by rule shall require compliance with the applicable construction, abandonment, operating, monitoring, reporting, and financial responsibility requirements of Part 146 as soon as possible but no later than one year after the authorization by rule.

(3) Underground injections into existing class IV wells which have submitted the information required under § 146.42 shall be authorized by rule ending at the time of their closure under § 146.43(a). Such authorization shall require monitoring and reporting as set forth in § 146.44 within 90 days of the authorization.

[*Comment:* The operation of *new* Class IV wells shall be prohibited by rule. See § 122.45.]

(4) Underground injections into class V wells which have submitted the information required under §146.52 may be authorized by rule for a period ending at the time when new requirements promulgated by EPA became applicable.

(b) Owners or operators of underground injection facilities who have not complied with applicable rules are subject to enforcement action by the State or, where appropriate, EPA.

§ 122.36 Authorization of underground injection by permit.

(a) *Who must apply.* All underground injections into Class I, II (except existing enhanced recovery and hydrocarbon storage) or III wells in listed States must be authorized by permit.

(b) *Time to apply.* Any person who performs or proposes an underground injection for which a permit is required shall submit an application to the Director in accordance with the State UIC program (including the State permit plan under part 123) as follows:

(1) For existing injection wells, as expeditiously as practicable and in accordance with the schedule contained in State permit plan, but no later than four years from the effective date of the State UIC program.

(2) For new injection wells, a reasonable time before injection is expected to begin. Injection may not begin until the owner or operator has received a permit.

(c) *Contents of UIC application.* Applicants for UIC permits shall submit the following information to the Director:

(1) All applicants must submit the identity of the owner or operator of the injection operation, the location or proposed location of the injection well, and the purpose or function of the well.

(2) Applicants for State-issued permits for existing injection wells shall submit, in addition to the information required by subparagraph (1), such other information as the Director requires.

[*Comment:* In many States, most or all of the information which the Director must consider in writing permit conditions is already contained in State files. Part 146 Subparts B–D list the information which the Director must consider for various classes of wells. The Director may review the State files upon receipt of an application and then require the applicant to submit any applicable information which either is not contained in the State file or is in need of correction or updating. Only new information submitted by the applicant that is not already contained in State files is subject to the signatory requirements of §122.5.]

(3) Applicants for State-issued permits for new injection wells shall submit, in addition to the information required by subparagraph (1), all additional information which the Director will be required under Part 146 to consider for the applicable class of well. Certain maps, sections, and tabulations of wells within the area of review (see §§ 146.15, 146.25 and 146.36), may be included in the application by reference provided they are available to the Director and sufficiently identified to be retrieved.

(4) Applicants for EPA-issued permits shall submit, in addition to the information required by subparagraph (1), all additional information which the Director will be required under Part 146 to consider for the applicable class of well.

(d) *Mechanical integrity.* The Director shall issue no permits to wells which lack mechanical integrity as determined under § 146.08.

§ 122.37 Area permits.

(a) The Director may issue permits on a well-by-well basis or an area basis, provided that all injection wells covered by an area permit are:

(1) Within a single well field project, or site in a single State;

(2) Covered by the application for the permit;

(3) Of the same type as determined under § 122.34;

(4) Injecting into the same aquifer or zone; and

(5) Controlled by a single person.

(b) Area permits shall specify the boundary within which underground injections are authorized and shall identify by location each injection well covered by the area permit.

(c) A permittee may obtain administrative authorization from the Director for additional new injection wells within the permitted area without public notice and hearing:

(1) If the permittee notifies the Director of his/her intent to place an additional injection well within the permitted area and provides information on the location of the proposed well;

(2) If the permittee demonstrates to the satisfaction of the Director that the additional underground injection well is similar in construction to wells already covered by the area permits and will meet the operation requirements of Part 146; and

(3) Where authorization under this paragraph is obtained orally, the information in (1) and (2) must be provided in writing within 30 days.

[*Comment:* Such authorization of additional injection wells does not constitute a permit modification subject to § 122.9.]

§ 122.38 Corrective action.

(a) Where the Director's review of an application for a class I, II (other than existing) or III well indicates that the proposed injection well's area of review contains wells which are improperly completed and/or plugged or that the remedial actions proposed by the applicant are inadequate, he/she shall prescribe such steps or modifications as are necessary to prevent fluid migration ("corrective action"). In determining such steps or modifications, the Director shall consider the factors set forth in § 146.07.

(b) In the case of a new or existing class II injection well in an existing

injection field, the Director shall by rule (or by permit) require that where a source of leaking fluids may cause a significant risk to public health, the leak shall be corrected in the shortest reasonabale period of time or the operator shall cease injecting.

(c) In the case of an existing injection well which must be authorized by permit, the Director shall issue the permit with a condition that if any required corrective action is not accomplished within the shortest reasonable time, the permit shall be revoked.

(d) In the case of a new injection well authorized by permit, the operation shall not begin unless all required corrective action has been taken.

(e) In the case of a class I, II or III well which is authorized by rule, if any monitoring indicates the migration of injection or formation fluids into underground sources of drinking water, the Director shall prescribe such additional requirements for construction, corrective action, operation, monitoring or reporting (including closure of the injection well) as are necessary to prevent such migration.

[*Comment:* In the case of wells authorized by permit, such additional requirements may be imposed by modifying the permit in accordance with § 122.9.]

(f) If at any time the Director gains knowledge of a Class V well which presents a significant risk to the health of persons, he/she shall prescribe such action as necessary (including the immediate closure of the injection well) to remove such hazard.

§ 122.39 General prohibition against movement of fluid into underground sources of drinking water.

No class I, II or III well shall cause or allow movement of fluid into underground sources of drinking water.

§ 122.40 Temporary authorization.

(a) Notwithstanding any other provision of this Part, the Director may, in the following circumstances, temporarily authorize a specific underground injection which has not otherwise been authorized by rule or permit:

(1) An imminent and substantial hazard to human health or the environment will result unless temporary authorization is granted; or

(2) If a substantial and irretrievable loss of oil or gas resources will occur unless temporary authorization is granted to a Class II well; and

(i) Timely application for a permit could not have practicably been made; and

(ii) The temporary authorization will not result in the movement of fluids into underground sources of drinking water.

(b)(1) Any authorization under paragraph (a)(1) shall be for no longer than required to prevent the hazard or loss of such resources.

(2) An authorization under paragraph (a)(2) shall be for no longer than 90 days, except that if a permit application has been submitted prior to the expiration of the 90-day period, the Director may extend the authorization until the permit is granted or denied.

(c) Notice of any authorization under this paragraph shall be published in accordance with § 124.11 within 10 days of the authorization.

§ 122.42 Establishing UIC permit terms and conditions.

(a) Permit terms and conditions shall at a minimum establish, in addition to terms and conditions required under §§ 122.9 and 122.11, the following:

(1) Construction requirements as set forth in Part 146;

(2) Corrective action as set forth in § 122.38 and § 146.7;

(3) Operation requirements as set forth in Part 146;

(4) Monitoring and reporting requirements as set forth in § 122.12 and Part 146;

(5) Schedules of compliance. Schedules shall set forth dates which are as early as possible but no later than three years after the dates of permit issuance. No later than 30 days following each interim or final date, the permittee shall provide the Director with written notice of compliance or noncompliance with the interm of final requirements;

(6) Plugging and abandonment of injection wells. Where a permittee intends to cease underground injection, the permittee shall immediately notify the director and follow the procedures prescribed by the director for plugging and abandonment of the well; and

(7) Fiscal responsibility of permittees. The permittee shall maintain fiscal responsibility and resources, in the form of performance bonds or other appropriate form, to close, plug and abandon the underground injection operation in a manner prescribed by the Director.

[*Comment:* To assure that the well is constructed and operated in accordance with the requirements of Part 146, the permit should set forth the specific data on which the permit is based. For example, the permit should establish injection volumes and pressures which will assure compliance with the Part 146 operating requirements.

(b) The director may impose additional terms and conditions on a case-by-case basis if necessary to prevent the migration of fluids into underground sources of drinking water.

§ 122.43 Noncompliance reporting.

(a) The Director shall submit, as part of the quarterly report required under § 122.15(a), information concerning noncompliance by major underground injectors with permit requirements or the requirements of any applicable rule.

(b) The following shall be contained in the noncompliance report:

(1) *Failure to Complete Construction Elements.* Noncompliance shall be reported in the following circumstances:

(i) When an injector has failed to complete, by the date specified in the permit or rule, an element of the compliance schedule involving planning for construction (e.g., award of contract, preliminary plans, ets.) or a construction step (e.g., begin construction, attain operation level); and

(ii) The injector has not returned to compliance within 30 days from the date a report is due under Part 146.

(2) *Failure to Complete/Provide Compliance Schedule Reports.* Noncompliance shall be reported in the following circumstances:

(i) When an injector has failed to complete or provide a report required in the compliance schedule (e.g., progress reports, notification or compliance/noncompliance etc.); and

(ii) The injector has not submitted a complete report within 30 days from the date the report is due.

(3) *Noncompliance with Operational Requirements.* Noncompliance shall be reported in the following circumstances;

(i) When a permittee or an injector authorized by rule has violated an operational requirement and has not returned to compliance with applicable requirements within 45 days from the date notification of noncompliance under Part 146 was due; or

(ii) When the Director determines that a pattern of noncompliance with applicable operational requirements exists for any injector over a period of 12 months prior to the end of the current reporting period. This includes but is not limited to:

(A) Any violation of the same requirement in two consecutive quarters; and

(B) Any violation of one or more requirements in each of the four quarters comprising the 12-month period.

(4) *Failure to Report Data.* The State shall include in its report instances

where reports are received or the reports provided by the injector are so deficient as to cause misunderstanding on the part of the Director and impede the review of the status of compliance.

[*Comment:* Noncompliance reported under this paragraph shall be reported in successive reports until the noncompliance is resolved. This resolution of noncompliance shall also be reported. Once the noncompliance is reported as resolved, it need not appear in subsequent reports.]

(d) Where the State is the permit-issuing authority, the State Director shall submit any reports required under this section to the Regional Administrator. Where EPA is the permit-issuing authority, the Regional Administrator shall submit any reports required under this section to EPA Headquarters.

§ 122.44 Special Requirements for wells managing hazardous wastes.

(a) The owner or operator of any well that is used to inject hazardous wastes accompanied by a manifest or delivery document shall obtain authorization to inject as specified in §§ 122.35 and 122.36.

(b) In addition to the applicable requirements of this Part and Part 146 Subparts B-F, the Director shall, for each facility meeting the requirements of paragraph (a), require that the owner or operator comply with:

(1) The notification requirements of Part 250, Subpart G (proposed at 43 FR 29911 (July 11, 1978)); and

(2) The manifest system record-keeping, and reporting requirement of § 250.43–5(a), (b)(6), (c)(5)(i), (c)(5)(ii), (c)(5)(iii), (c)(5)(iii)(A)–(F) and (c)(5)(iii)(H), and (c)(6) (proposed at 43 FR 59003 (December 18, 1978)).

[*Comment:* Wells which inject hazardous wastes qualify as hazardous waste management facilities under the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. 6901 *et. seq.* This section is designed to integrate regulatory coverage of these wells under RCRA and SDWA to avoid imposing inconsistent requirements.]

§ 122.45 Elimination of all class IV wells.

(a) *Existing class IV wells.* Existing class IV wells shall be inventoried and closed by the Director as described in §§ 146.42 and 146.43.

(b) *New class IV wells.* The Director shall by rule prohibit all new class IV wells immediately upon the effective date of the UIC program.

§ 122.46 Inventory of class V wells.

(a) The Director shall by rule require the owner/operator of any class V well to submit the information required in § 146.52.

(b) The Director shall, within two years of the effective date of the State program:

(1) Conduct an assessment of the contamination potential of class V wells;

(2) Conduct an assessment of the available corrective alternatives where appropriate and their environmental and economic consequences; and

(3) Submit a report to EPA containing items (1) and (2) as well as recommendations for appropriate regulatory approaches and remedial actions.

Any underground injection for which the required information is not submitted will not be authorized by either rule or permit and will thus be subject to appropriate enforcement action.

[*Comment:* Based on the submitted information, States shall develop reports and recommendations, which the Agency will use as a basis for promulgating minimum national requirements to bring class V wells under regulatory control.

The assessment mandated for class V wells represents solely the recognition that insufficient information is available to the Agency at this time. EPA has every intention of continuing to seek the necessary environmental amd economic data.]

Subpart D—Additional Requirements for National Pollutant Discharge Elimination System Programs Under the Clean Water Act

§ 122.61 Purpose and scope.

(a) This Subpart sets forth additional requirements for the National Pollutant Discharge Elimination System (NPDES) program including permit programs under sections 402, 318 and 405 of the Act; it applies to the program as administered by EPA and, to the extent incorporated by reference in Part 123, by approved NPDES States.

(b) Section 402 of the Clean Water Act (CWA, 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.

§ 122.62 Law authorizing NPDES permits.

(a) Section 301(a) of CWA 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 CWA 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 CWA 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 CWA 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 sludge entering the navigable waters, such disposal is prohibited except in accordance with a permit issued by the Administrator under section 402 of this Act."

(e) Sections 402(b), 318(b) and (c), and 405(c) of CWA authorize EPA approval of State permit programs for discharges from point sources, discharges to aquaculture projects, and disposal of sewage sludge.

(f) Section 404 authorizes EPA approval of State permit programs for the discharge of dredged or fill material.

(g) Section 304(i) of CWA provides that the Administrator shall promulgate guidelines establishing uniform application forms and other minimum requirements for the acquisitions of information from dischargers in approved States and establishing minimum procedural and other elements of approved State NPDES program.

(h) Section 501(a) of CWA 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 regulation, standard, effluent limitation, 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."

§ 122.63 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 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 CWA.

(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 introduction of pollutants into publicly owned treatment works. Plans or agreements 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 eliminated. All applicable pretreatment standards promulgated under section 307(b) of CWA 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 of other conveyances owned by a State, municipality or other party not leading to treatment works. (See § 122.3(d)).]

(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 § 122.76;

(ii) Discharges from concentrated aquatic animal production facilities as defined in § 122.77;

(iii) Discharges to aquaculture projects as defined in § 122.78; and

(iv) Discharges from silvicultural point sources as defined in § 122.80.

(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 CWA.

§ 122.64 Application for a permit.

(a) Any person who discharges or proposes to discharge pollutants, except persons covered by general permits under § 122.62 or excluded under § 122.63, 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.

(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) Results 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) Have 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.]

(d) *Special provisions for applications from new sources.* (1) The owner or operator of any facility which may be a new source as defined in § 122.3(d) and which is located in a State without an approved NPDES program must comply with the provisions of this paragraph.

(2)(i) Before beginning any on-site construction as defined in § 122.81, 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.

(ii) The Regional Administrator shall make an initial determination whether the facility is a new source within 30 days of receiving all necessary information under subparagraph (2)(i) of this paragraph.

(3) The Regional Administrator shall issue a public notice in accordance with § 124.11 of the new source determination under subparagraph (2)(1) of this paragraph. The notice shall state that the applicant, if determined to be a new source must comply with the environmental review requirements of 40 CFR Part 6.900 *et seq.*

(4) Any interested person may challenge the Regional Administrator's initial new source determination by requesting an evidentiary hearing under Subpart E of Part 124 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, and consolidate the hearing on the determination with any hearing on the permit.

(e) *Applications for variances from and modifications of effluent limitations by non-POTWs.* A discharger which is not a publicly owned treatment works may request a variance from or modification of otherwise applicable effluent limitations under any of the following statutory or regulatory provisions within the times specified in this paragraph:

(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 § 124.12. The request shall explain how the requirements of § 124.15 and 40 CFR Part 125, Subpart D have been met.

(2) A request for a variance from the BAT requirements for CWA section 301(b)(2)(F) pollutants (commonly called "non-conventional" pollutants) pursuant to section 301(c) of CWA because of the economic capability of the owner or operator; or pursuant to section 301(g) of CWA 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 must have been 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 § 124.15 and the applicable requirements of Part 125 have been met no later than the close of the public comment period under § 124.12.

(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 CWA section 301(i)(2) of the statutory deadlines in sections 301(b)(1)(A) or (b)(1)(C) of CWA 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 (f)(2) of this section, whichever is later. The request shall explain how the requirements of 40 CFR Part 125, Subpart J have been met.

(4) An extension under CWA 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 § 124.12 for the discharger's initial permit requiring compliance with the best available technology economically achievable. The request shall demonstrate that the requirements of § 124.15 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 § 124.12 on the permit from which the variance is sought. The request shall demonstrate that the requirements of that section have been met.

(6) A variance under CWA section 316(a) for the thermal component of any discharge must be filed with a timely application for a permit under this section. If thermal effluent limitations are established under CWA section 402(a)(1) or are based on water quality standards the application shall be filed by the close of the public period under § 124.12. A copy of the application as required under 40 CFR Part 125, Subpart H shall be sent simultaneously to the appropriate State or interstate certifying agency. (See § 124.67 for special procedures for section 316(a) thermal variances.)

(f) *Applications for variances from and modifications of effluent limitations by POTW's.* A discharger which is a publicly owned treatment works (POTW) may request a modification of otherwise applicable effluent limitations under any of the following statutory provisions as specified in this paragraph:

(1) A preliminary application for a modification under CWA section 301(h) from requirements of CWA 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 40 CFR Part 125, Subpart G, after that Subpart is promulgated, and shall demonstrate on its face that all the requirements of 40 CFR Part 125, Subpart G have been met. (See § 124.66 for special rules for CWA section 301(h) modifications.)

(2) An extension under CWA section 301(i)(1) from the statutory deadlines in CWA sections 301 (b)(1)(B) or (b)(1)(C) based on delay in the construction of POTWs must have been requested on or before June 26, 1978.

(3) A modification under CWA 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 § 124.12 on the permit from which the modification is sought.

(g)(1) Notwithstanding the time requirements in paragraphs (e) and (f), the Director may notify the applicant before a draft permit is published pursuant to § 124.6 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 an application explaining how the requirements of 40 CFR Part 125 applicable to the variance have been met and to require its submission within a specified reasonable time before the draft permit is formulated. This notice can be sent before the application under this section 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 CWA variance or modification will be applied for.]

(2) A discharger who cannot file a complete request required under paragraphs (e)(2)(ii), (e)(2)(iii), (e)(3)(ii) or (e)(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 6 months in duration. The request may be granted or denied in the discretion of the Director.

§ 122.65 Effect of an NPDES permit.

Compliance with a permit during its term constitutes compliance, for purposes of sections 309 and 505, with applicable standards and limitations of CWA, 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 §§ 122.9 and 122.73.

§ 122.66 Duration of permits.

No NPDES 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:

(a) 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 CWA; or

[*Comment:* EPA is presently reviewing and revising effluent limitations for industries listed in Appendix A. In some cases, EPA may approve existing effluent limitations or choose not to develop new limitations. If EPA decides not to develop new effluent limitations it will publish notice in the Federal Register that the limitations are "approved" for the purpose of this regulation.]

(b) The permit incorporates:

(1) The "reopener clause" required by § 122.69(b)(1);

(2) Effluent limitations to meet the requirements of sections 301(b)(2) (A), (C), (D), (E) and (F) of CWA.

[*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 CWA, 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 (b)(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 achievable" (BAT).

(2) A determination that a particular discharger falls within a given industrial category for purposes of setting a permit expiration date under paragraph (b) is not conclusive as to the discharger's inclusion in that industrial category for any other purposes, and does not prejudice any rights to challenge or change that inclusion at the time that a new permit based on that determination is formulated.]

§ 122.67 Prohibitions.

No NPDES permit shall be issued in the following circumstances:

(a) Where the terms or conditions of the permit do not comply with the applicable guidelines requirements of CWA, or regulations.

(b) Where the applicant is required to obtain a State or other appropriate certification under section 401 of CWA and § 124.53 and that certification has not been obtained or waived.

(c) By the State Director where the Regional Administrator has objected to issuance of the permit under § 123.99.

(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 CWA.

(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 CWA.

(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 CWA, unless the Director determines permit issuance to be in the public interest; or

(2) After promulgation of guidelines under section 403(c) of CWA, 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:

(A) 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

(B) 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.

§ 122.68 Additional conditions applicable to NPDES permits.

The following conditions, in addition to those set forth in § 122.11, are applicable to all NPDES permits. They shall be either expressly incorporated into the permit or incorporated by reference.

(a) [Reserved]

[*Comment:* This paragraph is reserviced pending publication of a revised NPDES application form. This form, and accompanying regulations, are being proposed in today's Federal Register, as a separate part of the Permit Consolidation package. When finally promulgated, the regulations appearing with the revised NPDES form will be incorporated into the text of this section. 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) 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 CWA 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 CWA section 307(a) for toxic pollutants injurious to human health are effective within the time provided in the implementing regulations, even absent permit modification.]

(c) *Bypass.* (1) *Definitions.*

(i) "Bypass" means the intentional diversion of wastes from any portion of a treatment facility.

(ii) " Severe property damage" means substantial 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 three 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 of 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.]

(3) *Prohibition of bypass.* The Director may prohibit bypass in consideration of the adverse effect of the bypass and the conditions set forth in paragraph (c)(2) of this section should have been provided by the treatment facility 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.

(d) *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 paragarph (d)(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 applicable operation and maintenance procedures;

(iii) The permittee submitted information 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 § 122.11(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.

[*Comment:* Although in the usual exercise of prosecutorial discretion, Agency enforcement personnel should review any claims that noncompliance was caused by an upset, no determinations made in the course of the review constitute 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.]

(e) 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 until 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.

§122.69 Applicable limitations, standards, prohibitions, and conditions.

Each NPDES permit shall provide for and ensure compliance with all applicable requirements of CWA and regulations promulgated under CWA. 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 CWA, 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 CWA, 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 CWA 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 Clean Water Act then applicable."]

(B) The Director shall promptly modify, or alternatively revoke and reissue, the permit to incorporate an applicable effluent 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 CWA. 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, the permit shall include effluent limitations and a compliance schedule to meet the requirements of sections 301(b)(2)(A), (C), (D), (E) and (F) of CWA, whether or not applicable effluent limitations guidelines have been promulgated or approved. Such permits need not incorporate the clause required by subparagraph (A) of this paragraph.

(c) Standards of performance for new sources under section 306 of CWA, 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 CWA 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 CWA 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 CWA, 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 CWA which are reasonably necessary for the achievement of effluent limitations under section 301 of CWA.

[*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 CWA;

(2) Attain or maintain a specified water quality through water quality related effluent limits established under section 302 of CWA;

(3) Conform to the conditions of a State certification under section 401 of CWA where EPA is the permit issuing authority;

(4) Conform to applicable water quality requirements under section 402(a)(2) of CWA 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 CWA;

(6) Ensure consistency with the requirements of a Water Quality management plan approved by EPA under section 208(b) of CWA;

(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 40 CFR 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 CWA, 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 limitations guidelines or standards in accordance with 40 CFR 125.2.

[*Comment:* Subparagraph (10) applies to all dischargers including new sources and new dischargers, even where covered by the protection period in § 122.81.]

(g) Best management practices to control or abate the discharge of pollutants where:

(1) Authorized under section 304(e) of the CWA 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 and intents of CWA.

[*Comment:* Examples of best management practices which may be imposed under subparagraph (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 subparagraph (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 subsections (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 subparagraph (g)(1) and Subpart K of 40 CFR Part 125 imposed for toxic and hazardous materials under section 304(e).]

(h) Requirements under section 405 of CWA 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 §§ 122.9 or 122.73.)

Where effluent limitations were imposed under section 402(a)(1) of CWA 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 required to meet the effluent limitations in 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 than 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 CWA).

(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.

§ 122.70 Calculation and specification of effluent limitations and standards.

(a)(1) All NPDES permits shall impose final, and where necessary, interim effluent limitations, standards and prohibitions under §§ 122.11, 122.68 and 122.69 for each outfall or discharge point of the permitted facility, except as otherwise provided under § 122.69(g)(2) and paragraph (i) of this section.

(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 §§ 122.11, 122.68 and 122.69 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 CWA specifies the limitation for the metal in the dissolved or valent form; or

(2) In establishing permit limitations on a case-by-case basis under § 122.69(1), it is necessary to express the limitation on the metal in the dissolved or valent form in order to carry out the provisions of CWA.

(c) For continuous discharges all interim and final permit effluent limitations, standards and prohibitions established under § 122.11. § 122.68 and § 122.69, including those necessary to achieve water quality standards, shall be stated as:

(1) Maximum daily and average monthly discharge limitations for all dischargers other than publicly owned treatment works; and

(2) Average weekly and average monthly discharge limitations for POTWs.

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.

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.

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.

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 (g), 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 entirely 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 determined 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 §§ 122.9 or 122.73.

(2) Permit effuent limitations or standards adjusted under this paragraph shall be calculated on the basis of the amount of pollutants present 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 polluntants 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 very physically, chemically or biologically from the pollutants limited by the permit. Nor shall effluent limitations or standards by adjusted when the discharger significantly increases concentrations of pollutants in the intake water, even though the total amount of pollutants might remain the same.

(h) 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).

(i) Where permit effluent limitations or standards imposed at the point of discharge are impractical or infeasible, effluent limitations or standards of discharges of pollutants may be imposed on internal waste streams prior to mixing with other 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.]

§ 122.71 NPDES requirements for recording and reporting of monitoring reports.

(a) To assure compliance with permit terms and conditions, all NPDES permittees shall monitor as specified in the permit:

(1) The amount, concentration or other measurement specified in § 122.70 for each pollutant specified in the permit;

(2) The volume of effluent discharged from each point source; and

(3) According to test procedures for the analysis of pollutants meeting the requirements of paragraph (b);

(4) As otherwise specifically required in the permit, e.g., as required under § 122.70(g)(2).

(b)(1) Test procedures identified in 40 CFR Part 136 shall be utilized for pollutants or parameters listed in that Part, unless and alternative test procedure has been approved under the Part.

(2) Where no test procedure under 40 CFR Part 136 has been approved, the Director shall specifiy a test method in the permit.

(3) Notwithstanding paragraph (1), the Director may specify in a permit the test procedure used in developing the date 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.

(c) The sampling frequency and other monitoring requirements specified by the director under paragraph (b) shall, to the extent applicable, be consistent with monitoring requirements specified in a standard or effluent guideline on which the effluent limitations in the permit are based.

(d) If the permittee believes that the monitoring requirements specified by the director under paragraph (b) 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.

(e) The CWA 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.

(f) The CWA 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 or § 122.14 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.

(g) 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 and included in the calculation and reporting of the data submitted 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 as specified in the permit.

(h) The CWA 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.

§ 122.72 NPDES noncompliance reporting requirements.

(a) On the last working day of February, May, August, and November, the State director shall submit to the Regional Administrator information concerning noncompliance with NPDES permit requirements by major dischargers in the State in accordance with the reporting schedule contained in paragraph (g). The Regional Administrator shall submit such information and shall also prepare and submit information for EPA-issued permits to EPA Headquarters in accordance with paragraph (g).

(b) *Quarterly Reports.* 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 (e.g., 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 § 122.12(a)(2).

(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 § 122.14 (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 day from the date it is due under § 122.12(a)(2).

(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 § 122.11(h) was due;

(iii) 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 § 122.12(a)(3).* Noncompliance resulting from or constituting the basis for a modification under § 122.12(a)(3) shall be reported.

[*Comment:* Noncompliance reported under this paragraph 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 information required under § 122.15(a);

(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).

(e) *Annual reports.* For minor dischargers whose compliance has been reviewed by the permitting authority, statistical information on the types of noncompliance listed under paragraph (b) shall be reported annually. In additional, 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 of noncompliance by major dischargers under paragraphs (b), (c), and (d) shall be as follows:

Quarters covered by reports on noncompliance by major dischargers:	*Dates for completion of reports*
January	May 31*.
February	
March	
April	August 31*.
May	
June	
July	November 30*.
August	
September	
October	February 28*.
November	
December	

* Report made available to the public on this date.

(2) The annual reporting period for noncompliance by minor dischargers under paragraph (e) 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.]

§ 122.73 Modifications or revocation and reissuance of NPDES permits.

In addition to the causes set forth in § 122.9(e), NPDES permit may be modified, or revoked and reissued for the following causes:

(a) Where water quality standards or EPA promulgated effluent limitations guidelines (including interim final effluent guidelines) are revised, withdrawn or modified, *but only when:*

(1) The permit term or condition requested to be modified or revoked was based on a promulgated effluent limitation guideline or a EPA approved or promulgated water quality standard;

(2)(i) EPA has revised, withdrawn or modified that portion of the effluent limitation guideline on which the permit term or condition was based; or

(ii) EPA has approved a State action with regard to a water quality standard on which the permit term or condition was based; and

(3) A request for modification or revocation and reissuance is filed in accordance with § 124.5 (or applicable State procedures meeting the requirements of § 124.5) within ninety (90) days after Federal Register notice of:

(i) Revision, withdrawal or modification of that portion of the effluent limitation guideline; or

(ii) EPA approval of a State action regarding a water quality standard.

(b) 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 90 days of the judicial remand;

(c) Where any modification or revocation and reissuance of permits is specifically authorized by CWA, e.g., sections 301(c), (g), (h), (i) or (k).

(d) As necessary under §§ 122.68(b), 122.69(b) and 122.12(a)(3)(i) and (ii).

(e) 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 CWA.

(f) The following additional minor permit modifications for NPDES permits shall not require public notice and opportunity for hearing under § 124.5 or § 124.7 unless they would render the permit less stringent, or unless contested by the permittee:

(1) A change in the construction schedule for a discharger which is a new source. No such change shall affect a dischargers obligation to have all pollution control equipment installed and in operation prior to discharge under § 122.81; and

(2) 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.

§ 122.74 Termination of NPDES permits.

In addition to the causes for termination set forth in § 122.10, NPDES permits may be terminated where there is 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.

§ 122.75 Disposal of pollutants into wells, into publicly owned treatment works or by land applications.

(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 an NPDES 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 limitation 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 discharges to wells, publicly owned treatment works, or by land application change the character or treatability of the pollutants being discharged to receiving waters.

[*Comment:* 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 §§ 122.11, 122.68 and 122.69.

§ 122.76 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 (b)(2) (i), (ii) or (iii) below:

(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 lambs,

(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 waste waters 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 subparagraphs (b)(2) (i) and (ii) above shall be 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 passover, 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.

§ 122.77 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 United 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 subparagraph 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.

§ 122.78 Aquaculture projects.

(a) Discharges into aquaculture projects, as defined in this section, are subject to the NPDES permit program through section 318 of CWA, and in accordance with 40 CFR 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 part, and be harvested within a defined geographic area.

§ 122.79 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 § 122.82).

(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 provisions 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 CWA, 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 CWA, 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.]

§ 122.80 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 CWA 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.)

§ 122.81 New sources and new dischargers.

(a) *Definitions.* (1) "New source" and "new discharger" are defined in § 122.3(d).

(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(d):

(i) Construction of a source on a site where another source(s) 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 § 122.9(e)(1).

(3) Construction of a new source as defined under § 122.3(d) 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 are 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 an NPDES 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 § 124.64(d) 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 negative declaration, unless such construction is determined by the Regional Administrator to not cause significant adverse environmental impacts.

(5) The permit applicant must notify the Regional Administrator of any on-site construction which begins before the times specified in subparagraph (4). 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 which commenced construction 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 CWA 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 or 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 not listed as toxic under section 307(a) of CWA or as hazardous under section 311 of CWA 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 then applicable requirements of CWA 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) of CWA, 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.

§ 122.82 NPDES general permit program.

(a) *Definitions.* (1) The term "separate storm sewer" is defined in § 122.79.

(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 NPDES 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 90-day review. If the draft general permit does not meet the criteria of § 122.82(b)(2), the EPA Deputy Assistant Administrator may object to the issuance of the general permit within those 90 days. See §§ 123.73(g) and 124.7(a)(2).]

(3) The term "general permit" means an authorization to discharge which:

(i) Where issued by EPA, is published in the Federal Register;

(ii) Where issued by a State, is 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 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 monitoring requirements and

(v) In the opinion of the Director would be more appropriately controlled under a general permit than under an indivdual 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 geogrpahic 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 § 122.79(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 of the classes of point sources within the GPPA, or as necessary to address water quality problems effectively.

(3) NPDES General permits shall be issued in accordance with the applicable requirements of Part 124.

[*Comments:* The permit issuing authority is encouraged to provide as much actual notice of the draft general permit to the permittees as possible. This notice would be in addition to the public notice requirements in § 124.11(f) and could include notice in trade associations' journals and newsletters.]

(d) *Scope of NDPES General Permits.* (1) Each NDPES 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) For 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) Sources excluded from NDPES 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 sources.

(e) *Case-by-case designation.* (1) Under § 124.70, 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 NDPES 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 limitation guidelines are subsequently promulgated for point sources covered by the general NPDES permit;

(v) A Water Quality Management plan containing requirements applicable to such point sources is approved; or

(iv) 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 a 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 NPDES 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.

§ 122.63 Special considerations under Federal law.

Under section 301(b)(1)(C) of CWA, permits shall be consistent with and reflect requirements under applicable—Federal laws other than CWA and to the extent authorized by law, requirements under Executive Orders. For permits issued by the Regional Administrator 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.*

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 and 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 and Electronic Components	June 30, 1981
Electroplating	June 30, 1981
Explosives Manufacturing	June 30, 1981
Foundries	June 30, 1981
Gum and Wood Chemicals	June 30, 1981
Inorganic Chemicals	March 31, 1981
Iron and 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 and 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 and Synthetic materials	March 31, 1981
Porcelain Enamel	June 30, 1981
Printing and Publishing	December 31, 1981
Pulp and Paper	March 31, 1981
Rubber	March 31, 1981
Soaps and Detergents	June 30, 1981
Steam Electric	September 30, 1981
Textile Mills	March 31, 1981
Timber	September 30, 1981

PART 123—STATE PROGRAM REQUIREMENTS

Subpart A—General Program Requirements

Sec.

123.1 Purpose and scope.
123.2 Definitions.
123.3 Elements of a program submission.
123.4 Program description.
123.5 Attorney General's Statement.
123.6 Memorandum of Agreement with the Regional Administrator.
123.7 Requirement to obtain a permit.
123.8 Operational requirements.
123.9 Compliance evaluation programs.
123.10 Enforcement authority.
123.11 Progress reports.
123.12 Approval process.
123.13 Procedure for revision of State programs.
123.14 Criteria for withdrawal of State programs.
123.15 Procedures for withdrawal of State programs.
123.16 Sharing of information.
123.17 Coordination with other programs.

Subpart B—Additional Requirements for State Hazardous Waste Programs

123.31 Purpose and scope.
123.32 Interim authorization.
123.33 Authorization.
123.34 Program description.
123.35 Attorney General's statement for interim authorization.
123.36 Progress reports.
123.37 Memorandum of Agreement.
123.38 EPA review of State permits.
123.39 Operational requirements.
123.40 Approval process.
123.41 Criteria for withdrawal.

Subpart C—Additional Requirements for State Underground Injection Control Programs

Subpart D—Additional Requirements for State Programs Under the National Pollutant Discharge Elimination System

Subpart E—Additional Requirements for State Programs Under Section 404 of the Clean Water Act

Authority: Resource Conservation and Recovery Act, 42 U.S.C. 6901 et seq.; Safe Drinking Water Act, 42 U.S.C. 300f et seq.; Clean Water Act, 33 U.S.C. 1251.

Subpart A—General Program Requirements

§ 123.1 Purpose and scope.

(a) This part specifies procedural and other requirements which must be present in State programs in order to obtain approval of the Administrator under:

(1) Section 3006 (hazardous waste) of the Solid Waste Disposal Act as amended by the Resource Conservation and Recovery Act of 1976, (Pub. L. 94–580, as amended by Pub. L. 95–609, hereinafter called RCRA);

(2) Section 1422 (underground injection control—UIC) of the Safe Drinking Water Act (Pub. L. 93–523, as amended by Pub. L. 95–190, hereinafter called SDWA);

(3) The National Pollutant Discharge Elimination System (NPDES) (sections 318, 402 and 405 of the Clean Water Act, Pub. L. 92–500, as amended by Pub. L. 95–217 and Pub. L. 95–576, hereinafter called CWA); and

(4) Section 404 (dredge and fill) of CWA.

[*Comment:* This Part should be read in conjunction with Parts 122 and 124 which provide general requirements of the Federal program and, by the references contained in this Part, to State programs.]

(b) A State program which conforms to the applicable requirements of this Part shall be approved by the Administrator.

(c) Upon approval of a State program the Administrator or the Secretary (in the case of section 404 programs) shall suspend the issuance of Federal permits for those activities subject to the approved State program.

(d) Any State program approved by the Administrator shall at all times be conducted in accordance with the requirements of this Part.

(e) In many cases States will lack authority to regulate activities on Indian lands. This lack of authority to regulate acitivities on Indian lands. This lack of authority does not impair a State's ability to obtain full program approval in accordance with this Part. However, States are required to exercise jurisdiction over Indian lands to the extent they are authorized to do so.

[*Comment:* Partial State programs are not allowed under RCRA, NPDES and section 404. However, failure of a State to regulate activities on Indian lands does not constitute a partial program. Similarly, a State can assume primary enforcement responsibility for the UIC program, notwithstanding § 123.51(e), where the State program is unable to regulate activities on Indian lands within the State. States are advised to contact the United States Department of Interior concerning authority over Indian lands. EPA or the Secretary, in the case of section 404 programs, will administer the program on Indian lands whenever the State lacks authority.]

(f) Except as provided in § 123.33(c), nothing in this Part precludes a State from:

(1) Adopting or enforcing requirements which are more stringent or more extensive than those required under this Part;

(2) Operating a program with a greater scope of coverage than that required under this Part.

[*Comment:* Where an approved State program has greater scope of coverage than required by Federal law the additional coverage is not part of the Federally approved program. For example, where a State requires permits for discharges into publicly owned treatment works, these permits are not NPDES permits.]

§ 123.2 Definitions.

The definitions in Part 122 apply to this Part.

§ 123.3 Elements of a program submission.

(a) EPA will not begin formal review of a proposed State program until it receives three copies of a complete program submission. EPA will notify the State within 30 days whether its submission is complete. If a submission made by a State is found to be incomplete, the statutory review period (i.e., the period of time allotted for EPA review under the appropriate Act) shall not begin until all the requested information is filed with EPA.

(b) If the State's submission is materially changed during the statutory review period, the review period shall recommence.

(c) The State and EPA may extend the review period by agreement.

(d) 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 § 123.5;

(3) A Memorandum of Agreement with the Regional Administrator as required by § 123.6;

(4) A complete program description, as required by § 123.4, describing how the State intends to carry out its responsibilities under this Part;

(5) Copies of the following forms the State intends to employ in its program: the permit form(s); the application form(s); standard reporting form(s) and the manifest form. Except as provided in Part 122, 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 its intention to use such forms.

[*Comment:* States are encouaged to use uniform national forms established by the Administrator or the Secretary (in the case of section 404 programs). Uniform national forms may be modified to include the State Agency's name, address, logo and other similar information, as appropriate, in place of EPA's. NPDES States are required to use standard Discharge Monitoring Reports (DMR).]

(6) Copies of all applicable State statutes and regulations, including those governing State administrative procedures;

(7) In the case of section 404 programs a Memorandum of Agreement with the Secretary as required by § 123.93; and

(8) The showing required by § 123.40(d) (RCRA) and § 123.58(b) (UIC).

§ 123.4 Program description.

Any State that wishes to administer a 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 the information below. Additional requirements for State program descriptions are detailed in §§ 123.34 (RCRA), 123.52 (UIC), and 123.95 (404).

(a) A description in narrative form of the scope, structure, coverage and processes of the State program.

(b) A description (including organization charts) of the organization and structure of the State agency or agencies which will have responsibility for administering the program including the information listed below. If more than one agency is responsible for administration of a program, their responsibilities must be delineated, their procedures for coordination set forth, and one of the agenices may be designated a "lead agency" to facilitate communications between EPA and the State agencies having program responsibility. Where the State proposes to administer a program of greater scope of coverage 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:

(1) A description of the State agency staff who will be engaged in carrying out the State program, including the number and occupations of the employees;

[*Comment:* The State need not submit complete job descriptions for every employee engaged in carrying out the State program.]

(2) An itemization of the proposed or actual costs of establishing and administering the program for the first two years after approval, including cost of the personnel listed in subparagraph (1), cost of administrative support, and cost of technical support.

(3) An itemization of the sources and amounts of funding, including Federal grant money, available to the State Director for the first two years after approval to meet the costs listed in subparagraph (2) identifying any restrictions or limitations upon this funding.

(4) Information on the number, size and character of the activities that will be regulated under the approved State program. (See §§ 123.34 (RCRA), 123.52 (UIC), and 123.95 (404)).

(c) A description of applicable State procedures, including permitting procedures and any State appellate review procedures;

(d) A general description of the State's priorities for issuance of permits and for enforcement, including a complete description of the State's compliance tracking and enforcement program.

[*Comment:* It is anticipated that a more specific identification of priorities will be contained in subsidiary State/EPA agreements such as annual grant agreements.]

§ 123.5 Attorney General's Statement.

(a) Any State desiring to administer a program covered by this Part shall submit a statement from the State Attorney General (or the attorney for those State or interstate agencies which have independent legal counsel), that the laws of the State, or the interstate compact, provide adequate authority to carry out the program described under § 123.4 and to meet the requirements of this Part. This statement shall include citations to specific statutes, administrative regulations, and, where appropriate, judicial decisions to support the analysis. The authorities cited by the State Attorney General or other legal officer shall be in the form of lawfully adopted State statutes and regulations which shall be in full force and effect at the time the statement is signed.

[*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 agency in court on all matters pertaining to the State program.]

(b) Where jurisdiction can be exercised over activities on Indian lands, the statement shall contain an appropriate analysis of the State's authority.

§ 123.6 Memorandum of Agreement with the Regional Administrator.

(a) Before the Administrator approves any State program, the State Director and the Regional Administrator shall execute a Memorandum of Agreement (MOA), which the Administrator shall approve before or at the time of program approval. In addition to 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 no inconsistent with this Part. No Memorandum of Agreement shall be approved which contains provisions which restrict EPA's statutory oversight responsibility.

[*Comment:* The Administrator may delegate his or her authority to approve modifications of MOA's. In such cases, however, the Regional Administrator's decision would be subject to review by EPA Headquarters.]

(b) The Memorandum of Agreement shall include the following:

(1) Provisions for the prompt transfer of any pending permit applications or any other relevant information not already in the possession of the State Director (e.g., support files for permit issuance, compliance reports, etc.) from EPA to the State. 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.

[*Comment:* In many instances States will lack the authority to directly administer permits issued by the Federal government. However, a procedure may be established to transfer responsibility for these permits. For example, a State could issue permits identical to the outstanding Federal permits which could be simultaneously revoked.]

(2) Provisions specifying classes and categories of permit applications and permits that the Regional Administrator will receive from the State for review, comment and, where applicable, objection;

[*Comment:* The nature and basis of EPA review of State permits and permit applications differs between the programs governed by this Part. See §§ 123.38 (RCRA), 123.78 (NPDES) and 123.99 (404). In addition, EPA will issue guidance on the significant types of permits that will be subject to EPA review pursuant to these Memoranda of Agreement.]

(3) Provisions specifying the frequency and content of reports (e.g., see § 123.11), documents and other information which the State must submit to EPA; and provisions on program evaluations. The State shall allow EPA to routinely review State records, reports and files relevant to the administration and enforcement of the State program. State reports may be combined with grant reports where appropriate;

(4) Provisions on the State's enforcement program, including:

(i) Compliance monitoring by the State and by EPA. These may specify the basis on which the Regional Administrator may select facilities or activities within the State for EPA inspection. The Regional Administrator will normally notify the State at least seven (7) days before any such inspection;

(ii) Fiscal arragnements for effective litigation support for the State attorney general or other appropriate legal officers;

(5) Where appropriate, provisions for joint processing of permits by the State and EPA, for facilities or activities which require permits from both EPA and the State under different programs.

[*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 consider steps to coordinate or consolidate their own permit programs and activities.]

(6) Provisions for modification of the Memorandum of Agreement.

(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 the 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, e.g., a provision in the MOA specifying that EPA will select facilities in the State for inspection annually as part of the State/EPA agreement.]

§ 123.7 Requirement to obtain a permit.

Except where an activity may be authorized by rule as provided in §§ 122.35, 123.54 (UIC) and 123.39 (RCRA), State permit programs must have a statute or regulation, enforceable in State courts, which prohibits the activity requiring a permit under the appropriate Act, except as authorized by a permit in effect under the State program. Where an activity may be authorized by rule there must be a similar statutory prohibition against such activities except as authorized by a rule in effect under the State program.

§ 123.8 Operational requirements.

State programs must have legal authority to implement each of the following provisions and must be administered in conformance with each of the following provisions:

(a) § 122.5—(Signatories);

(b) § 122.7—(Permit issuance);

(c) § 122.8 (a) and (b)—(Duration);

(d) § 122.9—(Permit review and modification);

(e) § 122.10—(Permit termination);

(f) § 122.11—(Permit conditions);

(g) § 122.12 (a) and (d)—(Schedules of compliance);

(h) § 122.14—(Recordkeeping/Reporting);

(i) § 122.15—(Noncompliance reporting);

(j) § 122.16(b)—(Confidential information);

(k) § 124.6 (a) and (b)—(Draft permit) except as provided in § 123.98(c)(2) for State section 404 programs;

(l) § 124.8—(Statement of basis), except as provided in § 123.98(c)(2) for State section 404 programs;

(m) § 124.9—(Fact sheets), except as provided in § 123.98(c)(2) for State section 404 programs;

(n) § 124.11—(Public notice);

(o) § 124.12—(Public comments and requests for hearings);

(p) § 124.19 (a) and (c)—(Response to comments);

(q) Such other provisions as are specified in §§ 123.39 (RCRA), 123.57 (UIC) and 123.73 (NPDES).

§ 123.9 Compliance evaluation programs.

(a) State programs shall have procedures for receipt, evaluation, recordkeeping and investigation for possible enforcement of all notices and reports required of permittees (or failure to submit such notices and reports).

(b) State programs shall have inspection and surveillance procedures to determine, independent of information supplied by operators and permittees, 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 making comprehensive surveys of all waters and/or activities subject to the State Director's authority in order to identify persons subject to regulation who have failed to comply with permit application or other filing requirements. Any compilation, index, or inventory of such activities shall be made available to the Regional Administrator upon request;

(2) A program for periodic inspections of the activities subject to regulation. These inspections shall:

(i) Determine compliance or noncompliance with issued permit terms and conditions and other program requirements;

(ii) Verify the accuracy of information submitted by permittees in reporting forms and other forms supplying monitoring data; and

(iii) Verify the adequacy of sampling, monitoring and other methods used by permittees to develop that information;

(3) A program for investigating evidence of violations of applicable program and/or permit requirements, which shall apply whether the evidence is indicated in the reports and notifications evaluated under paragraph (a) or by the survey, inspection, and surveillance activities provided in paragraph (b); and

(4) The State's enforcement 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.

(c) The State officers engaged in compliance evaluation activities shall have authority to enter any site or premises subject to regulation or in which records are kept in order to inspect, monitor or otherwise investigate suspected violations of the State program including suspected violations of permit terms and conditions;

[*Comment:* State programs which require a search warrant for entry conform with this requirement.]

(d) Investigatory inspections shall be conducted, samples shall be taken and other information shall be gathered in a manner (e.g., using proper "chain of custody" procedures) that will produce evidence admissible in an enforcement proceeding or in court.

§ 123.10 Enforcement authority.

(a) Any State agency administering a program shall have available the following remedies for violations of the appropriate Act:

(1) To restrain immediately and effectively any person by order or by

suit in State court from engaging in any unauthorized activity which is threatening or causing actual damage to public health or the environment, or, where EPA is authorized to take immediate action, to immediately notify the Regional Administrator by telephone of any unauthorized activity which is threatening or causing actual damage to public health or the environment;

(2) To sue in courts of competent jurisdiction to enjoin any threatened or continuing violation of any program requirement, including permit terms and conditions, without the necessity of a prior revocation of the permit;

[*Comment:* Subparagraph (a)(1) requires that States have a mechanism (e.g., an administrative order or a temporary restraining order) to stop any unauthorized activity endangering public health or the environment, or, alternatively, to notify EPA of the situation so it may act. Where EPA cannot act immediately, e.g., in a State with a fully approved UIC program, the second alternative is not acceptable. Subparagraph (a)(2) merely requires that states have authority to permanently enjoin unauthorized activities.]

(3) To assess or to sue to recover in court civil penalties for the violation by any person of any of the following:

(i) Any applicable permit term or condition;

(ii) Any notice or reporting requirement;

(iii) Any duty to allow inspection, entry, or other monitoring activites; or

(iv) Any rule, regulation, or order issued by the state.

(4) To seek criminal remedies, including fines, for the violation by any person of any applicable program requirement, including violations of permit terms or conditions.

(5) To seek criminal remedies, including fines, against any person who knowingly makes any false statement, representation or certification in any program form or any notice or report, including those 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:* In many States the State Director will be 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 Subpart, he/she should have power to request that any of the above actions be brought.]

(b)(1) The maximum civil penalties and criminal fines that can be sought by the state under subparagraphs (a)(3), (4) and (5) of this section shall be at least the same as the maximum amounts that can be sought by the EPA under the appropriate Act. The maximum civil penalty or criminal fine shall be assessable for each instance of violation and, if the violation is continuous, shall be assessable up to the maximum amount for each day of violation.

[*Comment:* The Agency welcomes comments on this requirement. In particular, EPA is interested in determining whether there are any State statutes which meet all the requirements of ths Part except the above subparagraph. Any State which believes this to be the case should, in addition, notify EPA of what, if any, criminal remedies are provided for under State law.]

(2) The burden of proof and degree of knowledge or intent required under state law for establishing violations under subparagraphs (a)(3), (4) and (5) shall be no greater than the burden of proof or degree of knowledge or intent EPA must provide when it brings an action under the appropriate Act;

[*Comments:* (1) For example, this requirement is not met if State law includes mental state as an element of proof for civil violations.

(2) Under CWA the Agency must establish that a violation was negligent or willful to maintain a criminal action. Under RCRA the degree of criminal intent for EPA prosecution is "knowingly" and under UIC "willful." Criminal prosecution under the State program shall require no greater burden of proof than that for EPA prosecution.]

(c) Any civil penalty assessed, sought or agreed upon by the State Director under subparagraph (a)(3) 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 in establishing the underlying violation(s) in such litigation. In the event that such a civil penalty, together with the costs of expeditious compliance, would be so severely disproportionate to the resources of the violator as to jeopardize continuance in business, the payment of the penalty may be deferred or the penalty may be forgiven in whole or part, as circumstances may warrant.

For a violation resulting from failure to meet a statutory or final permit compliance 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 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, definance, 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; and 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).

[*Comment:* In addition to the above, the State may have other enforcement remedies. The following enforcement options, while not mandatory, are highly recommended:

(i) Procedures for assessment by the State for the costs of an investigation, inspection, or monitoring survey which led to the establishment of the violation;

(ii) Procedures which enable the State to assess or to sue any persons responsible for the unauthorized activities for any expenses incurred by the State in removing, correcting, or terminating any adverse effects upon the human health and the environment resulting from the unauthorized activity, whether or not accidental;

(iii) Procedures which enable the State to sue for compensation for any loss or destruction of wildlife, fish or aquatic life, and for any other damages caused by unauthorized activity, either for the State for any residents of the State who are directly aggrieved by the unauthorized activity, or both; and

(iv) Procedures for the administrative assessment of penalties by the Director.]

§ 123.11 Progress reports.

States with interim authorization under RCRA (see § 123.32) and States listed as needing a UIC program (see § 123.51) shall submit information every six months in accordance with § 123.30 (RCRA) and § 123.55 (UIC) on the status and progress of State efforts to obtain approval.

§ 123.12 Approval process.

The process for EPA approval of State programs is set out in §§ 123.40 (RCRA), 123.58 (UIC), 123.83 (NPDES) and 123.104 (404).

§ 123.13 Procedure for revision of State 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 shall keep EPA fully informed of any proposed modifications to its basic statutory or regulatory authority, 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 such other documents as are necessary under the circumstances.

(2) Whenever EPA determines that the proposed program modification(s) is substantial, the Agency shall issue public notice and provide an opportunity to comment for a period of at least 30 days. The public notice shall be mailed to interested persons and shall be published in enough of the largest newspapers in the State to provide Statewide coverage. The public notice shall summarize the proposed modifications and provide for the opportunity to request a public hearing. Such 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 any substantial modification shall be published in the Federal Register. Non-substantial program modifications may be approved by a lettter from the Agency.

[*Comment:* The Administrator is expected to delegate his or her authority in this regard to the Regional Administrator. The Regional Administrator's action would, however, be subject to review by EPA Headquarters.]

(c) Approved State programs 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. If such change affects the State's ability to meet the requirements of this Part, 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) Whenever the Administrator has reason to believe that circumstances may have changed with respect to a State program, he may request, and the State shall provide a supplemental Attorney General's Statement, program description, other document or information as necessary.

§ 123.14 Criteria for withdrawal of State programs.

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

(1) Where the State's legal authority no longer meets the requirements of this Part, including:

(i) Failure of the State to promulgate or enact new authorities when necessary; and

(ii) Action by a State legislature or appellate level court striking down or limiting State authorities.

(2) Where the operation of the State program fails to comply with the requirements of this Part, including:

(i) Failure to exercise control over activities required to be regulated under this Part, including failure to issue permits;

(ii) Repeated issuance of permits which do not conform to the requirements of this Part; and

(iii) Failure to comply with the public participation requirements of this Part.

(3) Where the State's enforcement program fails to comply with the requirements of this Part, including:

(i) Failure to act on violations of permits or other program requirements;

(ii) Failure to seek and collect adequate enforcement penalties; and

(iii) Failure to inspect and monitor activities subject to regulation.

(4) Failure to comply with the terms of the Memorandum of Agreement required under § 123.5; and

(5) Such other criteria as provided in the applicable provisions of Subparts B–D.

§ 123.15 Procedures for withdrawal of State programs.

(a) A State with a program approved under this Part may voluntarily transfer program responsibilities required by Federal law to EPA (or to the Secretary in the case of 404 programs) by taking the following actions, or in such other manner as may be agreed upon with the Administrator.

(1) The State shall give the Administrator (and the Secretary in the case of Section 404 programs) 180 days notice of the proposed transfer and shall submit a plan for the orderly transfer of all relevant program information not in the possession of EPA (such as permits, permit files, compliance files, reports, permit applications, etc.) which are necessary for EPA (or the Secretary in the case of section 404 programs) to administer the program.

(2) Within 60 days of receiving the notice and transfer plan, the Administrator (and the Secretary in the case of section 404 programs) shall evaluate the State's transfer plan and shall identify any additional information needed by the Federal Government for program administration and/or identify any other deficiencies in the plan.

(3) At least 30 days before the transfer is to occur the Administrator shall publish notice of the transfer in the Federal Register and in enough of the largest newspapers in the State to provide Statewide coverage, and shall mail notice to all permit holders, permit applicants and other interested persons on appropriate EPA and State mailing lists.

(b) The following procedures apply when the Administrator orders the commencement of proceedings to determine whether to withdraw approval of a State program, other than a UIC program. The process for withdrawing approval of State UIC programs is set out in § 123.59.

(1) *Order.* The Administrator may order the commencement of withdrawal proceedings on his or her own initiative or in response to a petition from an interested person alleging failure of the State to comply with the requirements of this Part or of the appropriate Act as set forth in § 123.14. When the Administrator receives a petition to commence withdrawal proceedings he may conduct an informal investigation of the allegations to determine whether probable cause exists to commence proceedings under this paragraph. The Administrator's order commencing proceedings under this paragraph shall fix a time and place for the commencement of the hearing and shall specify the allegations against the State which are to be considered at the hearing. Within 30 days the State shall admit or deny these allegations in a written answer. The party seeking withdrawal of the State's program shall have the burden of coming forward with the evidence in a proceeding under this paragraph.

(2) *Definitions.* For purposes of this paragraph the definitions of §§ 22.03 (a), (b), (i), (j), and (p) of this Chapter apply in addition to the following:

(i) "Party" means the petitioner, the State, the Agency and any other person whose request to participate as a party is granted.

(ii) "Person" means the Agency, the State and any individual or organization having an interest in the subject matter or the proceeding;

(iii) "Petitioner" means any person whose petition for commencement of withdrawal proceedings has been granted by the Administrator.

(3) *Procedures.* The following provisions of Part 22 of this Chapter are applicable to proceedings under this paragraph:

(i) Section 22.02—(use of number/gender);

(ii) Section 22.04(c)—(authorities of Presiding Officer);

(iii) Section 22.06—(filing/service of rulings and orders);

(iv) Section 22.07 (a) and (b)—*provided,* that the time for commencement of the hearing shall not be extended beyond the date set in the Administrator's order without approval of the Administrator—(computation/extension of time);

(v) Section 22.08—however substitute "order commencing proceedings" for "complaint"—(Ex Parte contacts);

(vi) Section 22.09—(examination of filed documents);

(vii) Section 22.11 (a), (c) and (d), *provided,* motions to intervene must be filed within 15 days from the date the notice of the Administrator's order is first published—(intervention);

(viii) Section 22.16 *provided,* service shall be in accordance with subparagraph (4) of this paragraph, and *provided further,* the words "recommended decision" shall be substituted for the words "initial decision, except as provided in § 22.28" in § 22.16(c),—(motions);

(ix) Section 22.19 (a), (b) and (c)—(prehearing conference);

(x) Section 22.22—(evidence);

(xi) Section 22.23—(objections/offers of proof);

(xii) Section 22.25—(filing the transcript); and

(xiii) Section 22.26—(findings/conclusions).

(4) *Record of proceedings.* (i) The hearing shall be either stenographically reported verbatim or tape recorded, and thereupon transcribed, by an official reporter designated by the Presiding Officer;

(ii) All orders issued by the Presiding Officer, transcripts of testimony, written statements of position, stipulations, exhibits, motions, briefs or other written material of any kind submitted in the hearing shall be a part of the record and shall be available for inspection or copying, upon payment of costs, by the parties or any other persons in the Office of the Hearing Clerk. Inquiries may be made at the office of the Administrative Law Judges, Hearing Clerk, 401 M Street, S.W., Washington, D.C. 20460;

(iii) Upon notice to all parties the Presiding Officer may authorize corrections to the transcript which involve matters of substance;

(iv) An original and two (2) copies of all written submissions to the hearing shall be filed with the Hearing Clerk;

(v) A copy of each such submission shall be served by the person making the submission upon the Presiding Officer and each party of record. Service under this paragraph shall take place by mail or personal delivery;

(vi) 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, time and manner of service and the names of the persons served, certified by the person who made service; and

(vii) The 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.

(5) *Participation by a person not a party.* A person who is not a party may, in the discretion of the Presiding Officer, be permitted to make a limited appearance by making oral or written statement of his position on the issues within such limits and on such conditions as may be fixed by the Presiding Officer, but he may not otherwise participate in the proceeding.

(6) *Rights of parties.* (i) All parties to the proceeding may:

(A) Appear by counsel or other representative in all hearing and pre-hearing proceedings;

(B) Agree to stipulations of facts which shall be made a part of the record.

(7) *Recommended decision.* (i) Within 30 days after the filing of proposed findings and conclusions, the Presiding Officer shall evaluate the record before him, the proposed findings and conclusions and any briefs filed by the parties and shall prepare a recommended decision, and shall certify the entire record, including the recommended decision, to the Administrator.

(ii) Copies of the recommended decision shall be served upon all parties.

(iii) Within 20 days after the certification and filing of the record and recommended decision, all parties may file with the Administrator exceptions to the recommended decision and a brief in support thereof.

(8) *Decision by Administrator.* (i) Within 60 days after the certification of the record and filing of the Presiding Officer's recommended decision, the Administrator shall review the record before him and issue his own decision;

(ii) If the Administrator concludes that the State has administered the program in conformity with the appropriate Act and regulations his decision shall constitute "final agency action" within the meaning of 5 U.S.C. 704.

(iii) If the Administrator concludes that the State has not administered the program in conformity with the appropriate Act he shall list the deficiencies in the program and provide the State a reasonable time, not to exceed 90 days, to take such appropriate corrective action as the Administrator determines necessary.

(iv) Within the time prescribed by the Administrator the State shall take such appropriate corrective action as required by the Administrator and shall file with the Administrator and all parties a statement certified by the State Director that such appropriate corrective action has been taken.

(v) The Administrator may require a further showing in addition to the certified statement that corrective action has been taken.

(vi) If the State fails to take such appropriate corrective action and file a certified statement thereof, the Administrator shall issue a supplementary order withdrawing approval of the State program. If the State takes such appropriate corrective action, the Administrator shall issue a supplementary order stating that approval of authority is not withdrawn.

(vii) The Administrator's supplementary order shall constitute final Agency action within the meaning of 5 U.S.C. 704.

(c) Withdrawal of authorization under this section and the appropriate Act does not relieve any person from complying with the requirements of State law.

§ 123.16 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 submit that claim to EPA when providing information under this Part. 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 from a State information 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.

§ 123.17 Coordination with other programs.

(a) Initial issuance of State permits under this Part may be coordinated whenever possible and appropriate in timing and procedure with initial issuance of RCRA, NPDES, 404 and UIC permits whether they are controlled by

the State or EPA. If steps are taken to accomplish this coordination, they shall be addressed in the Memorandum of Agreement.

(b) The State director of any approved program which may affect the planning for and development of hazardous waste management facilities and practices shall consult and coordinate with agencies designated under section 4006(b) of RCRA as responsible for the development and implementation of State solid waste management plans under section 40002(b) of RCRA (40 CFR Part 256, proposed at 43 FR 38534–38546, August 28, 1978).

Subpart B—Additional Requirements for State Hazardous Waste Programs

§ 123.31 Purpose and scope.

This subpart describes additional substantive and procedural requirements for State hazardous waste programs under section 3006 of RCRA, and additional features of EPA's review of State hazardous waste programs. In case of any inconsistency between this Subpart and Subpart A, this Subpart is controlling.

§ 123.32 Interim authorization.

(a) Interim authorization may be granted only for the 24 months beginning on the date six months after the date of promulgation of regulations under section 3001 of RCRA at 40 CFR 250, Subpart A (proposed at 43 FR 58954, December 18, 1978). The Administator shall grant interim authorization under section 3006(c) of RCRA if the State's program complies with the requirements of Subparts A and B of this Part (except as provided in paragraph (b)), and the State:

(1) Controls by permit system at least on-site or off-site hazardous waste disposal facilities. The legislative authority to meet this requirement shall be effective no later than 90 days after the date of promulgation of 40 CFR 250, Subpart A, (proposed at 43 FR 58954–58968, December 18, 1978);

(2) Commits adequate resources, and has the administrative capability to process permits and conduct an effective enforcement program, including a program for compliance evaluation.

(b) To obtain interim authorization States need to show compliance with Subparts A and B of this Part, except that they need only show substantial compliance with §§ 123.8, 123.10 and 123.39(a). States need not comply with §§ 123.33 and 123.39 (b), (c) and (d).

[*Comment:* A program to control hazardous waste treatment or storage facilities is desirable but is not required for interim authorization. Note, however, that States within interim authorization which have the necessary authorities in existence to implement a manifest system and/or control of treatment and/or storage facilities *must do so.*]

§ 123.33 Authorization.

(a) The Administrator will not grant authorization under section 3006(b) of RCRA to any State hazardous waste program until after the date of promulgation of regulations under section 3001 of RCRA at 40 CFR 250, Subpart A (proposed at 43 FR 58954–58968, December 18, 1978), or of this Part, whichever is later.

(b) No partial programs will be approved. A State program must comply with all the requirements of Subparts A and B of this Part in order to obtain the approval of the Administrator.

(c) In order to obtain approval, a State program must be consistent with the Federal program and State programs applicable in other States. For purposes of this paragraph, the phrase "State programs applicable in other States" refers only to those hazardous waste programs which have received authorization under this Part. Any aspect of the State program which restricts, impedes, or operates as a ban on the free movement across the State border of hazardous wastes from or to other States for treatment, storage or disposal at facilities having hazardous waste permits under the Federal or an approved State program may be deemed inconsistent for purposes of this paragraph.

§ 123.34 Program description.

The State's program description shall meet the requirements of § 123.4 and include the following:

(a) In the case of a submission for interim authorization the State's program description shall contain the following:

(1) A general description and estimate of:

(i) The number, types and relative sizes of activities to be regulated by the State during the interim authorization period; and

(ii) If available, the total quantity of hazardous wastes expected to be disposed of annually from both in-State and out-of-State sources.

(2) An "authorization plan" which shall describe the additions or modifications necessary to the State program to qualify for authorization under this Part by the end of the interim authorization period. This plan shall include a schedule which the State proposes to achieve those additions or modifications, and shall describe the nature of and schedules for any changes in State legal authority, resource levels, the permit system and the surveillance and enforcement program which will be necessary during the interim authorization period in order to enable the State to become eligible for authorization.

(b) In the case of a submission for authorization, the State's program description shall include:

(1) A description of the State manifest system.

(2) A description of the types and relative sizes of regulated activities, including an estimate of the number of the following:

(i) Generators;

(ii) Transporters; and

(iii) On- and off-site storage, treatment and disposal facilities which must file for or have been issued a State permit.

(3) If available, an estimate of the annual quantities of hazardous wastes:

(i) Generated within the State;

(ii) Transported into or out of the State; and

(iii) Stored, treated, or disposed of: (A) on-site; and (B) off-site.

(c) Where more than one agency within a State has responsibility for administering the State program, an identification of a "lead agency" and a description of how the State agencies will coordinate their activities.

(d) The State's program description may include such other matters as the State deems relevant.

[*Comment:* A State's past performance in responding to situations involving hazardous waste which may present an endangerment to health or the environment will be considered by EPA in deciding whether to approve its hazardous waste programs.]

§ 123.35 Attorney General's statement for interim authorization.

In the case of a submission for interim authorization, the Attorney General's Statement shall certify that the State has legal authority to implement the program (see, § 123.32) and that the authorization plan (see § 123.34(a)(2)), if carried out, would provide the State with the legal authority to meet the requirements for authorization.

§ 123.36 Progress reports.

In accordance with the reporting requirement of § 123.11, the State Director of a State with interim authorization shall submit a semi-annual progress report to the EPA Regional Administrator within four weeks of the date six months after the date of conferral of interim authorization status, and at six month intervals thereafter

until the expiration of interim authorization. Such reports shall briefly summarize, in a manner and form prescribed by the Administrator, the State's compliance in meeting the requirements of the authorization plan, the reasons and proposed remedies for any delay in meeting milestones, and the anticipated problems and solutions for the next reporting period.

§ 123.37 Memorandum of Agreement.

In addition to the requirements of § 123.6, the Memorandum of Agreement shall include provisions on the following:

(a) The Regional Administrator or his designee may conduct inspections of all major HWM facilities in each Federal fiscal year for which the State has received interim authorization or authorization. The Regional Administrator and the State Director may agree to limitations regarding inspections of non-major HWM facilities, generators and transporters.

(b) The State Director shall agree to forward to the Regional Administrator copies of draft permits and permit applications for all major HWM facilities for review and comment. The Regional Administrator and the State Director may agree to limitations regarding review and comment of draft permits and/or permit applications for non-major HWM facilities.

(c) No limitation on EPA inspection of non-major HWM facilities, generators and transporters under paragraph (a), shall restrict EPA's right to inspect any HWM facility, generator or transporter it has cause to believe is not in compliance with RCRA; however, before conducting an inspection, EPA will normally allow the State a reasonable opportunity to conduct a compliance evalution inspection.

[*Comment:* The inspections conducted pursuant to paragraph (a) are intended to be routine compliance evaluation surveys. Except for major HWM facilities, EPA may agree to limit these routine inspections. However, paragraph (c) provides that EPA may inspect any facility, generator or transporter which the Agency has cause to believe is violating RCRA after affording the State the opportunity to investigate the situation.]

§ 123.38 EPA review of State permits.

(a) The Regional Administrator may comment on permit applications and draft permits within the time provided in the Memorandum of Agreement.

(b) Where a comment indicates that EPA believes issuance of the permit would be inconsistent with RCRA or regulations promulgated thereunder, it shall set forth:

(1) A statement of the reasons for the comment (including the section of RCRA or regulations promulgated thereunder that support the comment); and

(2) The actions that should be taken by the State Director in order to address the comments (including the terms and conditions which the permit would include if it were issued by the Regional Administraor).

(c) The Regional Administrator shall withdraw such a comment if satisfied that the State met or refuted his or her concerns.

§ 123.39 Operational requirements.

(a) In addition to meeting the requirements of § 123.8, any State hazardour waste permit program must have legal authority to implement each of the following provisions and shall be administered in accordance with each of the following provisions:

(1) Section 122.23—(Application for a permit);

(2) Section 122.24–(Establishing permit terms and conditions); and

(3) Section 122.27—(Reporting).

(b) State hazardous waste programs must have legal authority to control the facilities and activites covered by §§ 122.25 (special HWM facility permits), 122.26 (permits by rule), and 122.28 (emergency authorizations). States may choose to regulate these facilities and activities in the same manner as EPA under §§ 122.25, 122.26 and 122.28 or in a more stringent manner.

[*Comment:* An example of more stringent control would be the issuance of an individual permit rather than to authorize the activity by rule.]

(c) Any State program shall provide a degree of control over the generation and transportation of hazardous wastes equivalent to 40 CFR Part 250, Subparts B and C (proposed at 43 FR 58969, December 18, 1978, and 43 FR 18506. April 28, 1978, respectively), and shall include the management of manifests involving both intrastate and interstate transportation of hazardous waste. States shall take such measures as may be appropriate to ensure that interstate shipments of hazardous wastes are sent to and arrive at permitted HWM facilities. States must use the manifest format published by the Administrator in the Federal Register (40 CFR 250.22(h), proposed at 43 FR 58977 and 58980), but may supplement that format as appropriate to meet specific requirements or needs.

(d) The State process for identification and/or listing of hazardous waste and the standards applicable to owners and operators of hazardous waste storage, treatement and disposal facilities shall provide a degree of control equivalent to 40 CFR 250, Subpart A and D (proposed at 43 FR 58954–58968 and 58994–59022 respectively, December 18, 1978).

[*Comment:* Section 3006(b) does not require State programs to be identical to EPA's program, but only "equivalent." These regulations identify what is necessary for a program to be considered "equivalent" to the Federal program, and provide the State a degree of flexibility within the basic framework. The degree of flexibility accorded to States has been carefully set out in the regulations thenselves. A program will be considered "equivalent" only if it meets all applicable requirements of Part 123.

To meet the requirements of this Part, States need not use the same language or structure as RCRA and its regulations. However, where allowable under State law, EPA encourage States to incorporate Federal requirements by reference.

The proposed regulations of 40 CFR Part 250 indicate, to an extent, certain requirements for State programs which are necessary in order to be deemed "equivalent." For example, 40 CFR 250.10(c), advises States that in order to be deemed equivalent "their programs [must] contain standards and procedures which identify as hazardous at least the same universe of wastes defined as hazardous" by EPA. In addition, the Agency is considering several alternative approaches for systematically judging equivalency with the 40 CFR Part 250 requirements, including requiring States to directly employ 40 CFR Part 250. For further information and discussion see the preamble to this Part.]

§ 123.40 Approval process.

(a) These regulations identify the procedures by which State Program applications for authorization or interim authorization will be developed and process. Except as exressly provided, each of these requirements apply both to requests for authorization and for interim authorization.

(b) Prior to submitting an application to EPA for approval of a State program, the State shall issue public notice of its intent to seek program approval from EPA. This public notice shall:

(1) Be circulated in a manner calculated to attract the attention of interested persons including:

(i) Publication in enough of the largest newspapers in the State to attract Statewide attention; and

(ii) Mailing to persons on the State agency mailing list and to any other persons whom the agency has reason to believe are interested;

(2) Indicate when and where the State's proposed submission may be reviewed by the public or discussed with agency officials in such

informational public meetings as the agency may choose to hold;

(3) Indicate the cost of obtaining a copy of the submission;

(4) Provide for a comment period of not less than 30 days during which interested members of the public can express their views on the proposed program;

(5) Provide that a public hearing will be held by the State or EPA if sufficient public interest is shown or, alternatively, schedule such a public hearing;

(i) Any public hearing to be held by the State on its application for authorization shall be scheduled no earlier than 30 days after the notice of hearing is published;

(ii) The State is not required to hold a separate public hearing on its application for interim authorization. If the State declines to hold a hearing, the State shall state in its notice of application that a public hearing will be held by EPA if sufficient public interest is shown. The State shall participate in any public hearing held by EPA in lieu of a State hearing (see § 123.40(e) (1) and (2));

(6) Indicate what type of authorization the State will seek and briefly outline the fundamental aspects of the State program and, where interim authorization is sought, of the authorization plan; and

(7) Indicate who an interested member of the public should contact with any questions.

(c) If the proposed State program is substantially modified after the public comment period provided in paragraph (b)(4) of this section, the State shall, prior to submitting its program to the Administrator, provide the opportunity for further public comment in accordance with the procedures of paragraph (b) of this section, *provided* that the opportunity for further public comment may be limited to those portions of the State's application which have been changed since the prior public notice.

(d) After complying with the requirements of (b) and (c) above the State may submit, in accordance with § 123.3, a proposed program to EPA for approval. The program submission shall include copies of all written comments received by the State, a transcript or recording of any public hearing which was held by the State and a responsiveness summary which identifies the public participation activities conducted, describes the matter presented to the public, summarizes significant comments received and responds to these comments, including explanations on what the State has done to accommodate these comments.

(e) Within ninety days from the date of receipt of a complete program submission, the Administrator shall:

(1) Make a tentative determination as to whether or not he expects to grant authorization to the State program or issue notice, in accordance with the procedures of paragraph (b) of this section, of a public hearing on the State's application for interim authorization. If the Administrator indicates that he may not approve the State program he shall include a general statement of his areas of concern. The Administrator shall give notice of this tentative determination in the Federal Register and in accordance with subparagraph (b)(1) of this Section;

(2) Schedule a public hearing to be held by EPA no earlier than 30 days after notice of the tentative determination of authorization or of a public hearing on interim authorization, *provided*, that if public interest in a hearing is not expressed, the hearing may be cancelled if a statement to this effect is included in the public notice;

(3) Afford the public 30 days after the notice to comment on the State's submission and the tentative determination; and

(4) Note the availability of the State submission for inspection and copying by the public.

(f) Within ninety days of the notice given pursuant to paragraph (e) of this section, the Administrator shall make a final determination whether or not to approve the State's program taking into account any comments submitted. The Administrator shall give notice of this final determination in the Federal Register and in accordance with subparagraph (b)(1) of this section. If the Administrator determines not to approve the State program, the notification shall include a concise statement of the reasons for this determination.

§ 123.41 Criteria for withdrawal.

In addition to the criteria set forth in § 123.14, any aspect of the State program which restricts, impedes or operates as a ban on the free movement across the State border of hazardous wastes from or to other States for treatment, storage or disposal at facilities having hazardous waste permits under an approved State or Federal program constitutes grounds for withdrawal of authorization.

Subpart C—Additional Requirements for State Underground Injection Control Programs

§ 123.51 Purpose and scope.

(a) This Subpart describes additional substantive and procedural requirements for State UIC programs authorized under sections 1421 and 1422 of SDWA. In case of any inconsistency between this Subpart and Subpart A, this Subpart is controlling.

(b) Each State listed in the Federal Register under section 1422(a) of SWDA shall submit to the Administrator a proposed State UIC program complying with § 123.3 of this Part within 270 days of the date of promulgation of these regulations or within 270 days of the date of listing under section 1422(a) of SDWA, whichever is later. The Administrator may, for good cause, extend the date for submission of a proposed State UIC program for up to an additional 270 days.

(c) EPA will establish a UIC program in any State which does not comply with paragraph (b) of this section. EPA will continue to operate a UIC program in such a State until the State receives approval of a UIC program in accordance with the requirements of this Part.

(d) Any State which desires to operate a UIC program but which is not listed by the Administrator under section 1422(a) of the SDWA may, nonetheless, make a submission for program approval in accordance with the requirements of this Part. In addition to meeting the requirements of § 123.3 of this Part, such a submission shall contain a petition from the Governor of the State requesting that the State be listed.

[*Comment:* States which are authorized to administer the NPDES permit program under section 402 of CWA are encouraged to rely on existing statutory authority, to the extent possible, in developing a State UIC program. Section 402(b)(1)(D) of CWA 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 existing statutory authority to regulate well disposal which satisfies the requirements of the UIC program. Note, however, that CWA 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.

Unlisted States are also encouraged to seek UIC approval prior to listing. If EPA determines that the State's program is fully approvable the State will be listed and approved at the same time.]

(e) Whenever a State UIC program is fully approved by EPA, the State

assumes primary enforcement authority under section 1422(b)(3) of SDWA. EPA retains primary enforcement responsibility whenever the State program is disapproved in whole or in part.

[*Comment:* States with fully approved programs have authority to enforce any violation of the underground injection control program. States which have partially approved programs have authority to enforce any violation of the approved portion. In either case, EPA retains authority to enforce violations of a State underground injection control program, except that, when a State has a fully approved program, EPA will not take enforcement actions without providing prior notice to the State and otherwise complying with section 1423 of SDWA.]

(f)(1) If a State can demonstrate that there are no underground injections within the State for one or more types of injection wells subject to SDWA, the State need not submit a program to regulate such injections. However, the State shall demonstrate adequate legal authority to initiate control over such injections should they occur in the future.

(2) State UIC programs may be approved in part or in full within the discretion of the Administration. (See § 122.3, Definition of "Partial Authorization").

§ 123.52 Program description.

(a) In addition to the requirements of § 123.4, the State's program description shall include:

(1) A State permit plan in accordance with paragraph (b) of this section. This permit plan satisfies the requirements of § 123.4(b)(4);

(2) A detailed description of how the State will implement the authorization of underground injection by rule in accordance with § 122.35, including the procedures which will be followed in promulgating such rules.

(3) a brief description and schedule for the State's program to establish and maintain a current inventory of injection wells which are required to be permitted under State law;

(4) A description of aquifers or parts thereof which the State has determined are underground sources of drinking water under § 122.33, a detailed description of the aquifers, or parts thereof, not designated, and a summary of the data upon which the exemptions are based.

(5) A description and schedule for the State's program to establish an inventory of Class V wells, to prohibit Class IV wells and to assess the need for a program to regulate Class V wells.

(b) The State Director shall develop a permit plan which assures that all injection wells within the State, except those authorized by rule, are issued a UIC permit as expeditiously as possible but no later than 5 years after approval of the State UIC program. The permit plan shall:

(1) Describe the State's priorities for issuing permits including the number of permits by class of injectors which will be issued each year over the first five years of operation of the program;

(2) Describe how the State will implement the mechanical integrity testing requirements of § 146.08 including the frequency of testing that will be required and the number of tests that will be reviewed by the State each year; and

(3) Describe how the State will notify injectors of the requirement for a permit and when to file permit applications (i.e, by individual notice, rule, regulation, or statute). The notice required by this paragraph shall clearly establish application filing deadlines as soon as possible but not later than 4 years after program approval for each injection well which must receive a permit.

(c) In determining the priorities required by subparagraphs (b)(1) and (b)(2) the Director shall consider the following factors:

(1) Injection wells known to be contaminating underground sources of drinking water;

(2) Injection wells known to be injecting fluids containing toxic or hazardous contaminants;

(3) Likelihood of contamination of underground sources of drinking water;

(4) Potentially affected population;

(5) Injection wells violating existing State requirements;

(6) Coordination with the issuance of permits required by other State or Federal permits programs;

(7) Age and depth of the injection well; and

(8) Expiration dates of existing State permits, if any.

§ 123.53 Attorney General's Statement.

In addition to the requirements of § 123.5, the State's Attorney General's Statement shall include an analysis of the legal authority for and enforceability of any rule prohibiting or authorizing well injections without a permit.

§ 123.54 Requirement to obtain a permit.

The State may authorize certain well injections by rule rather than by permit. Any authorization by rule shall comply with § 122.35.

§ 123.55 Progress reports.

In accordance with § 123.11, each State listed by the Administrator as needing a UIC program (see § 123.51(b)) shall submit to the Administrator six months after the date of promulgation of these regulations, or six months after the date of listing, whichever is later, a report describing the State's progress in developing a UIC program. If the Administrator extends the time for submission of a UIC program an additional 270 days, pursuant to § 123.51(b), the State shall submit a second report six months after the first report is due. The report shall be in a manner and form prescribed by the Administrator.

§ 123.56 Annual report.

(a) Each approved State shall submit each year a written report to the Administrator (in a manner and form prescribed by the Administrator) consisting of:

(1) The noncompliance information required under § 122.15(b) including a summary of violations during the preceding year;

(2) A summary of enforcement actions taken by the State Director including actions taken to enforce the ban on Class IV wells;

(3) A detailed description of the State's implementation of its program;

(4) Any necessary changes to the program description and the permit plan which more accurately reflect the State's progress in issuing permits;

(5) A list of all permits issued where an alternative for tubing and packer has been approved by the State Director under 40 CFR § 146.12;

(6) An updated inventory of active underground injection operations in the State; and

(7) A summary of all surface water and ground water contamination cases which may have been caused or affected by underground injection.

(b) In addition to the requirements of paragraph (a) of this section the State Director shall provide the Administrator within three months of the completion of the first year of State operation of the UIC program a supplemental report containing information on remedial actions taken by operators of Class II wells based upon these regulations (including information on the results of mechanical integrity testing and on evaluations of construction of nearby wells located within the area of review). The supplemental report required by this paragraph may be submitted along with the annual report if the time for reporting under this paragraph coincides with that of paragraph (a).

[*Comment:* EPA will issue further guidance on the preparation of the "mid-course assessment" required under this paragraph.]

§ 123.57 Operational requirements.

In addition to the requirements of § 123.8, State UIC programs shall have legal authority to implement each of the following provisions and shall be administered in accordance with each of the following provisions:

(a) Section 122.33—(Designation of aquifers);

(b) Section 122.35—(Authorization by rule);

(c) Section 122.36—(Authorization by permit);

(d) Section 122.37—(Area permits);

(e) Section 122.38—(Corrective action);

(f) Section 122.39—(General prohibition against movement of fluids into underground sources of drinking water);

(g) Section 122.42—(Permit terms);

(h) Section 122.43—(Reporting);

(i) Section 122.44—(Special requirements for wells managing hazardous wastes);

(j) Section 122.45—(Elimination of Class IV); and

(k) Section 122.46—(Inventory of Class V).

§ 123.58 Program approval process.

(a) Prior to submitting an application to the Administrator for approval of a State UIC program, the State shall issue public notice of its intent to adopt a UIC program and to seek program approval from EPA. This public notice shall:

(1) Be circulated in a manner calculated to attract the attention of interested persons. Circulation of the public notice shall include publication in enough of the largest newspapers in the State to attract Statewide attention and mailing to persons on appropriate State mailing lists;

(2) Indicate when and where the State's proposed program submission may be reviewed by the public;

(3) Indicate the cost of obtaining a copy of the submission;

(4) Provide for a comment period of not less than 30 days during which interested persons can comment on the proposed UIC program;

(5) Schedule a public hearing on the State program for no less than 30 days after notice of the hearing is published;

(6) Briefly outline the fundamental aspects of the State UIC program; and

(7) Indicate whom an interested member of the public should contact for further information.

(b) After complying with the requirements of paragraph (a) above any State may submit a proposed UIC program under section 1422 of SDWA and § 123.3 of this Part to EPA for approval. In accordance with § 123.3(d)(8), such a submission shall include a showing of compliance with paragraph (a) of this section including a responsiveness summary which identifies the public participation activities conducted, describes the matters presented to the public, summarizes significant comments received and responds to these comments.

(c) Upon determining that a State's submission for UIC program approval is complete the Administrator shall issue public notice of the submission, provide an opportunity to comment, and schedule a public hearing. This notice may specify that a public hearing will not be held unless sufficient public interest is expressed.

(d) Within 90 days of the receipt of a complete submission (as provided in § 123.3) or material amendment thereto, the Administrator shall by rule, either fully approve, disapprove, or approve in part the State's UIC program.

§ 123.59 Withdrawal process.

Approval of a State UIC program may be withdrawn and a Federal program established in its place where the Administrator determines, after holding a public hearing, that the State program is not in compliance with the requirements of SDWA and this Part.

(a) *Notice to State of Public Hearing.* If the Administrator has cause to believe that a State is not administering or enforcing its authorized program in compliance with the requirements of SDWA and this Part, he or she shall inform the State by registered mail of the specific areas of alleged noncompliance. If the State demonstrates to the Administrator within 30 days of such notification that the State program is in compliance, the Administrator shall take no further action toward withdrawal and shall so notify the State by registered mail.

(b) *Public Hearing.* If the State has not demonstrated its compliance to the satisfaction of the Administrator, within 30 days after notification, the Administrator shall inform the State Director and schedule a public hearing to discuss withdrawal of the State program. This hearing shall be convened not less than 60 days nor more than 75 days following the publication of the notice of the hearing. Notice of the hearing shall identify the Administrator's concerns. All interested parties shall be given opportunity to present written and oral testimony on the State's program at the public hearing.

(c) *Notice to State of Findings.* Where the Administrator finds after the public hearing that the State is not in compliance, he or she shall notify the State by registered mail of the specific deficiencies in the State program and of necessary remedial actions. Within 90 days of receipt of the above letter, the State shall either carry out the required remedial action or the Administrator shall withdraw program approval. If the State carries out the remedial action or, as a result of the hearing is found to be in compliance, the Administrator shall so notify the State by registered mail and conclude the withdrawal proceedings.

§ 123.60 State UIC program revisions.

Within 270 days of any amendment to Parts 122, 123, 124 or 146 which revises or adds any requirement respecting an approved State UIC program, the State shall submit such information as is specified by EPA showing that the State UIC program meets the revised or added requirement. Failure by the State to comply with this provision is cause for disapproval or partial disapproval of the State program.

Subpart D—Additional Requirements for State Programs Under the National Pollutant Discharge Elimination System

§ 123.71 Purpose and scope.

(a) This subpart describes additional requirements for State NPDES programs under sections 318, 402 and 405 of CWA. A State NPDES program will not be approved by the Administrator under section 402 of CWA unless it has authority to control the discharges specified in sections 318 and 405(a) of CWA. Permit programs under sections 318 and 405 will not be approved independent of a section 402 permit program.

(b) These regulations are promulgated under the authority of sections 304(i) and 101(e) of CWA, and implement the requirements of those sections.

(c) No partial NPDES programs will be approved by EPA. The State program must regulate (except as provided in § 122.63) all point source discharges of pollutants, discharges into aquaculture projects and disposal of sewage sludge which results in any pollutant from such sludge entering into any waters of the United States within the State's jurisdiction. 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.

[*Comment:* 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.]

(d) After program approval EPA shall retain jurisdiction over any permits (including general permits) which it has issued 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 may, when ageed to by the State, continue to retain jurisdiction until the matter is resolved.

(e) In case of any inconsistency between this Subpart and Subpart A, this Subpart is controlling.

§ 123.72 Memorandum of Agreement.

(a) In addition to the requirements of § 123.6, the Memorandum of Agreement between the Regional Administrator and the State Director shall contain provisions specifying the extent to which EPA review of State-issued permits will be waived under sections 402 (d)(3), (e) or (f) of CWA. While the Regional Administrator and the State may agree to waive EPA review of certain "classes or categories" or permits, no waiver of review may be granted for the following discharges:

(1) Discharges into the territorial sea or contiguous zone;

(2) Discharges which may affect the waters of a State other than the one in which the discharge originates;

(3) Proposed general permits (see § 122.82);

(4) Discharges from publicly owned treatment works with a daily average discharge exceeding 1 million gallons per day;

(5) Discharges of uncontaminated cooling water with a daily average discharge exceeding 500 million gallons per day;

(6) Discharges from any major discharger or from any discharger within any of the 21 industrial categories listed in the Appendix A to Part 122;

(7) Discharges from other sources with a daily average discharge exceeding 0.5 (one half) million gallons per day, except that EPA review of permits for discharges on non-process wastewater may be waived, regardless of flow, with the prior concurrence of the EPA Deputy Assistant Administrator for Water Enforcement;

(b) Whenever a waiver is granted under paragraph (a), a statement that the regional Administrator retains the right to terminate the waiver, in whole or in part, at any time by sending the 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.

§ 123.73 Operational requirements.

In addition to the requirements of § 123.8, State NPDES programs shall have legal authority to implement each of the following provisions and must be administered in conformance with each of the following provisions:

(a) Section 122.64 (e) and (f)—(Variance applications);

(b) Section 122.66—(Duration of permits);

(c) Section 122.67—(Prohibitions);

(d) Section 122.68—(Conditions applicable to all permits);

(e) Section 122.69—(Applicable limitations, standards, prohibitions and conditions);

(f) Section 122.70—(Calculation and specification of effluent limitations and standards);

(g) Section 122.71—(Recording/reporting of monitoring results);

(h) Section 122.72—(Non compliance reporting);

(i) Section 122.73—(Modifications);

(j) Section 122.74—(Permit termination);

(k) Section 122.75—(Disposal into wells, etc.);

(l) Section 122.76—(Concentrated animal feeding operations);

(m) Section 122.77—(Aquatic animal production facilities);

(n) Section 122.78—(Aquaculture projects);

(o) Section 122.79—(Separate storm sewers);

(p) Section 122.80—(Silviculture);

(q) Section 122.82—(General Permits), *provided* States are not required to implement the general permit program under § 122.82. If a State chooses to issue general permits, such action is subject to the following conditions:

(1) Any general permit shall be issued in accordance with § 122.82;

(2) Prior to, or at the time of proposal of any general permit, the State Attorney General (or other legal officer as appropriate, see § 123.5) shall certify that the State has adequate legal authority to issue and enforce general permits;

(3) EPA shall have 90 days to review any proposed general permit; and

(4) 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 enforcement Division Director;

(r) Section 124.56—(Fact sheets);

(s) Section 124.58—(Public notice);

(t) Section 124.59—(Comments from government agencies);

(u) Subparts A, B, C, D, H, I, J, K and L of Part 125; and

(v) 40 CFR Parts 129, 133 and Subchapter N.

§ 123.74 Control of disposal of pollutants into wells.

State NPDES 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 issuing permits for such discharges with appropriate permit terms and conditions.

[*Comment:* States which are authorized to administer the NPDES permit program under section 402 of CWA are encouraged to rely on existing statutory authority, to the extent possible, in developing a State UIC program under section 1422 of SDWA. Section 402(b)(1)(D) of CWA 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 existing statutory authority to regulate well disposal which satisfies the requirements of the UIC program. Note, however, that CWA 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.]

§ 123.75 Inspections, monitoring, entry and reporting.

Any State NPDES 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 CWA.

§ 123.76 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. The Memorandum of Agreement under § 123.6 shall provide for the following, in such manner as the State Director and the Regional Administrator shall agree:

(a) Prompt transmission to the State Director from the Regional Administrator 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 which the Regional Administrator identifies as incomplete or otherwise deficient until the State Director receives information sufficient to correct the deficiency.

§ 123.77 Transmission of information to EPA.

(a) Each State agency administering a permit program shall transmit to the Regional Administrator copies of permit program forms and any other relevant information to the extent and in the manner agreed to by the State Director and the Regional Administrator in the Memorandum of Agreement and not inconsistent with this Part. 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 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. For proposed permits the State program shall provide 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 § 122.73(q)), may comment upon, object to, or make recommendations with respect to the proposed permit. A copy of any comment, objection or recommendation shall be sent to the permit applicant by the Regional Administrator. In the case of general permits, EPA shall have 90 days to comment upon, object to or make recommendations with respect to the proposed permit.

[*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.]

(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) The State program shall provide for transmission by the State Director to EPA of:

(1) Notices from publicly owned treatment works under § 122.68 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 a summary of any significant comments presented at any hearing on any draft permit 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 § 122.72.

(c) Within the time period agreed upon in the Memorandum of Agreement, (or 90 days in the case of proposed general permits), the Regional Administrator (or, where appropriate, the EPA Deputy Assistant Administrator for Water Enforcement) pursuant to the right to object provided in CWA and § 123.78, may comment upon, object to, or make recommendations on any proposed permit.

(d) The Regional Administrator may, by agreement with the State Director in the Memorandum of Agreement (see § 123.72) waive the right to review, object to, or comment upon 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 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 CWA or of this Part.

§ 123.78 Objections to proposed 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 subparagraph (2) of this paragraph 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 (1), or in the case of general permits within 90 days after 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 also set forth in writing and transmit to the State Director:

(i) A statement of the reasons for the objection (including the section of CWA 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 the Regional Administrator).

[*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 subparagraph (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 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 CWA. 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 to the Administrator is required under section 402(b)(5) of CWA, 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 CWA 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 CWA or any guidelines or regulations under CWA, 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 CWA, by the guidelines and regulations issued under CWA, or by the proposed permit;

(6) In the case of any proposed permit with respect to which applicable effluent standards and limitations under sections 301, 302, 306, 307, 318, 403 and 405 of CWA 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 CWA or of any regulations issued under CWA;

[*Comment:* The provisions of this subparagraph 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 CWA, 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 CWA, or regulations issued under CWA.

(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 § 123.77;

(2) May, if the information provided is inadequate to determine whether the proposed permit meets the guidelines and requirements of CWA, 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 § 123.77, 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 of the record; 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 interstate agency 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 shall provide public notice and hold a public hearing in accordance with the procedures of §§ 124.11 and 124.13 if warranted by significant public interest. A hearing shall be held whenever requested by the State or the interstate agency 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 CWA 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).

§ 123.79 Prohibition.

Any State permit program shall provide that no permit shall be issued when the Regional Administrator has objected in writing under section 402(d) of CWA.

§ 123.80 Compliance evaluation programs.

In addition to the requirements of § 123.9, State compliance evaluation programs shall:

(a) 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 State agency;

(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) Where warranted, a substantive technical evaluation following the initial screening of all permit or grant-related compliance information to determine the appropriate agency response;

(4) The maintenance of a management information system which supports the compliance evaluation activities of this Part.

(b) Provide for inspections of the facilities of all major dischargers (see *Comment* to § 122.72) at least annually.

§ 123.81 Continuing planning process.

Any State permit program shall have an approved continuing planning process under 40 CFR Parts 130 and 131

and shall assure that its approved planning process is at all times consistent with CWA.

§ 123.82 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 2 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 either in the first instance, as modified or reissued, or on appeal.

(2) "Significant portion of income" shall mean 10 percent or more of gross personal income for a calendar year, except that it shall mean 50 percent or more 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.

§ 123.83 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, and in enough of the largest newspapers in the State to attract statewide attention, and shall mail notice to persons known to be interested in such matters, including all people on appropriate State and EPA 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 CWA 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 program he or she shall notify the State and publish notice in the Federal Register. EPA shall suspend the issuance of permits 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.

Subpart E—Additional Requirements for State Programs Under Section 404 of the Clean Water Act

§ 123.91 Purpose and scope.

(a) This Subpart describes additional requirements, both procedural and substantive, for State permit programs under section 404 of the Clean Water Act (regulating discharges of dredged or fill material). Since EPA does not operate the section 404 program, there is no Subpart E to Part 122. Additional permit application and processing requirements applicable to State programs are set out in this Subpart.

(b) These regulations are promulgated under the authority of sections 101(e) and 501(a) of CWA.

(c) No partial section 404 programs will be approved by EPA. Except as provided in § 123.107, the State program must regulate all discharges of dredged or fill material into waters of the United States (as delineated in CWA section 404(g)(1)) within the State's jurisdiction.

(d) After program approval the Secretary shall retain jurisdiction over any permits (including general permits) which he or she has issued unless arrangements have been made with the State in the Memorandum of Agreement under § 123.93 for the State to assume responsibility for these permits. Retention of jurisdiction shall include the processing of any permit appeals, or modification requests; the conduct of inspections, and the receipt and review of self-monitoring reports. If any permit appeal or modification request is not finally resolved when the Federally issued permit expires, the Secretary, upon agreement with the State, may continue to retain jurisdiction until the matter is resolved.

[*Comment:* Under section 404(b)(5) of CWA, States are entitled, after program approval, to administer and enforce general permits issued by the Secretary. If the State chooses not to administer and enforce these permits, the Secretary retains jurisdiction until they expire.]

(e) In case of any inconsistency between this Subpart and Subpart A, Part 122 or Part 124, this Subpart is controlling.

(f) Compliance with a permit issued by a State approved under this Part during its term, including any activity conducted in compliance with a general permit, constitutes compliance for purposes of sections 309 and 505 of CWA, with sections 310, 307 and 403, except for any standard imposed under section 307(a)(5) of CWA.

§ 123.92 Memorandum of Agreement.

(a) In addition to the requirements of § 123.6, the Memorandum of Agreement between the regional Administrator and the State Director shall contain provisions on the scope of the waivers available under sections 404(k) or (l) of CWA. The Regional Administrator and the State, after 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:

(1) Discharges which may affect the waters of a State other than one in which the discharge originates;

(2) Major dischargers;

[*Comment:* EPA will formulate guidance defining what discharges are "major" under this paragraph. Comments are welcome.]

(3) Discharges into critical areas including fish and wildlife sanctuaries, National and historical monuments, wilderness areas and preserves,

National and State parks and the designated critical habitat of threatened or endangered species.

[*Comment:* EPA is considering adding to this list of critical areas. Comments are welcome.]

(4) Proposed general permits; or

(5) Discharges known or suspected to contain toxic pollutants in toxic amounts or hazardous substances in reportable quantities.

(b) Whenever a waiver is granted under paragraph (a), the Memorandum of Agreement shall contain a statement that the Regional Administrator retains the right to terminate the waiver, in whole or in part, at any time by sending the Director written notice of termination. Notwithstanding any waiver, the State shall continue to supply EPA with copies of permit applications, public notices and final permits when requested by EPA. Nothing in this Section shall diminish the Administrator's authority under section 404(c) or the State's obligation under section 404(h)(1)(F) of CWA.

§ 123.93 Memorandum of Agreement with the Secretary.

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 sections 404(g)(1) and (h)(2) of CWA) 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 Rivers and Harbors 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 responsibility for these permits to the State.

[*Comment:* In many instances States will lack the authority to directly administer permits issued by the Federal government. However, procedures may be established to transfer responsibility for these permits. For example, a State could, in one action, issue permits identical to the outstanding Federal permits which could be simultaneously revoked. An individual Corps' permit may be transferred to a State only where the State has the authority to administer and enforce all terms and conditions of the Federal permit.]

(d) Procedures whereby the Secretary will transfer to the State pending section 404 permit applications and other relevant information, as specified in § 123.97.

(e) A provision stating that the State shall 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:* Where an approved State permit program includes coverage of those traditionally navigable waters in which only the Secretary may issue section 404 permits (by virtue of section 404(g)(1) of CWA), the State is strongly encouraged to establish in this MOA, procedures for joint processing of Federal and State permits, including joint public notices and public hearings.]

§ 123.94 Attorney General's Statement.

In addition to the requirements of § 123.5, the State Attorney General's Statement shall contain:

(a) 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.

(b) A certification that upon program approval, the State will have 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:

(1) Authority to apply the criteria contained in 40 CFR Part 230;

(2) 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 (b)(2) is intended to limit the Administrator's authority to take similar actions under section 404(c) of CWA.]

§ 123.95 Program description.

In addition to the requirements of § 123.4, the State's program description shall:

(a) Designate one agency to be responsible for issuing section 404 permits.

(b) Describe how the State section 404 agency will interact with other State and local agencies.

(c) Describe the categories and sizes of discharges of dredged or fill material for which the State Director proposes to issue permits. For each category, the following information shall be given:

(1) An estimate of the number of facilities within each catetgory which must file for a permit; and

(2) An estimate of the number and percent of activities within each category for which the State has already issued a State permit or equivalent document regulating the discharge.

(d) Describe the specific best management practices requirements proposed to be used to satisfy the exemption provisions of section 404(f)(1)(E) of CWA for construction or maintenance of farm roads, forest roads, or temporary roads for moving mining equipment in accordance with § 123.107.

(e) A description of how the State will coordinate its enforcement strategy with that of the Corps of Engineers and EPA.

§ 123.96 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 CWA.

§ 123.97 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 the Secretary. The Memorandum of Agreement under § 123.93 shall provide for the following, in such manner as the State Director and the Secretary shall agree:

(a) Prompt transmission to the State Director from 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 Secretary which the Secretary has identified as incomplete or otherwise deficient until the State Director receives information sufficient to correct the deficiency.

§ 123.98 Transmission of information to EPA.

(a) Each State agency administering a section 404 permit program shall transmit by certified mail to the Regional Administrator, the Corps of Engineers, the U.S. Fish and Wildlife Service, and the National Marine Fisheries Service copies of permit programs 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 under § 123.6. 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. Where State law requires preparation of an environmental impact statement (EIS) or similar process, such EIS or other document shall accompany the permit application when transmitted to the Regional Administrator.

(2) Prompt transmission to the Regional Administrator of notice of every action taken by the State agency related to the consideration of any permit application, including a copy of each proposed permit and any terms, conditions, requirements, or documents which are related to the proposed permit or which affect the authorization of the proposed permit. The State program shall provide:

(i) A period of time (up to 90 days) in which the Regional Administrator may comment upon, object to, or make recommendations with respect to the permit application or the proposed permit. A copy of any comment, objection or recommendation shall be sent to the permit applicant by the Regional Administrator.

[*Comment:* Except as provided in paragraph (c), EPA review is usually restricted to permit applications; however, in some cases the Agency may request the State to prepare a proposed permit.]

(ii) Procedures for action by the State agency following a written objection by the Regional Administrator under section 404(j) of CWA.

(iii) For the 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) Within the time period agreed upon the Memorandum of Agreement, the Regional Administrator, pursuant to the right to object provided in CWA and § 123.99, may comment upon, object to, or make recommendations with respect to any permit application or proposed permit. The Regional Administrator shall notify the State Director of his or her intent to comment upon or object to a permit application or a proposed permit within 30 days of receipt, however, if the State proposes to issue a permit which differs from that described in the permit application such approved permit shall be transmitted for review in accordance with this section and §§ 123.99 and 123.110. The Regional Administrator may notify the State that there is no comment but reserve the right to object based on any new information brought out by the public during the comment period or at a hearing.

(c)(1) For discharges listed in § 123.92(a), State section 404 programs shall comply with the draft permit requirements of §§ 124.6 (a) and (b), 124.8 and 124.9, as provided in § 123.8.

(2) For discharges not listed in § 123.92(a), EPA and public review shall be based on the permit application unless EPA requests the State to prepare a proposed permit under § 123.99(c)(2). For these discharges States need not comply with §§ 124.6 (a) and (b), 124.8 and 124.9.

§ 123.99 Objections to 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 permit. This notification shall set forth in writing the general nature of the objection.

(2) Within 90 days following receipt of a permit application or the proposed permit which has been objected to under subparagraph (1), the Regional Administrator shall also set forth in writing and transmit to the State Director:

(i) A statement of the reason(s) for the objection (including the section of CWA 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 conditions which the permit would include if it were issued by the Regional Administrator).

(3) When the State Director has received an objection to a permit application or proposed permit under this section but has taken the steps required by the Regional Administrator to eliminate the objection, the revised permit shall be transmitted to the Regional Administrator for review. If no further objection is received from the Regional Administrator within 15 days of the receipt of the revised permit, the Director may issue the permit.

(b) Any objection under this section 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;

(2) In the case of any proposed permit for which notification to the Administrator is required under section 404(h)(1)(E) of CWA, 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 formulations of the proposed permit failed in a material respect to comply with procedures required by CWA, regulations and guidelines thereunder or by the Memorandum of Agreement;

(4) Any finding made by the State Director in connection with the proposed permit misinterprets CWA or any guidelines or regulations under CWA, or misapplies them to the facts.

(5) Any provisions of the permit application or 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 water quality standards, required by CWA, by Part 230 guidelines issued under CWA, or by the proposed permit;

(6) In the case of any proposed permit with respect to which applicable standards and limitations 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 CWA; or any regulations issued under CWA;

(7) The information contained in the permit application is insufficient to judge compliance with 40 CFR Part 230; or

(8) Issuance of a permit would in any other respect be outside the requirements of section 404 of CWA, or regulations implementing section 404 of CWA.

(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 §§ 123.98 and 123.110.

(2) Shall, if the information provided is inadequate to determine whether the permit application or proposed permit meets the guidelines and requirements of CWA, 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 or other information that the Regional Administrator determines are necessary for review. This request shall be made within thirty days of receipt of the State submittal under § 123.98. 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. Alternatively, the Regional Administrator, within thirty days of receipt may request the State Director to supplement the application with specified new information (which may include a proposed permit or other information) and resubmit such amended application to EPA and the other Federal agencies under § 123.98. Such amended application (and/or proposed permit) shall be considered a new application for the purposes of Federal and public review procedures.

[*Comment:* It is anticipated that proposed permits will be requested only in exceptional and/or complex cases.]

(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 shall provide public notice and hold a public hearing in accordance with the procedures of §§ 124.12 and 124.13 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, the Assistant Administrator for Water and Waste Management, 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, the Secretary may issue the permit in accordance with the guidelines and regulations of CWA 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.

(h) For purposes of this section any draft permit prepared under § 124.6 shall be considered a proposed permit.

§ 123.100 Prohibitions.

No permit shall be issued by the Director in the following circumstances:

(a) Where the terms or conditions of the permit do not comply with the requirements of CWA, or regulations and guidelines implementing CWA, including the section 404(b)(1) environmental guidelines. (40 CFR Part 230).

(b) Where the Regional Administrator has objected to issuance of the permit under section 404(j) of CWA and where such objection has not been satisfied or resolved.

(c) Where, in the judgment of the Secretary of the Army acting through the Chief of Engineers, anchorage and navigation in or on any of the waters of the United States would be substantially impaired by the discharge.

(d) Where the proposed discharge would be into a defined area for which specification as a disposal site has been prohibited, restricted, denied, or withdrawn by the Administrator under section 404(c) of CWA, or by the State Director, and where such discharge would fail to comply with the Director's actions under those authorities.

§ 123.101 Enforcement authority.

In addition to the requirements of § 123.10, State section 404 programs shall include 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:

(a) Issue a cease and desist or an interim protective order to any person responsible for, or involved in an unauthorized discharge.

(b) Sue in the appropriate State court to immediately restrain any person responsible for, or involved in an unauthorized discharge, and

(c) Immediately notify the Regional Administrator by telephone, and by subsequent written confirmation, of any actual or threatened endangerment to the public health and welfare resulting from any discharge of dredged or fill material.

§ 123.102 Continuing planning process.

Any State permit program shall have an approved continuing planning process under 40 CFR Parts 130 and 131 and shall assure that its approved planning process is at all times consistent with CWA.

§ 123.103 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 2 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 either in the first instance, as modified or reissued, or an appeal.

(2) "Significant portion of income" shall mean 10 percent or more of gross personal income for a calendar year, except that it shall mean 50 percent or more 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 which the recipient does not know the identity of the primary sources of income.

§ 123.104 Approval process.

(a) Within 10 days 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 the State's application in the Federal Register, and in enough of the largest newspapers in the State to attract Statewide attention, and shall 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 CWA 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 CWA as identified in the Memorandum of Agreement between the State and the Secretary (see § 123.93).

(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.

§ 123.105 Applicable conditions and requirements.

In addition to the requirements of § 122.11, each permit issued by the State Director shall provide for and ensure:

(a) That the discharge will be conducted in compliance with the section 404(b)(1) environmental guidelines (40 CFR Part 230), including conditions to ensure that the discharge will be conducted in a manner which minimizes adverse impact upon the physical, chemical, and biological integrity of the waters of the United States.

(b) That if a toxic effluent standard or prohibition for dredged material (including any schedule of compliance specified in such effluent standard or prohibition) is established under section 307(a) of CWA for a toxic pollutant present in the permittee's discharge and that standard or prohibition is more stringent than any limitation upon such pollutant in the permit, the State Director shall modify the permit to conform to the toxic effluent standard or prohibition and so notify the permittee.

(c) That the permit (other than general permits) shall include a detailed sketch, specifying location and boundaries of the proposed discharge site including a limitation of the quantity and type of dredged or fill material which may be discharged at that site. In open water sites, a delination of the disposal site shall be included.

(d) The State Director shall incorporate approved BMPs developed by a Statewide CWA section 208(b)(4)(B) regulatory agency into permits as provided in the agreement described in § 123.110(a)(1). Where BMP's were developed for application in a specific geographic area they shall only be incorporated into permits for that area. Where BMP's are less stringent than the conditions which are necessary to assure compliance with the 40 CFR Part 230, the BMP's shall be supplemented with additional and/or more stringent conditions incorporated into the 404 permit as necessary.

§ 123.106 General permits.

(a) General permits may be issued for activities which are similar in nature, will cause only minimal adverse environmental effects when performed separately, and will have only minimal cumulative adverse affects on the environment. If several activities are grouped in one general permit their similarity should be established when the general permit is proposed.

(b) In addition to the conditions in § 122.11 each general permit issued by the State Director shall include, where applicable, the following conditions:

(1) Conditions specified in § 123.105 (a) and (b);

(2) The maximum quantity and type of material that may be discharged and the maximum extent that an area may be modified by a single operation;

(3) A specification of the activities covered by the general permit with emphasis on unique factors, if present;

(4) Geographic area to which the general permit applies, including a clear description of the type(s) of water(s) (with specific references to wetlands) in which the activity(ies) are permitted;

(5) BMP's necessary to assure that environmental effects will be minimal;

(6) limitations on construction of any structures including the following factors:

(i) Size and type of structure(s) permitted;

(ii) Specifications for conservation and environmental protection, including, to the maximum extent practicable, minimizing impairments to the biological, chemical and physical integrity of the waters of the United States;

(iii) Site restoration after the structure is completed.

(iv) Depth of fill permitted.

(7) Any other conditions deemed necessary by the State Director.

(c) The State Director shall require advance notification by persons or agencies intending to discharge dredged or fill material under a general permit, including the name of the discharger, the location, nature and duration of the discharge. Advance notification is required unless the Regional Administrator concurs in writing that it is unnecessary.

[*Comment:* EPA envisions that the information required can be submitted on a postcard. Submission of information should be construed as a notification not as an application for a permit. This information can be used to monitor the individual and cumulative environmental effects of the activities authorized by the general permit and provide a basis for determining whether its modification or termination is necessary.]

(d) After a general permit has been issued, activities falling within the scope of the permit do not require an individual permit unless the State Director determines, on a case-by-case basis, that the concerns of the aquatic environment as expressed in 40 CFR Part 230 indicate the need for an individual permit.

(e) In addition to grounds in §§ 122.9 and 122.10, the State Director may modify, revoke and reissue or terminate a general permit on the following grounds:

(1) If he determines that the effects of the activities authorized by it are having or will have a more than minimal individual or cumulative adverse affect on the environment; or

(2) If he determines that the permitted activities are more appropriately permitted by individual permits.

(f) The State Director shall provide public notice of amendment or termination of a general permit.

(g) The public notice for proposed general permits, including proposed amendments to general permits, shall include:

(1) Applicable statutory authority or regulations;

(2) A copy of the proposed permit, describing the activities and waters to be covered;

(3) A description of the estimated environmental effects of the permit;

(4) Name and water quality standards classification, if applicable, of the receiving waters into which the discharge is proposed, and a general description and location of the site of each proposed discharge;

(5) Any other available information which may assist the public in evaluating the likely environmental affects of the proposed activity, if any, upon the integrity of the receiving waters;

(6) Address and telephone number of the place where interested persons may obtain further information;

(7) Name and address of person to whom comments should be addressed, deadline for submission of comments; and

(8) A statement of the right to request a public hearing, and that a hearing will be held if there is significant public interest.

§ 123.107 Activities not requiring permits.

(a) Except as specified in paragraphs (b) and (c) of this section, any discharge of dredged or fill material that may result from any of the following activities is not prohibited by or otherwise subject to regulation under this section:

(1) Normal farming, silviculture and ranching activities such as plowing, seeding, cultivating, minor drainage, and harvesting for the production of food, fiber, and forest products, or upland soil and water conservation practices.

The construction of any canal, ditch, dike or other waterway or structure which drains or otherwise significantly modifies a stream, lake, swamp, marsh, bay or any other wetland or aquatic area lying within the waters of the United States is not considered minor drainage, and any discharge of dredged or fill material into the waters of the United States incidental to the construction of any such structure or waterway requires a permit.

The discharge of dredged or fill material incidental to the management or rotation of crops on lands in current active use for farming is a normal farming practice not requiring a permit. However, a permit is required for any discharge of dredged or fill material made for the purpose of converting waters of the United States to farming, forestry, or ranching uses (e.g., discharge of dredged or fill material to erect a dike, dam, levee or other structure to divert, reduce or eliminate the flow of water into or through a wetland.

(2) maintenance, including emergency reconstruction of recently damaged parts of currently serviceable structures such as dikes, dams, levees, grions, riprap, breakwaters, causeways, bridge abutments or approaches, and transportation structures. This exemption does not include maintenance that changes the character, scope, or size specific to the original fill design. Emergency reconstruction must occur within a reasonable period of time after damage occurs in order to qualify for this exemption.

(3) Construction or maintenance of farm or stock ponds or irrigation ditches, or the maintenance of drainage ditches. This particular provision does not apply to the construction of drainage ditches. Any discharge of dredged or fill material incidental to the modification of a stream bank or other shoreline area within a water of the United States to connect any such water to a water intake structure or water discharge structure shall be required to have a section 404 permit.

(4) Construction of temporary sedimentation basins on a construction site which does not include placement of fill material into waters of the United States. The term "construction site" refers to any site involving the erection of buildings, roads, and other discrete structures and the installation of support facilities necessary for construction and utilization of such structures. The term also includes any other land areas which involve land-disturbing and excavation activities, including quarrying or other mining activities, where an increase in the runoff of sediment is controlled through the use of temporary sedimentation basins.

(5) Construction or maintenance of farm roads, forest roads, or temporary roads for moving mining equipment, where such roads are constructed and maintained, in accordance with best management practices, to assure that flow and circulation patterns and chemical and biological characteristics of waters of the United States are not impaired, that the reach of the waters of the United States is not reduced, and that any adverse effect on the aquatic environment will be otherwise minimized. These best management practices which must be applied to satisfy this provision shall include those detailed best management practices described in the State's approved program description pursuant to the requirements of § 123.95(d), and shall also include the following baseline provisions:

(i) Logging in streams is prohibited;

(ii) Permanent roads (for farming or forestry activities), temporary access roads (for mining, forestry, or farm purposes) and skid trails (for logging) shall be held to the minimum feasible number, width and total length consistent with the purpose of specific farming, silvicultural or mining operations;

(iii) All roads, temporary or permanent, shall be located sufficiently far from streams or other water bodies (except for portions of such roads which must cross water bodies) to avoid significant increases in sediment runoff;

(iv) The road fill shall be bridged or culverted to prevent the restriction of expected high flows;

(v) The discharge shall not disrupt the migration or other movement of those species of aquatic life inhabiting the water body;

(vi) Discharges into breeding and nesting areas for migratory waterfowl, spawning areas, and wetlands shall be avoided if practical alternatives exist;

(vii) The discharge shall consist of suitable material free from toxic pollutants in toxic amounts;

(viii) The discharge shall not take, or jeopardize the continued existance of, a threatened or endangered species as defined under the Endangered Species Act, or adversely modify or destroy the critical habitat of such species;

(ix) The fill shall be properly maintained during and following construction to prevent erosion and other non-point sources of pollution;

(x) Soil losses shall be held close to geological rates through careful selection of logging and farming methods, and through professional access route management;

(xi) A selective uneven-aged management cutting method should be employed on slopes, near streams, or in other sensitive areas unless the use of other forest management options would result in the same or less alteration of the chemical, physical and biological integrity of affected waters, including less sedimentation;

(xii) Vegetative disturbance shall be kept to minimum.

(xiii) Borrow material shall be taken from upland sources wherever feasible, and sufficient zones of vegetation adjacent to water bodies shall be preserved to filter out debris and sediment transported by runoff from nearby harvest sites and to prevent thermal pollution by preserving shade cover of water bodies.

(xiv) The discharge shall not occur in a component of the National Wild and Scenic River System;

(xv) Upon removal of temporary roads, any area of the waters of the United States whose bottom elevation has been altered by discharge of the road bed fill shall be restored to its original elevation;

(xvi) The use of pesticides and herbicides shall be avoided where possible and shall not be used in water bodies, including wetlands, in conjunction with road construction;

(xvii) All operators electing to qualify for the exemption must be familiar with and shall apply as appropriate to specific practices, professional management methods that are available from technical assistance, training and advice provided by the U.S. Forest Service, State Foresters, the Soil Conservation Service, the office of surface mining, or by similar recognized public sources of technical information and guidance.

(6) Any activity with respect to which a State has an approved program under section 208(b)(4)(B) of CWA which meets the requirements of subparagraphs (B) and (C) of that section.

(b) If any discharge of dredged or fill material resulting from the activities listed in paragraphs (a) (1)–(6) contains any toxic pollutant such discharge shall be subject to any effluent standard or prohibition established for such toxic pollutants pursuant to provisions of section 307 of CWA, and requires a permit under the State program.

(c) Any discharge of dredged or fill material into waters of the United States, incidental to any of the activities identified in paragraphs (a) (1)–(6) or to any other activity must have a permit if its purpose is to bring an area of the waters of the United States into a use to which it was not previously subject, where the flow or circulation of waters of United States may be impaired or the reach of such waters reduced.

[*Comment:* Where the proposed discharge will result in significant discernible alterations to flow or circulation, the presumption is that flow or circulation *may* be impaired by such alteration, and the activity shall be required to have a section 404 permit. Any discharge which converts any area of the waters of the United States to dry land or which connects any such waters to dry land through dikes, levees or other fills shall be deemed to thereby reduce the reach of the waters of the United States and must have a section 404 permit. For example, a permit will be required for the conversion of a cypress swamp to some other use or the conversion of lands from silvicultural to agricultural use when a discharge of dredged or fill materials is made into waters of the United States in conjunction with construction of dikes, drainage ditches or other works or structures used to effect such conversion. The reach of the waters of the United States shall not, however, be deemed to be reduced by a discharge which elevates the bottom of waters of the United States without converting it to dry land.]

(d) Federal projects which qualify under the criteria contained in section 404(r) of CWA are exempt from State section 404 permit requirements.

§ 123.108 Permit application.

(a) *Publicity and Preapplication Consultation.* The State Director is encouraged to establish and maintain a program to inform, to the extent possible, potential applicants for permits of the requirements of the State program and of the steps required to obtain permits for activities in State regulated waters. As part of this program, the State Director is encouraged to include pre-application consultation to assist applicants in understanding the requirements of 40 CFR Part 230 and in fulfilling permit application requirements.

(b) *Application for Permit.* Except where an activity is authorized by a general permit or is exempt from the permit requirement under § 123.107, any person who proposes to discharge dredged or fill material into State regulated waters shall complete, sign and submit an application to the State Director.

[*Comment:* State application forms are subject to EPA review and approval, see § 123.3.]

(c) *Content of Application.* A complete application shall include:

(1) A complete description of the proposed activity including (i) necessary drawings, sketches or plans (in cross section and plan view) showing the general and specific site location including site address and character of all proposed activities; (ii) size relationship of the proposed discharge to the size of the affected waters and depth of water in the area relative to the ordinary high water mark; (iii) the purpose and intended use of the proposed activity, scheduling of the activity and the names and addresses of property owners adjacent to the site and, if appropriate, the location and dimensions of adjacent structures;

(2) The source of the dredged or fill material and method of dredging used, if any; a description of the type, composition and quantity of the material; the proposed method of transportation and disposal of the material, including the type of equipment to be used.

(3) The use of any specific structures to be erected on the fill.

(4) Information about the discharge area needed to evaluate compliance within 40 CFR Part 230, including documentation concerning the following factors:

(i) A discussion of alternatives to the proposed discharge, including alternative disposal site, construction methods, and methods of discharge, and also including reasons for rejecting the alternatives;

(ii) Physical and chemical characteristics of the discharge site including the bottom and the receiving water;

(iii) Plants, fish, shellfish and wildlife in the discharge site which may be dependent on water quality and quantity;

(iv) Site characteristics of the affected and adjacent areas that may require protection or preservation;

(v) Uses of the disposal area which might affect human health and welfare; and

(5) A description of technologies or management practices by which the applicant proposes to minimize adverse environmental effects of the discharge.

[*Comment:* Guidelines for minimizing the adverse effects of discharges of dredged or fill material are found in 40 CFR Part 230.]

(6) A list of the approvals required by other Federal, interstate, State or local agencies for the work, including all approvals received or denials already made.

(7) One original set or one good quality reproducible set of drawings and maps, as specified below:

(i) A vicinity map identifying the map or chart from which the vicinity map was taken and showing the following:

(A) Location of the activity site including latitude and longitude and river mile, if known;

(B) Name of waterway;

(C) All applicable political (e.g., county, borough, town, city, etc.) boundary lines;

(D) Names of all major roads in the vicinity of the site including the road providing closest practicable access to the site;

(E) Graphic scale; and

(F) North arrow.

(ii) A plan view of the proposed activity showing the following:

(A) Existing shorelines;

(B) North arrow;

(C) Graphic or numerical scale;

(D) Ordinary high water mark of the body of the water;

(E) Location of known wetlands;

(F) Delineation of dispoasl site;

(G) Water depths around the project;

(H) Principal dimensions of the structure or work and extent of encroachment beyond the applicable high water line;

(I) Waterward dimension from an existing permanent fixed structure or object;

(J) Distances to nearby Federal projects, if applicable;

(K) Number of cubic yards, type of material, method of handling, and location of fill or spoil disposal area if applicable. If spoil material is to be placed in approved dumping grounds, a separate map showing the location of the dumping grounds should be attached. The drawing must indicate proposed retention levees, weirs, and/or other devices for retaining dredge or fill materials; and

(L) Location of structures, if any, in waters of the United States immediately adjacent to the proposed activity, including permit numbers, if known. Identify purposes of all structures.

(iii) An elevation and/or section view of proposed project showing the following:

(A) Same water elevations as in the plan view;

(B) Depth at waterward face of proposed work, or if dredging is proposed, show dredging grade;

(C) Dimensions from applicable ordinary high water mark for proposed fill, float or pile supported platform. Identify any structure to be erected thereon;

(D) Graphic or numerical scale;

(E) Cross-section of excavation or fill, including approximate side slopes;

(F) Elevation of spoil areas;

(G) Location of wetlands; and

(H) Delineation of disposal site.

(iv) Notes on all maps or drawings submitted, including:

(A) A list of names of adjacent property owners whose property also adjoins the water and are not shown on plan view;

(B) A statement of the purpose of proposed activity;

(C) A statement of datum used and elevation views. (Use mean low water, mean lower low water, National Ocean Survey Datum or National Geodetic Vertical Datum of 1929); and

(D) A title block for each sheet submitted identifying the proposed activity and containing the name of the body of water; river mile, if applicable; name of county, and State; names of applicant or agent; number of the sheet and the total number of sheets in set; and date the drawing was prepared.

§ 123.109 [Reserved]

§ 123.110 Coordination requirements.

(a) *General Coordination.* (1) The State Director shall develop an agreement with the agency designated to administer a Statewide CWA section 208(b)(4) regulatory program. Such an agreement shall include:

(i) A definition of the activities to be regulated by each program;

(ii) Arrangements for the agencies providing an opportunity to comment on perspective permits, BMP's and other relevant actions; and

(iii) Arrangements for incorporating BMP's developed by the section 208(b)(4) program into section 404 permits, where appropriate.

[*Comment:* Where such a CWA section 208(b)(4) program has been approved, no permit shall be required for activities for which the Administrator has approve BMP's under such approved program except as provided in § 123.107. Until such Section 208(b)(4) program has been approved by the Administrator under CWA section 208(b)(4)(C), a person proposing to discharge must obtain an individual permit or comply with a general permit.]

(2) States are encouraged to receive and use information developed by the Fish and Wildlife Service as part of the National Inventory as it becomes available.

(b) *Coordination with Other Federal and Federal-State Review Process.* To assure coordination of a permit with Federal and Federal-State water related planning and review processes, the State Director shall take the following actions:

(1) Assure that the impact of the proposed discharge will be consistent with the Wild and Scenic Rivers Act where the proposed discharge could affect portions of rivers designated wild, recreational, scenic or under consideration for such designation.

(2) Assure that the proposed discharge will be consisitent with State water quality management planning under sections 208 and 303 of CWA.

(3) Consult the State agency(ies) with jurisdiction over fish and wildlife resources.

[*Comment:* Proposed discharges which are determined to be consistent with these authorities in (1)–(4) will nevertheless be denied section 404 permits if such discharge does not comply with other provisions of this Part and 40 CFR 230.]

The State Director shall furnish copies of the permit application to agencies consulted under this subsection.

(c) *Coordination with Other States.* If the proposed discharge may affect the quality of the waters of any State(s) other than the State in which the discharge occurs the State Director shall provide an opportunity for such State(s) to submit written comments within the public comment period on the effect of the proposed discharge on such State(s) waters, and to suggest additional permit conditions. If these recommendations are not accepted by the State Director, he shall notify the affected State and the Regional Administrator in writing of his failure to accept these recommendations, together with his reasons for so doing.

(d) *Review by Corps of Engineers, Fish and Wildlife Service, and National Marine Fisheries Service.* (1) All permit applications transmitted to the District Engineer, to the U.S. Fish and Wildlife Service, and to the National Marine Fisheries Service shall be accompanied by a statement that the agencies have 20 days from the date fo the receipt of the permit application to notify EPA whether they wish to comment. Failure to so notify EPA within 20 days may

constitute a waiver of the right to comment.

(2) In cases where the agencies have notified the Regional Administrator that they wish to comment, they should submit their evaluations and comments to the Regional Administrator within 50 days of receipt of the permit application. The agencies may request additional time. If the Regional Administrator finds that more time should be allowed he will advise the agencies of the new deadline. Written comments should normally be submitted within the initial 20 day period, or as soon as practicable thereafter.

(3) If any of these agencies feels that additional time is necessary to complete evaluation of any permit application, it shall notify the Regional Administrator, who may request an extension from the State Director. If the State Director allows additional time, the Regional Administrator shall notify the affected agencies.

(4) All comments from the U.S. Army Corps of Engineers, the U.S. Fish and Wildlife Service, and the National Marine Fisheries Service will be considered by the Regional Administrator in accordance with provisions of this section. If the Regional Administrator does not adopt an objection of any such agency, he shall consult with the objecting agency(s). The final decision to object or to require permit conditions will be made by the Regional Administrator.

§ 123.111 Emergency procedures.

In an emergency situation the requirements for public notice and full Federal review may be waived with the concurrence of the Regional Administrator. An emergency is a situation which would result in an unacceptable hazard to life or severe loss of property if corrective action requiring a permit is not undetaken within a time period less than the normal time needed to process the application under required procedures of this Part. Emergency permits shall include conditions for restoration of the disposal site.

§ 123.112 Reporting.

In accordance with the requirements of § 122.15, the State Director shall:

(a) Submit to the Regional Administrator a quarterly report on the last day of January, April, July, and October, which shall include:

(1) Any unauthorized discharges of dredged or fill material subject to the State's jurisdiction and a description of enforcement actions taken or contemplated;

(2) A description of investigations conducted to determine compliance with the conditions and limitations of any permits subject to the State's jurisdiction, including any enforcement actions taken against violators of permit terms or conditions.

(b) Submit to the Regional Administrator an annual report assessing the cumulative impacts of the State's permit program on the integrity of State-regulated waters. This annual report may be appended to the October quarterly report described in paragraph (a) as agreed in the Memorandum of Agreement, and shall include:

(1) The number and nature of individual permits issued by the State during the year. This should include the locations and types of water bodies where permitted activities are sited (e.g., wetlands, rivers, lakes, and any other categories which the Director and Regional Administrator may establish);

(2) The number of acres of each of the categories of waters in paragraph (b)(1) which were filled during the year (either by authorized or unauthorized activities);

(3) The number of acres of each of the categories of waters in paragraph (b)(1) which were protected under the State's authorities to prohibit, deny, restrict, or withdraw the specification of disposal sites for receiving dredged or fill material, as required by § 123.94.

(4) The number and nature of permits modified, revoked and reissued or terminated during the year;

(5) The number and nature of permits issued under emergency conditions, as provided in § 123.111;

(6) The approximate number of individuals in the State discharging dredged or fill material under general permits and an estimation of the cumulative impacts of these permitted activities.

PART 124—PROCEDURES FOR DECISION MAKING

Subpart A—General Program Requirements

Sec.

Subpart B—Specific Procedures Applicable to RCRA Permits

Subpart C—Specific Procedures Applicable to PSD Permits

Subpart D—Specific Procedures Applicable to NPDES Permits

Subpart E—Evidentiary Hearing for EPA Issued NPDES Permits

Authority: Resource Conservation and Recovery Act, 42 U.S.C. 6901 et seq., Clean Air Act, 42 U.S.C. 1857 et seq.; and Clean Water Act, 33 U.S.C. 1251 et seq.

Subpart A—General Program Requirements

§ 124.1 Purpose and scope.

(a) This Part specifies the procedures EPA will follow in issuing and modifying NPDES, RCRA and UIC permits, and permits to implement the "prevention of significant deterioration" (PSD) provisions of the Clean Air Act.

(b) This Part is designed so that permits for a given facility under two or more of the listed programs can be processed either separately or in combination at the choice of the permitting authority. This will allow EPA to combine the processing of permits where greater efficiency is likely to result, but will not bind the Agency to follow that course in all cases. Consolidation of permits can take place either when the permit applications are submitted or when draft of final permits are issued even where permit applications have been submitted separately. Permit applications may recommend whether or not their permit applications should be consolidated in any given case.

(c) Subpart A specifies procedures applicable to all three permit programs. Subparts B–E provide procedures specific to the RCRA, PSD and NPDES permit programs. Subpart F provides a procedure based on the "initial licensing" provisions of the APA that can be used instead of Subparts A–E in appropriate cases.

(d) State administration of each of RCRA, UIC, NPDES and 404 permit programs can be approved by EPA under Part 123. Only selected portions of this Part apply to these approved State programs, as listed in § 123.8. (In the case of PSD programs, none of the provisions of Part 124 has been made applicable to States.) However, there is a need for coordination in making decisions when two or more such permits will be issued to an activity by both EPA and by a State. Accordingly, the regulations provide that applications may be jointly processed, joint comment periods and hearings may be held, and final permits may be drafted on a cooperative basis whenever EPA and a State agree to take such steps either in general or in an individual case. Such joint processing agreements may be provided in the Memorandum of Agreement developed under § 123.6.

§ 124.2 Definitions.

The definitions in Part 122 apply to this Part.

§ 124.3 Application for a permit.

(a) Any person who requires a permit under the RCRA, UIC, PSD or NPDES program shall complete, sign, and submit an application for each permit required to the Director in accordance with §§ 122.6, 122.23, 122.25, 122.36, and 122.64 or 123.105, or the applicable requirements of 40 CFR 52.21, except as provided in § 124.82 for NPDES general permits or for RCRA permits by rule under § 122.26.

(b) No permit shall be issued until the applicant has fully complied with the governing application filing requirements of this Part and Part 122. If an applicant fails or refuses to correct deficiencies in the application, the permit shall be denied or appropriate enforcement actions may be taken under the provisions of the appropriate Act. These provisions include sections 308, 309, 402(h) and 402(k) of the CWA, section 3008 of RCRA, and sections 1423 and 1424 of SDWA.

(c) Permit applications are designed to fit the normal situation for most applicants. However, if the Director determines that further information of a site visit is necessary in order to evaluate the application completely and accurately, the applicant shall be notified and a date shall be scheduled for receipt of the requested information or scheduling of any necessary site visit.

(d) Permit applications must comply with the signature and certification requirements of § 122.5.

(e)(1) Any application submitted by a new source, new HWM facility or new injection well, and any Part B application for an existing HWM facility for an EPA-issued permit shall be reviewed for completeness by the Director within 30 days of its receipt. Upon completing this review, the Director shall inform the applicant in writing whether or not the application is complete and list any required additional information. The requirements of this paragraph shall not preclude a Director from requesting additional information from the applicant at a later time for purposes of clarification, modification or supplementation of previously submitted data.

(2) In the event of such a deficiency, the date of receipt of the application shall be, for the purposes of this section, the date on which the Director received all relevant information.

§ 124.4 Consolidation of applications.

(a) Except as provided for RCRA permit applications (Part A only) under § 122.23, any facility or activity requiring a permit under two or more of the RCRA, UIC or NPDES programs which will be issued entirely by EPA may postpone the filing date for any application for such a permit to consolidate it with another application which has a later filing date:

(1) For up to 180 days, provided:

(i) The other application legally must be filed by the later filing date and it will be timely filed; and

(ii) The permit applicant notifies the Regional Administrator, in writing of his/her intent to postpone the filing date; or

(2) For up to two and one half years, provided the permit applicant obtains the written permission of the Regional Administrator to so consolidate the permits.

(b) Except as provided for RCRA permits applications (Part A only) under § 122.23, if an agreement between EPA and an approved State so provides, any

facility that requires two or more of an RCRA permit, a UIC permit or an NPDES permit, one or more of which will be issued by EPA and one or more of which will be issued by an approved State, may postpone the filing date for any application for such a permit:

(1) For up to 180 days, in order to consolidate it with another permit application which legally must be filed within that period and which will be timely filed, if such person notifies the Regional Administrator and the State Director in writing of his/her intent to postpone the filing date; or

(2) With the written permission of both the Regional Administrator and the State Director, for up to two and one half years in order to so consolidate it.

(c) When permit applications are filed together under this section, neither the Regional Administrator nor the State Director is required to issue the corresponding draft permits under § 124.6 at the same time. Conversely, draft permits for a given facility under the RCRA, UIC and NPDES programs may be issued at the same time even where the permit applications were filed at different times.

[*Comments:* (1) States are encouraged to consolidate applications, where they have been approved by EPA to administer two or more of the RCRA, UIC or NPDES programs. However they are not required to do so.

(2) This section does not apply to Air PSD permits.]

§ 124.5 Requests for modification or revocation and reissuance or termination of permits.

(a) If a permittee believes that a modification to or revocation and reissuance of a RCRA, UIC, PSD or NPDES permit is justified under §§ 122.9 or 122.10, (or section 52.21 in the case of a PSD permit) he/she may request a modification or revocation and reissuance or termination from the Director in writing. The request shall set forth all facts or reasons known to the permittee which may be relevant to a decision on the request.

(b) If the Director agrees that the modification or revocation and reissuance request under paragraph (a) appears justified, he/she shall prepare and formulate a draft permit under § 124.6 incorporating the changes. The Director may request additional information or, in appropriate cases, may require the submission of a new permit application.

(c) If the Regional Administrator, or where appropriate, the State Director decides that the modification or revocation and reissuance request under paragraph (a) does not appear justified, he/she shall reply to the permittee briefly setting forth in writing the reasons for that decision.

(d) 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.

(e) In the case of a proposed modification to an existing 404 permit initiated by the permittee which involves any change in applicable conditions or requirements under §§ 122.11 or 123.105, such proposed modification shall be treated as a permit application and shall be processed in accordance with all requirements of § 123.113.

§ 124.6 Draft permit.

(a) If a permit has been properly applied for, or the Director, after analyzing the information concerning a permit furnished under that Part and any other relevant information, shall tentatively decide whether to issue or deny the permit. If the tentative decision is to issue the permit, a draft permit shall be prepared containing at a minimum the following information:

(1) All conditions or requirements specified in § 122.11;

(2) For:

(i) RCRA permits, standards for treatment, storage or disposal and other permit terms and conditions which meet the requirements of § 122.24;

(ii) UIC permits, permit terms and conditions that meet the requirements of § 122.42;

(iii) PSD permits, permit terms and conditions that meet the requirements of 40 CFR 52.21;

(iv) NPDES permits, effluent limitations, standards, prohibitions and conditions required under § 122.69, including where applicable any conditions certified by a State agency under § 124.55, and all variances or other modifications that are to be included under § 124.64. All effluent limitations and standards shall be calculated and specified as required under § 122.70;

(v) 404 permits, permit terms and conditions that meet the requirements of § 123.105;

(3) All compliance schedules required by § 122.12; and

(4) All monitoring requirements required by § 122.14.

(b) All draft permits formulated under this section and § 124.7 shall be accompanied by a statement of basis or fact sheet under §§ 124.8 or 124.9. In addition, EPA-formulated draft permits shall be based on the administrative record required by § 124.9.

[*Comment:* Additional requirements for draft NPDES permits incorporating CWA section 301(h) modifications are set forth in § 124.57.]

(c) If the Regional Administrator determines under 40 CFR Part 6.900 that an Environmental Impact Statement shall be prepared for an NPDES new source, the public notice of the draft permit under this section shall not be given until a draft environmental impact statement is issued.

(d) *Consolidation of draft permits.* (1) If a facility or activity will require a permit under two or more of the RCRA, UIC, PSD or NPDES programs the Regional Administrator may issue consolidated draft permits whether or not the permits were applied for at the same time, provided the conditions for issuance of each separate permit have been met. Whenever consolidated draft permits are issued the statements of basis (see § 124.8) or fact sheets (see § 124.9), administrative records (see § 124.10), public comment periods (see § 124.11) and any public hearings for those permits shall also be consolidated. However, the final permits need not all be issued together if in the judgment of the Regional Administrator, joint processing would result in unreasonable delay in the issuance of one or more permits.

(2) If a facility or activity will require two or more of a RCRA, UIC, PSD or NPDES permit, one or more of which is to be issued by EPA and one or more of which is to be issued by an approved State, the Regional Administrator and the State Director(s) may agree to issue the draft permits at the same time whether or not they were applied for at the same time. Whenever two or more draft permits are issued at the same time, administrative records (for EPA-issued permits only) should be consolidated for highly significant permits and any public hearings for those permits shall also be consolidated. However, the final permits need not all be issued together if, in the judgment of either the Regional Administrator or the State Director, such consolidation would result in unreasonable delay in the issuance of one or more permits.

(3) The Director shall not, without the written consent of the permit applicant, consolidate issuance of a PSD permit with issuance of any other permit under this section when to do so would delay

issuance of the PSD permit more than one year from the date of application.

(4) Whenever draft permits including an NPDES permit are consolidated under this subsection, and the Regional Administrator elects to make the special "initial licensing" provisions of Subpart F applicable to the NPDES permit, any permits with which that NPDES permit was consolidated shall likewise be processed under Subpart F.

(e) 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. Appropriate appeals may then be made under this Part.

§ 124.7 Other draft permits.

(a) The Director may formulate a draft permit or notice concerning a RCRA, UIC, PSD or NPDES permit without having received an application, as provided in this section.

(1) If the Director decides that a permit should be:

(i) Modified or revoked and reissued under § 122.9, the Director shall formulate a draft permit containing the provisions required under § 124.6.

(ii) Terminated under § 122.10, the Director shall issue a notice of intent to terminate the permit.

(2) NPDES general permits under § 122.82 shall be proposed in draft form, shall contain the designation of the General Permit Program Area (under § 122.82(a)(2)), and, except for general permits for 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 objections must be made within 90 days from the public notice for the draft general permit under § 124.58(b).

(b) Any draft permit formulated under paragraph (a) shall be based on the administrative record as defined in § 124.10 and § 124.62 (for NPDES permits only).

[*Comment*: Public comment and hearings under §§ 124.12 and 124.13 pertaining to permit modifications will be limited to the terms of the proposed modification.]

(c) In the case of a proposed modification to an existing 404 permit initiated by the State Director which involves any change in applicable conditions or requirements under §§ 122.11 or 123.105, such proposed modification shall be treated as a permit application and shall be processed in accordance with all requirements of § 123.113.

§ 124.8 Statement of Basis.

A statement of basis shall be prepared for every draft permit formulated under § 124.6 for which a fact sheet is not required under § 124.9. The statement of basis shall briefly describe the derivation of the terms and conditions of the permit and the reasons for them. The statement of basis shall be part of the administrative record and shall be sent to the applicant and to interested State and Federal agencies and to other members of the public on request.

§ 124.9 Fact Sheet.

(a) A fact sheet shall be prepared for every draft permit for a major HWM facility, UIC facility, or NPDES discharger, for every NPDES general permit under § 122.82 and NPDES draft permit that incorporates a variance or modification, and for every draft permit which the 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 interested State and Federal agencies, 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, where applicable:

(1) A brief description of the type of facility or activity which is proposed to be permitted;

(2) The type and quantity of wastes, pollutants or fluids which are proposed to be treated, stored, disposed of, discharged, emitted or injected;

(3) A brief summary of the basis for the proposed permit conditions including reference to applicable statutory or regulatory provisions and, for EPA permits, appropriate supporting references to the administrative record required by § 124.10, and § 124.62 (for NPDES permits only);

(4) Reasons why any requested variances, modifications, or alternatives to required standards do or do not appear justified;

(5) A description of the procedures for deciding on the final permit including:

(i) The beginning and ending dates of the comment period required under § 124.12 and the address where comments will be received;

(ii) Procedures for requesting a hearing and the nature of that hearing; and

(iii) Any other procedures by which the public may participate in the formulation of the final permit.

(6) Name and telephone number of a person to contact for additional information.

(c) "Major permit" means:

(1) In the case of an NPDES permit, any permit for dischargers on the state-by-state list of major dischargers;

(2) In the case of a UIC permit, any permit to an underground injection well identified as a major permit in EPA's annual operating guidance for EPA Regional Offices and States; and

(3) In the case of a RCRA permit, a permit for a major HWM facility as defined in § 122.3(b).

§ 124.10 Administrative record for EPA-issued permits.

(a) Decisions by the Regional Administrator to formulate a draft permit under § 124.6 shall be made only on the basis of the administrative record defined in this section.

(b) The record for formulating a draft permit under § 124.6 shall consist of:

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

(2) The draft permit;

(3) The statement of basis under § 124.8 or any fact sheet under § 124.9;

(4) All documents cited in the fact sheet or statement of basis, unless they are published materials which are generally available, (in which case they should be specifically referenced);

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

(6) For NPDES permits only, 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 § 124.7 shall consist of the draft permit, the statement of basis required by § 124.8 or fact sheet prepared under § 124.9 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.

[*Comments*: (1) The administrative record for draft permits under this section will comprise the bulk of the material for the final administrative record.

(2) See also § 124.62 for additional NPDES administrative record requirements.]

§ 124.11 Public notice of permits.

(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*: In the discretion of the Director, this could also include press releases or the use of any other forum or medium to elicit public participation.]

(b) Notice of the formulation of any draft permit formulated under § 124.6 and notice of an initial new source determination under § 124.81, notice of receipt of a section 404 application and notice of all hearings required by § 124.13 shall be given by the Director:

[*Comment*: Notice of receipt of a section 404 permit application is required only where no draft permit is formulated. See § 123.98(c).]

(1) By mailing a copy of the notice to:

(i) The applicant;

(ii) Any other agency which has issued or will issue a RCRA, UIC, PSD or NPDES permit to the activity in question;

(iii) To any State agency responsible for plan development under sections 208(b)(2) or 303(c) of the Clean Water Act;

(iv) For NPDES permits only, 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;

(v) For 404 permits only:

(A) To the Regional Director of the Federal Aviation Administration, if the discharge involves the construction of structures which may affect aircraft operations or for purposes associated with seaplane operations;

(B) To any adjacent property owner;

(C) To any State agency(ies) responsible for administering water quality, fish, shellfish and wildlife resources and State Section 404 programs in the affected state, if the proposed discharge may effect the waters of any State(s) other than the State in which the work is to be done;

(2) By mailing a copy of the notice to any person on a mailing list developed;

(i) From those who request to be in the list;

(ii) By soliciting persons for "area lists" from participants in past permit proceedings in that area; and

(iii) By notifying the public as to the availability of such 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

(3) By any of the following methods:

(i) By application of a notice meeting the requirements of paragraph (c) in a daily or weekly newsletter within the area affected by the facility or activity;

(ii) By posting a copy of the information required under paragraphs (c) and (d) at the principal office of the municipality or political subdivision affected by the facility or activity, and by posting a copy at the United States Post Office serving those premises;

(iii) By any other method reasonably calculated to give actual notice of the action in question to the persons potentially affected by it; or

(iv) Where the program is being administered by an approved State, in any other manner constituting legal notice to the public under State law.

(4) Any person otherwise entitled to receive notice under subparagraph (1) of this paragraph may waive their right to receive notice for any classes and categories of permits.

(c) All public notices issued under this Part shall contain the following information:

(1) Name and address of the office processing the application or conducting the hearing;

(2) Name and location of the facility or activity to be permitted, except in the case of NPDES general permits under § 122.82;

(3) Name of the person, and address and telephone number where interested persons may obtain further information, including copies of the draft permit and statement of basis or fact sheet or, for section 404 permits only, copies of the application and proposed permit, if required.

(4) For EPA-issued permits, the location of the administrative record required by §§ 124.10 and 124.62 (for NPDES permits only) and the times at which it will be open for public inspection;

(5) For NPDES permits only: (i) a general description of the location of each existing or proposed discharge point, including the receiving water;

(ii) If the applicant has submitted data and information in accordance with CWA section 316(a) for a thermal variance, a statement to that effect. The notice shall state that all data submitted by the application 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 § 124.12 upon the applicant's desired alternative effluent limitations and may also request a hearing; and

(6) For 404 permits only, applicable statutory authority and regulations;

(7) Any additional information considered necessary or proper.

(d) Public notice mailed to persons identified in paragraphs (b)(1) and (b)(2) shall contain the information required by paragraph (c) and the following information:

(1) A brief description of the applicant's activities or operations that are involved in the facility or activity described in the application and a statement whether the application pertains to a new or existing facility or activity.

(2) A summary of major terms of the draft permit;

(3) Brief description of the comment procedures required by § 124.12, and the time and place of any public hearing that will be held; and

(4) For NPDES permits only, 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; and

(5) For 404 permits only:

(i) The purpose of the proposed activity and intended use, including a description of the type of structures, if any, to be erected, and a description of the type, composition and quantity of materials to be changed and means of conveyance; and any proposed conditions and limitations on the discharge;

(ii) Name and water quality standards classification, if applicable, of the receiving waters into which the discharge is proposed, and a general description and location of the site of each proposed discharge.

(iii) Any other available information which may assist the public in evaluating the likely environmental impact of the proposed activity, if any, upon the integrity of the receiving waters.

(6) A statement of the right to request a public hearing.

(7) Any other procedures by which the public may participate in the formulation of the final permit.

(e) In addition to the information required under paragraphs (c) and (d) above, the public notice of a public hearing held under § 124.13 shall contain the following information:

(1) Reference to the date of previous public notice relating to the permit;

(2) Date, time and place of the hearing; and

(3) In the case of mailed public notice, a brief description of the nature and purpose of the hearing, including the applicable rules and procedures.

(4) For 404 permits only, a summary of major issues raised to date during the public comment period.

(f) Public notice issued under this section may describe more than one permit and more than one permitted activity. No public notice shall be given in cases where a request for permit modification is denied, but written notice of that denial shall be given the person requesting such modification. Public notice of the draft permit may be issued at the same time public notice of a hearing is given.

§ 124.12 Public comments and requests for hearings.

(a) During the public comment period provided under § 124.11(a), any interested persons may submit written comments and may request a public hearing. A request for a public hearing shall be in writing and shall state the nature of the issues proposed to be raised in the hearing. All comments shall be considered in preparing the final permit and shall be responded to as provided in § 124.19.

(b) Written comments may be submitted: (i) For all permits except those section 404 permits for which no draft permit is required (see § 123.98(c)), on the draft permit and accompanying statement of basis or fact sheet or other portions of the administrative record;

(ii) For 404 permits for which no draft permit is required (see § 123.98(c)), on the permit application or amended application (including proposed permit where required).

(c) Where the Director finds a significant degree of public interest in a draft permit or permits, he/she shall hold a public hearing to consider the permit or permits. Public notice of that hearing shall be given as specified in § 124.11. Where a state authority other than the Director is required under State law to hold hearings, on permits, it rather than the Director may hold hearings under this paragraph.

(d) Any person may submit oral or written statements at hearings held under this section. Reasonable limits may be set upon the time allowed for oral statements.

§ 124.13 Public hearings.

(a)(1) When a public hearing will be held under § 124.13 and EPA is the permitting authority, the Regional Administrator shall designate a Presiding Officer for the hearing who shall be responsible for its scheduling and orderly conduct. The Regional Administrator may also designate an EPA panel to take part in the hearing. The membership of the panel in general should consist of EPA employees having special expertise in an area related to the issues to be addressed at the hearing. For this reason, the membership of the panel may change as different issues are presented for discussion. The Regional Administrator may also designate EPA employees who will not or possibly will not serve on the hearing panel to provide staff support to the panel as needed.

(2) Joint EPA-State hearings on permits subject to this Part, one or more of which will be issued by EPA and one or more of which will be issued by an approved state, may be held either as provided in § 124.4 or otherwise by agreement in individual cases. Where joint hearings are held with a State agency, the Presiding Officer and the panel members may be employees of either EPA or the State. The Presiding Officer, any panel members and any panel support staff shall be chosen by agreement of EPA and the State.

(b) At any hearing under this section, any person may submit oral or written statements and data concerning the proposed permit. Reasonable limits may be set upon the time allowed for oral statements, and the submission of statements in writing may be required.

(c) The Presiding Officer and any panel member may question any person participating in the hearing. Persons in the hearing audience, including other hearing participants, 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/her sole discretion, ask these questions, or allow a member of the panel to ask them.

(d) Participants in the hearing shall submit for the hearing record such additional material as the hearing panel may request within 10 days following the close of the hearing, or such other period of time as is ordered by the Presiding Officer. Participants may also submit additional information for the hearing record on their own accord within 10 days after the close of the hearing.

(e) The hearing shall be either stenographically reported verbatim or tape recorded.

§ 124.14 Cross-examination and other supplementary procedures.

(a) No cross-examination shall be permitted at any hearing held under § 124.13. However, any participant in such a hearing may submit a request for cross-examination after the hearing has closed. The request shall be received by EPA within one week after a full transcript of the panel hearing becomes available 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 the light of the record made thus far, and the extent to which and why they can reasonably be considered material to the decision on the application for modification; and

(2) The person(s) a participant desired to cross-examine, and an estimate of the time necessary. This shall include a statement as to why the cross-examination requested can be expected to result in resolving the issue of material fact involved.

(b) As expeditiously as practicable after receipt of all requests for cross-examination under paragraph (a) of this section, the Presiding Officer, after consultation with the hearing panel, shall issue an order either granting or denying each such request, which shall be disseminated to all persons requesting cross-examination and all persons to be cross-examined. If any request for cross-examination is granted, the order shall specify:

(1) The issues on which cross-examination action is granted;

(2) The persons to be cross-examined on each issue;

(3) The persons allowed to conduct cross-examination;

(4) Time limits as appropriate for the examination of witnesses by each cross-examiner; and

(5) The date, time and place of the supplementary hearing where cross-examination shall take place.

(c) 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 submittal 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).

(d) In issuing any order under paragraph (b), the presiding officer:

(1) 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.

(2) Shall consider the extent to which the issues raised are likely to be the subject of an evidentiary hearing under Subpart E and shall deny cross-examination with respect to any such issues. The presiding officer may grant cross-examination to the extent he/she finds such a grant would be likely to avoid the need for an evidentiary hearing.

(3) May require, as a precondition to ruling on the merits of such request, alternative means of clarifying the record to be used whether or not a request to do so has been made under paragraph (b). 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 Presiding Officer and at least one member of the original hearing panel shall preside 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 verbatim transcript shall be made of this hearing.

§ 124.15 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 is not appropriate, 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 § 124.12.

§ 124.16 Reopening of comment period.

If any information or arguments submitted during the public comment period, including information or arguments whose submission is required under § 124.15, appears to raise substantial new questions concerning a permit, the Regional Administrator may conclude that one of the following actions is necessary for an informed decision:

(a) Formulation a new draft permit, appropriately modified, under § 124.6.

(b) Preparation a fact sheet or revised fact sheet under § 124.9 and reopening of the comment period under § 124.12; or

(c) Reopening of the comment period under §124.12 to give interested persons an opportunity to comment on the information or arguments submitted.

In each case the notice required by § 124.11 shall be given.

§ 124.17 Issuance and effective date of permits.

(a) After the close of the public comment period (including any public hearing period) required by § 124.12 on a draft permit, the Regional Administrator shall prepare and issue a final permit and shall serve notice of that action on 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 appeal a RCRA, UIC or PSD permit determination or to contest an NPDES permit determination.

(b) A permit shall become effective 30 days after the service of notice of the decision under paragraph (a), unless;

(1) A later effective date is specified in the decision; or

(2) Review is requested under § 124.21 (RCRA, UIC and PSD permits) or a request for an evidentiary hearing is granted under § 124.75 (NPDES permits).

§ 124.18 Stays of contested permit terms.

(a) *Stays.* (1) If a request for review of a RCRA or UIC permit under § 124.21 or § 124.60 is granted, the force and effect of the contested permit terms shall be stayed and shall not be subject to judicial review pending final agency action.

(2) Uncontested terms which are not severable from those contested shall be stayed together with the contested terms under subsection (a). Stayed provisions shall be designated by the Regional Administrator. All other provisions of a permit shall remain in full force and effect, and the permittee shall be subject to all these provisions.

(b) *Stays based on Cross-Effects.* (1) No stay may be granted based on the grounds that an appeal to the Administrator under § 124.21 will likely result in changes to a permit granted to a facility or activity under one statute that will in turn make changes to a permit under some other statute advisable, unless each of the permits involved has been appealed to the Administrator and he/she has accepted the appeal.

(2) If terms and conditions of a RCRA or UIC permit are marked down for reconsideration in an evidentiary hearing on an NPDES permit under § 124.82 then the affected terms and conditions shall be stayed pending both the presiding officer's recommended decision as to them and any action on any recommended changes by the Regional Administrator. Any decision by the Regional Administrator on the presiding officer's recommendation shall be treated like the issuance of a permit for purpose of § 124.17.

(3) No stay of an NPDES, RCRA or UIC permit issued by EPA shall be granted based on the staying for any reason of any such permit issued by a State except at the discretion of the Regional Administrator and upon written request from the State Director.

[*Comment:* NPDES stay provisions are provided in § 124.60.]

§ 124.19 Response to comments.

(a) At the time that any final permit is issued, the Director shall issue 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 of the permit application (for section 404 permits only) 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 § 124.20.

(c) The response to comments shall be available to the public.

[*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.]

§ 124.20 Administrative record for final permit where EPA is the permitting authority.

(a) Decisions of the Regional Administrator to issue a final permit under § 124.17 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 provided under § 124.12;

(2) The tape or transcript of any hearing(s) held under § 124.13.

(3) The response to comments required by § 124.19;

(4) For NPDES new source permits only, 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.

(c) The additional documents required under paragraph (b) shall be added to the record as soon as feasible after their receipt or publication by the Agency.

(d) This section applies to all final RCRA, UIC, PSD and NPDES permits where the draft permit was subject to the administrative record requirements of § 124.10.

(e) Material readily available at the issuing Regional Office or published materials which are generally available, and which are included in the administrative record under the standards of this section or of § 124.19 ("Response to Comments"), do 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 administrative record or in the response to comments.

§ 124.21 Appeal of RCRA, UIC and PSD permits.

(a) Within 30 days after a RCRA, UIC or PSD permit has been issued under § 124.17, any person who filed comments on that permit or participated in the public hearing may petition the Administrator to review any term or condition of the permit. The thirty day period within which a person may request review under § 124.17 begins with the postmark date of notice of the Regional Administrator unless a later date is specified in such notice. The petition shall include a statement of the reasons supporting such review, including a demonstration that any points being raised were raised during the public comment period as required by § 124.12 and where appropriate, a showing that the term or condition in question is based on

(1) A finding of fact or conclusion of law which is clearly erroneous, or

(2) An exercise of discretion or policy which is important and which the Administrator should, in his discretion, review.

(b) The Administrator may also decide on his or her own initiative to review any term or condiditon of any RCRA, UIC or PSD permit issued under this Part.

(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. To the extent review is denied, the terms and conditions of the permit become the final decison of the agency. Public notice of any grant of review or a decision by the Administrator to take review under paragraph (b) shall be given as provided in § 124.11. Any such notice shall set forth a briefing schedule for the appeal and shall state that any interested person may file an amicus brief. Notice of denial of review shall be sent to the person(s) requesting review.

(d) The Administrator may defer consideration of an appeal under this section until the completion of proceedings under Subpart E or F relating to an NPDES permit issued to the same source.

(e) A petition to the Administrator under paragraph (a) of this section is, under 5 U.S.C. 704, a prerequisite to the seeking of judicial review of the final decision of the agency.

(f)(1) For purposes of judicial review under the appropriate Act, final agency action occurs when a final RCRA, UIC or PSD permit is issued by EPA 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 Regional order specifically provides that appeal of the remand decision will be required in order to exhaust administrative remedies.

(2) Notice of any final action regarding a PSD permit shall promptly be published in the Federal Register.

§ 124.22 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.

Subpart B—Specific Procedures Applicable to RCRA Permits

§ 124.31 Public notice of receipt of application and availability of summary.

(a) Upon receipt of a complete RCRA permit application, including both Part A and Part B, for major HWM facilities as defind in § 122.3(b), the Regional Administrator shall issue a public notice that an application has been received.

(b) This notice, as a minimum shall be distributed to the following:

(1) The appropriate State agency in the State where the proposed hazardous waste management facility will be located;

(2) The chief executive or legislative office of any county or municipality within a 10 mile (16 km.) radius of the proposed facility;

(3) The public library serving the location of the facility;

(4) The applicant;

(5) Any person on the mailing list referred to in Section 124.11, and

(6) Anyone else requesting it.

(c) The public notice shall include the following as a minimum:

(1) Name and address of the facility seeking a permit;

(2) Where complete copies of the application are available for inspection;

(3) The name of a person in the EPA Regional office who can be contacted for information or questions; and

(4) A statement that comments may be submitted in writing to EPA on the content of the application, the adequacy of the information submitted, recommendations regarding approval or disapproval of the permit, possible permit conditions, and other related matters during the period of permit review by EPA, and

(5) A statement whether or not a summary of the application will be prepared and when any such summary will be made available to persons requesting it.

(6) That after issuance of a draft permit, all interested persons will be given an opportunity to comment in accordance with § 124.11.

Subpart C—Specific Procedures Applicable to PSD Permits

§ 124.41 Procedures for small sources.

(a) The procedures in Subpart A shall not apply to a source whose increased allowable emissions are less than 50 tons a year, 1,000 pounds a day, or 100 pounds an hour. Instead, to the extent practicable, the Regional Administrator shall make every effort to observe the following schedule:

(1) Completion of the required analyses and notice of the tentative decision to issue or deny the permit within 30 days after receipt of a complete application; and

(2) Completion of the public participation process, to the extent required by § 52.21(r)(3), within 45 days after receipt of a complete application.

(b) At the time the Regional Administrator gives notice of his/her tentative decision, he/she shall also open the comment period, if necessary, for 30 days. If no response is received after 15 days, no public hearing shall be held. If no supportable concerns are received during the scheduled 30-day public comment period (or the public hearing, if one is held) the Regional Administrator shall issue a final decision.

Subpart D—Specific Procedures Applicable to NPDES Permits

§ 124.51 Purpose and scope.

(a) This Subpart sets forth additional requirements and procedures for decisionmaking for the NPDES program.

(b) Decisions on NPDES variance requests will ordinarily be made during the permit issuance process. Permit modifications and other changes in permit terms will be made generally 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.

§ 124.52 Permits required on a case-by-case basis.

(a) Various sections of Part 122, Subpart D allow the Director to determine, on a case-by-case basis, that certain concentrated animal feeding operations (§ 122.76), concentrated aquatic animal production facilities (§ 122.77), separate storm sewers (§ 122.79), and certain other facilities covered by general permits (§ 122.82) that do not generally require an individual permit may be required to obtain an individual permit 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 then apply for a permit under § 122.64 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 § 124.11 and any subsequent hearing.

§ 124.53 State certification.

(a) Under section 401(a)(1) of CWA, 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 a 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 § 124.55, 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.

(d) Any State certification shall be issued or denied within the reasonable time specified under § 124.53(c)(3). The State shall provide notice of its action, including a copy of any certification, to the applicant and the Regional Administrator.

(e) 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 CWA 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 subparagraph (1). For each such condition, the provision of CWA 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 condition which may be established during the EPA permit issuance process.

[*Comment:* The requirement of paragraph (e)(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 the 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 § 124.54.]

§ 124.54 Special provisions for State certification and concurrence of applications for section 301(h) modifications.

(a) Where an application for a permit incorporating a request under 301(h) of CWA is submitted to the State, the appropriate State official shall 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 modification permit under CWA 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 § 124.53(b) 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 CWA 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:* CWA 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.]

§ 124.55 Effect of State certification.

(a) Where certification is required under section 401(a)(1) of CWA, 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 § 124.53(d)(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 § 124.53 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 CWA to set more stringent limitations than those required by CWA. 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 § 124.53(d). 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.

§ 124.56 Fact sheets.

(a) In addition to the requirements of § 124.9, NPDES fact sheets shall contain the following:

(1) Any calculations or other necessary explanation of the derivation of specific effluent limitations and conditions, including a citation to the applicable guideline or standard provisions as required under § 122.69 and reasons why they are applicable or an explanation of how the alternate effluent limitations were developed;

(2) Where appropriate, a sketch or detailed description of the location of the discharge described in the application;

(3) For EPA-issued NPDES permits, the results of any State certification under § 124.53.

(b) In addition to the requirements of § 124.9, the Director shall send all fact sheets for NPDES permits 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 notice for any classes and categories of permits.

§ 124.57 Requirements for NPDES draft permits incorporating section 301(h) modifications.

Sections 124.6, 124.7, 124.8, 124.9, 124.10 and 124.56 are applicable to draft permits incorporating section 301(h) modifications except that the terms "Administrator or a person designated by the Regional Administrator" shall be substituted for the term Director, as appropriate.

§ 124.58 Public notice.

(a) In addition to the information required under § 124.11 (c) and (d), mailed public notice of an NPDES draft permit for a discharge where a CWA section 316(a) application has been filed under § 122.64(e) shall include:

(1) A statement that the thermal component of the discharge is subject to effluent limitations under sections 301 or 306 of CWA 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 under § 125.72 for a section 316(a) variance, a statement that the applicant has submitted such a plan.

(b) Notice of the formulation of a draft general permit under § 122.82 shall include:

(1) The requirements of § 124.11 (c) and (d), shall be concurrently published in a daily or weekly newspaper within the area affected by the discharge and in the Federal Register for EPA-issued permits 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 general permit.

(c) A public notice of an evidentiary hearing under Subpart E shall contain the information required under § 124.11(c), (e)(1) and (e)(3) and a mailed public notice shall also include:

(1) Reference to any public hearing under § 124.12 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.

(d) A public notice for a draft permit that will be processed under Subpart F shall include the information in paragraphs (c) and a statement that any hearing will be held under the non-adversary procedures for initial licensing. 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 F, 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(f);

(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 within 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).

(e) A notice of a grant of a panel hearing requested under Subpart F shall include the applicable information from paragraph (d). 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.

§ 124.59 Terms requested by the Corps of Engineers and other governmental agencies.

(a) During the comment period for an NPDES draft permit, if the District Engineer advises the Director in writing 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 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 other State or 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 CWA.

(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.

§ 124.60 Issuance and effective date of NPDES permits.

In addition to the requirements of § 124.17, the following provisions apply to NPDES permits.

(a) 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.

(b) Whether or not a draft NPDES permit was formulated or final permit was issued, 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 § 124.7 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 § 124.60 shall remain in effect.

(c)(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 exisiting 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 CWA, 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 alternatives terms and conditions.

(d) 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. 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 paragraphs (c) and (d):

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 intends 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 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 Example 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 that the equipment required for attaining the pH limit is achieved by the installation of the TSS equipment. In this the Regional Administrator may determine that the pH permit term is inserverable 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. Noted 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 severable 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.

(e) When issuing a finally effective permit under Subpart F, 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 § 124.17(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.]

(f) For purposes of judicial review under section 509(b) of CWA, final administrative action on a permit does not occur unless and until a party has requested and exhausted its Administrative remedies under Subparts E and F and § 124.101. Any party which neglects or fails to seek review under § 124.101 thereby waives its opportunity to exhaust available Agency remedies.

§ 124.61 Final environmental impact statement.

No final NPDES 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.

§ 124.62 Administrative Record.

Whether or not a draft or final permit was prepared subject to these regulations, the Regional Administrator, in any case where it appears during the course of an evidentiary hearing on a permit that significant new factors affecting that permit should be considered, may withdraw the contested terms subject to the hearing and issue a new draft permit addressing those terms under §§ 124.6 or 124.7. Uncontested terms shall remain in effect. The new draft permit shall proceed through the same process of public comment and opportunity for a public hearing, etc., as would any other draft permit.

§ 124.63 Decision on Variances and Modifications.

(a) The Director may grant or deny the following modifications or variances (subject to EPA objection under § 123.78 for State permits):

(1) Extensions under CWA section 301(i) based on delay in completion of a publicly owned treatment works;

(2) After consultation with the Regional Administrator, extensions under CWA section 301(k) based on the use of innovative technology; or

(3) Variances under CWA 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 CWA;

(3) A variance based upon certain water quality factors under CWA section 301(g); or

(4) A modification of CWA 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.

§ 124.64 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 § 122.64, 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 § 124.3 for issuance or renewal of that permit but has not yet formulated a draft permit under § 124.6 covering the discharge in question, the Regional Administrator after obtaining any necessary concurrence of the EPA Deputy Assistant Administrator for Water Enforcement under § 124.63, shall set forth a tentative determination on the request at the time the draft permit is formulated as specified in § 124.6, 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 § 124.6 covering the discharge in question, but that permit has not yet become final, 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 § 124.9. 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 and no application under § 124.3 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 § 124.6. This permit shall be accompanied by the fact sheet required by §§ 124.9 and 124.56 except that the only matters considered shall relate to the requested variance.

§ 124.65 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 on the EPA permit conditions must be filed under Subpart F 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 F unless the Regional Administrator determines that consolidation with an evidentiary hearing under Subpart E will expedite consideration of the issues presented.

[*Comment:* The panel proceedings of Subpart F 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 CWA section 301(j)(2), if a request for an evidentiary hearing is granted regarding a variance under CWA 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 CWA 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) are granted pursuant to § 124.60.

§ 124.66 Special procedures for discharge into marine waters section 301(h).

(a) Where it is clear on the face of a section 301(h) application that the discharge 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 tentative 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 § 124.54. 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 Subpart F of this Part.

§ 124.67 Special procedures for decisions on thermal variances (section 316(a)).

(a) Except as provided in § 124.66 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 §§ 124.17 ands 124.60 are whether alternative effluent limitations would be justified under CWA 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 § 122.64. The Regional Administrator will then decide whether or not to grant it. If it is granted, both the early decision on CWA 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 CWA 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 § 124.17 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 CWA section 316(a) after conducting such studies as are required under 40 CFR Part 125, Subpart H.

[*Comment:* A New discharger may not commence operation in violation of the thermal effluent limitation which are initially proposed unless and until the CWA section 316(a) variance request is finally approved.]

(b) Any hearing scheduled under paragraph (a) shall be publicized as required by § 124.11 and shall be held 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.

(c) Whenever the Regional Administrator defers the determination under CWA section 316(a), any determination under section 316(b) may be deferred.

Subpart E—Evidentiary Hearings for EPA Issued NPDES Permits

§ 124.71 Applicability.

The regulations in this Subpart govern all evidentiary hearings conducted by EPA under section 402 of CWA, except as otherwise provided in Subpart F. An evidentiary hearing is available to challenge any permit issued under § 124.17 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 a individual NPDES permit under § 122.64 as authorized in § 122.82 and then request an evidentiary hearing on the issuance or denial of an individual permit. In certain cases, evidentiary hearings may also be held on the terms of RCRA, UIC and PSD permits that are very closely linked with the terms of NPDES permits as to which a hearing has been granted. See § 124.74(b)(2).

§ 124.72 Definitions.

For the purpose of this Subpart, 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 the 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.

§ 124.73 Filing and submission of documents.

(a) All submissions authorized or required to be filed with the Agency 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 rejected materials 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 means 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 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 § 124.17, 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)(1) 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 § 124.20.

[*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.]

(2) Persons requesting an evidentiary hearing on an NPDES permit under this section may also request an evidentiary hearing on a RCRA, UIC or PSD permit. Such a request is subject to all the requirements of paragraph (1) and in addition will only be granted if each of the following conditions is met:

(i) Processing of the RCRA, UIC or PSD permit at issue was consolidated with the processing of the NPDES permit as provided in § 124.6(d);

(ii) The standards for granting a hearing on the NPDES permit are met; and

(iii) It is likely that the issues raised concerning the NPDES permit will be resolved in a way that makes modification of the RCRA or UIC permit appropriate.

(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 CWA.

(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 CWA.

(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 in accordance with § 124.60(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).

(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 § 124.20 as part of the formulation of and comment on a draft permit, 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 § 124.20 as part of the formulation of and comment on a draft permit 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 § 124.15.

§ 124.77 Notice of hearing.

Public notice of the grant of an evidentiary hearing regarding a permit shall be given as provided in § 124.58(c) 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 decision body who receives or who makes or knowingly causes to be made a communication prohibited by the Regional Hearing Clerk, for the public hearings, 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 CWA 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 necessarily 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 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.

(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 any other interested person not employed by the Agency at the time of the communications 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 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 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).

(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 § 124.20 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) The 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 the expert 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 § 124.20, 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 not genuine issue of material fact for determination. Any such motion shall be filed at least 45 days before the date set for the hearing, unless 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 countermotion 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 decision 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.

(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) Arrange and issue notice of the date, time and place of hearings and conferences and;

(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 confidential business information in accordance with § 122.16 and 40 CFR Part 2.

(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 not 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 his direct testimony first.

(2) All participants other than participants specified in the preceding subsection shall file their direct testimony on said issue not later than twenty days after the date of the filing of the testimony under the preceding subsection.

(3) All rebuttal testimony shall be filed no later than thirty days after the date of the filing of the testimony under paragraph (c)(1).

(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 required by § 124.20 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 decision-maker; and (3) it provides factual material for use by the decision-maker. 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 Deputy Assistant Administrator for Water Enforcement in accordance with § 124.103.

§ 124.86 Motions.

(a) Any party may make a motion, (including a motion to dismiss a particular claim on 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 3 days or extended for an additional ten days by the Presiding Officer for good cause shown.

(c) Notwithstanding § 122.69, 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 § 124.17. 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 CWA, 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 § 122.16 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 and upon payment of costs.

The Presiding Officer shall allow witnesses, parties, and their counsel an opportunity to submit 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 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 the final decision thirty (30) days after its service unless within such time.

(i) A party files a petition for review by the Administrator pursuant to § 124.101; or

(ii) The Administrator *sua sponte* files a notice that he or she will review the decision pursuant to § 124.101; or

(c) If a hearing has been granted on terms or conditions of a RCRA, UIC or PSD permit under the standards set forth in § 124.74(b)(2), the initial decision of the Presiding Officer to those terms and conditions shall be in the form of recommendations to the Regional Administrator for changes to the RCRA, UIC or PSD permit. The Regional Administrator shall modify the RCRA, UIC or PSD permit to the extent he or she considers appropriate, and explain his or her reasons for rejecting any recommendations of the Presiding Officer, within thirty days of receipt of the Presiding Officer's recommendations. The permit as modified may be appealed to the Administrator as provided in § 124.21.

§ 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 preceeding, 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 for 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 will 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, any adverse order or ruling to which the party objected during the hearing by filing with the Administrator notice of appeal and 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 days 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 initial decision or the denial of an evidentiary hearing.

(e) 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 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 CWA, final Agency action on an issue occurs after EPA review procedures are exhausted and the Administrator's decision is issued 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 the final Agency action and occurs upon the service or 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 (2).

(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 therefrom.

(2) For purposes of judicial review under section 509(b) of CWA, final agency action occurs 10 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 extend 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.

§ 124.102 Applicability of subpart E.

(a) All the provisions of this subpart except § 124.76, § 124.83(c)(3) and § 124.85(d)(1) concerning the automatic receipt of the administrative record into evidence shall apply to all hearings for which the notice of hearing under § 124.77 is issued after the effective date of these regulations, *provided* that the Presiding Officer at any such proceeding may vary or suspend any of the terms of these regulations during a six-month transitional period after their effective date to avoid inconvenience or injustice.

(b) Section 124.76 and the provisions of §§ 124.83(c)(3) and 124.85(d)(1) for automatic receipt of the administrative record into evidence shall apply to all hearings regarding a permit which was based on an administrative record under §§ 124.20 and 124.62.

§ 124.103 EPA headquarters approval of stipulation or consent agreement.

No evidentiary hearing under Subpart E 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 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.

Subpart F—Non-Adversary Procedures for NPDES 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 A through E in the following cases:

(1) In all proceedings for the issuance of a modified permit under section 301(h) of the Clean Water Act, except that in such proceedings:

(i) The terms "Administrator or a person designated by the Administrator" shall be substituted for the term "Regional Administrator"; and

(2) In any proceedings for the issuance of any other NPDES 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. If an NPDES draft permit is processed under this Subpart, any other draft permits which have been consolidated with the NPDES draft permit under § 124.6(d) shall likewise be processed under this Subpart.

(3) The parties to an evidentiary hearing that would otherwise be held under Subpart E 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 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 stating the reasons. 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, Subpart E shall be applied instead.

(b) "Initial licensing" includes both the first grant of an NPDES permit to a discharger that has not previously held a 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 A through E apply to procedures under this Subpart:

(a)(1) Sections 124.1 through 124.11.

(2) Section 124.18;

(3) Section 124.22.

(c)(1) Section 124.54 "Terms requested by the Corps of Engineers and other Government Agencies".

(2) Section 124.61 "Final environmental impact statement".

(3) Section 124.6e "Decision on variances and modifications".

(d)(1) Section 124.72 "Definitions".

(2) Section 124.73 "Filing".

(3) Section 124.78 "Ex parte communications".

(4) Section 124.80 "Filing and service".

(5) Section 124.85(a) (Burden of proof);

(6) Section 124.86 "Motions"; and

(7) Section 124.87 "Record of hearings".

(8) Section 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 §§ 124.11 and 124.58. At the discretion of the Regional Administrator, the comment period specified in this notice may include an opportunity for a public hearing under § 124.12.

§ 124.114 Request for hearing; request to participate in a hearing.

(a) By the close of the comment period set forth in § 124.113, 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 § 124.58(e). 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 also decide before a draft permit is issued that a hearing should be held under this Part. At the discretion of the Regional Administrator the notice may provide for a hearing under § 124.13 before a panel hearing is held, provided that no cross-examination under § 124.14 shall be permitted. When such a hearing is to be held, the notice of the formulation of the draft permit under § 124.113 shall so state.

§ 124.115 Effect of denial of, 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 § 124.58(d).

§ 124.116 Notice of hearing.

(a) Upon granting a request for a hearing under § 124.114 the Regional Administrator shall promptly publish a notice of the hearing as required under § 124.58(e). 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) 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. 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) 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 shall be restricted either to points that could not have been made in written comments, or to emphasize 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) for the filing of main 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) 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 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 the persons identified in paragraph (a) 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 § 124.10 (or in the case of voluntary use of these procedures under § 124.111(a)(3), the administrative record for the final permit under § 124.20 and § 124.62) 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 EPA temporary or permanent 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 the 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 persons 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 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.

(e) At any time before the close of the hearing, any person may submit to the Presiding Officer written questions specifically directed to any person appearing or testifying in the hearing. The Presiding Office, after consultation with the panel may, at his sole discretion, ask the written question so submitted.

(f) 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 of the record, 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) of this section, 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 be served on all hearing participants and 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 § 124.20;

(2) Any material submitted under § 124.78 relating to *ex parte* contracts.

(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 § 124.121;

(10) Any motions for, orders for and the results of, any alternatives to cross-examination under § 124.121;

(11) The full transcript of any cross-examination held; and

(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 § 124.20 or § 124.62;

(2) All requests for hearing submitted under § 124.74, and all rulings on those requests; and

(3) The items specified in subparagraphs (a)(4) through (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 respect 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.

(a)(1) 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 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 issues 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 his designee may consult with the Presiding Officer, members of the hearing panel or any other EPA employee in preparing the final decision. 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.

§ 124.128 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.

§ 124.129 EPA headquarters approval of stipulation or consent agreement.

No non-adversary initial licensing hearing under Subpart F 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 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.

[FR Doc. 79-18204 Filed 6-13-79; 8:45 am]
BILLING CODE 6560-01-M