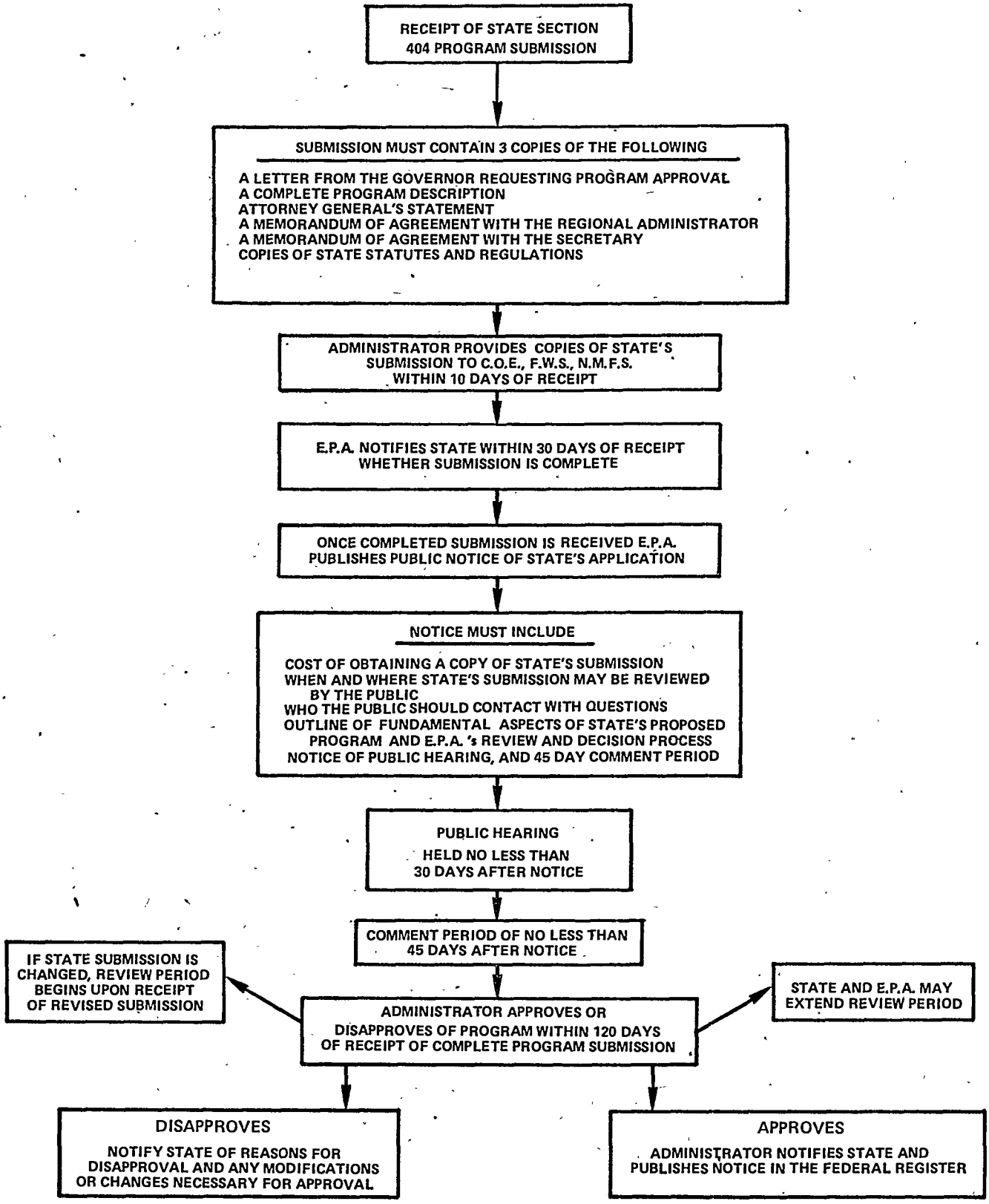
404 PROGRAM SUBMISSION AND APPROVAL PROCESS



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I. Part 124—Procedures for Decisionmaking.

A. What Does This Part Do?

Part 124 establishes the procedures for issuing, denying, modifying, revoking and reissuing, or terminating EPA-issued RCRA, UIC, PSD, and NPDES permits. It also establishes procedures applicable to certain State administered permit programs.

This framework gives EPA the discretion to process RCRA, UIC, PSD, or NPDES permits separately or in combination. While consolidating permit procedures is not mandatory, it is encouraged whenever a facility or activity requires permits under more than one statute. Without consolidation, a facility needing multiple permits would repeat the entire permit process for each permit. But with the opportunity for joint issuance of draft permits, joint comment periods, and joint public hearings under Part 124, a facility would go through the process only once.

When EPA issues all the permits required by a facility, the process may be consolidated at any time. When responsibility is divided between EPA and a State, the regulations encourage joint proceedings.

Part 124 includes procedures for issuing permits under regulations implementing the "prevention of significant deterioration" (PSD) provisions of the Clean Air Act. These procedures are similar to 40 CFR § 52.21(r). No parallel requirements have been included in Parts 122 and 123 because the mechanism for approving State programs under the Clean Air Act differs from that for other permit programs. EPA will explore the possibility of more comprehensive consolidation in the future.

B. How Does This Part Work?

Under these procedures, a facility must apply for a permit under the requirements in Part 122 (RCRA, UIC, NPDES) or 40 CFR § 52.21 (PSD). The Director reviews the application and notifies the applicant when the application is complete (§ 124.3). The Director then decides whether to deny the application or prepare a draft permit. If the former, the Director issues a notice of intent to deny; if the latter, he or she prepares a draft permit under § 124.6. Both decisions are accompanied by a "statement of basis" (§ 124.7) or a "fact sheet" (§ 124.8) that becomes part of the "administrative record" assembled for all EPA-issued permits (§ 124.9). Because of practical limits on EPA's ability to explain in comprehensive detail each of the permits it issues, the depth of discussion in the fact sheet or statement of basis will be related to the importance of the issues involved and their controversial nature.

Decisions to modify, revoke and reissue, or terminate a permit (§ 124.5) also require the Director to deny the request or prepare a draft permit. The Director may take any of these actions either on his or her initiative or by acting on a request submitted by any interested person. Denials of requests for modification, revocation and reissuance, or termination, unlike denials of applications, are not subject to public notice, public comment or public hearings. If the Director decides to deny the request, he or she sends the requester a notice briefly stating reasons for the denial. This notice is not accompanied by a "statement of basis" or a "fact sheet." And an "administrative record" is not assembled. Denials of requests for modification, revocation and reissuance, or termination cannot be formally appealed to the Administrator under § 124.19 but only informally under § 124.5(b). All draft permits prepared under §§ 124.5 and 124.6 are subject to public notice (§ 124.10), public comment (§ 124.11) and, in suitable cases, public hearings (§ 124.12). This process allows any interested person to bring forward any comments or questions concerning the draft permit or its supporting materials. After the comment period (including any public hearing) has closed, EPA issues a final decision on a permit (§ 124.15). The final permit decision is accompanied by a response to all significant comments (§ 124.17) which, together with additional supporting material, completes the final administrative record (§ 124.18).

Whenever commenters on a draft permit ask that changes be made, the final permit will not become effective until 30 days after notice is served under § 124.15(a). This gap between the date of issuance and the effective date of a final permit allows interested persons time to appeal a decision on a RCRA, UIC, or PSD permit to the Administrator under § 124.19 or request an evidentiary hearing for an NPDES permit under § 124.74. If no such comments are received, the final permit is issued and effective the same day.

When an approved State program is the permitting authority, the State Director must prepare a draft permit, provide public notice and opportunity for a hearing and allow the public at least 30 days to comment on the draft permit before a final permit is issued. A fact sheet for all major permits is also required. (These regulations do not include requirements for processing State-issued PSD permits.) Section headings (or when necessary, paragraph headings) have been highlighted to make it easier to identify which Part 124 requirements apply to approved State programs.

C. What Kinds of Hearings Are Available Under This Part?

There are three kinds of hearings available under Part 124: the public hearing, the evidentiary hearing and the non-adversary panel hearing.

(1) *The Public Hearing.* Section 124.12 describes a public hearing that is purely legislative in nature. Public hearings are granted in two situations: (1) upon written request, if the Director finds "a significant degree of public interest" in a RCRA, UIC, PSD, or NPDES draft permit or (2) without request at the Director's discretion. At such a hearing, oral or written statements and data concerning the draft permit can be submitted by any interested person. In general, this is the only type of hearing that will be held on RCRA, UIC, or PSD permits. Limited exceptions to this rule are described below.

(2) *The Evidentiary Hearing.* Evidentiary hearings are provided for in Subpart E. These hearings are available whenever NPDES permits are contested, if a written request is filed within 30 days after a decision on the final permit. Evidentiary hearings also are available whenever RCRA permits are terminated. Under certain circumstances (outlined in § 124.74(b)(2)), persons requesting an evidentiary hearing on an NPDES permit also may request that the evidentiary hearing include closely related conditions of a RCRA or UIC permit. PSD permits can never be made subject to a Subpart E hearing.

(3) *The Non-Adversary Panel Hearing.* Subpart F contains procedures for conducting a non-adversary panel hearing. These new procedures primarily apply to specific kinds of NPDES permits. Panel hearings may be held for first decisons on any CWA variance and for the issuance of any other NPDES permit which constitutes "initial licensing" under the Administrative Procedure Act. The Regional Administrator also may use these procedures when making RCRA or UIC permit decisions, or when preparing a draft NPDES general permit under § 122.59. Finally, the parties to an evidentiary hearing under Subpart E may agree to use Subpart F procedures instead. Whenever a Subpart F hearing is held on one permit and other permits subject to this Part have been consolidated with that first permit, all

the permits are processed together under Subpart F.

In a panel hearing the Presiding Officer sits with a panel of other EPA employees. Together they question the participants, rule on requests for cross-examination, and schedule supplemental hearings for cross-examination. A recommended decision is issued and becomes final if not appealed to the Administrator within 30 days. (The Presiding Officer will generally be an Administrative Law Judge. Persons other than Administrative Law Judges may serve as Presiding Officers if no NPDES permit other than a general permit is involved or by agreement of the parties if an NPDES permit other than a general permit is involved.)

To clarify the different types of hearings available, EPA has adopted the following terminology:

A "public hearing" is a hearing under section 124.12.

An "evidentiary hearing" is a hearing under Subpart E of Part 124.

A "panel hearing" is a hearing under Subpart F of Part 124.

A "formal hearing" is either a hearing under Subpart E or a hearing under Subpart F, since both types of hearings conform to the formal hearing requirements of the Administrative Procedure Act.

These terms can be found in the "definitions" section (§ 124.2).

D. How Does This Part Relate to the June 14, 1979, Proposed Regulations?

The following is a discussion of significant comments received and the basis for revisions made to Part 124 of the proposed regulations. Minor editorial changes have been made in most sections and are not discussed.

EPA has attempted to address all significant comments received on this Part during this rulemaking. However, the procedures in Part 124 are a direct outgrowth of the procedures in the final NPDES regulations published June 7, 1979. See 44 FR 32854. Many comments addressed in the preamble to those regulations apparently were answered satisfactorily and were not raised again. As they still may be relevant to a full understanding of these procedures, the reader may find it helpful to read the preamble to the final NPDES regulations as well as this preamble.

§ 124.1 Purpose and scope.

A number of commenters questioned the value of the entire consolidation effort. Several points were made.

(1) Consolidation will be too cumbersome.

Several commenters argued that consolidation would slow down the permitting process to the pace of the slowest permit. They provided graphic examples of how confusion would result when decisionmaking on one permit interacted with decisionmaking on another. These commenters also argued for the efficiency of a facility getting its permits in sequence, as they are needed, rather than all at once. Accordingly, the comments suggested that consolidation ought to be at the option of the permit applicant.

While issuing several permits together often may take longer than issuing the first of a sequence of permits, this is not the whole picture. First, RCRA, UIC, PSD, and new source NPDES permits are construction permits. A new facility or activity which requires a permit under more than one statute must obtain *all* required permits before construction can begin. Thus, it is the granting of the *last* permit, not the first, that completes the job of specifying the environmental requirements applicable to a plant. Planning and financing often cannot proceed until those administrative requirements are fixed. Consolidating the procedures, in almost all cases, will accelerate the granting of that last and most important permit.

Second, and more important, the very process of issuing permits to a major source in sequence, rather than at the same time, leads to problems of its own. The issuance of an earlier permit may have been based on assumptions about what a later permit would require. When the later permit imposes unanticipated requirements, the first permit then may need to be re-examined. Moreover, evidence introduced at a later permit proceeding may affect the evidence at an earlier proceeding and call into question an earlier decision. Whenever such situations arise, the Agency (and the applicant) are faced with either trying to patch up the earlier permit, which is slow and cumbersome, or moving toward final action and judicial review with questions of consistency unresolved. Consolidation at least provides a mechanism by which such problems can be identified and resolved before the final permits are issued.

For these reasons EPA has rejected the suggestion not to proceed further with consolidation at this time.*

EPA also has rejected the suggestion that consolidation should be the choice of the permit applicant only. The regulations provide that the permit applicant may request consolidation, and in most cases considerable weight will be given to that request. There may be some cases when staggering the issuance of permits fits a project construction schedule better than issuing all the permits together, and when the dangers inherent in issuing permits in sequence are worth risking. However, both the States' and EPA's interests in handling their own workload and the public interest in effective environmental regulation also must be considered. Since both of these interests could be served by consolidating permits in a particular case, the suggestion to give the permit applicant veto power over consolidation has not been accepted.

(2) New programs should not be consolidated with older ones.

One commenter argued that because the RCRA and UIC programs are new, untested, and subject to change, they should not be consolidated with the NPDES and PSD programs.

We agree that these programs are new and that consolidation is an untested effort. It is quite likely that in a few years, these consolidated regulations might be comprehensively rewritten to account for what we will have learned, just as the NPDES regulations had to be revised in light of practical experience.

However, this is no reason for avoiding consolidation. From the very beginning of these new programs, questions about their relationship to each other and to older permit programs were inevitable. These consolidated regulations are simply an effort to address in advance some of those questions explicitly rather than to improvise solutions later on a case-by-case basis.

(3) Consolidation will make NEPA more broadly applicable.

When these regulations were proposed, the preamble stated EPA's position that the National Environmental Policy Act (NEPA) does not require preparation of an environmental impact statement (EIS) when permits are issued under the RCRA, UIC, or PSD programs, or when non-new source NPDES permits are issued. 44 *FR* 34247. (June 14, 1979)

No comments opposing this position were received, and a number of comments supported it, either directly or by necessary implication. Accordingly, the same position has been adopted in the final regulations. See § 124.9.

Several commenters were concerned that consolidating permits would make

*One commenter argued that these regulations should be delayed because of possible inconsistency with the Energy Mobilization Board proposals. In fact, these regulations are entirely consistent with that legislation. Both the House and Senate versions of the bill place their major emphasis on coordinating, and where possible, consolidating decisionmaking for a facility. This is also the aim of these regulations.

NEPA more broadly applicable. One commenter argued that even though PSD permits are exempt from NEPA by statute, if a PSD permit were consolidated with a new source NPDES permit for the same plant, PSD issues might have to be discussed in the EIS on the NPDES permit. The result would make NEPA applicable to the PSD permit despite the explicit language of the Clean Air Act.

EPA agrees that this is an anomalous result, but it is hard to see how to avoid it. Given the explicit language of many NEPA cases that *all* the reasonably foreseeable major impacts of a project must be discussed in an EIS, a strong argument can be made that the kind of comprehensive balancing analysis NEPA contemplates would be impossible if air quality impacts were totally excluded. This argument, however, does not rise or fall on whether the permits are consolidated. It applies just as strongly to an NPDES permit issued to a source after *or* before a PSD permit. Indeed, in one recent case EPA has been challenged for its failure to adequately consider air issues in an EIS on an NPDES permit issued after the source's PSD permit. *Save the Valley, Inc.* v. *EPA,* Civil No. 79–3058 (6th Cir. 1979). In such a case, issuing permits in sequence rather than together will likely lead to confusion of the NEPA issues. If the EIS is prepared for one permit before another permit is issued, any new information provided in subsequent permit proceedings may lead to charges that the EIS is inadequate for not considering it. If the EIS is prepared after some of the permits are issued, any new information in the EIS, conversely, may lead to charges that the consideration of the earlier permits was inadequate.

Consolidating permit proceedings offers a procedural vehicle for avoiding these results and ensures that work on the EIS does not have to be re-examined in the context of an individual permit decision.

§ 124.2 Definitions.

A few commenters stated that the regulations did not clarify whether permit modification, revocation and reissuance, and termination would be processed through the same procedures as permit issuance and denial. To make this clear, the regulations identify, on a section-by-section basis, which kinds of permit actions are concerned.

This section has also been rewritten to specify more precisely the definitions that apply to the PSD program, and to help make clear that, for PSD, the general provisions of Part 122 do not apply.

§ 124.3 Application for a permit.

(1) A number of commenters urged EPA to specify a date by which an application should be considered complete. One commenter suggested that this date should be the date of a complete response to the Director's request for additional information. EPA has accepted this suggestion, but has not accepted a second suggestion to limit the Director's authority to request information that will make the application complete. Without the power to require such information, the Director will not be able to make responsible decisions. If the Director believes an application is incomplete and needs to be supplemented, this section now requires him or her to list, in a notice of deficiency, all the information needed to make an application complete. The limiting factor is that not more than one deficiency notice may be issued in any given permit proceeding.

(2) Beyond this, many commenters urged that EPA set legally binding deadlines for its own actions under this Part. These comments have not been fully accepted for the reasons set forth in the preamble to the final NPDES regulations. See 44 *FR* 32892 (June 7, 1979).

But, EPA has partially accepted the comments where major new facilities or activities are concerned. EPA will now set and make public a schedule for decisionmaking for each new project.

The schedule is not legally binding, although EPA expects schedules to be followed in most cases. If schedules were set so that they could be met in all cases, they would not be of much use as a management tool. Accordingly, EPA expects to set schedules tight enough to pose some risk of not meeting them, and it expects some schedules will not be met. This provision does not apply to PSD permits as they are already subject to a one-year, statutorily imposed, timetable for decision.

(3) Some commenters recommended that § 124.3(a) explicitly exempt UIC activities authorized by rule under § 122.37 from the application requirement. This section does not apply to them because UIC activities authorized by rule do not "require a permit." An exemption has been added to the final regulations to make this explicit.

(4) 40 CFR § 52.21(r)(3) provides that certain sources requiring a PSD permit need not go through EPA permitting procedures if the relevant State has already provided an equivalent opportunity for public comment. These provisions have been included in Part 124 as § 124.3(b).

§ 124.4 Consolidation of permit processing.

(1) EPA has redrafted proposed § 124.4 in its entirety. The proposal covered both existing and new facilities and allowed applicants to delay filing RCRA and UIC permit applications for up to 180 days in order to consolidate them with applications for new NPDES permits or with reapplications for expiring NPDES permits.

These elaborate provisions were included in the proposal because RCRA and UIC permits were to be granted for the life of the facility. Thus, it was necessary to provide a special mechanism to coordinate issuing these permits with renewals of five-year NPDES permits. Now that RCRA permits and UIC permits for Class I wells also will be issued for fixed terms, it will be much simpler to coordinate by allowing the Director to set permits to expire simultaneously; the regulations have been rewritten to provide for that.

A special provision for coordinating applications is unnecessary for new facilities. Since all permits subject to this Part will be required at the same early stage of the project's planning, there will be a natural incentive to file corresponding applications even earlier and at about the same time.

(2) A number of commenters (including some who opposed the concept of consolidation) urged that States should be required to consolidate permit proceedings with EPA whenever EPA and a State share permitting authority for a given facility or activity. EPA believes it would be unwise to start the consolidation effort by compelling the States to act in parallel with the Federal government whenever the Federal government saw fit. Because the efficiency of the consolidation effort will partially depend on State cooperation, the comment has not been accepted. The regulations have been amended to reflect EPA's position that approved States are encouraged to consolidate applications, but are not required to do so.

(3) The sections relating to consolidation of draft permits were originally part of proposed § 124.6. Proposed § 124.6(d) has been combined with the new § 124.4 to make clear that consolidation can occur at different stages in the permitting process. Comments addressing proposed § 124.6(d) are answered here.

Several commenters objected to the potential consolidation of PSD permits with other permits. They argued that consolidation of PSD permits would

cause unreasonably delay, and might even breach the one-year statutory deadline imposed by CAA section 165(c).

EPA disagrees. Compliance with the statutory deadline has not been a problem with the vast majority of PSD permits. The applicant's right to a speedy decision is explicitly preserved by § 124.4(e) which provides that consolidation leading to a breach of the deadline will not occur without the applicant's consent. One year is short compared to the time generally needed by the private sector to plan and construct a facility without regard to any Federal regulation; large facilities often require more than a decade. Taking longer to process the PSD permit alone due to consolidation is likely to be more than offset by the shorter time needed to process other permits for the same facility and by gains from considering applications together instead of sequentially. Because it is the *application* date which fixes the right to available PSD increments, consolidation will not affect a facility's "place in line" for available increments.

§ 124.5 Modification, revocation and reissuance, or termination of permits.

This section combines proposed §§ 124.5 and 124.7 under a single heading in order to eliminate an unnecessary distinction between actions arising out of requests by interested persons (including the permittee) and actions undertaken by the Director without any preceding request. Whether a modification, revocation and reissuance, or termination is based on a request or on an independent decision by the Director, the action must be supported by cause under §§ 122.15 or 122.16. This section has been amended to allow the Director to request the submission of an updated application whenever a permit is being modified and to require the submission of a new application whenever a permit is being revoked and reissued. A draft permit must be prepared for any modification or revocation and reissuance unless the permit modification qualifies as a minor modification under § 122.17. A "notice of intent to terminate" is a type of draft permit and is issued for all proposed terminations. These drafts, whether in permit or notice form, are processed the same as any draft permit prepared under § 124.6. They are accompanied by a statement of basis (§ 124.7) or a fact sheet (§ 124.8), based on the administrative record (§ 124.9), subject to public notice (§ 124.10), and public comment (§ 124.11) and public hearings (§ 124.12). Terminations of RCRA and NPDES permits are eligible for evidentiary hearings under § 124.74.

(1) EPA has kept this section separate from the section on draft permits (§ 124.6) for two reasons. First, EPA wants to distinguish permit actions that can be initiated only by the permittee (permit issuance based upon an application under § 124.6) from permit actions that can be initiated by the Director (124.5).

We emphasize this distinction in response to one commenter who asked whether the Director could prepare a draft permit for a facility that had not even applied for one. The Director's authority to take permit actions without having received an application is limited to the situations specified in § 124.5 and to general permits and permits by rule. Second, EPA wants to distinguish a denial of a request for modification, revocation and reissuance, or termination under § 124.5 from a tentative decision to deny a permit application under § 124.6.The former is not subject to the same procedures as a denial of an application for a permit. Notice of a denial of a request for modification, revocation and reissuance or termination is not a draft permit and there is no opportunity for public comment, a public hearing or a formal administrative appeal. These denials are subject only to an informal appeal under § 124.5(b).

In adopting this position, EPA rejected comments urging that modification denials be appealable through the same agency procedures as permit issuance or denial. Departures from the cycle of permit issuance and periodic reexamination should not be encouraged in such a manner. If encouraged, they could keep many permits in a state of perpetual reexamination thus impeding the control program being implemented.

(2) Other commenters urged that the Director should be required to consult with the permittee before he or she modifies, revokes and reissues, or terminates a permit. In most cases, modifications by the Director will be triggered by information submitted by the permittee, and the Director may determine whether "cause" exists under § 122.15. Therefore, "surprise" modification actions will be rare. Although EPA agrees that consultation may be advisable in many cases, there may be other cases where it is not advisable. Accordingly, the comment has not been accepted.

(3) The Natural Resources Defense Council asked that interested persons besides the permittee be allowed to request permit modification, revocation and reissuance, or termination. EPA agrees with this comment and has rewritten § 124.5 to reflect this.

(4) This section does not contain special procedures for modifying PSD permits. EPA will decide whether such procedures are necessary when it promulgates rules based on its September 5, 1979 Notice of Proposed Rulemaking and may amend this section at that time. This section, however, does contain procedures based on 40 CFR § 52.21(w) for terminating PSD permits. Since the purpose of § 52.21(w) is to quickly adjust permits granted under an erroneous interpretation of the law to the clear standards of the *Alabama Power* decision, no procedures are provided for those decisions. They simply will be granted or denied by the Regional Administrator upon written application.

§ 124.6 Draft permits.

(1) A number of commenters objected to the use of draft permits. These commenters would perfer to comment on the permit application before the agency takes a tentative position instead of after such a position has been taken and prepared in the form of a draft permit. These commenters feel that preparing a draft permit creates the impression that the agency already has prejudged the case. EPA disagrees with this view. A draft permit functions only as a *tentative* decision on the issuance, modification, revocation and reissuance, or termination of a permit. It is a mere proposal, subject to change based upon comments received during the public comment (including the public hearing) period. Moreover, there is a major advantage to the public in commenting on the draft permit rather than on the application alone. Comments on the application are invariably restricted to the content of the application, reflecting only the applicant's analysis and policy choices. The draft permit, on the other hand, embodies the tentative views and analysis of the decisionmaker who the comments are, ultimately, designed to influence. Therefore, comments on a draft permit can be written in a more focused and informed way.

(2) This section also has been amended to make clear that the standard permit provisions of Part 122 do not apply to PSD permits.

§ 124.7 Statement of basis.

§ 124.8 Fact sheet.

(1) EPA has rejected comments urging that the discussion requirements in both these sections be expanded. As explained in the preamble to EPA's Final NPDES Regulations (see 44 *FR* 32881 (June 7, 1979)), the statement of

basis is supposed to be a brief summary that meets minimum requirements. If the Director needs to provide more detail, he or she always may prepare a fact sheet, which is more comprehensive than a statement of basis.

(2) EPA also has rejected comments urging that the statement of basis requirement be eliminated for UIC permits for Class II wells. Preparing a statement of basis should not be burdensome even for individual wells, and the burden under the UIC program will be eliminated for injections authorized by rule (§ 122.37) and reduced for injections within area permits (§ 122.36).

(3) Commenters suggested that EPA define "major permits" more precisely. Though this would be desirable, the comment cannot be accepted now. Such a definition is a function both of EPA's knowledge of the impact of the pollution involved and of its resources to address this aspect of permit issuance. Both are too uncertain right now to justify departing from the present approach of year-by-year designation of "major" permits, which is described in § 122.3.

§ 124.9 Administrative record for draft permits when EPA is the permitting authority.

(1) Several commenters urged EPA to include supporting as well as nonsupporting documents in the administrative record. Because the documents for draft permits under this section will generally comprise most of the material in the final administrative record, EPA agrees that the record should include both kinds of documents. Fact sheets (and, to the extent discussion is needed, statements of basis) also should be objective statements of the issues faced by EPA and should cite documents on both sides of controversial issues. No change has been made because the existing text is consistent with this interpretation.

(2) Another commenter suggested that all material in the administrative record be stamped with the date of submission. This approach, or a variation of it, might be advisable in some cases (or for some documents). However, right now EPA does not know enough about handling these administrative records to specify a particular approach on questions of detail in this regulation.

§ 124.10 Public notice of permit actions and public comment period.

(1) Several commenters stated that this section sounded as if public hearings could not be scheduled when a permit is issued and would only be held in response to requests received during the public comment period. The commenters assumed, and EPA agrees, that hearings often will be scheduled at the same time the public notice is issued. A sentence has been added to § 124.10(a) to make this clear.

(2) One commenter questioned the provision for giving notice of 404 permit action to adjacent property owners, arguing that the identity of such owners in some cases, might be very hard to determine. Although EPA believes such cases will be rare, the language has been changed to require notice to be given to "any reasonably ascertainable" property owner.

(3) Another commenter objected to the "comment" in the proposal that gave the Director the discretion to use press releases as a method of public notice. Although EPA eliminated that "comment," the Agency recognizes that the use of press releases for public notice is both customary and often essential for any organization that wants to communicate with the public.

(4) Finally, one commenter objected to the inclusion under § 124.10(d) of a "summary of major conditions" in the notice of draft permits. It argued that this would either lead to long notices or to litigation for failure to provide an adequate "summary."

EPA agrees and has eliminated summaries from the public notice requirements. Not only would summaries result in long public notices, they would also impose an increased burden on the Director by requiring the preparation of an additional document. Since summaries repeat essentially the same information contained in the permit application, draft permit and statement of basis or fact sheet, EPA has decided to require copies of the latter documents to be sent to certain persons instead. This requirement would spare Directors from an additional burden without sacrificing public participation. Other interested persons may request copies of these documents.

§ 124.12 Public hearings.

Several commenters argued that the ground for granting a hearing—"significant degree of public interest"—was vague, and that it did not take account of the permit applicant's interest (or someone else's interest) in using the hearing to explore issues further.

EPA has not changed this requirement. One of the purposes of having a public hearing is to respond to public interest, which is not subject to precise measurement. EPA, however, has added a second ground for holding a public hearing which allows the Director to hold a public hearing at his or her discretion.

Since a public hearing is not required by any of the statutes covered by this Part,[8] EPA does not believe that a refusal to hold a hearing by itself, should ever lead to invalidation of a permit. The question on judicial review should be whether the record EPA generated adequately supports the decisions involved, not whether some other record might have been better.

I. *Adjudicatory hearings or public hearings.* In the preamble to the proposed regulations, EPA stated its opinion that a formal evidentiary hearing under § 554 of the Administrative Procedure Act (APA) is not required for issuance of RCRA, UIC, or PSD permits. Supporting reasons were given. See 44 *FR* 34264–65. (June 14, 1979)

This conclusion proved uncontroversial where the UIC and PSD programs were concerned. EPA did not receive any comments challenging its conclusion that formal hearings were not required for PSD permits, and received only one dissenting comment as to UIC permits.[9]

The question of the proper procedures for RCRA permits, however, proved to be the single most controversial issue in Part 124. Several major industrial groups argued that formal hearings were required. Others were equally forceful in their arguments that no such hearing was mandated and that the procedures proposed by EPA were more elaborate than justified. Because of its importance this issue will be discussed in detail.

A. Arguments in Favor of a Formal Hearing

(1) *Due Process Arguments.* Some commenters urged that due process required a formal APA hearing before the initial decision on a RCRA permit. It is well settled by now, however, that the requirements of due process are flexible, and that the procedures used can be adapted to the nature of the problem being addressed. *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. 517, 524 (1978), *Mathews* v. *Eldridge*, 424 U.S. 319 (1976), *Goss* v. *Lopez*, 419 U.S.

[8] Except for the PSD program, where an opportunity for a hearing is required by statute. See CAA section 165(a)(2). EPA believes that this requirement should be read in the light of the provisions of CAA section 307(d)(8) concerning procedural errors.

[9] One commenter argued that because the SDWA section 1424(b)(2) required a formal hearing for certain interim permits issued by the Administrator, Congress must also have intended to impose such requirements where the statute is silent, as it is in section 1421. However, as the preamble to the proposal explained, the normal approach in statutory construction is the opposite of that advocated by the comment. (See 44 *FR* 34265 (June 14, 1979).) Differing language generally indicates differing meanings, rather than the same meaning.

565 (1975). Although some of the commenters on this point cited earlier editions of Professor Davis' *Treatise on Administrative Law*, the latest edition of the *Treatise* strongly favors this flexible approach. K. Davis, *Administrative Law Treatise*, Chs. 10, 12 (2d ed 1979).)

EPA believes it has fully met whatever due process tests may apply. It has provided for notice of what the Agency proposes to do, an opportunity to challenge that proposal both through written comments and at an informal hearing, a response to comments and a decision based on the administrative record.

It has done all this in the context of decisions aimed, not at punishing past misconduct in any way, but at implementing an entirely new field of regulatory policy. Decisions will be based on choices among policy approaches; not on judgments of legal violation. Moreover, the facts at issue will be the types of technical questions that trial procedures are not particularly well suited to address.

Indeed, due to the similarity among RCRA, UIC and PSD issues, a decision that due process requires a formal APA hearing for RCRA permits certainly would lead to the conclusion that such a hearing is required, on both the Federal and State levels, for PSD and UIC permits. This conclusion probably would result in a decision that formal hearings are required for many other types of State and Federal land use permits currently granted or denied by less cumbersome methods.

(2) *The Legislative Intent.* Most commenters did not emphasize the due process argument. Instead, they looked to RCRA itself, and made two arguments; one based on the text of the statute and one on its legislative history.

(a) *The Language of the Statute.* No commenter denied that the permitting section of RCRA, section 3005, contains no reference to a "hearing" of any sort in connection with the initial grant or denial of a permit. Instead, the commenters fixed on section 3008 (b), which provides for a "public hearing" on "any order or any suspension or revocation of a permit". They argued that "order" here has the meaning given in the definitions section of the Administrative Procedure Act, namely: "the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rulemaking but including licensing." 5 U.S.C. § 551(6). If this argument is accepted, the initial granting or denaying of a license falls within the APA definition of "order" and a formal hearing is required. But there are three problems in accepting this argument.

First, it is an extremely strained overall reading of the statute. If Congress had meant to require a formal hearing on the issuance of RCRA permits, it would have stated that intent in the section specifically concerned with permit issuance (section 3005), not by inserting it via the back door by the use of "order" in section 3008.

Indeed, the very sentence in section 3008 referred to by proponents of formal hearings requires such hearings for the "suspension" or "revocation" of a permit as well as for any "order." This shows that Congress was perfectly capable of describing procedures for permit action in detail when it chose to, rather than leaving such procedures to be inferred from the use of the word "order." As a matter of sentence construction, it casts doubt on whether "order" can properly be read to include permit actions; if it did include permit actions, the reference in the same sentence to permit revocations and suspensions would be redundant, since they are just as much "orders" within the APA definition as decisions on issuance.

Second, though the term "order" as used in this sentence is not explicitly defined anywhere in RCRA, its meaning as derived from the text of section 3008 as a whole leads to the conclusion that "order" does *not* have the APA meaning.

Section 3008 is entitled "Federal Enforcement," which in itself leads to the inference that the exclusive subject matter of that section is enforcement.[10] Subsection 3008(a) is entitled "Compliance Orders". The three references to "orders" in that subsection obviously apply only to "compliance orders". Similarly, subsection (c) is entitled "Requirements of Compliance Orders," and the one reference to an "order" in the subsection text obviously refers to a compliance order. The reference to "order" in the text of subsection (b) is the fifth and last reference to an "order" in the text of section 3008 as a whole. It is clear that the other four references mean only compliance orders. Yet the argument for formal hearings depends on giving this particular use of the word a completely different reading from the other four, though there is nothing to indicate that different reading was intended. It seems much more logical to assume that the drafters of this section simply referred to "Compliance Orders" in subsection headings, and then used "order" throughout the body of the text as a shorthand form of reference.

Third, to adopt the APA definition of "order" here would lead to absurd and impractical results. It would require a formal hearing for all actions under RCRA that fit the APA definition of "order:" a definition that is very broad and includes much more than simple permit issuance. It would include, for example, all final decisions to award or deny grants under sections 2004, 4007, 4008, 7007, 8001 and 8006 of the statute, as well as decisions to purchase or not to purchase given recycled materials or waste disposal services under section 6002. It might also include the denial of a petition under section 3001 or section 7004(a).

(b) *The Legislative History.* The Senate version of RCRA provided that permits could only be issued or denied after "opportunity for a public hearing." The House version contained no such provision. The text of the final statute follows the House version.

Nevertheless, some commenters argued that because Senator Randolph, who addressed the Senate before final passage and summarized the changes made between the Senate and the final version did not refer to dropping the hearing requirement, it must not have been dropped.

First, this argument overlooks the fact that the final version tracked the House bill, not the Senate bill. Second, the House debates are equally free from any mention of a change of approach. Thus, a counter-argument can be made that if the Senate's hearing requirement *had* been inserted, the House would certainly have mentioned it. Finally, it is not at all inconceivable to EPA that, in the brief floor debates on the final passage of RCRA, any reference to permit issuance procedure would simply have been omitted.

B. Arguments Against Formality

Other commenters argued that the proposed EPA permit procedures which provided for a "hybrid" public hearing and potential for cross-examination were too formal. They also argued that EPA had no legal authority to impose procedures more elaborate than Congress has explicitly required. Although EPA disagrees with this argument, EPA has eliminated both the hybrid public hearing and the opportunity to cross-examine from the public hearing stage. As previously discussed, there are now only three kinds of hearings under Part 124: a legislative-type public hearing, an evidentiary hearing and a non-adversary panel hearing.

[10] By contrast, section 3005 is entitled "Permits for Treatment, Storage, or Disposal of Hazardous Waste."

EPA recognizes that some RCRA and UIC permits may raise issues better suited to a more formalized mechanism for discussion than that provided by the traditional public hearing and has amended the final regulations to allow the Director to use the "non-adversary panel hearing" procedures in Subpart F, even if those permits were not consolidated with permits requiring a panel hearing. No comparable provision has been made for PSD permits because of the potential for delay.

As noted above, RCRA and SDWA do not require any hearing before permits are issued. Accordingly, in providing the Director with a range of choices under these regulations, EPA takes the position that no particular form of hearing is required for these permits. The Director is given discretion to choose the procedures that appear likely to result in the best decision under the circumstances of the case.

C. Other Considerations

EPA has previously said that a formal APA hearing *is* required under section 3008 for termination of a RCRA permit. See 43 *FR* 34730 (August 4, 1978). Termination of a permit is very likely to rest on an "accusatory" determination that standards established in the past have not been met, rather than on a judgment of what the goals of the statute require by way of control requirements, which is likely to be the case for initial permit decisions.

EPA previously had proposed procedures for terminating RCRA permits as part of EPA's consolidated rules for assessing civil penalties and revoking or suspending permits. See 43 *FR* 34730 (Aug. 4, 1978).[11] EPA has now decided that these procedures should instead be consolidated with the formal hearings in Part 124 for NPDES permits. This will provide a greater measure of procedural consolidation among different EPA permit programs than the approach originally proposed. In addition, the NPDES procedures are somewhat better adapted than the others to handle complicated factual records of the sort that may well be involved in a RCRA permit termination. As the preamble to Part 122 states, these procedures also apply when "interim status" is terminated for failure to furnish information necessary to make a final decision.

EPA believes that RCRA permit modifications under § 122.15 and revocation and reissuance (which amounts in effect to a modification) should be handled by the procedures used for permit issuance, rather than those used for permit termination. Although the statute is not explicit on this point, the only reference to "modification" is in section 3005 and not in section 3008.

In addition, the general scheme of the statute is to provide for regulatory activities (where no hearing is required) in section 3005 and activities of a purely enforcement nature (where a formal hearing is required) in section 3008. Thus, section 3005 allows the complete denial of a RCRA permit, resulting in site closing, without any statutory hearing requirement. Section 3008, on the other hand, is entitled "Federal Enforcement" and covers criminal and civil penalties as well as permit actions. The permit actions covered are "suspension" and "revocation," both of which describe the complete removal of a permit.

Against this background, EPA believes that changes in regulatory requirements which do not result in removal of the permit should be handled under section 3005 procedures instead of section 3008 procedures. The decision will not involve judgments of wrongdoing and punishment for which section 3008 was designed; rather it will involve imposing the regulatory requirements best adapted to carry out the statutory intent for which section 3005 was designed.

For these reasons EPA has rejected comments arguing that any permit modification was in effect a "revocation" of the superseded conditions and therefore had to be subject to section 3008. Section 3008 speaks in terms of "revocation" and "suspension" of whole permits, not of individual conditions. EPA interprets this to refer to the permit as a whole, namely the authorization to operate. A contrary conclusion would lead to the result that even permit modifications which make the permit more lenient must be treated as "revocations" under the statute, since the conditions which were no longer binding would, after all, have been "revoked."

§ 124.13 Obligation to raise issues and provide information during the public comment period.

(1) Many commenters argued that it would be impossible to provide all the information and arguments this section calls for within 30 days if a permit were controversial or complicated. EPA agrees. The 30 days is intended to be the minimum comment period for all permits. This section has been changed to state that longer comment periods should be freely established in complicated cases.[11]

(2) Other commenters urged that this section be amended to limit the extent to which points must be raised and information provided during the public comment period.

These comments have been rejected. As applied to the NPDES program, the reasons for rejecting these comments are set forth in the preamble to EPA's final NPDES regulations, 44 *FR* 32884–85 (June 7, 1979). It would be illogical to accept this comment with respect to RCRA, UIC, or PSD permits because the public comment on draft RCRA, UIC, or PSD permits is the exclusive mechanism for gathering facts and arguments relating to such draft permits. The later stages are appellate in nature and new issues should not be raised on appeal.

§ 124.15 Issuance and effective date of permit.

(1) Several commenters pointed out that the provision which makes a permit effective 30 days after its issuance would leave the facility without a valid permit during that period. This potential problem would be aggravated, so the argument goes, by the provision allowing the Regional Administrator to extend beyond 30 days the date on which the permit became effective.

EPA has not accepted this comment. If the permit in question is a renewal permit under § 122.9, the original permit remains in effect until it is superseded, in whole or in part, by a new permit. See also § 124.60. A new permit may become effective immediately where no adverse comments are received. Any delay is a necessary part of a party's right to request an evidentary hearing.

(2) This section has been changed to eliminate the possibility, noted in some comments, that an NPDES permit might become "effective" after 30 days, and then become "ineffective" upon the granting of a request for evidentary hearing.

§ 124.16 Stays of contested permit conditions.

(1) One commenter urged that this provision be amended to allow stays while requests for further proceedings were pending. The way the "effective date" of the permit is handled under section 124.15 accomplishes this result automatically.

[11] These rules were promulgated in final form on April 9, 1980. 45 *FR* 24360.

[11] One commenter argued that the provision in proposed § 124.11(a) for a minimum 30 day notice of a public hearing conflicted with the requirement in 40 CFR § 25.5 for a minimum 45 day notice period. However, § 122.1(e) provides that these regulations supersede Part 25 as it applies to actions covered by Parts 122 through 124.

(2) Several commenters argued against the provision in proposed § 124.18(b) for stays based on cross-effects. But because no commenter offered any alternative way to deal with the problems at which the section is aimed, the provision remains unchanged.

(3) Other commenters urged that permits (particularly permits for new facilities) should not be stayed pending Agency appeal proceedings. This comment has not been accepted for the reasons stated in the final NPDES regulations. See 44 *FR* 32883–32884 (June 7, 1979).

In addition, under 5 U.S.C. § 704, if the permit is not stayed, it becomes judicially reviewable immediately. This result makes little sense if an appeal within the Agency is pending, since both the court and the Agency would be reviewing the same permit simultaneously. However, in cases where an evidentiary hearing is granted on an NPDES permit (or on RCRA or UIC permit conditions which are associated with an NPDES permit), EPA, in recognition of the time it takes to conduct these hearings, has provided a mechanism (§ 124.60) by which the Presiding Officer at the hearing can authorize operations to begin before the date of final agency action if certain conditions are met. These conditions are based on those normally required for issuance of a preliminary injunction.

§ 124.17 Response to comments.

One commenter attacked the statement in the "comment" in proposed § 129.19 (now a part of the regulations) that EPA could document its response to comments by adding new material to the administrative record. The commenter argued that this would violate the standards set out in *Portland Cement Ass'n* v. *Ruckelshaus,* 486 F. 2d 375, 393–94 (D.C. Cir. 1973). EPA disagrees. That case addressed only the disclosure of data on which a *proposed* rule is based. Of course, there is no reason why the Agency cannot document in advance the course of action which it itself is proposing. What is involved here is a response to comments; not a proposal. The substance of those comments will not be known to EPA in advance since one of the major purposes of a comment period is to bring new material to the Agency's attention. Accordingly, it may often be impossible for the Agency to respond without making use of new material.

Many cases hold that an agency need not repropose an action if changes are made from the proposal. See, e.g., *International Harvester Co.* v. *Ruckelshaus,* 478 F. 2d 615, 632 n. 51 (D.C. Cir. 1973), which notes that rulemaking might never end if every change from the proposal required reproposal.

Similarly, if all new material in a response to comments required reproposal, the agency would be put to the unacceptable choice of either providing an inadequate response or embarking on the same kind of endless cycle of reproposals which the courts have already rejected.

§ 124.18 Administrative record for final permit where EPA is the permitting authority.

One commenter urged that the administrative record should be complete within 20 days after a final permit is issued, so that those who might wish to request further proceedings could make an informed decision on whether to go forward.

In response, EPA has changed this section to provide that the administrative record shall be complete on the date the permit is issued. By requiring the record to be assembled before the permit is issued, EPA has ensured that the Regional Administrator can base final decisions on the administrative record as a whole.

§ 124.19 Appeal of RCRA, UIC, and PSD permits.

(1) A number of commenters objected to the substantial showing required to justify an appeal to the Administrator. We agree with those commenters who stated that the Administrator has a broad power to review decisions under these programs. However, EPA's intent in promulgating these regulations is that (1) this power of review should be only sparingly exercised; (2) most permit conditions should be finally determined at the Regional level; and (3) review by the Administrator should be confined to cases which are important for the program as a whole, or are especially important in their own right. The proposed threshold showing is intended to further that purpose and has been retained.

(2) EPA rejects the suggestion for a 45-day time limit on *sua sponte* review by the Administrator. The 30-day time limit under this section parallels the 30-day period between the date the permit is issued and the date it becomes effective under § 124.15.

(3) One commenter suggested that the regulations explicitly require the Administrator to make findings when deciding an appeal. However, because this requirement is implicit in the establishment of a mechanism of appellate review itself, no change in the regulations is necessary.

(4) One commenter objected to PSD appeals on the grounds of delay. EPA believes that an appeal mechanism is necessary to ensure consistency in a national program and to provide central policy guidance. The best evidence is the ongoing informal appeal of PSD permits within EPA taking place without explicit regulatory provisions.

(5) Another commenter suggested that a permittee be allowed to appeal a permit on which it had not commented in order to address the possibility that the draft permit might have been acceptable to the permittee while the final permit contained unfavorable changes. This comment has been accepted and expanded to allow an appeal of the final permit by persons who failed to comment on the draft permit. The scope of such an appeal, however, is limited to whatever changes occurred between the draft and the final permit.

§ 124.20 Computation of time.

This section has been amended to include methods for computing time that conform with the Federal Rules of Civil Procedure.

Subpart B—Special Procedures Applicable to RCRA Permits [Reserved]

§ 124.31 Public notice of receipt of application and availability of summary.

EPA has deleted proposed § 124.31 from the final consolidated regulations. Although the preamble to the proposal stated that this section would ensure full public participation in the RCRA permit decision process, see 44 FR 34266. EPA has decided that this function is served equally well for all the permit programs at the general public notice stage under § 124.10 and that dual notification for RCRA applications is, therefore, unnecessary. The methods of public notice contained in § 124.10 have been specifically designed to encourage public participation in the permit decision process no matter what kind of permit is involved. EPA recognizes that RCRA permitting might be controversial and expects to conduct public hearings under § 124.12 where any interested person may submit oral or written statements and data on the RCRA issues.

Subpart C—Special Procedures Applicable to PSD Permits

A. Should PSD be Included?

Many commenters, beside generally opposing the notion of consolidation, particularly criticized the inclusion of PSD in the consolidation effort. These commenters argued that as PSD is a

preconstruction review program, the time for considering PSD issues will not be the same as the time for considering issues involving other permits. They also argued that EPA has made the procedures for issuing PSD permits more complicated and time-consuming, leading to confusion in the allocation of increments.

EPA has not accepted these comments. First, PSD does not differ from the other programs included in this Part in being a preconstruction requirement. As explained earlier, EPA's position is that new HWM facilities, NPDES new sources and underground injection wells also must have their permit in hand before construction can begin. Inclusion of PSD, therefore, should not strain permit processing schedules.

Second, the procedures for issuing a PSD permit by itself have not been made more complicated. The only significant change (§ 124.19) and the only one stressed in comments, is the provision of a formal opportunity to appeal a PSD permit to the Administrator. Such appeals are already made (usually at industry's inititative) and considered, even though the rules do not provide for them.

Some new procedures have been added to enable a single proceeding to handle more than one permit. As explained in detail above, although this may slow down issuance of the first permit, it is very likely to produce better decisions and to speed up issuance of the last permit, thereby reducing delay in reaching the actual on-line date for the facility.

EPA has no reason to expect, therefore, that including PSD in the consolidated permit regulations will make any great difference in the EPA-administered PSD permit program. It follows that EPA has no reason to expect any adverse effect on processing of permit applications and allocating increments on a first-in, first-out basis.

B. Changes Made to Better Incorporate the PSD Program

Although the PSD program is still part of these regulations, EPA has made a considerable number of changes to accommodate it. The major changes follow:

1. Proposed § 124.41 established special procedures for permitting "small sources." The *Alabama Power* decision in effect has eliminated that category of sources from mandatory PSD coverage, and so the section as proposed has been dropped.

2. Proposed § 124.41 has been changed to clarify the status of a State agency to which EPA has delegated or may delegate authority to administer these regulations. (Although regulatory authority for State delegations is presently found in 40 CFR § 52.21(v), this provision may be changed as a result of the pending amendments to the PSD regulations.) For the purposes of Part 124, a delegate State stands in the shoes of the Regional Administrator. Like the Regional Administrator, the delegate must follow the procedural requirements of Part 124. Any person aggrieved by a PSD permit issued by a delegate may appeal to the Administrator under § 124.19. Delegation under § 52.21(v) (or any successor provision) is distinct from transfer of the PSD program to a State by revisions to a State implementation plan under CAA section 110. A permit issued by a delegate is still an "EPA-issued permit"; a permit issued by a transferee State is a "State-issued permit." Part 124 does not apply to State-issued PSD permits. See § 124.1(d).

3. Proposed § 124.41 contains definitions designed to clarify the relationship between Part 124 and the PSD program, and to help ensure that portions of Part 122 are not inadvertently made applicable to PSD.

4. Section 165(d)(2) (C) and (D) of the Clean Air Act, and 40 CFR § 52.21(q) provide a complicated series of variances and exemptions which may be applied to the PSD permit for a source that will affect a Class I area. Section 124.42 relates these provisions to the Part 124 procedures. It provides that permit conditions that EPA may grant or deny must, like any other permit condition, be requested and documented before the close of the public comment period. Permit provisions which follow from a decision by the Governor of the State in question, or by the President, will be made outside the framework of Part 124 and automatically reflected in the permit.

5. Section 124.74 has been amended so that issues concerning a PSD permit may never be consolidated with a formal evidentiary hearing under Subpart E, though they may continue to be consolidated in non-adversary panel hearings under Subpart F. EPA accepted comments which argued that the potential for exceeding the one-year deadline under Subpart E proceedings was too great to risk.

6. As noted above, changes to better incorporate the PSD program have been made in §§ 124.3, 124.5 and 124.6.

7. In addition to these changes, complementary changes will be made to 40 CFR § 52.21 to clarify its relationship with Part 124. In particular, EPA expects to repeal § 52.21(r), which has been supplanted by this Part, and to insert appropriate cross-references to this Part in § 52.21.

C. Other

1. A number of commenters argued that the provision in section 307(d) of the Clean Air Act allowing 60 days to seek judicial review of a PSD permit should be reflected in the effective date of permits issued under these regulations. EPA has not accepted this comment. Accepting it would result in an automatic 60 day delay of the effective date of every permit, even those that were uncontroversial. Although the Administrative Procedure Act, 5 U.S.C. § 704, forbids making a permit effective before judicial review is available, judicial review of a PSD permit could come at any time between the date of final agency action and the closing of the section 307(d) period.

2. In the preamble to the proposal, EPA stated its position on whether "threshold" determinations that a given source would have to apply for a PSD permit should be regarded as final agency action. EPA has changed that position. Instead, the Agency supports the policy, announced in the September 1, 1979, Memorandum from the Assistant Administrator for Enforcement and the General Counsel in Federal Register Publication of Significant Final Activity under Title I of the Clean Air Act, that requires PSD applicability determination to be published in the Federal Register as final agency actions. Because of the consequences of applicability determinations for a source (for example, the triggering of a one-year monitoring requirement under CAA section 165(e)(2)) and the infrequency of factual questions, EPA has decided that for reasons of fairness and efficiency these determinations should be treated as final agency action.

Subpart D—Specific Procedures Applicable to NPDES Permits

Many of the comment on this Subpart and Subparts E and F essentially repeated points made during the rulemaking on EPA's NPDES program revisions. Those comments were addressed in the preamble to the final regulations, issued June 7, 1979, 44 *FR* 32854, and cross-references to that preamble are included here.

§ 124.53 State certification.

Comments received here questioned both the requirement for States to supply a complete certification within 60 days, and the statement that conditions properly certificated would be automatically accepted in almost all cases. However, no new arguments were raised, so the reasons given for

these provisions in the June 7 regulations remain applicable. 44 *FR* 32880.

§ 124.56 Fact sheets.

A new paragraph has been added to this section listing what must be included in the fact sheet. If a permit includes any of three types of conditions, the fact sheet must include an explanation of how those conditions were developed. (Section 124.8 also requires that a fact sheet, rather than a statement of basis, be developed.) The regulations governing how these three conditions are developed also require that an explanation be included in the fact sheet. See §§ 122.62(e) 122.63(i) and 125.3(g).

§ 124.59 Conditions requested by the Corps of Engineers and other government entities.

(1) Some commenters objected to the requirement that conditions requested by the Corps of Engineers would be automatically included in NPDES permits. It remains EPA's position that such a provision is legally required for the reasons stated in the June 7 preamble. 44 *FR* 32881–82.

(2) One commenter also questioned the provision in § 124.59(c) for informal consultation with other agencies before issuing a draft permit. Consultation before a draft permit is prepared does not violate any rules against "ex parte" contacts established even by the courts that have taken the most extreme positions on this issue. Such consultation could result in more informed and expeditious processing of permit applications. Hence, the comment has been rejected.

(3) One commenter attacked the provisions requiring permit conditions required by the Corps of Engineers to be appealed through the procedures of the Corps and not through EPA procedures. This comment has been rejected for the reasons stated in the final NPDES regulations. See 44 *FR* 32881 (June 7, 1979).

§ 124.60 Issuance and effective date of NPDES permits.

(1) Commenters again objected to the provision that an NPDES permit to a new discharger or new source would not take effect until final Agency action. As stated in the June preamble, EPA believes that such a position is entirely defensible as a matter of law. 44 FR 32883–32884. The Clean Water Act states that permits can only be issued following an opportunity for a "public hearing." Courts have interpreted this provision to mean a formal hearing. Thus, until the formal hearing stage of the proceedings is finished, the statutory preconditions to permit issuance have not been met. Even after an initial decision by an Administrative Law Judge or the Regional Administrator, 5 U.S.C. § 704 requires a permit to be stayed if judicial review is to be avoided. Since it makes little sense to judicially review a permit that is undergoing Agency review, EPA, instead of staying the control requirements in the permit, stays the status of having a permit and treats the new source or new discharger as being without a permit pending final Agency action.

EPA, however, has amended § 124.60(a) to give the Presiding Officer at an evidentiary hearing the power to authorize the source to commence operations before final agency action if the source complies with all the conditions of the contested permit. The Presiding Officer may issue such an order if the source requests and if no party objects. If a party objects, the order cannot be issued unless the source can meet the requirements listed in § 124.60(a)(2).

(2) One commenter asserted that although § 124.60(d) would prevent the lapse of an NPDES permit that was being reissued at the expiration of its term, it would not prevent the lapse of an NPDES permit which was being modified or revoked and reissued. This does not correspond to EPA's interpretation. In revocation and reissuance, the existing permit is revoked simultaneously with the establishment of the new permit conditions, leaving no gap uncovered by a permit. Similarly, when a permit is modified, the conditions change, but there is no interruption of the permit's coverage.

§ 124.62 Decisions on variances.

Several commenters opposed the provision in this section allowing EPA to retain jurisdiction over certain variances even in a State which had been approved to administer the basic NPDES program. However, as the June preamble explained, these provisions reflect the explicit language and intent of the CWA. 44 *FR* 32882–83.

§ 124.64 Appeals of variances.

A number of commenters objected to the test set forth in this section and § 124.117 for stays of permit conditions subject to requests for section 301(g) variances. This provision, however, simply reflects the explicit language of section 301(j)(2) of the CWA.

§ 124.65 Special procedures for discharge into marine waters under section 301(h).

In these final regulations EPA has decided to make section 301(h) decisions subject to the same procedural options as other types of variance decisions. This section and § 124.111 have been revised to eliminate the requirement that 301(h) variances be automatically processed through a panel hearing, independent of other pending permit actions. Giving the Regional Administrator discretion on the procedures to use and whether to consolidate 301(h) decisions with other decisions on the same permit should result in decisions that can be made more efficiently and economically.

§ 124.66 Special procedures for decisions on thermal variances.

One commenter urged that other types of variances should be made subject to the "early decision" provisions of this section. The comment pointed out that in these cases a decision on variance conditions might be necessary to allow States to make a decision. EPA believes, however, that only variances of extraordinary importance (e.g. section 316(a)) should be afforded this type of fragmented procedure, and therefore has not enlarged the "early decision" provision.

Subpart E—Evidentiary Hearing for EPA-Issued NPDES Permits and EPA-Terminated RCRA Permits

§ 124.71 Applicability.

One commenter questioned the statement in EPA's prior preambles that evidentiary hearings would not be held on general permits. 43 *FR* 37087; 44 *FR* 32884. It stated that although application for an individual permit, followed by individual proceedings on that permit, might be the best way to handle discharger-specific problems with a general permit, an evidentiary hearing should be available for challenges to the conditions of the permit in their general application.

EPA disagrees. As the preamble to the proposal stated, general permits are, functionally, rules. Evidentiary hearings today are almost never required before issuing such rules, and it is EPA's conclusion that Congress did not intend them in this context either. The notice and comment procedures provided here, together with the opportunity for judicial review, afford interested persons ample procedural protection. However, if the Regional Administrator decides to employ a more formal mechanism,

Subpart F panel hearings are available for this purpose.

EPA has added a sentence stating that termination and suspension of RCRA permits are governed by this Subpart.

§ 124.74 Requests for evidentiary hearing.

(1) Some commenters questioned the consequences of raising both legal and factual issues in a request for an evidentiary hearing. This section 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 § 124.91(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 becomes final and subject to judicial review.

(2) One commenter suggested that only persons who had commented on the draft permit should be allowed to request an evidentiary hearing on that permit.

EPA believes that persons should make as much of their case as possible during the notice and comment period before moving to an evidentiary hearing, but believes this comment goes further than appears necessary.

Section 124.76 provides that, generally speaking, the material and argument for an evidentiary hearing must have been presented during the notice and comment stage. Given this restriction, little benefit would result from restricting the participants at the hearing to those who took part at the preceding stages.

(3) Other commenters contended that the provision requiring the requester to produce documents and witnesses was too broad. This provision is no broader than the Agency subpoena power for which it substitutes. See 44 *FR* 32884.

§ 124.75 Decision on request for a hearing.

One commenter suggested that a time limit should be imposed on the Regional Administrator for either granting or denying a request for an evidentiary hearing. EPA has accepted this comment and has imposed a 30-day time limit for the granting or denying of an evidentiary hearing request.

§ 124.76 Obligation to submit evidence and raise issues before a final permit is issued.

A number of commenters thought this provision was too restrictive. Because no significant new points were raised, EPA continues to adhere to the position articulated in the final NPDES revision. See 44 *FR* 32884–32885. However, EPA does wish to emphasize the value of the good cause provision. This provision functions as a safety valve to prevent § 124.76 from being as restrictive as feared by the commenters. Good cause allows the Presiding Officer to exercise his or her discretion to admit issues and evidence not raised during the public comment period or at any public hearing. What is "good cause" will vary from case to case. Although suggestions of what can constitute good cause are included in the regulation itself, this list is not exhaustive. The provision has been slightly redrafted to clarify that point. These standards should be applied differently depending upon the procedural setting. When deciding whether to grant or deny a request for a hearing, the Regional Administrator should apply these standards in a relatively unrestrictive manner. Request should be rejected only if they are frivolous or clearly without merit. After a hearing has been granted and an Administrative Law Judge begins to structure the proceedings, he or she should apply those standards strictly in conformity with the principle of developing the record as much as possible during the notice and comment stages.

§ 124.78 Ex parte communicctions.

(1) One commenter objected to the statement that appearance as a witness is not automatically the same as the performance of "investigative or prosecuting functions" so as to invoke the *ex parte* rule. This, however, is the conclusion of Professor Davis, with which EPA concurs and which it has adopted. K. Davis, *Administrative Law Treatise*, § 11.17 (1958).

(2) Another commenter questioned why witnesses from EPA were not automatically subject to the "ex parte rule," while witnesses from outside the Agency were. The answer is that different legal tests apply to the two classes of witnesses. Witnesses from within EPA are subject only to the "separation of functions" provisions of the EPA if they have performed "investigative or prosecuting" functions. See 5 U.S.C. § 554(d).

However, the "ex parte provisions," added to the APA by the Government in the Sunshine Act, 90 Stat. 1241 *et. seq.*, apply to all contacts with any "interested person outside the Agency." See 5 U.S.C. section 544(d). The legislative history is clear that this definition includes any person whose interest in the case is greater than the interest of an ordinary member of the public. H.R. Rep. No. 94–880, 94th. Cong. 2d. Sess. at 19–20 (1976); S. Rep. No. 94–354, 94th. Cong., 1st. Sess. at 36 (1975).

§ 124.83 Prehearing conference.

(1) One commenter argued, without supporting reasons, that the discovery provisions in this section were illegal. However, the Administrative Conference of the United States has recommended that all Agencies, including those lacking formal subpoena authority adopt "discovery" procedures. The report accompanying Recommendation No. 21 asserts that such procedures would be legal. Tomlinson, "Report of the Committee on Compliance and Enforcement Proceedings in support of Recommendation No. 21," *Recommendation and Reports of the Administrative Conference of the United States*, Vol 1. 577,583.

(2) This same commenter urged that discovery be safeguarded against abuse. Any request for discovery is explicitly made subject, by § 124.83(c)(5), to the approval of the Presiding Officer. Accordingly, no change in the proposed regulation is necessary.

(3) Another commenter asked whether furnishing the names of witnesses under § 124.83(d) meant only the names of direct testimony witnesses. EPA agrees that, as a practical matter, such a limit will probably be set. But the Presiding Officer, in an appropriate case, could schedule a second conference to deal with rebuttal submissions. See § 124.83(a).

§ 124.84 Summary determination.

(a) One commenter urged that motions for summary determination should stay the hearing. This is not the practice in Federal District Courts with respect to motions for summary judgment, and the comment has not been accepted. (A similar suggestion regarding interlocutory appeals under § 124.90 has also been rejected.)

(2) EPA has accepted another commenter's suggestion that this provision be amended to include language patterned on Rule 56(f) of the Federal Rules of Civil Procedure.

§ 124.85 Hearing procedure.

(1) Several commenters questioned EPA's conclusion that the burden of persuasion for permit issuance always rests with the permit applicant. The only

new point, however, was that it made little sense to allocate the burden of persuasion differently from the burden of going forward, since a party not having the burden of persuasion, but having the burden of going forward, might hold back information unfavorable to its case. If this argument were valid, there would be no need for two concepts of "burden of proof", since the burden of going forward could always be derived from the burden of persuasion. However, not only are both concepts well established; it is settled that the question of who has the better access to information affects the burden of going forward far more easily than the burden of persuasion, and is often not dispositive even where the burden of going forward is concerned. See McCormick, *Handbook on the Law of Evidence*, at 675 (1954). See also, Wigmore, *Treatise on the Law of Evidence*, § 2486.

(2) One commenter objected to the provision in § 124.85(b)(14) for hearing opposing witnesses simultaneously or for asking them to confer outside the hearing. It claimed that this would convert an adversary hearing into a bargaining session or a scientific forum.

EPA disagrees with the apparent premise of this comment that hearing procedures should be chosen to preserve and protect adversary conduct. Hearing procedures instead should be chosen to produce the most accurate and comprehensive record for decision. When a complicated technical matter is under discussion, there may be real value in having the experts from all sides listening to each other and responding to or answering individual points. It is EPA's experience that excessively formal hearing procedures often obscure, rather than clarify, differences in methodology and points of agreement and disagreement among experts. In such cases it might be appropriate for the Presiding Officer to request the witnesses to discuss the matter informally; not to bargin a consensus solution, but simply to clarify their assumptions. Both approaches, after all, are widely used by technically trained persons to clarify issues in the course of their own professional activities, and there seems no reason to bar their use simply because a legal decision depends on that clarification.

(3) Proposed § 124.85(b)(16) prohibited cross-examination on questions of law and policy, or regarding matters (such as the validity of effluent limitations guidelines) that are not subject to challenge in a NPDES proceeding. Numerous comments were received on this provision, contending that it was unduly restrictive. One commenter suggested that this provision should be changed to allow Agency employees to be questioned on the basis for an Agency action relating to contested provisions in a final permit. EPA agrees that cross-examination may be proper on questions of policy to the extent required to disclose the factual basis for permit requirements and § 124.85(b)(16) has been revised accordingly.

(4) Other commenters objected to the automatic receipt of the administrative record into evidence under § 124.85(d)(2). The reasons for this approach were explained in the June preamble at 44 *FR* 32885. The only new argument raised was that such introduction could be prejudicial. However, in NPDES proceedings there is no jury to prejudice. Accordingly, the likelihood of prejudice in this less restrictive approach appears minimal, and it seems unlikely to outweigh the benefits of having the administrative record available.

(5) Another commenter objected to the requirement that a request for a witness to sponsor the administrative record on a showing meet a "legitmate doubt" test as well as the standards for cross-examination.

EPA partially agrees with this comment and has deleted the "legitimate doubt" test. The administrative record can be viewed as direct testimony introduced in writing, and so a sponsoring witness may be needed to allow cross-examination of the written direct. Accordingly, there is no need for an additional "legitimate doubt" test. EPA believes that the substance of this test is included in the requirement that the Presiding Officer find, before granting cross-examination, that cross-examination would be likely to clarify or resolve a relevant disputed issue of material fact. See § 124.85(d)(10).

(6) Commenters also argued that this section restricted cross-examination too much. Those comments have been rejected for the reasons stated in the June 7 preamble. See 44 *FR* 32886.

(7) The requirement contained in the proposal of this section and § 124.129 that hearings could only be settled with the approval of the Deputy Assistant Administrator for Water Enforcement has been deleted.

§ 124.86 Motions.

Comments opposed the provision of this section allowing new regulatory requirements to be made applicable. They have not been accepted for the reasons stated in the June preamble at 44 *FR* 32886–87.

§ 124.89 Decisions.

The provision in the proposal for treating the decisions of Administrative Law Judges simply as recommendations to the Regional Administrator when RCRA or UIC permit conditions are concerned has been deleted as causing unnecessary procedural complexity. Instead, the ALJ's decision regarding these permit conditions will be subject to appeal to the Administrator like any other decision after an evidentiary hearing.

§ 124.90 Interlocutory appeal.

(1) One commenter argued that the test for interlocutory appeal stated in § 124.90(a)(3) was unnecessary and that the function of screening out unqualified requests for interlocutory relief could be performed by two tests set forth in § 124.90(a)(2). This comment has been accepted.

(2) This commenter also challenged the provision in section 124.90(d) that interlocutory relief is extraordinary relief. This provision has been retained to ensure that interlocutory appeals do not become an administrative burden.

(3) The provision in this section and § 124.91 for mandatory consultation of the General Counsel on matters of law has been deleted. Of course, the Administrator or the Judicial Officer will still be free to consult any member of the General Counsel's Office on such matters, and request them to draft portions of the final decision to the extent that the persons consulted are not part of the trial staff designated under § 124.78.

§ 124.91 Appeal to the Administrator.

One commenter on this section asked that a provision be included for stays of final agency action. No such provision has been included because EPA believes questions concerning such stays are best addressed case-by-case.

Subpart F—Nonadversary Panel Procedures

Many comments were received on this Subpart. However, no new points were made that would necessitate revision of the discussion in the June 14, 1979 preamble at 44 *FR* 32887–32891.

A major feature of these procedures is the merging of the notice-and-comment procedures under Subpart A and the hearing under Subpart E into one proceeding. Accordingly, EPA believes that the full benefit of these procedures will be felt only if they are used beginning with the draft permit.

However, cases may arise in which it becomes apparent during or after Subpart A proceedings, that use of this

Subpart might be advisable. Accordingly, changes have been made to §§ 124.15, 124.74, 124.75, and various provisions of this Subpart to make it easier to switch a permit into this Subpart in cases where it was not placed under this Subpart from the beginning.

§ 124.111 Applicability.

This section has been changed to clarify that, though EPA considers variances and modifications to be eligible for "initial licensing" procedures, these procedures should not be used where they would result in duplicate hearings being held by EPA on the same permit. This could happen when a permit was being renewed and a variance application was made at the same time. The variance standing alone would be eligible for processing under Subpart F, while the other permit terms would be subject to an evidentiary hearing under Subpart E.

In such a case Subpart F could still be used if all parties agreed. However, without such agreement, the variance proceedings should be consolidated with the evidentiary hearing under Subpart E.

This principle applies to 301(h) variances as well as other types of variances.

§ 124.118 Submission of written comments on draft permit.

One commenter argued that this provision violated the APA by failing to provide for rebuttal testimony. Rebuttal rights, however, are adequately conferred in §§ 124.120 and 124.121.

§ 124.119 Presiding officer.

This section has been amended to make clear that the Chief Administrative Law Judge has no obligation to assign an Administrative Law Judge to preside at hearings not subject by statute to the formal hearing requirements of the Administrative Procedures Act when to do so would impair his or her ability to staff hearings that are subject to those requirements.

This section also has been amended to give the Presiding Officer greater control over the scheduling of the panel hearing. For example, if new evidence comes in, or if the evidence takes longer than expected to analyze, the Presiding Officer will be able to reschedule the start of the hearing or to recess it for a time after it has started.

§ 124.126 Final decision.

One commenter took the title of this section as the occasion to ask when the final *permit* was issued in proceedings under this Part.

It is EPA's position that the final permit is issued at the same time as the final "decision" described in this section.

Appendix—Guide to Decisionmaking Under Part 124

During the public comment period on the proposed Consolidated Regulations, the American Petroleum Institute (API) submitted their version of a flow chart of the Part 124 Procedures for Decisionmaking. It was seven feet long. Clearly, the API flow chart exaggerated the complexity of these regulations. To give the reader a better and more accurate understanding of how Part 124 works, EPA has attached its flow chart of these procedures as an Appendix to Part 124.

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

This rulemaking contains a series of revisions and technical amendments to Part 125, Criteria and Standards for the National Pollutant Discharge Elimination System. The technical amendments correct cross-references to 40 CFR Parts 122, 123 and 124, rendered incorrect, due to publication of the consolidated permit regulations where the NPDES regulations previously appeared. Two cross-references have been corrected in § 125.104(c), which is part of Subpart K, the Best Management Practices (BMP) regulation. The effective date for Subpart K has been deferred until completion of the technical guidance document for the BMP program. See 44 FR 47063 (Aug. 10, 1979) and 45 FR 17997 (March 20, 1980). In addition, §125.3 has been revised. These revisions were proposed along with the draft consolidated application forms in the June 14, 1979 Federal Register (44 FR 34393).

Subpart A—Criteria and Standards for Technology-Based Treatment Requirements Under Sections 301(b) and 402 of the Act

§ 125.3(c)(4)—This section allows permit limits to be written in terms of toxicity to a particular species. This regulation was proposed in Part III of the June 14, 1979 Federal Register (44 FR 34398). Only minor wording changes have been made from the proposal. A detailed discussion of comments received on this regulation appears elsewhere in today's Federal Register, in the preamble to the public notice of the consolidated application form.

§ 125.3(g)—This section authorizes the Director to use indicator pollutants to control toxic pollutants and hazardous substances by setting limits on indicators as if the indicators were toxic or hazardous. Limits on indicators (for toxic pollutants and for hazardous substances) which are conventional pollutants may be set at a level more stringent than the best conventional pollution control technology (BCT); and limits on indicators (for toxic pollutants only) which are nonconventional pollutants may be set at a level which is not subject to economic or water-quality modifications under section 301 (c) or (g) of CWA. The Director must show that the indicator provides control equivalent to a direct limitation of the toxic pollutant or hazardous substance and that a direct limitation is technically or economically infeasible.

This section, insofar as it applies to toxic pollutants, was proposed in Part III of the June 14, 1979 Federal Register (44 FR 34393), and a proposal to extend it to include hazardous substances was published on August 29, 1979 (44 FR 50780). A detailed discussion of the new section and the comments received on these proposals appears elsewhere in today's Federal Register, in the preamble to the public notice of the consolidated application form. One change has been made from the proposal: the safeguards against inappropriate use of indicators have been strengthened by adding a prohibition against setting more stringent limits on indicators where the permittee would be prevented from using a method of treatment which would assure compliance with a direct limitation on a toxic pollutant or hazardous substance.

Note.—The Environmental Protection Agency has determined that this document does not constitute a major regulation requiring preparation of an economic impact statement under Executive Order 12044. In accordance with Executive Order 12044, EPA will review the effectiveness and continued need for the provisions contained in these regulations no more than 5 years after promulgation. As part of this evaluation we will consider comments from the public, permit applicants, Regional and State permit writers, and other affected parties with regard to the financial and administrative costs incurred as a result of these regulations, and ways in which these costs can be reduced.

As explained in the portion of the preamble discussing §§ 122.36 and 122.45, EPA by this notice is inviting comment on all requirements for Class IV wells. Such comments must be received by July 15, 1980. Submit comments to: Alan Levin, Director, State Program Division (WH-550), Office of Drinking Water, Environmental

Protection Agency, Washington, D.C. 20460.

EPA is also scheduling a hearing in Washington, D.C. on Tuesday, July 8, 1980. The hearing will be held at the HEW Auditorium, 330 Independence Ave., S.W., Washington, D.C., and will last from 9 a.m. to 5 p.m., unless concluded earlier.

Authority: These regulations are issued under authority of the Resource Conservation and Recovery Act, 42 U.S.C. § 6901 *et seq.*; the Safe Drinking Water Act, 42 U.S.C. § 300(f) *et seq.*; the Clean Water Act, 33 U.S.C. § 1251 *et seq.*; and the Clean Air Act, 42 U.S.C. § 1857 *et seq.*

Dated: May 2, 1980.

Douglas M. Costle,
Administrator.

1. 40 CFR is amended by revising Parts 122, 123 and 124 to read as follows:

PART 122—EPA ADMINISTERED PERMIT PROGRAMS: THE NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM; THE HAZARDOUS WASTE PERMIT PROGRAM; AND THE UNDERGROUND INJECTION CONTROL PROGRAM

Subpart A—Definitions and General Program Requirements

Sec.
122.1 What are the consolidated permit regulations?
122.2 Purpose and scope of Part 122.
122.3 Definitions.
122.4 Application for a permit.
122.5 Continuation of expiring permits.
122.6 Signatories to permit applications and reports.
122.7 Conditions applicable to all permits.
122.8 Establishing permit conditions.
122.9 Duration of permits.
122.10 Schedules of compliance.
122.11 Requirements for recording and reporting of monitoring results.
122.12 Considerations under Federal law.
122.13 Effect of a permit.
122.14 Transfer of permits.
122.15 Modification or revocation and reissuance of permits.
122.16 Termination of permits.
122.17 Minor modifications of permits.
122.18 Noncompliance and program reporting by the Director.
122.19 Confidentiality of information.

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

122.21 Purpose and scope of Subpart B.
122.22 Application for a permit.
122.23 Interim status.
122.24 Contents of Part A of the RCRA permit application.
122.25 Contents of Part B of the RCRA permit application.
122.26 Permits by rule.
122.27 Emergency permits.
122.28 Additional conditions applicable to all RCRA permits.
122.29 Establishing RCRA permit conditions.
122.30 Interim permits for UIC wells.

Subpart C—Additional Requirements for Underground Injection Control Programs Under the Safe Drinking Water Act

Sec.
122.31 Purpose and scope of Subpart C.
122.32 Classification of injection wells.
122.33 Prohibition of unauthorized injection.
122.34 Prohibition of movement of fluid into underground sources of drinking water.
122.35 Identification of underground sources of drinking water and exempted aquifers.
122.36 Elimination of certain Class IV wells.
122.37 Authorization of underground injection by rule.
122.38 Application for a permit; authorization by permit.
122.39 Area permits.
122.40 Emergency permits.
122.41 Additional conditions applicable to all UIC permits.
122.42 Establishing UIC permit conditions.
122.43 Waiver of requirements by Director.
122.44 Corrective action.
122.45 Requirements for wells injecting hazardous waste.

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

122.51 Purpose and scope of Subpart D.
122.52 Prohibitions.
122.53 Application for a permit.
122.54 Concentrated animal feeding operations.
122.55 Concentrated aquatic animal production facilities.
122.56 Aquaculture projects.
122.57 Separate storm sewers.
122.58 Silvicultural activities.
122.59 General permits.
122.60 Additional conditions applicable to all NPDES permits.
122.61 Additional conditions applicable to specified categories of NPDES permits.
122.62 Establishing NPDES permit conditions.
122.63 Calculating NPDES permit conditions.
122.64 Duration of certain NPDES permits.
122.65 Disposal of pollutants into wells, into publicly owned treatment works or by land application.
122.66 New sources and new dischargers.
Appendix A to Part 122—NPDES Primary Industry Categories.
Appendix B to Part 122—NPDES Criteria for Determining a Concentrated Animal Feeding Operation (§ 122.54).
Appendix C to Part 122—NPDES Criteria for Determining a Concentrated Aquatic Animal Production Facility (§ 122.55).
Appendix D to Part 122—NPDES Permit Application Testing Requirements (§ 122.53).

Authority: Resource Conservation and Recovery Act, 42 U.S.C. § 6901 *et seq.*; Safe Drinking Water Act, 42 U.S.C. § 300f *et seq.*; and Clean Water Act, 33 U.S.C. § 1251 *et seq.*

Subpart A—Definitions and General Program Requirements

§ 122.1 What are the consolidated permit regulations?

(a) *Coverage.* (1) These consolidated permit regulations include provisions for five permit programs:

(i) The *Hazardous Waste Management* (HWM) Program under Subtitle C of the Solid Waste Disposal Act, as amended by the *Resource Conservation and Recovery Act of 1976* (RCRA) (Pub. L. 94–580, as amended by Pub. L. 95–609; 42 U.S.C. § 6901 *et seq.*);

(ii) The *Underground Injection Control* (UIC) Program under Part C of the *Safe Drinking Water Act* (SDWA) (Pub. L. 95–523, as amended by Pub. L. 95–190; 42 U.S.C. § 300f *et seq.*);

(iii) The *National Pollutant Discharge Elimination System* (NPDES) Program under sections 318, 402, and 405(a) of the *Clean Water Act* (CWA) (Pub. L. 92–500, as amended by Pub. L. 95–217 and Pub. L. 95–576; 33 U.S.C. § 1251 *et seq.*);

(iv) The *Dredge or Fill* (404) Program under section 404 of the *Clean Water Act;* and

(v) The *Prevention of Significant Deterioration* (PSD) Program under regulations implementing section 165 of the *Clean Air Act* (CAA), as amended, (Pub. L. 88–206 as amended; 42 U.S.C. § 7401 *et seq.*)

(2) For the RCRA, UIC, and NPDES programs, these regulations cover basic EPA permitting requirements (Part 122), what a State must do to obtain approval to operate its program in lieu of a Federal program and minimum requirements for administering the approved State program (Part 123), and procedures for EPA processing of permit applications and appeals (Part 124). For the 404 program, these regulations include only the requirements which must be met for a State to administer its own program in lieu of the U.S. Army Corps of Engineers in "State regulated waters," and provisions for EPA vetoes of State issued 404 permits. For the PSD program, these regulations cover only procedures for EPA processing of PSD permits in Part 124.

(b) *Structure.* (1) *Coverage of Parts.* These consolidated permit regulations are incorporated into three Parts of Title 40 of the Code of Federal Regulations:

(i) *Part 122.* This Part contains definitions for all of the programs except PSD. It also contains basic permitting requirements for EPA-administered RCRA, UIC, and NPDES programs, such as application requirements, standard permit conditions, and monitoring and reporting requirements.

(ii) *Part 123.* This Part describes what States must do to obtain EPA approval of their RCRA, UIC, NPDES, or 404 programs. It also sets forth the minimum requirements for administering these permit programs after approval.

(iii) *Part 124.* This Part establishes the procedures for EPA issuance of RCRA, UIC, NPDES, and PSD permits. It also establishes the procedures for administrative appeals of EPA permit decisions.

(2) *Subparts.* Parts 122, 123, and 124 are each organized into subparts. Each Part has a general Subpart A which contains requirements that apply to all the programs covered by that Part. Additional subparts supplement these general provisions with requirements which apply to one or more specified programs. In case of any inconsistency between Subpart A and any program-specific subpart, the program-specific subpart is controlling.

(3) Certain requirements set forth in Parts 122 and 124 are made applicable to approved State programs, including State 404 programs, by reference in Part 123. These references are set forth in § 123.7. If a section or paragraph of Parts 122 or 124 is applicable to States, through reference in § 123.7, that fact is signaled by the following words at the end of the section or paragraph heading: *(applicable to State programs, see § 123.7).* If these words are absent, the section (or paragraph) applies only to EPA-administered permits.

(4) The structure and coverage of these regulations by program is indicated in the following chart. A permit applicant or permittee that is interested in finding out about only one of the programs covered by these regulations can use this chart to determine which regulations to read. If a State is the permitting authority, the applicant or permittee should read the State laws and program regulations which implement the requirements of Part 123 for the relevant program.

Program	Coverage		
	Part 122	Part 123	Part 124
RCRA	Subparts A and B	Subparts A, B, and F	Subparts A, B, E, and F.
UIC	Subparts A and C	Subparts A and C	Subparts A and F.
NPDES	Subparts A and D	Subparts A and D	Subparts A, D, E, and F
404	Subpart A	Subparts A and E	Subpart A.
PSD	None	None	Subparts A, C, and F.

(c) *Relation to other requirements.* (1) *Consolidated permit application forms.* Applicants for EPA-issued RCRA Part A, UIC, NPDES, or PSD permits and persons seeking interim status under RCRA must submit their applications on EPA's consolidated permit application forms when available. (There will be no form for RCRA Part B applications and therefore no EPA application form is used. See § 122.25.) These forms, like these consolidated regulations, contain a general form covering all programs plus several program-specific forms. Although application forms have been consolidated, they, like permits, have been coordinated without losing their separate legal identities. There is no "consolidated permit." Each permit and application under a program is a separate document. Most of the information requested on these application forms (other than Form 5 for PSD) is required by these regulations. The essential information required in the general form (Form 1) is listed in § 122.4. The additional information required for RCRA Part A applications (Form 3) is listed in § 122.24, for UIC applications (Form 4) in § 122.37, and for NPDES applications (Forms 2a–d) in § 122.53. Applicants for State-issued permits must use State forms which must require at a minimum the information listed in these sections. All minimum information requirements for State 404 permit applications appear in § 123.94.

(2) *Technical regulations.* The five permit programs which are covered in these consolidated permit regulations each have separate additional regulations that contain technical requirements for those programs. These separate regulations are used by permit-issuing authorities to determine what requirements must be placed in permits if they are issued. These separate regulations are located as follows:

RCRA	40 CFR Parts 260-266
UIC	40 CFR Part 146
NPDES	40 CFR Parts 125, 129, 133, 136. 40 CFR Subchapter N (Parts 400–460).
404	40 CFR Part 230
PSD	40 CFR Part 52

(d) *Authority.* The consolidation of these permit programs into one set of regulations is authorized by sections 101(f) and 501(a) of CWA, sections 1006 and 2002 of RCRA, section 1450 of the SDWA, and section 301 of the CAA.

(e) *Public participation.* This rule establishes the requirements for public participation in EPA and State permit issuance, enforcement, and related variance proceedings; 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 (Public Participation), and supersede the requirements of that Part as they apply to actions covered under Parts 122, 123, and 124.

(f) *State authorities.* Nothing in Parts 122, 123, or 124 precludes more stringent State regulation of any activity covered by these regulations, whether or not under an approved State program, except as provided for the RCRA program in § 123.33 (requirement that State RCRA programs under final authorization be consistent with the Federal program and other State programs).

§ 122.2 Purpose and scope of Part 122.

(a) *Subpart A* of Part 122 contains definitions (§ 122.3) and basic permitting requirements (§§ 122.4 through 122.19). Definitions are given for the RCRA, UIC, NPDES, and State 404 programs. Definitions for EPA processing of PSD permits are in Part 124, Subpart C. The permitting requirements apply to EPA administered RCRA, UIC, and NPDES programs. (Permit program requirements for the Federal 404 program administered by the Corps of Engineers do not appear in these regulations but are found in 33 CFR Parts 320–327.) In addition, the permitting requirements apply to State-administered RCRA, UIC, NPDES, and 404 programs to the extent specified by cross-reference in § 123.7.

(b) *Subparts B, C, and D* contain additional requirements for RCRA, UIC and NPDES permitting, respectively. They apply to EPA, and to approved States to the extent specified by cross-reference in § 123.7.

§ 122.3 Definitions.

The following definitions apply to Parts 122, 123, and 124, except Part 124 coverage of the PSD program (see § 124.2). Terms not defined in this section have the meaning given by the appropriate Act. When a defined term appears in a definition, the defined term is sometimes placed within quotation marks as an aid to readers. When a definition applies primarily to one or more programs, those programs appear in parentheses after the defined term.

Acidizing (UIC) means the injection of acid through the borehole or "well" into a "formation" to increase permeability and porosity by dissolving the acid-soluble portion of the rock constituents.

Administrator means the Administrator of the United States Environmental Protection Agency, or an authorized representative.

Applicable standards and limitations (NPDES) means all State, interstate, and Federal standards and limitations to which a "discharge" or a related activity is subject under the CWA, including "effluent limitations," water quality standards, standards of performance, toxic effluent standards or prohibitions, "best management practices," and pretreatment standards under sections 301, 302, 303, 304, 306, 307, 308, 403, and 405 of CWA.

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

modifications or revisions. For RCRA, application also includes the information required by the Director under § 122.25 (contents of Part B of the RCRA application).

Appropriate Act and regulations means the Clean Water Act (CWA); the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act (RCRA); or Safe Drinking Water Act (SDWA), whichever is applicable; and applicable regulations promulgated under those statutes. In the case of an "approved State program" appropriate Act and regulations includes State program requirements.

Approved program or *approved State* means a State or interstate program which has been approved or authorized by EPA under Part 123.

Aquifer (RCRA and UIC) means a geological "formation," group of formations, or part of a formation that is capable of yielding a significant amount of water to a well or spring.

Area of reviw (UIC) means the area surrounding an "injection well" described according to the criteria set forth in § 146.06.

Average monthly discharge limitation (NPDES) means the highest allowable average of "daily discharges" over a calendar month, calculated as the sum of all daily discharges measured during a calendar month divided by the number of daily discharges measured during that month.

Average weekly discharge limitation (NPDES) means the highest allowable average of "daily discharges" over a calendar week, calculated as the sum of all daily discharges measured during a calendar week divided by the number of daily discharges measured during that week.

Best management practices ("BMPs") (NPDES and 404) means schedules of activities, prohibitions of practices, maintenance procedures, and other management practices to prevent or reduce the pollution of "waters of the United States." For NPDES, BMPs also include treatment requirements, operating procedures, and practices to control plant site runoff, spillage or leaks, sludge or waste disposal, or drainage from raw material storage. For State 404 programs, BMPs also include methods, measures, practices, or design and performance standards, which facilitate compliance with section 404(b)(1) environmental guidelines [40 CFR Part 230], effluent limitations or prohibitions under section 307[a], and applicable water quality standards.

BMPs (NPDES and 404) means "best management practices."

Closure (RCRA) means the act of securing a "Hazardous Waste Management facility" pursuant to the requirements of 40 CFR Part 264.

Contaminant (UIC) means any physical, chemical, biological, or radiological substance or matter in water.

Contiguous zone (NPDES) means the entire zone established by the United States under Article 24 of the Convention on the Territorial Sea and the Contiguous Zone.

Continuous discharge (NPDES) means a "discharge" which occurs without interruption throughout the operating hours of the facility, except for infrequent shutdowns for maintenance, process changes, or other similar activities.

CWA means the Clean Water Act (formerly referred to as the Federal Water Pollution Control Act or Federal Water Pollution Control Act Amendments of 1972) Pub. L. 92–500, as amended by Pub. L. 95–217 and Pub. L. 95–576; 33 U.S.C. § 1251 *et seq.*

Daily discharge (NPDS) means the "discharge of a pollutant" meansured during a calendar day or any 24–hour period that reasonably represents the calendar day for purposes of sampling. For pollutants with limitations expressed in units of mass, the "daily discharge" is calculated as the total mass of the pollutant discharged over the day. For pollutants with limitations expressed in other units of measurement, the "daily discharge" is calculated as the average measurement of the pollutant over the day.

Direct discharge (NPDES) means the "discharge of a pollutant."

Director means the Regional Administrator or the State Director, as the context requires, or an authorized representative. When there is no "approved State program," and there is an EPA administered program, "Director" means the Regional Administrator. When there is an approved State program, "Director" normally means the State Director. In some circumstances, however, EPA retains the authority to take certain actions even when there is an approved State program. (For example, when EPA has 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.) In such cases, the term "Director" means the Regional Administrator and not the State Director.

Discharge (NPDES) when used without qualification means the "discharge of a pollutant."

Discharge of a pollutant (NPDES) means:

(a)(1) Any addition of any "pollutant" or combination of pollutants to "waters of the United States" from any "point source," or

(2) Any addition of any pollutant or combination of pollutants to the waters of the "contiguous zone" or the ocean from any point source other than a vessel or other floating craft which is being used as a means of transportation.

(b) This definition includes additions of pollutants 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 person which do not lead to a treatment works; and discharges through pipes, sewers, or other conveyances leading into privately owned treatment works.

This term does not include an addition of pollutants by any "indirect discharger."

Discharge Monitoring Report ("DMR") (NPDES) means the EPA uniform national form, including any subsequent additions, revisions, or modifications, for the reporting of self-monitoring results by permitees. DMRs must be used by "approved States" as well as by EPA. 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.

Discharge of dredged material (404) means any addition from any "point source" of "dredged material" into "waters of the United States." The term includes the addition of dredged material into waters of the United States and the runoff or overflow from a contained land or water dredged material disposal area. Discharges of pollutants into waters of the United States resulting from the subsequent onshore processing of dredged material are not included within this term and are subject to the NPDES program even though the extraction and deposit of such material may also require a permit from the Corps of Engineers or the State section 404 program.

Discharge of fill material (404) means the addition from any "point source" of "fill material" into "waters of the United States." The term includes 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 (RCRA) means the discharge, deposit, injection, dumping, spilling, leaking, or placing of any "hazardous waste" into or on any land or water so that such hazardous waste or any constituent thereof may enter the environment or be emitted into the air or discharged into any waters, including ground water.

Disposal facility (RCRA) means a facility or part of a facility at which "hazardous waste" is intentionally placed into or on the land or water, and at which hazardous waste will remain after closure.

Disposal site (404) means that portion of the "waters of the United States" enclosed within fixed boundaries consisting of a bottom surface area and any overlaying volume of water. In the case of "wetland" on which water is not present, the disposal site consists of the wetland surface area. Fixed boundaries may consist of fixed geographic point(s) and associated dimensions, or of a discharge point and specific associated dimensions.

DMR (NPDES) means "Discharge Monitoring Report."

Draft permit means a document prepared under § 124.6 indicating the Director's tentative decision to issue or deny, modify, revoke and reissue, terminate, or reissue a "permit." A notice of intent to terminate a permit, and a notice of intent to deny a permit, as discussed in § 124.5, are types of "draft permits." A denial of a request for modification, revocation and reissuance, or termination, as discussed in § 124.5, is not a "draft permit." A "proposed permit" is not a "draft permit."

Drilling mud (UIC) means a heavy suspension used in drilling an "injection well," introduced down the drill pipe and through the drill bit.

Dredged material (404) means material that is excavated or dredged from "waters of the United States."

Effluent limitation (NPDES) means any restriction imposed by the Director on quantities, discharge rates, and concentrations of "pollutants" which are "discharged" from "point sources" into "waters of the United States," the waters of the "contiguous zone," or the ocean.

Effluent limitations guidelines (NPDES) means a regulation published by the Administrator under section 304(b) of CWA to adopt or revise "effluent limitations."

Effluents (404) means "dredged material" or "fill material," including return flow from confined sites.

Emergency permit means a RCRA, UIC, or State 404 "permit" issued in accordance with §§ 122.27, 122.40 or 123.96, respectively.

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

EPA means the United States "Environmental Protection Agency."

Exempted aquifer (UIC) means an "aquifer" or its portion that meets the criteria in the definition of "underground source of drinking water" but which has been exempted according to the procedures in § 122.35(b).

Existing HWM facility (RCRA) means a facility which was in operation or for which construction had commenced, on or before October 21, 1976. Construction had commenced if:

(a) The owner or operator had obtained all necessary Federal, State, and local preconstruction approvals or permits; and

(b)(1) A continuous physical, on-site construction program had begun, or

(2) The owner or operator had entered into contractual obligations—which cannot be cancelled or modified without substantial loss—for construction of the facility to be completed within a reasonable time.

[Note.—This definition reflects the literal language of the statute. However, EPA believes that amendments to RCRA now in conference will shortly be enacted and will change the date for determining when a facility is an "existing facility" to one no earlier than May of 1980; indications are that the conferees are considering October 30, 1980. Accordingly, EPA encourages every owner or operator of a facility which was built or under physical construction as of the promulgation date of these regulations to file Part A of its permit application so that it can be quickly processed for interim status when the change in the law takes effect. When those amendments are enacted, EPA will amend this definition.]

Existing injection well (UIC) means an "injection well" other than a "new injection well."

Facility or activity means any "HWM facility," UIC "injection well," NPDES "point source," or State 404 dredge or fill activity, or any other facility or activity (including land or appurtenances thereto) that is subject to regulation under the RCRA, UIC, NPDES, or 404 programs.

Fill material (404) means any "pollutant" which replaces portions of the "waters of the United States" with dry land or which changes the bottom elevation of a water body for any purpose.

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

Fluid (UIC) means any material or substance which flows or moves whether in a semisolid, liquid, sludge, gas, or any other form or state.

Formation (UIC) means a body of rock characterized by a degree of lithologic homogeneity which is prevailingly, but not necessarily, tabular and is mappable on the earth's surface or traceable in the subsurface.

Formation fluid (UIC) means "fluid" present in a "formation" under natural conditions as opposed to introduced fluids, such as "drilling mud."

General permit (NPDES and 404) means an NPDES or 404 "permit" authorizing a category of discharges under the CWA within a geographical area. For NPDES, a general permit means a permit issued under § 122.59. For 404, a general permit means a permit issued under § 123.95.

Generator (RCRA) means any person, by site location, whose act or process produces "hazardous waste" identified or listed in 40 CFR Part 261.

Ground water (RCRA and UIC) means water below the land surface in a zone of saturation.

Hazardous substance (NPDES) means any substance designated under 40 CFR Part 116 pursuant to section 311 of CWA.

Hazardous waste (RCRA and UIC) means a hazardous waste as defined in 40 CFR § 261.3.

Hazardous Waste Management facility ("HWM facility") means all contiguous land, and structures, other appurtenances, and improvements on the land, used for treating, storing, or disposing of "hazardous waste." A facility may consist of several "treatment," "storage," or "disposal" operational units (for example, one or more landfills, surface impoundments, or combinations of them).

HWM facility (RCRA) means "Hazardous Waste Management facility."

Indirect discharger (NPDES) means a nondomestic discharger introducing "pollutants" to a "publicly owned treatment works."

Injection well (RCRA and UIC) means a "well" into which "fluids" are being injected.

Injection zone (UIC) means a geological "formation," group of formations, or part of a formation receiving fluids through a "well."

In operation (RCRA) means a facility which is treating, storing, or disposing of "hazardous waste."

Interim authorization (RCRA) means approval by EPA of a State hazardous waste program which has met the requirements of § 3006(c) of RCRA and applicable requirements of Part 123, Subpart F.

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."

Major facility means any RCRA, UIC, NPDES, or 404 "facility or activity" classified as such by the Regional Administrator, or, in the case of "approved State programs," the Regional Administrator in conjunction with the State Director.

Manifest (RCRA and UIC) means the shipping document originated and signed by the "generator" which contains the information required by Subpart B of 40 CFR Part 262.

Maximum daily discharge limitation (NPDES) means the highest allowable "daily discharge."

Municipality (NPDES) means a city, town, borough, county, parish, district, association, or other public body created by or under State law and having jurisdiction over disposal or 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.

National Pollutant Discharge Elimination System means the national program for issuing, modifying, revoking and reissuing, terminating, monitoring and enforcing permits, and imposing and enforcing pretreatment requirements, under sections 307, 402, 318, and 405 of CWA. The term includes an "approved program."

New discharger (NPDES) means any building, structure, facility, or installation:

(a)(1) From which there is or may be a new or additional "discharge of pollutants" at a "site" at which on October 18, 1972 it had never discharged pollutants; and

(2) Which has never received a finally effective NPDES "permit" for discharges at that site; and

(3) Which is not a "new source."

(b) This definition includes an "indirect discharger" which commences discharging into "waters of the United States." It also includes any existing mobile point source, such as an offshore oil drilling rig, seafood processing rig, seafood processing vessel, or aggregate plant, that begins discharging at a location for which it does not have an existing permit.

New HWM facility (RCRA) means a "Hazardous Waste Management facility" which began operation or for which construction commenced after October 21, 1976.

New injection well (UIC) means a "well" which began injection after a UIC program for the State applicable to the well is approved.

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

(a) After promulgation of standards of performance under section 306 of CWA which are applicable to such source; or

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

NPDES means "National Pollutant Discharge Elimination System."

Off-site (RCRA) means any site which is not "on-site."

On-site (RCRA) means on the same or geographically contiguous property which may be divided by public or private right(s)-of-way, provided the entrance and exit between the properties is at a cross-roads intersection, and access is by crossing as opposed to going along, the right(s)-of-way. Non-contiguous properties owned by the same person but connected by a right-of-way which the person controls and to which the public does not have access, is also considered on-site property.

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 an authorization, license, or equivalent control document issued by EPA or an "approved State" to implement the requirements of this Part and Parts 123 and 124. "Permit" includes RCRA "permit by rule" (§ 122.26), UIC area permit (§ 122.39), NPDES or 404 "general permit" (§§ 122.59 and 123.95), and RCRA, UIC, or 404 "emergency permit" (§§ 122.27, 122.40, and 123.96). Permit does not include RCRA interim status (§ 122.23), UIC authorization by rule [§ 122.37), or any permit which has not yet been the subject of final agency action, such as a "draft permit" or a "proposed permit."

Permit by rule (RCRA) means a provision of these regulations stating that a "facility or activity" is deemed to have a RCRA permit if it meets the requirements of the provision.

Person means an individual, association, partnership, corporation, municipality, State or Federal agency, or an agent or employee thereof.

Phase I (RCRA) means that phase of the Federal hazardous waste management program commencing on the effective date of the last of the following to be initially promulgated: 40 CFR Parts 122, 123, 260, 261, 262, 263, and 265. Promulgation of Phase I refers to promulgation of the regulations necessary for Phase I to begin.

Phase II (RCRA) means that phase of Federal hazardous waste management program commencing on the effective date of the first Subpart of 40 CFR Part 264, Subparts F through R to be initially promulgated. Promulgation of Phase II refers to promulgation of the regulations necessary for Phase II to begin.

Physical construction (RCRA) means excavation, movement of earth, erection of forms or structures, or similar activity to prepare an "HWM facility" to accept "hazardous waste."

Plugging (UIC) means the act or process of stopping the flow of water, oil, or gas in "formations" penetrated by a borehole or "well."

Point source (NPDES and 404) 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.

Pollutant (NPDES and 404) means dredged spoil, solid waste, incinerator residue, filter backwash, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials (except those regulated under the Atomic Energy Act of 1954, as amended (42 U.S.C. § 2011 *et seq.*)), heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water. It does not mean:

(a) Sewage from vessels; or

(b) 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 the State determines that the injection or

disposal will not result in the degradation of ground or surface water resources.

[Note.—Radioactive materials covered by the Atomic Energy Act are those encompassed in its definition of source, byproduct, or special nuclear materials. Examples of materials not covered include radium and accelerator-produced isotopes. See *Train* v. *Colorado Public Interest Research Group, Inc.*, 426 U.S. 1 (1976).]

POTW means "publicly owned treatment works."

Primary industry category (NPDES) means any industry category listed in the NRDC settlement agreement (*Natural Resources Defense Council et al.* v. *Train*, 8 E.R.C. 2120 (D.D.C. 1976), *modified* 12 E.R.C. 1833 (D.D.C. 1979); also listed in Appendix A of Part 122.

Privately owned treatment works (NPDES) means any device or system which is (a) used to treat wastes from any facility whose operator is not the operator of the treatment works and (b) not a "POTW."

Process wastewater (NPDES) 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.

Proposed permit (NPDES) means a State NPDES "permit" prepared after the close of the public comment period (and, when applicable, any public hearing and administrative appeals) which is sent to EPA for review before final issuance by the State. A "proposed permit" is not a "draft permit."

Publicly owned treatment works ("POTW") means any device or system used in the treatment (including recycling and reclamation) of municipal sewage or industrial wastes of a liquid nature which is owned by a "State" or "municipality." This definition includes sewers, pipes, or other conveyances only if they convey wastewater to a POTW providing treatment.

Radioactive waste (UIC) means any waste which contains radioactive material in concentrations which exceed those listed in 10 CFR Part 20, Appendix B, Table II, Column 2, or exceed the "Criteria for Identifying and Applying Characteristics of Hazardous Waste and for Listing Hazardous Waste" in 40 CFR Part 261, whichever is applicable.

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, 42 U.S.C. § 6901 *et seq.*).

Recommencing discharger (NPDES) means a source which recommences discharge after terminating operations.

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

Schedule of compliance means a schedule of remedial measures included in a "permit," including an enforceable sequence of interim requirements (for example, actions, operations, or milestone events) leading to compliance with the "appropriate Act and regulations."

SDWA means the Safe Drinking Water Act (Pub. L. 95–523, as amended by Pub. L. 95–1900; 42 U.S.C. § 300f *et seq.*).

Secondary industry category (NPDES) means any industry category which is not a "primary industry category."

Secretary (NPDES and 404) means the Secretary of the Army, acting through the Chief of Engineers.

Section 404 program or *State 404 program* or *404 program* means an "approved State program" to regulate the "discharge of dredged material" and the "discharge of fill material" under section 404 of the Clean Water Act in "State regulated waters."

Sewage from vessels (NPDES) 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 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 (NPDES) 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.

Site means the land or water area where any "facility or activity" is physically located or conducted, including adjacent land used in connection with the 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 Commonwealth Northern Mariana Islands (except in the case of CWA).

State Director means the chief administrative officer of any State or interstate agency operating an "approved program," or the delegated representative of the State Director. If responsibility is divided among two or more State or interstate agencies, "State Director" means the chief administrative officer of the State or interstate agency authorized to perform the particular procedure or function to which reference is made.

State/EPA Agreement means an agreement between the Regional Administrator and the State which coordinates EPA and State activities, responsibilities and programs including those under the RCRA, SDWA, and CWA programs.

State regulated waters (404) means those "waters of the United States" in which the Corps of Engineers suspends 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 program description as required by § 123.4(h)(1). The Secretary shall retain jurisdiction over the following waters (see CWA section 404(g)(1)):

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

(b) 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

(c) "Wetlands" adjacent to waters in (a) and (b).

Storage (RCRA) means the holding of "hazardous waste" for a temporary period, at the end of which the hazardous waste is treated, disposed, or stored elsewhere.

Stratum (plural *strata*) (UIC) means a single sedimentary bed or layer, regardless of thickness, that consists of generally the same kind of rock material.

Total dissolved solids (UIC and NPDES) means the total dissolved (filterable) solids as determined by use of the method specified in 40 CFR Part 136.

Toxic pollutant (NPDES and 404) means any pollutant listed as toxic under section 307(a)(1) of CWA.

Transporter (RCRA) means a person engaged in the off-site transportation of "hazardous waste" by air, rail, highway or water.

Treatment (RCRA) 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 wastes, or so as to recover energy or material resources from the waste, or so as to render such waste non-

hazardous, or less hazardous; safer to transport, store or dispose of; or amenable for recovery, amenable for storage, or reduced in volume.

UIC means the Underground Injection Control program under Part C of the Safe Drinking Water Act, including an "approved program."

Underground injection (UIC) means a "well injection."

Underground source of drinking water ("USDW") (RCRA and UIC) means an "aquifer" or its portion:

(a)(1) Which supplies drinking water for human consumption; or

(2) In which the ground water contains fewer than 10,000 mg/l "total dissolved solids;" and

(b) Which is not an "exempted aquifer."

USDW (RCRA and UIC) means "underground source of drinking water."

Variance (NPDES) means any mechanism or provision under sections 301 or 316 of CWA or under 40 CFR Part 125, or in the applicable "effluent limitations guidelines" which allows modification to or waiver of the generally applicable effluent limitation requirements or time deadlines of CWA. This includes provisions which allow the establishment of alternative limitations based on fundamentally different factors or on sections 301(c), 301(g), 301(h), 301(i), or 316(a) of CWA.

Waters of the United States or *Waters of the U.S.* means:

(a) 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;

(b) All interstate waters, including interstate "wetlands;"

(c) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, "wetlands," sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds the use, degradation, or destruction of which would affect or could affect interstate or foreign commerce including any such waters:

(1) Which are or could be used by interstate or foreign travelers for recreational or other purposes;

(2) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or

(3) Which are used or could be used for industrial purposes by industries in interstate commerce;

(d) All impoundments of waters otherwise defined as waters of the United States under this definition;

(e) Tributaries of waters identified in paragraphs (1)–(4) of this definition;

(f) The territorial sea; and

(g) "Wetlands" adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a)–(f) of this definition.

Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of CWA (other than cooling ponds as defined in 40 CFR § 423.11(m) which also meet the criteria of this definition) are not waters of the United States. This exclusion applies only to manmade bodies of water which neither were originally created in waters of the United States (such as a disposal area in wetlands) nor resulted from the impoundment of waters of the United States.

Well (UIC) means a bored, drilled or driven shaft, or a dug hole, whose depth is greater than the largest surface dimension.

Well injection (UIC) means the subsurface emplacement of "fluids" through a bored, drilled, or driven "well;" or through a dug well, where the depth of the dug well is greater than the largest surface dimension.

Wetlands means those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.

§ 122.4 Application for a permit.

(Applicable to State programs, see § 123.7.)

(a) *Permit application.* Any person who is required to have a permit (including new applicants and permittees with expiring permits) shall complete, sign, and submit an application to the Director as described in this section and in §§ 122.23 (RCRA), 122.38 (UIC), 122.53 (NPDES), and 123.94 (404). Persons currently authorized with interim status under RCRA (§ 122.23) or UIC authorization by rule (§ 122.37) shall apply for permits when required by the Director. Persons covered by RCRA permits by rule (§ 122.26), and NPDES or 404 dischargers covered by general permits under § 122.59 or 123.97, respectively, need not apply. Procedures for applications, issuance and administration of emergency permits are found exclusively in §§ 122.27 (RCRA), 122.40 (UIC), and 123.96 (404).

(b) *Who applies?* When a facility or activity is owned by one person but is operated by another person, it is the operator's duty to obtain a permit, except that for RCRA only, the owner must also sign the permit application.

(c) *Completeness.* The Director shall not issue a permit under a program before receiving a complete application for a permit under that program except for NPDES and 404 general permits, RCRA permits by rule, or emergency permits. An application for a permit under a program is complete when the Director receives an application form and any supplemental information which are completed to his or her satisfaction. The completeness of any application for a permit shall be judged independently of the status of any other permit application or permit for the same facility or activity. For EPA—administered RCRA, UIC, and NPDES programs, an application which is reviewed under § 124.3 is complete when the Director receives either a complete application or the information listed in a notice of deficiency.

(d) *Information requirements.* All applicants for RCRA, UIC, or NPDES permits (for State 404 permits see § 123.94) shall provide the following information to the Director, using the application form provided by the Director (additional information required of applicants is set forth in §§ 122.24 and 122.25 (RCRA), 122.38 (UIC), and 122.53 (NPDES)).

(1) The activities conducted by the applicant which require it to obtain permits under RCRA, UIC, NPDES, or PSD.

(2) Name, mailing address, and location of the facility for which the application is submitted.

(3) Up to four SIC codes which best reflect the principal products or services provided by the facility.

(4) The operator's name, address, telephone number, ownership status, and status as Federal, State, private, public, or other entity.

(5) Whether the facility is located on Indian lands.

(6) A listing of all permits or construction approvals received or applied for under any of the following programs:

(i) Hazardous Waste Management program under RCRA.

(ii) UIC program under SDWA.

(iii) NPDES program under CWA.

(iv) Prevention of Significant Deterioration (PSD) program under the Clean Air Act.

(v) Nonattainment program under the Clean Air Act.

(vi) National Emission Standards for Hazardous Pollutants (NESHAPS) preconstruction approval under the Clean Air Act.

(vii) Ocean dumping permits under the Marine Protection Research and Sanctuaries Act.

(viii) Dredge or fill permits under section 404 of CWA.

(ix) Other relevant environmental permits, including State permits.

(7) A topographic map (or other map if a topographic map is unavailable) extending one mile beyond the property boundaries of the source, depicting the facility and each of its intake and discharge structures; each of its hazardous waste treatment, storage, or disposal facilities; each well where fluids from the facility are injected underground; and those wells, springs, other surface water bodies, and drinking water wells listed in public records or otherwise known to the applicant in the map area.

(8) A brief description of the nature of the business.

(e) *Recordkeeping.* Applicants shall keep records of all data used to complete permit applications and any supplemental information submitted under §§ 122.4(d), 122.24, and 122.25 (RCRA); 122.38 (UIC); 122.53 (NPDES); and 123.94 (404) for a period of at least 3 years from the date the application is signed.

§ 122.5 Continuation of expiring permits.

(a) *EPA permits.* When EPA is the permit-issuing authority, the conditions of an expired permit continue in force under 5 U.S.C. § 558(c) until the effective date of a new permit (see § 124.15) if:

(1) The permittee has submitted a timely application under §§ 122.25 (RCRA), 122.38 (UIC), or 122.53 (NPDES) which is a complete (under § 122.4(c)) application for a new permit; and

(2) The Regional Administrator, through no fault of the permittee, does not issue a new permit with an effective date under § 124.15 on or before the expiration date of the previous permit (for example, when issuance is impracticable due to time or resource constraints).

(b) *Effect.* Permits continued under this section remain fully effective and enforceable.

(c) *Enforcement.* When the permittee is not in compliance with the conditions of the expiring or expired permit the Regional Administrator may choose to do any or all of the following:

(1) Initiate enforcement action based upon the permit which has been continued;

(2) Issue a notice of intent to deny the new permit under § 124.6. If the permit is denied, the owner or operator would then be required to cease the activities authorized by the continued permit or be subject to enforcement action for operating without a permit;

(3) Issue a new permit under Part 124 with appropriate conditions; or

(4) Take other actions authorized by these regulations.

(d) *State continuation.*

(1) An EPA 1 (or, in the case of 404, Corps of Engineers) issued permit does not continue in force beyond its expiration date under Federal law if at that time a State is the permitting authority. States authorized to administer the RCRA, UIC, NPDES or 404 programs may continue either EPA (or Corps of Engineers) or State-issued permits until the effective date of the new permits, if State law allows. Otherwise, the facility or activity is operating without a permit from the time of expiration of the old permit to the effective date of the State-issued new permit.

§ 122.6 Signatories to permit applications and reports.

(Applicable to State programs, see § 123.7.)

(1) *Applications.* All permit applications, except those submitted for Class II wells under the UIC program (see paragraph (b) of this section), 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) *Reports.* All reports required by permits, other information requested by the Director, and all permit applications submitted for Class II wells under § 122.38 for the UIC program shall be signed by a person described in paragraph (a) of this section, or by a duly authorized representative of that person. A person is a duly authorized representative only if:

(1) The authorization is made in writing by a person described in paragraph (a) of this section;

(2) The authorization specifies either an individual or a position having responsibility for the overall operation of the regulated facility or activity, such as the position of plant manager, operator of a well or a well field, superintendent, or position of equivalent responsibility. (A duly authorized representative may thus be either a named individual or any individual occupying a named position.); and

(3) The written authorization is submitted to the Director.

(c) *Changes to authorization.* If an authorization under paragraph (b) of this section is no longer accurate because a different individual or position has responsibility for the overall operation of the facility, a new authorization satisfying the requirements of paragraph (b) of this section must be submitted to the Director prior to or together with any reports, information, or applications to be signed by an authorized representative.

(d) *Certification.* Any person signing a document under paragraphs (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 this document and all attachments and that, based on my inquiry of those individuals immediately responsible for obtaining the information, I believe that the 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."

§ 122.7 Conditions applicable to all permits.

(Applicable to State programs, see § 123.7.)

The following conditions apply to all RCRA, UIC, NPDES, and 404 permits. For additional conditions applicable to all permits for each of the programs individually, see sections 122.28 (RCRA), 122.41 (UIC), 122.60 and 122.61 (NPDES) and 123.97 (404). All conditions applicable to all permits, and all additional conditions applicable to all permits for individual programs, shall be incorporated into the permits either expressly or by reference. If incorporated by reference, a specific citation to these regulations (or the corresponding approved State regulations) must be given in the permit.

(a) *Duty to comply.* The permittee must comply with all conditions of this permit. Any permit noncompliance constitutes a violation of the appropriate Act and is grounds for enforcement action; for permit termination, revocation and reissuance, or modification; or for denial of a permit renewal application.

(b) *Duty to reapply.* If the permittee wishes to continue an activity regulated by this permit after the expiration date of this permit, the permittee must apply for and obtain a new permit.

(c) *Duty to halt or reduce activity.* It shall not be a defense for a permittee in an enforcement action that it would have been necessary to halt or reduce the permitted activity in order to maintain compliance with the conditions of this permit.

(d) *Duty to mitigate.* The permittee shall take all reasonable steps to minimize or correct any adverse impact

on the environment resulting from noncompliance with this permit.

(e) *Proper operation and maintenance.* The permittee shall at all times properly operate and maintain all facilities and systems of treatment and control (and related appurtenances) which are installed or used by the permittee to achieve compliance with the conditions of this permit. Proper operation and maintenance includes effective performance, adequate funding, adequate operator staffing and training, and adequate laboratory and process controls, including appropriate quality assurance procedures. This provision requires the operation of back-up or auxiliary facilities or similar systems *only* when necessary to achieve compliance with the conditions of the permit.

(f) *Permit actions.* This permit may be modified, revoked and reissued, or terminated for cause. The filing of a request by the permittee for a permit modification, revocation and reissuance, or termination, or a notification of planned changes or anticipated noncompliance, does not stay any permit condition.

(g) *Property rights.* This permit does not convey any property rights of any sort, or any exclusive privilege.

(h) *Duty to provide information.* The permittee shall furnish to the Director, within a reasonable time, any information which the Director may request to determine whether cause exists for modifying, revoking and reissuing, or terminating this permit, or to determine compliance with this permit. The permittee shall also furnish to the Director, upon request, copies of records required to be kept by this permit.

(i) *Inspection and entry.* The permittee shall allow the Director, or an authorized representative, upon the presentation of credentials and other documents as may be required by law, to:

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

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

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

(4) Sample or monitor at reasonable times, for the purposes of assuring permit compliance or as otherwise authorized by the appropriate Act, any substances or parameters at any location.

(j) *Monitoring and records.*

(1) Samples and measurements taken for the purpose of monitoring shall be representative of the monitored activity.

(2) The permittee shall retain records of all monitoring information, including all calibration and maintenance records and all original strip chart recordings for continuous monitoring instrumentation, copies of all reports required by this permit, and records of all data used to complete the application for this permit, for a period of at least 3 years from the date of the sample, measurement, report or application. This period may be extended by request of the Director at any time.

(3) Records of monitoring information shall include:

(i) The date, exact place, and time of sampling or measurements;

(ii) The individual(s) who performed the sampling or measurements;

(iii) The date(s) analyses were performed;

(iv) The individual(s) who performed the analyses;

(v) The analytical techniques or methods used; and

(vi) The results of such analyses.

(k) *Signatory requirement.* All applications, reports, or information submitted to the Director shall be signed and certified. (See § 122.6.)

(l) *Reporting requirements.* (1) *Planned changes.* The permittee shall give notice to the Director as soon as possible of any planned physical alternations or additions to the permitted facility.

(2) *Anticipated noncompliance.* The permittee shall give advance notice to the Director of any planned changes in the permitted facility or activity which may result in noncompliance with permit requirements.

(3) *Transfers.* This permit is not transferable to any person except after notice to the Director. The Director may require modification or revocation and reissuance of the permit to change the name of the permittee and incorporate such other requirements as may be necessary under the appropriate Act. (See § 122.14; in some cases, modification or revocation and reissuance is mandatory.)

(4) *Monitoring reports.* Monitoring results shall be reported at the intervals specified elsewhere in this permit.

(5) *Compliance schedules.* Reports of compliance or noncompliance with, or any progress reports on, interim and final requirements contained in any compliance schedule of this permit shall be submitted no later than 14 days following each schedule date.

(6) *Twenty-four hour reporting.* The permittee shall report any noncompliance which may endanger health or the environment. Any information shall be provided orally within 24 hours from the time the permittee becomes aware of the circumstances. A written submission shall also be provided within 5 days of the time the permittee becomes aware of the circumstances. The written submission shall contain a description of the noncompliance and its cause; the period of noncompliance, including exact dates and times, and if the noncompliance has not been corrected, the anticipated time it is expected to continue; and steps taken or planned to reduce, eliminate, and prevent reoccurrence of the noncompliance.

(7) *Other noncompliance.* The permittee shall report all instances of noncompliance not reported under paragraphs (1)(4), (5), and (6) of this section, at the time monitoring reports are submitted. The reports shall contain the information listed in paragraph (l)(6) of this section.

(8) *Other information.* Where the permittee becomes aware that it failed to submit any relevant facts in a permit application, or submitted incorrect information in a permit application or in any report to the Director, it shall promptly submit such facts or information.

§ 122.8 Establishing permit conditions.

(Applicable to State programs, see § 122.7.)

(a) *All programs.* In addition to conditions required in all permits for all programs (§ 122.7), the Director shall establish conditions, as required on a case-by-case basis, in permits for all programs under §§ 122.9 (duration of permits), 122.10(a) (schedules of compliance), 122.11 (monitoring), and for EPA permits only 122.10(b) (alternate schedules of compliance) and 122.12 (considerations under Federal law).

(b) *Individual programs.*

(1) In addition to conditions required in all permits for a particular program (§§ 122.28 for RCRA, 122.41 for UIC, 122.60 and 122.61 for NPDES, and 123.97 for 404), the Director shall establish conditions in permits for the individual programs, as required on a case-by-case basis, to provide for and assure compliance with all applicable requirements of the appropriate Act and regulations.

(2) For a State issued permit, an applicable requirement is a State statutory or regulatory requirement which takes effect prior to final administrative disposition of a permit. For a permit issued by EPA, an

applicable requirement is a statutory or regulatory requirement (including any interim final regulation) which takes effect prior to the issuance of the permit (except as provided in § 124.86(c) for RCRA, UIC and NPDES permits being processed under Subparts E or F of Part 124). Section 124.14 (reopening of comment period) provides a means for reopening EPA permit proceedings at the discretion of the Director where new requirements become effective during the permitting process and are of sufficient magnitude to make additional preceedings desirable. For State and EPA administered programs, an applicable requirement is also any requirement which takes effect prior to the modification or revocation and reissuance of a permit, to the extent allowed in § 122.15.

(3) New or reissued permits, and to the extent allowed under § 122.15 modified or revoked and reissued permits, shall incorporate each of the applicable requirements referenced in §§ 122.29 (RCRA), 122.42 (UIC), 122.62 and 122.63 (NPDES), and 123.98 (404).

(c) *Incorporation.* All permit conditions shall be incorporated either expressly or by reference. If incorporated by reference, a specific citation to the applicable regulations or requirements must be given in the permit.

§ 122.9 Duration of permits.

(Applicable to State programs, see § 123.7.)

(a) *NPDES and section 404.* NPDES and section 404 permits shall be effective for a fixed term not to exceed 5 years.

(b) *RCRA.* RCRA permits shall be effective for a fixed term not to exceed 10 years. (See also § 122.30 (interim permits for UIC wells)).

(c) *UIC.* UIC permits for Class I and Class V wells shall be effective for a fixed term not to exceed 10 years. UIC permits for Class II and III wells shall be issued for a period up to the operating life of the facility. The Director shall review each issued Class II or III well UIC permit at least once every 5 years to determine whether it should be modified, revoked and reissued, terminated, or a minor modification made as provided in §§ 122.15, 122.16, and 122.17.

(d) Except as provided in § 122.5, the term of a permit shall not be extended by modification beyond the maximum duration specified in this section.

(e) The Director may issue any permit for a duration that is less than the full allowable term under this section.

§ 122.10 Schedules of compliance.

(a) *General (applicable to State programs, see § 123.7).* The permit may, when appropriate, specify a schedule of compliance leading to compliance with the appropriate Act and regulations.

(1) *Time for compliance.* Any schedules of compliance under this section shall require compliance as soon as possible.

(i) *For NPDES,* in addition, schedules of compliance shall require compliance not later than the applicable statutory deadline under the CWA.

(ii) *For UIC,* in addition, schedules of compliance shall require compliance not later than 3 years after the effective date of the permit.

(2) *For NPDES only.* The first NPDES permit issued to a new source, a new discharger which commenced discharge after August 13, 1979, or a recommencing discharger shall not contain a schedule of compliance under this section. See also § 122.66(d)(4).

(3) *Interim dates.* Except as provided in paragraph (b)(1)(ii) of this section, if a permit establishes a schedule of compliance which exceeds 1 year from the date of permit issuance, the schedule shall set forth interim requirements and the dates for their achievement.

(i) The time between interim dates shall not exceed 1 year.

(ii) If the time necessary for completion of any interim requirement (such as the construction of a control facility) is more than 1 year 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.

[Note.—Examples of interim requirements include: (1) submit a complete Step 1 construction grant (for POTWs); (2) let a contract for construction of required facilities; (3) commence construction of required facilities; (4) complete construction of required facilities.]

(4) *Reporting.* The permit shall be written to require that no later than 14 days following each interim date and the final date of compliance, the permittee shall notify the director in writing of its compliance or noncompliance with the interim or final requirements, or submit progress reports if paragraph (a)(1)(ii) of this section is applicable.

(b) *Alternative schedules of compliance.* A RCRA, UIC, or NPDES permit applicant or permittee may cease conducting regulated activities (by receiving a terminal volume of hazardous waste for HWM facilities, plugging and abandonment for UIC wells, or termination of direct discharge for NPDES sources) rather than continue to operate and meet permit requirements as follows:

(1) If the permittee decides to cease conducting regulated activities at a given time within the term of a permit which has already been issued:

(i) The permit may be modified to contain a new or additional schedule leading to timely cessation of activities; or

(ii) The permittee shall cease conducting permitted activities before noncompliance with any interim or final compliance schedule requirement already specified in the permit.

(2) If the decision to cease conducting regulated activities is made before issuance of a permit whose term will include the termination date, the permit shall contain a schedule leading to termination which will ensure timely compliance with applicable requirements, or for NPDES, compliance no later than the statutory deadline.

(3) If the permittee is undecided whether to cease conducting regulated activities, the Director may issue or modify a permit to contain two schedules as follows:

(i) Both schedules shall contain an identical interim deadline requiring a final decision on whether to cease conducting regulated activities no later than a date which ensures sufficient time to comply with applicable requirements in a timely manner if the decision is to continue conducting regulated activities;

(ii) One schedule shall lead to timely compliance with applicable requirements, and for NPDES, compliance no later than the statutory deadline;

(iii) The second schedule shall lead to cessation of regulated activities by a date which will ensure timely compliance with applicable requirements, or for NPDES, compliance no later than the statutory deadline.

(iv) Each permit containing two schedules shall include a requirement that after the permittee has made a final decision under paragraph (b)(3)(i) of this section it shall follow the schedule leading to compliance if the decision is to continue conducting regulated activities, and follow the schedule leading to termination if the decision is to cease conducting regulated activities.

(4) The applicant's or permittee's decision to cease conducting regulated activities shall be evidenced by a firm public commitment satisfactory to the Director, such as a resolution of the board of directors of a corporation.

§ 122.11 Requirements for recording and reporting of monitoring results.

(Applicable to State programs, see § 123.7.)

All permits shall specify:

(a) Requirements concerning the proper use, maintenance, and installation, when appropriate, of monitoring equipment or methods (including biological monitoring methods when appropriate);

(b) Required monitoring including type, intervals, and frequency sufficient to yield data which are representative of the monitored activity including, when appropriate, continuous monitoring;

(c) Applicable reporting requirements based upon the impact of the regulated activity and as specified in Parts 264 and 266 (RCRA), Part 146 (UIC), § 122.62 (NPDES), and, when applicable, 40 CFR Part 230 (404). Reporting shall be no less frequent than specified in the above regulations.

§ 122.12 Considerations under Federal law.

Permits shall be issued in a manner and shall contain conditions consistent with requirements of applicable Federal laws. These laws may include:

(a) The *Wild and Scenic Rivers Act,* 16 U.S.C. 1273 *et seq.* Section 7 of the Act prohibits the Regional Administrator from assisting by license or otherwise the construction of any water resources project that would have a direct, adverse effect on the values for which a national wild and scenic river was established.

(b) The *National Historic Preservation Act of 1966,* 16 U.S.C. 470 *et seq.* Section 106 of the Act and implementing regulations (36 CFR Part 800) require the Regional Administrator, before issuing a license, to adopt measures when feasible to mitigate potential adverse effects of the licensed activity and properties listed or eligible for listing in the National Register of Historic Places. The Act's requirements are to be implemented in cooperation with State Historic Preservation Officers and upon notice to, and when appropriate, in consultation with the Advisory Council on Historic Preservation.

(c) The *Endangered Species Act,* 16 U.S.C. 1531 *et seq.* Section 7 of the Act and implementing regulations (50 CFR Part 402) require the Regional Administrator to ensure, in consultation with the Secretary of the Interior or Commerce, that any action authorized by EPA is not likely to jeopardize the continued existence of any endangered or threatened species or adversely affect its critical habitat.

(d) The *Coastal Zone Management Act,* 16 U.S.C. 1451 *et seq.* Section 307(c) of the Act and implementing regulations (15 CFR Part 930) prohibit EPA from issuing a permit for an activity affecting land or water use in the coastal zone until the applicant certifies that the proposed activity complies with the State Coastal Zone Management program, and the State or its designated agency concurs with the certification (or the Secretary of Commerce overrides the State's nonconcurrence).

(e) The *Fish and Wildlife Coordination Act,* 16 U.S.C. 661 *et.seq.*, requires that the Regional Administrator, before issuing a permit proposing or authorizing the impoundment (with certain exemptions), diversion, or other control or modification of any body of water, consult with the appropriate State agency exercising jurisdiction over wildlife resources to conserve those resources.

(f) *Executive orders.* (Reserved.)

(g) *For NPDES only,* the National Environmental Policy Act, 33 U.S.C. 4321 *et seq.*, may require preparation of an Environmental Impact Statement and the inclusion of EIS-related permit conditions, as provided in § 122.67(c).

§ 122.13 Effect of a permit.

(a) *(Applicable to State programs, see § 123.7(a)).* Except for Class II and III wells under UIC, and except for any toxic effluent standards and prohibitions imposed under section 307 of the CWA for NPDES, compliance with a permit during its term constitutes compliance, for purposes of enforcement, with Subtitle C of RCRA, Part C of SWDA, sections 301, 302, 306, 307, 318, 403, and 405 of CWA for NPDES, and sections 301, 307, and 403 of CWA for 404. However, a permit may be modified, revoked and reissued, or terminated during its term for cause as set forth in §§ 122.15 and 122.16.

(b) *(Applicable to State programs, see § 123.7(a).)* The issuance of a permit does not convey any property rights of any sort, or any exclusive privilege.

(c) The issuance of a permit does not authorize any injury to persons or property or invasion of other private rights, or any infringement of State or local law or regulations.

§ 122.14 Transfer of permits.

(Applicable to State programs, see § 122.7.)

(a) *Transfers by modification.* Except as provided in paragraph (b) of this section, a permit may be transferred by the permittee to a new owner or operator only if the permit has been modified or revoked and reissued (under § 122.15(b)(2)), or a minor modification made (under § 122.17(d)), to identify the new permittee and incorporate such other requirements as may be necessary under the appropriate Act.

(b) *Automatic transfers.* As an alternative to transfers under paragraph (a) of this section, any NPDES permit or UIC permit for a well not injecting hazardous waste may be automatically transferred to a new permittee if:

(1) The current permittee notifies the Director at least 30 days in advance of the proposed transfer date in paragraph (b)(2) of this section;

(2) The notice includes a written agreement between the existing and new permittees containing a specific date for transfer of permit responsibility, coverage, and liability between them and, in the case of UIC permits, the notice demonstrates that the financial responsibility requirements of § 122.42(g) will be met by the new permittee; and

(3) The Director does not notify the existing permittee and the proposed new permittee of his or her intent to modify or revoke and reissue the permit. A modification under this subparagraph may also be a minor modification under § 122.17. If this notice is not received, the transfer is effective on the date specified in the agreement mentioned in paragraph (b)(2) of this section.

§ 122.15 Modification or revocation and reissuance of permits.

(Applicable to State programs, see § 123.7).

When the Director receives any information (for example, inspects the facility, receives information submitted by the permittee as required in the permit (see § 122.7), receives a request for modification or revocation and reissuance under § 124.5, or conducts a review of the permit file) he or she may determine whether or not one or more of the causes listed in paragraphs (a) and (b) of this section for modification or revocation and reissuance or both exist. If cause exists, the Director may modify or revoke and reissue the permit accordingly, subject to the limitations of paragraph (c) of this section, and may request an updated application if necessary. When a permit is modified, only the conditions subject to modification are reopened. If a permit is revoked and reissued, the entire permit is reopened and subject to revision and the permit is reissued for a new term. See § 124.5(c)(2). If cause does not exist under this section or § 122.17, the Director shall not modify or revoke and reissue the permit. If a permit modification satisfies the criteria in § 122.17 for "minor modifications" the

permit may be modified without a draft permit or public review. Otherwise, a draft permit must be prepared and other procedures in Part 124 (or procedures of an approved State program) followed.

(a) *Causes for modification.* The following are causes for modification but not revocation and reissuance of permits. However, for Class II or III wells under UIC, the following may be causes for revocation and reissuance as well as modification; and the following may be causes for revocation and reissuance as well as modification under any program when the permittee requests or agrees.

(1) *Alterations.* There are material and substantial alterations or additions to the permitted facility or activity which occurred after permit issuance which justify the application of permit conditions that are different or absent in the existing permit.

[Note.—For NPDES, certain reconstruction activities may cause the new source provisions of § 122.67 to be applicable.]

(2) *Information.* The Director has received information. Permits other than for UIC Class II and III wells may be modified during their terms for this cause only if the information was not available at the time of permit issuance (other than revised regulations, guidance, or test methods) and would have justified the application of different permit conditions at the time of issuance. For UIC area permits (§ 122.39), NPDES general permits (§ 122.59) and 404 general permits (§ 123.95) this cause shall include any information indicating that cumulative effects on the environment are unacceptable.

(3) *New regulations.* The standards or regulations on which the permit was based have been changed by promulgation of amended standards or regulations or by judicial decision after the permit was issued. Permits other than for UIC Class II or III wells may be modified during their terms for this cause only as follows:

(i) For promulgation of amended standards or regulations, when:

(A) The permit condition requested to be modified was based on a promulgated Part 260–266 (RCRA) or Part 146 (UIC) regulation, or a promulgated effluent limitation guideline or EPA approved or promulgated water quality standard (NPDES); and

(B) EPA has revised, withdrawn, or modified that portion of the regulation or effluent limitation guideline on which the permit condition was based, or has approved a State action with regard to a water quality standard on which the permit condition was based; and

(C) A permittee requests modification in accordance with § 124.5 within ninety (90) days after Federal Register notice of the action on which the request is based.

(ii) For judicial decisions, a court of competent jurisdiction has remanded and stayed EPA promulgated regulations or effluent limitation guidelines, if the remand and stay concern that portion of the regulations or guidelines on which the permit condition was based and a request is filed by the permittee in accordance with § 124.5 within ninety (90) days of judicial remand.

(iii) For changes based upon modified State certifications of NPDES permits, see § 124.55(b).

(4) *Compliance schedules.* The Director determines good cause exists for modification of a compliance schedule, such as an act of God, strike, flood, or materials shortage or other events over which the permittee has little or no control and for which there is no reasonably available remedy. However, in no case shall an NPDES compliance schedule be modified to extend beyond an applicable CWA statutory deadline. See also § 122.17(c) (minor modifications) and paragraph (a)(5)(xi) of this section (NPDES innovative technology).

(5) *For NPDES only,* the Director may modify a permit:

(i) When the permittee has filed a request for a variance under CWA sections 301(c), 301(g), 301(h), 301(i), 301(k), or 316(a), or for "fundamentally different factors" within the time specified in § 122.53, and the Director processes the request under the applicable provisions of §§ 124.61, 124.62, and 124.64.

(ii) When required to incorporate an applicable 307(a) toxic effluent standard or prohibition (see § 122.62(b)).

(iii) When required by the "reopener" conditions in a permit, which are established in the permit under § 122.62(b) (for CWA toxic effluent limitations) or 40 CFR § 403.10(e) (pretreatment program).

(iv) Upon request of a permittee who qualifies for effluent limitations on a net basis under § 122.63(h).

(v) When a discharger is no longer eligible for net limitations, as provided in § 122.63(h)(1)(ii)(B).

(vi) As necessary under 40 CFR § 403.8(e) (compliance schedule for development of pretreatment program).

(vii) Upon failure of an approved State to notify, as required by section 402(b)(3), another State whose waters may be affected by a discharge from the approved State.

(viii) When the level of discharge of any pollutant which is not limited in the permit exceeds the level which can be achieved by the technology-based treatment requirements appropriate to the permittee under § 125.3(c).

(ix) When the permittee begins or expects to begin to use or manufacture as an intermediate or final product or byproduct any toxic pollutant which was not reported in the permit application under § 122.53(d)(9).

(x) To establish a "notification level" as provided in § 122.62(f).

(xi) To modify a schedule of compliance to reflect the time lost during construction of an innovative or alternative facility, in the case of a POTW which has received a grant under section 202(a)(3) of CWA for 100% of the costs to modify or replace facilities constructed with a grant for innovative and alternative wastewater technology under section 202(a)(2). In no case shall the compliance schedule be modified to extend beyond an applicable CWA statutory deadline for compliance.

(6) *For 404 only,* the Director shall modify a permit to reflect toxic effluent standards or prohibitions or water quality standards, under the "reopener" condition of § 123.97(g).

(b) *Causes for modification or revocation and reissuance.* The following are causes to modify or, alternatively, revoke and reissue a permit:

(1) Cause exists for termination under § 122.16, and the Director determines that modification or revocation and reissuance is appropriate.

(2) The Director has received notification (as required in the permit, see § 122.17(1)(3)) of a proposed transfer of the permit. A permit also may be modified to reflect a transfer after the effective date of an automatic transfer (§ 122.14(b)) but will not be revoked and reissued after the effective date of the transfer except upon the request of the new permittee.

(c) *Facility siting.* For RCRA and UIC, suitability of the facility location will not be considered at the time of permit modification or revocation and reissuance unless new information or standards indicate that a threat to human health or the environment exists which was unknown at the time of permit issuance.

§ 122.16 Termination of permits.

(Applicable to State programs, see § 122.7.)

(a) The following are causes for terminating a permit during its term, or for denying a permit renewal application:

(1) Noncompliance by the permittee with any condition of the permit;

(2) The permittee's failure in the application or during the permit issuance process to disclose fully all relevant facts, or the permittee's misrepresentation of any relevant facts at any time; or

(3) A determination that the permitted activity endangers human health or the environment and can only be regulated to acceptable levels by permit modification or termination.

(4) *For NPDES and 404 only,* permits may be modified or terminated when 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 (for example, plant closure or termination of discharge by connection to a POTW).

(b) The Director shall follow the applicable procedures in Part 124 or State procedures in terminating any RCRA, UIC, NPDES, or 404 permit under this section.

§ 122.17 Minor modifications of permits.

Upon the consent of the permittee, the Director may modify a permit to make the corrections or allowances for changes in the permitted activity listed in this section, without following the procedures of Part 124. Any permit modification not processed as a minor modification under this section must be made for cause and with Part 124 draft permit and public notice as required in § 122.15. Minor modifications may only:

(a) Correct typographical errors;

(b) Require more frequent monitoring or reporting by the permittee;

(c) Change an interim compliance date in a schedule of compliance, provided the new date is not more than 120 days after the date specified in the existing permit and does not interfere with attainment of the final compliance date requirement; or

(d) Allow for a change in ownership or operational control of a facility where the Director determines that no other change in the permit is necessary, provided that a written agreement containing a specific date for transfer of permit responsibility, coverage, and liability between the current and new permittees has been submitted to the Director.

(e) *For RCRA only,* change the lists of facility emergency coordinators or equipment in the permit's contingency plan.

(f) *For UIC only,*

(1) Change quantities or types of fluids injected which are within the capacity of the facility as permitted and, in the judgment of the Director, after reviewing information required under §§ 146.16, 146.26 and 146.36, would not interfere with the operation of the facility or its ability to meet conditions prescribed in the permit, and would not change its classification.

(2) Change construction requirements approved by the Director pursuant to § 122.42(a) (establishing UIC permit conditions), provided that any such alteration shall comply with the requirements of this Part and Part 146.

(g) *For NPDES only,*

(1) Change the construction schedule for a discharger which is a new source. No such change shall affect a discharger's obligation to have all pollution control equipment installed and in operation prior to discharge under § 122.66.

(2) Delete a point source outfall when the discharge from that outfall is terminated and does not result in discharge of pollutants from other outfalls except in accordance with permit limits.

(h) *For 404 only,* extend the term of a State section 404 permit, so long as the modification does not extend the term of the permit beyond 5 years from its original effective date.

§ 122.18 Noncompliance and program reporting by the Director.

(Applicable to State programs, see § 123.7.)

The Director shall prepare quarterly and annual reports as detailed below. When the State is the permit-issuing authority, the State Director shall submit any reports required under this section to the Regional Administrator. When EPA is the permit-issuing authority, the Regional Administrator shall submit any report required under this section to EPA Headquarters. For purposes of this section only, RCRA permittees shall include RCRA interim status facilities, when appropriate.

(a) *Quarterly reports for RCRA, UIC, and NPDES.* The Director shall submit quarterly narrative reports for major facilities as follows:

(1) *Format.* The report shall use the following format:

(i) Provide separate lists for RCRA, UIC, and NPDES permittees; the NPDES permittees shall be further subcategorized as non-POTWs, POTWs, and Federal permittees;

(ii) For facilities or activities with permits under more than one program, provide an additional list combining information on noncompliance for each such facility;

(iii) Alphabetize each list by permittee name. When two or more permittees have the same name, the lowest permit number shall be entered first.

(iv) For each entry on a list, include the following information in the following order:

(A) Name, location, and permit number of the noncomplying permittee.

(B) A brief description and date of each instance of noncompliance for that permittee. Instances of noncompliance may include one or more of the kinds set forth in paragraph (a)(2) of this section. When a permittee has noncompliance of more than one kind under a single program, combine the information into a single entry for each such permittee.

(C) The date(s) and a brief description of the action(s) taken by the Director to ensure compliance.

(D) Status of the instance(s) of noncompliance with the date of the review of the status or the date of resolution.

(E) Any details which tend to explain or mitigate the instance(s) of noncompliance.

(2) *Instances of noncompliance to be reported.* Any instances of noncompliance within the following categories shall be reported in successive reports until the noncompliance is reported as resolved. Once noncompliance is reported as resolved it need not appear in subsequent reports.

(i) *Failure to complete construction elements.* When the permittee has failed to complete, by the date specified in the permit, an element of a compliance schedule involving either planning for construction (for example, award of a contract, preliminary plans), or a construction step (for example, begin construction, attain operation level); and the permittee has not returned to compliance by accomplishing the required element of the schedule within 30 days from the date a compliance schedule report is due under the permit.

(ii) *Modifications to schedules of compliance.* When a schedule of compliance in the permit has been modified under §§ 122.15 or 122.17 because of the permittee's noncompliance.

(iii) *Failure to complete or provide compliance schedule or monitoring reports.* When the permittee has failed to complete or provide a report required in a permit compliance schedule (for example, progress report or notice of noncompliance or compliance) or a monitoring report; and the permittee has not submitted the complete report within 30 days from the date it is due under the permit for compliance schedules, or from the date specified in the permit for monitoring reports.

(iv) *Deficient reports.* When the required reports provided by the permittee are so deficient as to cause

misunderstanding by the Director and thus impede the review of the status of compliance.

(v) *Noncompliance with other permit requirements.* Noncompliance shall be reported in the following circumstances:

(A) Whenever the permittee has violated a permit requirement (other than reported under paragraphs (a)(2) (i) or (ii) of this section), and has not returned to compliance within 45 days from the date reporting of noncompliance was due under the permit; or

(B) When the Director determines that a pattern of noncompliance exists for a major facility permittee over the most recent four consecutive reporting periods. (*For NPDES only,* this pattern of noncompliance is based on violations of monthly averages and excludes parameters where there is continuous monitoring.) This pattern includes any violation of the same requirement in two consecutive reporting periods, and any violation of one or more requirements in each of four consecutive reporting periods; or

(C) When the Director determines significant permit noncompliance or other significant event has occurred, such as a discharge of a toxic or hazardous substance by an NPDES facility, a fire or explosion at an RCRA facility, or migration of fluids into a USDW.

(vi) *All other.* Statistical information shall be reported quarterly on all other instances of noncompliance by major facilities with permit requirements not otherwise reported under paragraph (a) of this section.

(3) *For RCRA only,* the Director shall submit, in a manner and form prescribed by the Administrator, quarterly reports concerning noncompliance by transporters (for example, recordkeeping requirements), and by generators that send their wastes to off-site treatment, storage, or disposal facilities.

(b) *Quarterly reports for State 404 programs.* The Director shall submit noncompliance reports for section 404 discharges specified under § 123.6(f)(1)(i) (A)–(E) containing the following information:

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

(2) A brief description and date of each instance of noncompliance, which should include the following:

(i) Any unauthorized discharges of dredged or fill material subject to the State's jurisdiction or any noncompliance with permit conditions; and

(ii) A description of investigations conducted and of any enforcement actions taken or contemplated.

(c) *Annual reports for RCRA, UIC, and NPDES.*

(1) *Annual noncompliance report.* Statistical reports shall be submitted by the Director on nonmajor RCRA, UIC, and NPDES permittees indicating the total number reviewed, the number of noncomplying nonmajor permittees, the number of enforcement actions, and number of permit modifications extending compliance deadlines. The statistical information shall be organized to follow the types of noncompliance listed in paragraph (a) of this section.

(2) *For NPDES only,* a separate list of nonmajor discharges which are one or more years behind in construction phases of the compliance schedule shall also be submitted in alphabetical order by name and permit number.

(3) *For RCRA only,* in addition to the annual noncompliance report, the Director shall prepare a "program report" which contains information (in a manner and form prescribed by the Administrator) on generators and 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. This summary information shall be reported according to EPA characteristics and lists of hazardous wastes at 40 CFR Part 261.

(4) *For State-administered UIC programs only,* in addition to the annual noncompliance report, the State Director shall:

(i) Submit each year a program report to the Administrator (in a manner and form prescribed by the Administrator) consisting of:

(A) A detailed description of the State's implementation of its program;

(B) Suggested changes if any to the program description (see § 123.4(f)) which are necessary to more accurately reflect the State's progress in issuing permits;

(C) An updated inventory of active underground injection operations in the State.

(ii) In addition to complying with the requirements of paragraph (c)(4)(i) of this section the State Director shall provide the Administrator within 3 months of the completion of the second full year of State operation of the UIC program a supplemental report containing the information required in 40 CFR Part 146 on corrective actions taken by operators of new Class II wells based upon these regulations.

(d) *Annual reports for State 404 programs.* The State Director shall 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 report 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 (for example, wetlands, rivers, lakes, and other categories which the Director and Regional Administrator may establish);

(2) The number of acres of each of the categories of waters in paragraph (d)(1) of this section which were filled or which received any discharge or dredged material during the year (either by authorized or known unauthorized activities);

(3) The number and nature of permit applications denied; and permits modified, revoked and reissued, or terminated during the year.

(4) The number and nature of permits issued under emergency conditions, as provided in § 123.96;

(5) The approximate number of persons in the State discharging dredged or fill material under general permits and an estimate of the cumulative impacts of these activities.

(e) *Schedule.*

(1) *For all quarterly reports.* On the last working day of May, August, November, and February, the State Director shall submit to the Regional Administrator information concerning noncompliance with RCRA, UIC, NPDES, and State 404 permit requirements by major dischargers (or for 404, other dischargers specified under § 123.6(f)(1)(i)(A)–(E)) in the State in accordance with the following schedule. The Regional Administrator shall prepare and submit information for EPA-issued permits to EPA Headquarters in accordance with the same schedule:

Quarters Covered by Reports on Noncompliance by Major Dischargers

(Date for completion of reports)

January, February, and March	May 31 [1]
April, May, and June	Aug. 31 [1]
July, August, and September	Nov. 30 [1]
October, November, and December	Feb. 28 [1]

[1] Reports must be made available to the public for inspection and copying on this date.

(2) *For all annual reports.* The period for annual reports shall be for the calendar year ending December 31, with reports completed and available to the public no more than 60 days later.

§ 122.19 Confidentiality of information.

(a) In accordance with 40 CFR Part 2, any information submitted to EPA

pursuant to these regulations may be claimed as confidential 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 treated in accordance with the procedures in 40 CFR Part 2 (Public Information).

(b) *(Applicable to State programs, see § 123.7.)* Claims of confidentiality for the following information will be denied:

(1) The name and address of any permit applicant or permittee;

(2) *For UIC permits,* information which deals with the existence, absence, or level of contaminants in drinking water;

(3) *For NPDES permits,* permit applications and permits; and

(4) *For NPDES and 404 permits,* effluent data.

(c) *(Applicable to State programs, see § 123.7.) For NPDES only,* information required by NPDES application forms provided by the Director under §§ 122.4 and 122.53 may not be claimed confidential. This includes information submitted on the forms themselves and any attachments used to supply information required by the forms.

(d) *(Applicable to State programs, see § 122.7.) For RCRA only,*

(1) Claims or confidentiality for permit application information must be substantiated at the time the application is submitted and in the manner prescribed in the application instructions.

(2) If a submitter does not provide substantiation, the Director will notify it by certified mail of the requirement to do so. If the Director does not receive the substantiation within 10 days after the submitter receives the notice, the Director shall place the unsubstantiated information in the public file.

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

§ 122.21 Purpose and scope of Subpart B.

(a) *Content of Subpart B.* The regulations in this Subpart set forth the specific requirements for the RCRA permit program. They apply to EPA, and to approved States to the extent set forth in Part 123. Sections of this Subpart which are applicable to States are indicated at the section headings as follows: (Applicable to State RCRA programs, see § 123.7). The regulations in this Subpart supplement the requirements in Part 122, Subpart A, which contains requirements for all programs.

(b) *Authority for this Subpart and other RCRA Subtitle C Regulations.*

(1) Section 3001 of RCRA requires EPA (i) to establish criteria for identifying the characteristics of hazardous waste and for listing hazardous waste, and (ii) using those criteria to identify the characteristics of hazardous waste and list particular wastes considered to be hazardous.

(2) Section 3002 of RCRA requires EPA to establish standards applicable to generators of hazardous waste. Section 3002 also requires establishment of a manifest system to assure that hazardous waste which is transported off-site goes to a permitted treatment, storage, or disposal facility.

(3) Section 3003 of RCRA requires EPA to establish standards applicable to transporters of hazardous waste.

(4) Section 3004 of RCRA requires EPA to establish standards for the location, design, construction, monitoring, and operation of hazardous waste treatment, storage, and disposal facilities.

(5) Section 3005 of RCRA requires EPA to publish regulations requiring each person owning or operating a hazardous waste treatment, storage, or disposal facility to obtain a RCRA permit.

(6) Section 3006 of RCRA requires EPA to publish guidelines to assist States in developing hazardous waste management programs.

(7) Section 3010 of RCRA requires any person who generates or transports hazardous waste, or who owns or operates a facility for the treatment, storage, or disposal of hazardous waste, to notify EPA (or States having approved hazardous waste programs under section 3006 of RCRA) of such activity within 90 days of the promulgation or revision of regulations under section 3001 of RCRA. Section 3010 provides that no hazardous waste subject to regulations under Subtitle C of RCRA may be transported, treated, stored, or disposed of unless the required notification has been given.

(8) The following chart indicates where the regulations for sections 3001 through 3006 and the public notice for section 3010 appear in the Federal Register.

Section of RCRA	Coverage	Final regulation	Location
Subtitle C	Overview and definitions	40 CFR Part 260	45 FR 12724; Feb. 26, 1980; and [45 FR ——].
3001	Identification and listing of hazardous waste.	40 CFR Part 261	[—— FR ——]
3002	Generators of hazardous waste.	40 CFR Part 262	45 FR 12724, Feb. 26, 1980.
3003	Transporters of hazardous waste.	40 CFR Part 263	45 FR 12737, Feb. 26, 1980.
3004	Standards for HWM facilities.	40 CFR Parts 264, 265, and 266.	[—— FR ——]
3005	Permit requirements for HWM facilities.	40 CFR Parts 122 and 124	These regulations.
3006	Guidelines for State programs.	40 CFR Part 123	These regulations.
3010	Preliminary notification of HW activity.	(Public Notice)	45 FR 12746, Feb. 26, 1980.

(c) *Overview of the RCRA Permit Program.* Not later than 90 days after the promulgation or revision of regulations in 40 CFR Part 261 (identifying and listing hazardous wastes) all generators and transporters of hazardous waste, and all owners or operators of hazardous waste treatment, storage, or disposal facilities must file a notification of that activity under section 3010. Six months after the initial promulgation of the Part 261 regulations, treatment, storage, or disposal of hazardous waste by any person who has not applied for or received a RCRA permit is prohibited. A RCRA permit application consists of two parts, Part A (see § 122.24) and Part B (see § 122.25). For "existing HWM facilities," the requirement to submit an application is satisfied by submitting only Part A of the permit application until the date the Director sets for submitting Part B of the application. (Part A consists of Forms 1 and 3 of the Consolidated Permit Application Forms.) Timely submission of both notification under section 3010 and Part A qualifies owners and operators of existing HWM facilities for *interim status* under section 3005(e) of RCRA. Facility owners and operators with interim status are treated as having been issued a permit until EPA or a State with interim authorization for Phase II or final authorization under Part 123 makes a final determination on the permit application. Facility owners and operators with interim status must comply with *interim status standards* set forth at 40 CFR Part 265 or with the equivalent provisions of a State program which has received interim or final

authorization under Part 123. Facility owners and operators with interim status are not relieved from complying with other State requirements. For existing HWM facilities the Director shall set a date, giving at least six months notice, for submission of Part B of the application. There is no form for Part B of the application; rather, Part B must be submitted in narrative form and contain the information set forth at § 122.25. Owners or operators of new HWM facilities must submit Part A and Part B of the permit application at least 180 days before physical construction is expected to commence.

(d) *Scope of the RCRA permit requirement.* RCRA requires a permit for the "treatment," "storage," or "disposal" of any "hazardous waste" as identified or listed in 40 CFR Part 261. The terms "treatment," "storage," "disposal," and "hazardous waste" are defined in § 122.3.

(1) *Specific inclusions (applicable to State RCRA programs, see § 123.7).* Owners and operators of certain facilities require RCRA permits as well as permits under other programs for certain aspects of the facility operation. RCRA permits are required for:

(i) Injection wells that dispose of hazardous waste, and associated surface facilities that treat, store, or dispose of hazardous waste. (See § 122.30.) However, the owner and operator with a UIC permit in a State with an approved or promulgated UIC program, will be deemed to have a RCRA permit for the injection well itself if they comply with the requirements of § 122.26(b) (permit by rule for injection wells).

(ii) Treatment, storage, or disposal of hazardous waste at facilities requiring an NPDES permit. However, the owner and operator of a publicly owned treatment works receiving hazardous waste will be deemed to have a RCRA permit for that waste if they comply with the requirements of § 122.26(c) (permit by rule for POTWs).

(iii) Barges or vessels that dispose of hazardous waste by ocean disposal and onshore hazardous waste treatment or storage facilities associated with an ocean-disposal operation. However, the owner and operator will be deemed to have a RCRA permit for ocean disposal from the barge or vessel itself if they comply with the requirements of § 122.26(a) (permit by rule for ocean disposal barges and vessels).

(2) *Specific exclusions.* The following persons are among those who are not required to obtain a RCRA permit:

(i) Generators who accumulate hazardous waste on-site for less than 90 days, as provided in 40 CFR § 262.34.

(ii) Farmers who dispose of hazardous waste pesticides from their own use as provided in 40 CFR § 262.51.

(iii) Persons who own or operate facilities solely for the treatment, storage, or disposal of hazardous waste excluded from regulations under this Part by 40 CFR § 261.4 or § 261.5 (small generator exemption).

(iv) Owners or operators of totally enclosed treatment facilities as defined in 40 CFR § 260.10.

(v) Owners or operators of totally enclosed treatment facilities as defined in 40 CFR § 260.10.

§ 122.22 Application for a permit.

(Applicable to State RCRA programs, see § 123.7.)

(a) *Existing HWM facilities.* (1) Not later than six months after the first promulgation of regulations in 40 CFR Part 261 listing and identifying hazardous wastes, all owners and operators of existing hazardous waste treatment, storage, or disposal facilities must submit Part A of their permit application with the Regional Administrator.

(2) At any time after promulgation of Phase II the owner and operator of an existing HWM facility may be required to submit Part B of their permit application. The State Director may require submission of Part B (or equivalent completion of the State RCRA application process) if the State in which the facility is located has received interim authorization for Phase II or final authorization; if not, the Regional Administrator may require submission of Part B. Any owner or operator shall be allowed at least six months from the date of request to submit Part B of the application. Any owner or operator of an existing HWM facility may voluntarily submit Part B of the application at any time.

(3) Failure to furnish a requested Part B application on time, or to furnish in full the information required by the Part B application, is grounds for termination of interim status under Part 124.

(b) *New HWM Facilities.* (1) No person shall begin physical construction on a new HWM facility without having submitted Part A and Part B of its permit application and received a finally effective RCRA permit.

(2) An application for a permit for a new HWM facility (including both Part A and Part B) may be filed any time after promulgation of Phase II. The application shall be filed with the Regional Administrator if at the time of application the State in which the new HWM facility is proposed to be located has not received interim authorization for Phase II or final authorization; otherwise it shall be filed with the State Director. All applications must be submitted at least 180 days before physical construction is expected to commence.

(c) *Updating permit applications.* (1) If any owner or operator of a HWM facility has filed Part A of a permit application and has not yet filed Part B, the owner or operator shall file an amended Part A application:

(i) With the Regional Administrator, if the facility is located in a State which has not obtained interim authorization for Phase II or final authorization, within six months after the promulgation of revised regulations under Part 261 listing or identifying additional hazardous wastes, if the facility is treating, storing, or disposing of any of those newly listed or identified wastes.

[Note.—EPA intends to promulgate regulations in June of 1980 listing or designating additional wastes beyond those listed or designated in its initial promulgation of Part 261. The wastes to be listed or designated in June are set forth in an Appendix to the initial promulgation. EPA encourages facilities applying for interim status before that second set of wastes is actually published to list or designate any of the wastes in that set which they are treating, storing, or disposing of. That will avoid the need to extensively update the Part A application when the June 1980 promulgation occurs.]

(ii) With the State Director, if the facility is located in a State which has obtained Phase II interim authorization or final authorization, no later than the effective date of regulatory provisions listing or designating wastes as hazardous in that State in addition to those listed or designated under the previously approved State program, if the facility is treating, storing, or disposing of any of those newly listed or designated wastes; or

(iii) As necessary to comply with provisions of § 122.23 for changes during interim status or the analogous provisions of a State program approved for final authorization or interim authorizaton for Phase II. Revised Part A applications necessary to comply with the provisions of § 122.23 shall be filed with the Regional Administrator if the State in which the facility in question is located does not have Phase II interim authorization or final authorization; otherwise it shall be filed with the State Director.

(2) The owner or operator of a facility who fails to comply with the updating requirements of paragraph (c)(1) of this section does not receive interim status as to the wastes not covered by duly filed Part A applications.

(d) *Reapplications.* Any HWM facility with an effective permit shall submit a new application at least 180 days before the expiration date of the effective permit, unless permission for a later date has been granted by the Director. (The Director shall not grant permission for applications to be submitted later than the expiration date of the existing permit.)

§ 122.23 Interim status.

(a) *Qualifying for interim status.* Any person who owns or operates an "existing HWM facility" shall have interim status and shall be treated as having been issued a permit to the extent he or she has:

(1) Notified the Administrator within 90 days from the promulgation or revision of Part 261 as required in Section 3010 of RCRA (this may be done by completing EPA form 8700–12); and

(2) Complied with the requirements of § 122.22 (a) and (c) governing submission of Part A applications;

(3) When EPA determines on examination or reexamination of a Part A application that it fails to meet the standards of these regulations, it may notify the owner or operator that the application is deficient and that the owner or operator is therefore not entitled to interim status. The owner or operator will then be subject to EPA enforcement for operating without a permit.

(b) *Coverage.* During the interim status period the facility shall not:

(1) Treat, store, or dispose of hazardous waste not specified in Part A of the permit application;

(2) Employ processes not specified in Part A of the permit application; or

(3) Exceed the design capacities specified in Part A of the permit application.

(c) *Changes during interim status.* (1) New hazardous wastes not previously identified in Part A of the permit application may be treated, stored, or disposed of at a facility if the owner or operator submits a revised Part A permit application prior to such a change;

(2) Increases in the design capacity of processes used at a facility may be made if the owner or operator submits a revised Part A permit application prior to such a change (along with a justification explaining the need for the change) and the Director approves the change because of a lack of available treatment, storage, or disposal capacity at other hazardous waste management facilities;

(3) Changes in the processes for the treatment, storage, or disposal of hazardous waste may be made at a facility or additional processes may be added if the owner or operator submits a revised Part A permit application prior to such a change (along with a justification explaining the need for the change) and the Director approves the change because:

(i) It is necessary to prevent a threat to human health or the environment because of an emergency situation, or

(ii) It is necessary to comply with Federal regulations (including the interim status standards at 40 CFR Part 265) or State or local laws.

(4) Changes in the ownership or operational control of a facility may be made if the new owner or operator submits a revised Part A permit application no later than 90 days prior to the scheduled change. When a transfer of ownership or operational control of a facility occurs, the old owner or operator shall comply with the requirements of 40 CFR Part 265, Subpart H (financial requirements), until the new owner or operator has demonstrated to the Director that it is complying with that Subpart. All other interim status duties are transferred effective immediately upon the date of the change of ownership or operational control of the facility. Upon demonstration to the Director by the new owner or operator of compliance with that Subpart, the Director shall notify the old owner or operator in writing that it no longer needs to comply with that Part as of the date of demonstration.

(5) In no event shall changes be made to an HWM facility during interim status which amount to reconstruction of the facility. Reconstruction occurs when the capital investment in the changes to the facility exceeds fifty percent of the capital cost of a comparable entirely new HWM facility.

(d) *Interim status standards.* During interim status, owners or operators shall comply with the interim status standards at 40 CFR Part 265.

(e) *Grounds for termination of interim status.* Interim status terminates when:

(1) Final administrative disposition of a permit application is made; or

(2) Interim status is terminated as provided in § 122.22(a)(3).

§ 122.24 Contents of Part A.

(Applicable to State RCRA programs, see § 123.7.)

In addition to the information in § 122.4(d), Part A of the RCRA application shall include the following information:

(a) The latitude and longitude of the facility.

(b) The name, address, and telephone number of the owner of the facility.

(c) An indication of whether the facility is new or existing and whether it is a first or revised application.

(d) For existing facilities, a scale drawing of the facility showing the location of all past, present, and future treatment, storage, and disposal areas.

(e) For existing facilities, photographs of the facility clearly delineating all existing structures; existing treatment, storage, and disposal areas; and sites of future treatment, storage, and disposal areas.

(f) A description of the processes to be used for treating, storing, and disposing of hazardous waste, and the design capacity of these items.

(g) A specification of the hazardous wastes listed or designated under 40 CFR Part 261 to be treated, stored, or disposed at the facility, an estimate of the quantity of such wastes to be treated, stored, or disposed annually, and a general description of the processes to be used for such wastes.

§ 122.25 Contents of Part B.

(Applicable to State RCRA programs, see § 123.7.)

Part B of the RCRA application includes the following:

(a) *General information requirements.* The following information is required for all facilities:

(1) A general description of the facility.

(2) Chemical and physical analyses of the hazardous wastes to be handled at the facility. At a minimum, these analyses shall contain all the information which must be known to treat, store, or dispose of the wastes in accordance with Part 264.

(3) A copy of the waste analysis plan required by § 264.13(b) and, if applicable, § 264.13(c).

(4) A description of the security procedures and equipment required by § 264.14, or a justification demonstrating the reasons for requesting a waiver of this requirement.

(5) A copy of the general inspection schedule required by § 264.15(b).

(6) A justification of any request for a waiver(s) of the preparedness and prevention requirements of § 264.30.

(7) A copy of the contingency plan required by Part 264, Subpart D.

(8) A description of procedures, structures, or equipment used at the facility to,

(i) Prevent uncontrolled reaction of incompatible wastes (for example, procedures to avoid fires, explosions, or toxic gases).

(ii) Prevent hazards in unloading operations (for example, ramps, special forklifts).

(iii) Prevent runoff from hazardous waste handling areas to other areas of the facility or environment, or to prevent flooding (for example, berms, dikes, trenches).

(iv) Prevent contamination of water supplies.

(v) Mitigate effects of equipment failure and power outages.

(vi) Prevent undue exposure of personnel to hazardous waste (for example, protective clothing).

(9) Traffic pattern, volume and control (for example, show turns across traffic lanes, and stacking lanes (if appropriate); provide access road surfacing and load bearing capacity; show traffic control signals; provide estimates of traffic volume (number, types of vehicles)).

b. [*Reserved.*]

[Note.—The requirements set forth in § 122.25(a) reflect those permit application requirements related to the initial promulgation of Part 264. Additional permit application requirements including specific design and operating data, financial plans, and site engineering information will be promulgated when the remaining portions of Part 264 are promulgated.]

§ 122.26 Permits by rule.

(Applicable to State RCRA programs, see § 123.7.)

Notwithstanding any other provision of this Part or Part 124, the following shall be deemed to have a RCRA permit if the conditions listed are met:

(a) *Ocean disposal barges or vessels.* The owner or operator of a barge or other vessel which accepts hazardous waste for ocean disposal, if the owner or operator:

(1) Has a permit for ocean dumping issued under 40 CFR Part 220 (Ocean Dumping, authorized by the Marine Protection, Research, and Sanctuaries Act, as amended, 33 U.S.C. § 1420 *et seq.*);

(2) Complies with the conditions of that permit; and

(3) Complies with the following hazardous waste regulations:

(i) 40 CFR § 264.11, Identification number;

(ii) 40 CFR § 264.71, Use of manifest system;

(iii) 40 CFR § 264.72, Manifest discrepancies;

(iv) 40 CFR § 264.73(a) and (b)(1), Operating record;

(v) 40 CFR § 264.75, Annual report; and

(vi) 40 CFR § 264.76, Unmanifested waste report.

(b) *Injection wells.* The owner or operator of an injection well disposing of hazardous waste, if the owner or operator:

(1) Has a permit for underground injection issued under Part 122, Subpart C or Part 123, Subpart C; and

(2) Complies with the conditions of that permit and the requirements of § 122.45 (requirements for wells managing hazardous waste).

(c) *Publicly owned treatment works.* The owner or operator of a POTW which accepts for treatment hazardous waste, if the owner or operator:

(1) Has an NPDES permit;

(2) Complies with the conditions of that permit; and

(3) Complies with the following regulations:

(i) 40 CFR § 264.11, Identification number;

(ii) 40 CFR § 264.71, Use of manifest system;

(iii) 40 CFR § 264.72, Manifest discrepancies;

(iv) 40 CFR § 264.73 (a) and (b)(1), Operating record;

(v) 40 CFR § 264.75, Annual report;

(vi) 40 CFR § 264.76, Unmanifested waste report; and

(4) If the waste meets all Federal, State, and local pretreatment requirements which would be applicable to the waste if it were being discharged into the POTW through a sewer, pipe, or similar conveyance.

§ 122.27 Emergency permits.

(Applicable to State RCRA programs, see § 123.7.)

Notwithstanding any other provision of this Part or Part 124, in the event the Director finds an imminent and substantial endangerment to human health or the environment the Director may issue a temporary emergency permit to a facility to allow treatment, storage, or disposal of hazardous waste for a non-permitted facility or not covered by the permit for a facility with an effective permit. This emergency permit:

(a) May be oral or written. If oral, it shall be followed within five days by a written emergency permit;

(b) Shall not exceed 90 days in duration;

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

(d) May be terminated by the Director at any time without process if he or she determines that termination is appropriate to protect human health and the environment;

(e) Shall be accompanied by a public notice published under § 124.11(b) including:

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

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

(3) A brief description of the wastes involved;

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

(5) Duration of the emergency permit; and

(f) Shall incorporate, to the extent possible and not inconsistent with the emergency situation, all applicable requirements of this Part and 40 CFR Parts 264 and 266.

§ 122.28 Additional conditions applicable to all RCRA permits.

(Applicable to State RCRA programs, see § 122.7.)

The following conditions, in addition to those set forth in § 122.7, apply to all RCRA permits:

(a) In addition to § 122.7(a) (duty to comply): the permittee need not comply with the conditions of this permit to the extent and for the duration such noncompliance is authorized in an emergency permit. (See § 122.27.)

(b) In addition to § 122.7(j) (monitoring): the permittee shall maintain records from all ground monitoring wells and associated groundwater surface elevations, for the active life of the facility, and for disposal facilities for the post-closure care period as well.

(c) In addition to § 122.7(l)(1) (notice of planned changes): for a new HWM facility, the permittee may not commence treatment, storage, or disposal of hazardous waste; and for a facility being modified the permittee may not treat, store, or dispose of hazardous waste in the modified portion of the facility, until:

(1) The permittee has submitted to the Director by certified mail or hand delivery a letter signed by the permittee and a registered professional engineer stating that the facility has been constructed or modified in compliance with the permit; and

(2)(i) The Director has inspected the modified or newly constructed facility and finds it is in compliance with the conditions of the permit; or

(ii) Within 15 days of the date of submission of the letter in paragraph (c)(1) of this section, the permittee has not received notice from the Director of his or her intent to inspect, prior inspection is waived and the permittee may commence treatment, storage, or disposal of hazardous waste.

(d) The following shall be included as information which must be reported orally within 24 hours under § 122.7(l)(6):

(1) Information concerning release of any hazardous waste that may cause an

endangerment to public drinking water supplies.

(2) Any information of a release or discharge of hazardous waste, or of a fire or explosion from a HWM facility, which could threaten the environment or human health outside the facility. The description of the occurrence and its cause shall include:

(i) Name, address, and telephone number of the owner or operator;

(ii) Name, address, and telephone number of the facility;

(iii) Date, time, and type of incident;

(iv) Name and quantity of material(s) involved;

(v) The extent of injuries, if any;

(vi) An assessment of actual or potential hazards to the environment and human health outside the facility, where this is applicable; and

(vii) Estimated quantity and disposition of recovered material that resulted from the incident.

The Director may waive the five day written notice requirement in favor of a written report within fifteen days.

(e) The following reports required by Part 264 shall be submitted in addition to those required by § 122.7[l] (reporting requirements):

(1) Manifest discrepancy report: if a significant discrepancy in a manifest is discovered, the permittee must attempt to reconcile the discrepancy. If not resolved within fifteen days, the permittee must submit a letter report including a copy of the manifest to the Director. (See 40 CFR § 264.72.)

(2) Unmanifested waste report: must be submitted to the Director within 15 days of receipt of unmanifested waste. (See § 264.76.)

(3) Annual report: an annual report must be submitted covering facility activities during the previous calendar year. (See 40 CFR § 264.75.)

(4) [Reserved.]

[Note.—The above reports are required in Part 264 as initially promulgated. Additional reports will be required and added to this section when remaining portions of Part 264 are promulgated.]

§ 122.29 Establishing RCRA permit conditions.

(Applicable to State RCRA programs, see § 123.7.)

In addition to the conditions established under § 122.8(a), each RCRA permit shall include each of the applicable requirements specified in 40 CFR Parts 264 and 266.

§ 122.30 Interim permits for UIC wells.

(Applicable to State programs, see § 123.7.)

The Director may issue a permit under this Part to any Class I UIC well [see § 122.32] injecting hazardous wastes within a State in which no UIC program has been approved or promulgated. Any such permit shall apply and insure compliance with all applicable requirements of 40 CFR Part 264, Subpart R (RCRA standards for wells), and shall be for a term not to exceed two years. No such permit shall be issued after approval or promulgation of a UIC program in the State. Any permit under this section shall contain a condition providing that it will terminate upon final action by the Director under a UIC program to issue or deny a UIC permit for the facility.

Subpart C—Additional Requirements for UIC Programs Under the Safe Drinking Water Act

§ 122.31 Purpose and scope of Subpart C.

(a) *Content of Subpart C.* The regulations in this Subpart set forth the specific requirements for the UIC program. They apply to EPA, and to approved States to the extent set forth in Part 123. Sections of this Subpart which are applicable to States are indicated at the section heading as follows: [Applicable to State UIC programs, see § 123.7]. The regulations in this Subpart are supplemental to the requirements in Part 122, Subpart A, which contains requirements for all programs.

(b) *Authority.* (1) Section 1421 of SDWA requires the Administrator to promulgate regulations establishing minimum requirements for effective UIC programs.

(2) 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 an approved State program in a listed State.

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

(4) Section 1431 authorizes the Administrator to take action to protect the health of persons when a contaminant which is present in or may enter a public water system may present an imminent and substantial endangerment to the health of persons.

(5) Section 1445 of SDWA authorizes the promulgation of regulations for such recordkeeping, reporting, and monitoring requirements "as the Administrator may reasonably require . . . to assist him in establishing regulations under this title," and 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 . . ."

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

(c) *Overview of the UIC program.* A UIC program is necessary in any State listed by EPA under section 1422 of SDWA. Because all States have been listed, all States must submit a UIC program within 270 days after the effective date of these rules and 40 CFR Part 146, unless the Administrator grants an extension, which can be for a period not to exceed an additional 270 days. If a State fails to submit an approvable program, EPA will establish a program for that State. Once a program is established, SDWA provides that all underground injections in listed States are unlawful and subject to penalties unless authorized by a permit or a rule. This Subpart sets forth the requirements governing authorizations by permit or rule and prohibits authorization of certain types of injection. The technical regulations governing these authorizations appear in 40 CFR Part 146.

(d) *Scope of the permit or rule requirement.* The UIC permit program regulates underground injections by five classes of wells (see definition of "well injection," § 122.3). The five classes of wells are set forth in § 122.32. All owners or operators of these injection wells must be authorized either by permit or rule by the Director. In carrying out the mandate of the SDWA, this Subpart provides that no Class I, II, or III well shall be authorized by permit or rule if it results in movement of fluid into underground sources of drinking water (USDWs) (§ 122.34). The technical requirements of Part 146 are designed to insure that such movement will not occur. No Class V well shall be authorized by permit or rule if it results in the presence of any contaminant in USDWs which may adversely affect the health of persons (§ 122.34). Existing Class IV wells which inject hazardous waste directly into an underground source of drinking water are to be eliminated over a period of six months and new such Class IV wells are to be prohibited (§ 122.36). Class V wells will be inventoried and assessed and regulatory action will be established at a later date. In the meantime, if remedial action appears necessary, an individual permit may be required (§ 122.37) or the

Director must require remedial action or closure by order (§ 122.34(c)). During UIC program development, the Director may identify aquifers and portions of aquifers which are actual or potential sources of drinking water (see § 123.4(g) for State programs). This will provide an aid to the Director in carrying out his or her duty to protect all USDWs. An aquifer is a USDW if it fits the definition, even if it has not been "identified." The Director may also designate "exempted aquifers" using criteria in Part 146. Such aquifers are those which would otherwise qualify as "underground sources of drinking water" to be protected, but which have no real potential to be used as drinking water sources. Therefore they are not USDWs. No aquifer is an "exempted aquifer" until it has been affirmatively designated under the procedures in § 122.35. Aquifers which do not fit the definition of "underground sources of drinking water" are not "exempted aquifers." They are simply not subject to the special protection afforded USDWs.

(1) *Specific inclusions.* The following wells are included among those types of injection activities which are covered by the UIC regulations. (This list is not intended to be exclusive but is for clarification only.)

(i) Any injection well located on a drilling platform inside a State's territorial waters.

(ii) Any dug hole or well that is deeper than its largest surface dimension, where the principal function of the hole is emplacement of fluids.

(iii) Any septic tank or cesspool used by generators of hazardous waste, or by owners or operators of hazardous waste management facilities, to dispose of fluids containing hazardous waste.

(iv) Any septic tank, cesspool, or other well used by a multiple dwelling, community, or Regional system for the injection of wastes.

(2) *Specific exclusions.* The following are not covered by these regulations:

(i) Injection wells located on a drilling platform or other site that is beyond a State's territorial waters.

(ii) Individual or single family residential waste disposal systems such as domestic cesspools or septic systems.

(iii) Any dug hole which is not used for emplacement of fluids underground.

§ 122.32 Classification of injection wells.

(Applicable to State UIC programs, see § 123.7.)

Injection wells are classified as follows:

(a) *Class I.*

(1) Wells used by generators of hazardous wastes or owners or operators of hazardous waste management facilities to inject hazardous waste, other than Class IV wells.

(2) Other industrial and municipal disposal wells which inject fluids beneath the lowermost formation containing, within one quarter mile of the well bore, an underground source of drinking water.

(b) *Class II.* Wells which inject fluids:

(1) Which are brought to the surface in connection with conventional oil or natural gas production;

(2) For enhanced recovery of oil or natural gas; and

(3) For storage of hydrocarbons which are liquid at standard temperature and pressure.

(c) *Class III.* Wells which inject for extraction of minerals or energy, including:

(1) Mining of sulfur by the Frasch process;

(2) Solution mining of minerals;

(3) In situ combustion of fossil fuel; and

(4) Recovery of geothermal energy.

(d) *Class IV.* Wells used by generators of hazardous wastes or of radioactive wastes, by owners or operators of hazardous waste management facilities, or by owners or operators of radioactive waste disposal sites to dispose of hazardous wastes or radioactive wastes into or above a formation which within one quarter mile of the well contains an underground source of drinking water.

(e) *Class V.* Injection wells not included in Classes I, II, III, or IV.

§ 122.33 Prohibition of unauthorized injection.

(Applicable to State programs, see § 123.7.)

Any UIC program shall prohibit, effective no later than the date of approval (for State programs) or the effective date of regulations establishing the program (for EPA-administered programs) any underground injection, except as authorized by permit or rule issued under this Part and Part 123, as applicable. Any UIC program shall also prohibit the construction of any well required to have a permit under this Part until the permit has been issued.

§ 122.34 Prohibition of movement of fluid into underground sources of drinking water.

(Applicable to State UIC programs, see § 123.7.)

(a) No UIC authorization by permit or rule shall be allowed in the following circumstances:

(1) Where a Class I, II, or III well causes or allows movement of fluid into underground sources of drinking water.

(2) Where a Class IV or V well causes or allows movement of fluid containing any contaminant into underground sources of drinking water, and the presence of that contaminant may cause a violation of any primary drinking water regulation under 40 CFR Part 142 or which may adversely affect the health of persons.

(b) For Class, I, II, and III wells, if any monitoring indicates the movement 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 movement. In the case of wells authorized by permit, these additional requirements shall be imposed by modifying the permit in accordance with § 122.15, or the permit may be terminated under § 122.16 if cause exists, or appropriate enforcement action may be taken if the permit has been violated. In the case of wells authorized by rule, see § 122.37(a).

(c) For Class V wells, if at any time the Director learns that a Class V well may cause a violation of primary drinking water regulations under 40 CFR Part 142, he or she shall:

(1) Require the injector to obtain an individual permit;

(2) Order the injector to take such actions (including where required closure of the injection well) as may be necessary to prevent the violation; or

(3) Take enforcement action.

(d) Whenever the Director learns that a Class V well may be otherwise adversely affecting the health of persons, he or she may prescribe such actions as may be necessary to prevent the adverse effect, including any action authorized under paragraph (c) of this section.

(e) Notwithstanding any other provision of this section, the Director may take emergency action upon receipt of information that a contaminant which is present in or is likely to enter a public water system may present an imminent and substantial endangerment to the health of persons.

§ 122.35 Identification of underground sources of drinking water and exempted aquifers.

(Applicable to State UIC programs, see § 123.7.)

(a) The Director may identify (by narrative description, illustrations, maps, or other means) and shall protect, except where exempted under paragraph (b) of this section, as an underground source of drinking water, all aquifers or parts of aquifers which meet the definition of an "underground

source of drinking water" in § 122.3. Even if an aquifer has not been specifically identified by the Director, it is an underground source of drinking water if it meets the definition in § 122.3.

(b) After notice and opportunity for a public hearing the Director may identify (by narrative description, illustrations, maps, or other means) and describe in geographic and/or geometric terms (such as vertical and lateral limits and gradient) which are clear and definite, all aquifers or parts thereof which the Director proposes to designate as exempted aquifers using the criteria in 40 CFR § 146.04. For State UIC programs, no such designation shall be final until approved by the Administrator as part of the State program. Subsequent to program approval identification of additional exempted aquifers shall be treated as program modifications under § 123.6(b)(8).

§ 122.36 Elimination of certain Class IV wells.

(Applicable to State UIC programs, see § 123.7.)

(a) In addition to the requirement of § 122.45, any UIC program shall prohibit:

(1) The construction of any Class IV well for the injection of hazardous waste directly into an underground source of drinking water;

(2) The injection of hazardous waste directly into an underground source of drinking water through a Class IV well that was not in operation prior to the effective date of this Part;

(3) Any increase in the amount of hazardous waste or change in the type of hazardous waste injected into a well injecting hazardous waste directly into a USDW.

(4) The operation of any Class IV well injecting hazardous waste directly into a USDW after 6 months following approval or promulgation of any UIC program for a State.

§ 122.37 Authorization of underground injection by rule.

(Applicable to State UIC programs, see § 123.7.)

(a) *Types of underground injection which may be authorized by rule.* The Director may authorize underground injections by rule as outlined in this paragraph. Underground injections not authorized by rule or by permit are prohibited (see § 122.33).

(1) Injection into existing Class I, II (except existing enhanced recovery and hydrocarbon storage), and III wells may be authorized by rule for periods up to five years from the date of approval or promulgation of the UIC program. (All wells must be issued permits within the five year period or close down at its end, unless the rule is continued under § 122.38(a).) The rule shall require compliance with applicable requirements of 40 CFR Part 146 as soon as possible but no later than one year after the authorization. Rules authorizing existing Class II and Class III facilities may allow them to continue normal operations until permitted, including construction and operation of new injection wells at the facility site, provided the owner or operator maintains compliance with all applicable requirements.

(2) Injection into existing Class II enhanced recovery and hydrocarbon storage wells may be authorized for the life of the well. The rule shall include compliance schedules for achieving applicable requirements of 40 CFR 146 no later than one year, and with the construction requirements of 40 CFR Part 146 no later than three years, after the promulgation of the rule.

(3) Injection into existing Class IV wells injecting directly into a USDW may be authorized for a period of not more than six months after approval or promulgation of the UIC program. The rule shall require monitoring and reporting as set forth in 40 CFR § 146.44 within 90 days of the authorization.

(4) Injections into Class V wells may be authorized indefinitely, subject to the requirement of paragraphs (b) and (d) of this section and 40 CFR § 146.53. However, the Director must have authority to withdraw the authorization if required under this Part.

(b) *Requirements of rules.* Any rule promulgated by the Director shall apply, and ensure compliance with, the following requirements applicable to permittees, except that the terms "permit" and "permittee" shall be read to include rules and those authorized by rule:

(1) § 122.41(a)—(exemption from rule where authorized by temporary permits);

(2) § 122.41(b)—(retention of records);

(3) § 122.41(d)—(reporting within 24 hours);

(4) § 122.41(e)—(180 days notice of abandonment);

(5) Construction requirements under § 146.12 (Class I), § 146.22 (Class II), and § 146.32 (Class III);

(6) For Class I, II, or III wells, corrective action under § 146.07;

(7) Operating, monitoring, and reporting requirements under § 146.13 (Class I), § 146.23 (Class II), and § 146.33 (Class III);

(8) § 122.42(g)—(Financial responsibility);

(9) Mechanical integrity requirements under § 146.08.

(c) *Requiring a permit.* (1) The Director may require any Class I, II, III, or V injection well authorized by a rule to apply for and obtain an individual or area UIC permit. Cases where individual or area UIC permits may be required include:

(i) The injection well is not in compliance with any requirement of the rule;

[Note.—Any underground injection which violates any rule under this section is subject to appropriate enforcement action.]

(ii) The injection well is not or no longer is within the category of wells and types of well operations authorized in the rule;

(iii) The protection of USDWs requires that the injection operation be regulated by requirements, such as for corrective action, monitoring and reporting, or operation, which are not contained in the rule.

(2) For EPA administered programs, the Regional Administrator may require the owner or operator authorized by a rule to apply for an individual or area UIC permit under this paragraph only if the owner or operator has been notified in writing that a permit application is required. The notice shall include a brief statement of the reasons for this decision, an application form, a statement setting a time for the owner or operator to file the application, and a statement that upon the effective date of the UIC permit the rule no longer applies to the activities regulated under the UIC programs.

(3) Any owner or operator authorized by a rule may request to be excluded from the coverage of the rule by applying for an individual or area UIC permit. The owner or operator shall submit an application under § 122.38 with reasons supporting the request, to the Director. The Director may grant any such request.

(d) *Inventory requirements.* All injection wells covered by rule shall submit inventory information to the Director. Any rule under this section shall provide for the automatic termination of authorization for any well which fails to comply within the time specified in paragraph (c)(3) of this section.

(1) *Contents.* The Director shall require at least the information listed in § 146.52 as part of the inventory.

(2) *Notice.* Upon approval of the UIC program in a State, the Director shall notify owners or operators of injection wells of their duty to submit inventory information. The method of notification selected by the Director must assure that the owners or operators will be

made aware of the inventory requirement.

(3) *Deadlines.* Owners or operators of injection wells must submit inventory information no later than one year after the authorization by rule. The Director need not require inventory information from any facility with interim status under RCRA.

(e) *Assessment of Class V Wells.* The Director shall, within three years of the approval of the program in a State submit a report and recommendations to EPA in compliance with § 146.52(b).

§ 122.38 Application for a permit; authorization by permit.

(Applicable to State UIC programs, see § 123.7.)

(a) *Permit application.* Except as provided in § 122.37 (authorization by rule), all underground injections into Class I, II, or III wells in listed States shall be prohibited unless authorized by permit. Those authorized by a rule under § 122.37 must still apply for a permit under this section unless authorization by rule was for the life of the well. Rules authorizing well injections for which permit applications have been submitted shall lapse for a particular well injection only upon the effective date of the permit or permit denial for that well injection.

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

(1) For existing injection wells, as expeditiously as practicable and in accordance with the schedule contained in any program description under § 123.4(g), but no later than 4 years from the approval of the UIC program, or as required under § 122.45(b) for wells injecting hazardous waste.

(2) For new injection wells, except new wells covered by an existing area permit under § 122.39(c), a reasonable time before construction is expected to begin. (See also § 122.41(b)).

(c) *Contents of UIC application.* [Reserved.]

§ 122.39 Area permits.

(Applicable to State UIC programs, see § 123.7.)

(a) The Director may issue a permit on an area basis, rather than for each well individually, provided that the permit is for injection wells:

(1) Described and identified by location in permit application(s), if they are existing wells,

(2) Within the same well field, facility site, reservoir, project, or similar unit in the same State;

(3) Of similar construction;

(4) Of the same class as determined under § 122.32; and

(5) Operated by a single owner or operator.

(b) Area permits shall specify:

(1) The area within which underground injections are authorized, and

(2) The requirements for construction, monitoring, reporting, operation, and abandonment, for all wells authorized by the permit.

(c) The area permit may authorize the permittee to construct and operate new injection wells within the permit area provided:

(1) The permittee notifies the Director no later than the date on which monitoring reports are required to be submitted under § 122.7(l)(4), pursuant to a procedure which shall be specified in the permit, when and where the new well has been or will be drilled;

(2) The additional well satisfies the criteria in paragraph (a) of this section and meets the requirements specified in the permit under paragraph (b) of this section; and

(3) The cumulative effects of drilling and operation of additional injection wells are considered by the Director during evaluation of the area permit application and are acceptable to the Director.

(d) If the Director determines that any well constructed pursuant to paragraph (c) of this section does not satisfy any of the requirements of paragraphs (c)(1) and (c)(2) of this section the Director may modify the permit under § 122.15, terminate under § 122.16, or take enforcement action. If the Director determines that cumulative effects are unacceptable, the permit may be modified under § 122.15.

§ 122.40 Emergency permits.

(a) *Coverage.* Notwithstanding any other provision of this Part or Part 124, the Director may temporarily permit a specific underground injection which has not otherwise been authorized by rule or permit if:

(1) An imminent and substantial endangerment to the health of persons will result unless a temporary emergency permit is granted; or

(2) A substantial and irretrievable loss of oil or gas resources will occur unless a temporary emergency permit is granted to a Class II well; and

(i) Timely application for a permit could not practicably have been made; and

(ii) The injection will not result in the movement of fluids into undergound sources of drinking water; or

(3) A substantial delay in production of oil or gas resources will occur unless a temporary emergency permit is granted to a new Class II well and the temporary authorization will not result in the movement of fluids into an underground source of drinking water.

(b) *Requirements for issuance.* (1) Any temporary permit under paragraph (a)(1) of this section shall be for no longer term than required to prevent the hazard.

(2) Any temporary permit under paragraph (a)(2) of this section 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 temporary permit until final action on the application.

(3) Any temporary permit under paragraph (a)(3) of this section shall be issued only after a complete permit application has been submitted and shall be effective until final action on the application.

(4) Notice of any temporary permit under this paragraph shall be published in accordance with § 124.11 within 10 days of the issuance of the permit.

(5) The temporary permit under this section may be either oral or written. If oral, it must be followed within 5 calendar days by a written temporary emergency permit.

(6) The Director shall condition the temporary permit in any manner he or she determines is necessary to ensure that the injection will not result in the movement of fluids into an underground source of drinking water.

§ 122.41 Additional conditions applicable to all UIC permits.

(Applicable to State UIC programs, see § 123.7.)

The following conditions, in addition to those set forth in § 122.7, apply to all UIC permits and shall be incorporated into all permits either expressly or by reference. If incorporated by reference, a specific citation to these regulations (or approved State regulations) must be given in the permit.

(a) In addition to § 122.7(a) (duty to comply): the permittee need not comply with the provisions of this permit to the extent and for the duration such noncompliance is authorized in a temporary emergency permit under § 122.40.

(b) In addition to § 122.7(j)(2) (monitoring and records): the permittee shall retain all records concerning the nature and composition of injected fluids until five years after completion of any plugging and abandonment procedures specified under § 122.42(f). The Director may require the owner or

operator to deliver the records to the Director at the conclusion of the retention period.

(c) In addition to § 122.7(l)(1) (notice of planned changes): a new injection well may not commence injection until construction is complete, and

(1) The permittee has submitted notice of completion of construction to the Director; and

(2)(i) The Director has inspected or otherwise reviewed the new injection well and finds it is in compliance with the conditions of the permit; or

(ii) The permittee has not received notice from the Director of his or her intent to inspect or otherwise review the new injection well within 13 days of the date of the notice in paragraph (c)(1) of this section, in which case prior inspection or review is waived and the permittee may commence injection.

(d) The following shall be included as information which must be reported within 24 hours under § 122.7(l)(5):

(1) Any monitoring or other information which indicates that any contaminant may cause an endangerment to a USDW.

(2) Any noncompliance with a permit condition or malfunction of the injection system which may cause fluid migration into or between USDWs.

(e) The permittee shall notify the Director at least 180 days before conversion or abandonment of the well.

§ 122.42 Establishing UIC permit conditions.

(Applicable to State programs, see § 123.7.)

In addition to the conditions established under § 122.8(a), each UIC permit shall include conditions meeting the following requirements, when applicable:

(a) *Construction requirements* as set forth in Part 146. Existing wells shall achieve compliance with such requirements according to a compliance schedule established as a permit condition. The owner or operator of a proposed new injection well shall submit plans for testing, drilling, and construction as part of the permit application. Except as authorized by an area permit, no construction may commence until a permit has been issued containing construction requirements (see § 122.33). New wells shall be in compliance with these requirements prior to commencing injection operations. Changes in construction plans during construction may be approved by the Director as minor modifications (§ 122.17). No such changes may be physically incorporated into construction of the well prior to approval of the modification by the Director.

(b) *Corrective action* as set forth in § 122.44 and § 146.7.

(c) *Operation requirements* as set forth in 40 CFR Part 146; the permit shall establish any maximum injection volumes and/or pressures necessary to assure that fractures are not initiated in the confining zone, that injected fluids do not migrate into any underground source of drinking water, that formation fluids are not displaced into any underground source of drinking water, and to assure compliance with the Part 146 operating requirements.

(d) *Requirements for wells managing hazardous waste*, as set forth in § 122.45.

(e) *Monitoring and reporting requirements* as set forth in 40 CFR Part 146. The permittee shall be required to identify types of tests and methods used to generate the monitoring data.

(f) *Plugging and abandonment.* Any Class I, II or III permit shall include, and any Class V permit may include, conditions to ensure that plugging and abandonment of the well will not allow the movement of fluids either into an underground source of drinking water or from one underground source of drinking water to another. Any applicant for a UIC permit shall be required to submit a plan for plugging and abandonment. Where the plan meets the requirements of this paragraph, the Director shall incorporate it into the permit as a condition. Where the Director's review of an application indicates that the permittee's plan is inadequate, the Director shall require the applicant to revise the plan, prescribe conditions meeting the requirements of this paragraph, or deny the application. For purposes of this paragraph, temporary intermittent cessation of injection operations is not abandonment.

(g) *Financial responsibility.* The permit shall require the permittee to maintain financial responsibility and resources, in the form of performance bonds or other equivalent form of financial assurance approved by the Director, to close, plug, and abandon the underground injection operation in a manner prescribed by the Director. In lieu of individual performance bonds, operators may furnish a bond or other equivalent form of financial guarantee approved by the Director covering all injection wells in any one State.

(h) *Mechanical integrity.* A permit for any Class I, II, or III well or injection project which lacks mechanical integrity shall include, and for any Class V well may include, a condition prohibiting injection operations until the permittee shows to the satisfaction of the Director under § 146.08 that the well has mechanical integrity.

(i) *Additional conditions.* The Director shall impose on a case-by-case basis such additional conditions as are necessary to prevent the migration of fluids into underground sources of drinking water.

§ 122.43 Waiver of requirements by Director.

(a) *When injection does not occur into, through, or above an underground source of drinking water,* the Director may authorize a well with less stringent requirements for area of review, construction, mechanical integrity, operation, monitoring, and reporting than required in 40 CFR 146 or § 122.42 to the extent that the reduction in requirements will not result in an increased risk of movement of fluids into an underground source of drinking water.

(b) *When injection occurs into, through, or above an underground source of drinking water,* but the radius of endangering influence when computed under § 146.06(c) is a negative number, the Director may authorize a well with less stringent requirements for operation, monitoring, and reporting than required in 40 CFR 146 or § 122.42 to the extent that the reduction in requirements will not result in an increased risk of movement of fluids into an underground source of drinking water.

(c) When reducing requirements under paragraph (a) or (b) of this section, the Director shall prepare a fact sheet under § 124.9 (or equivalent document under State procedures) explaining the reasons for the action.

§ 122.44 Corrective action.

(Applicable to State UIC programs, see § 123.7.)

(a) *Coverage.* Applicants for Class I, II (other than existing), or III injection well permits shall identify the location of all known wells within the injection well's area of review which penetrate the injection zone. For such wells which are improperly sealed, completed, or abandoned, the applicant shall also submit a plan consisting of such steps or modifications as are necessary to prevent movement of fluid into underground sources of drinking water ("corrective action"). Where the plan is adequate, the Director shall incorporate it into the permit as a condition. Where the Director's review of an application indicates that the permittee's plan is inadequate (based on the factors in § 146.07) the Director shall require the applicant to revise the plan, prescribe a

plan for corrective action as a condition of the permit under paragraph (b) of this section, or deny the application. The Director may disregard the provisions of § 146.06 (area of review) and § 146.07 (corrective action) when reviewing an application to permit an existing Class II well.

(b) *Requirements*—(1) *Existing injection wells.* Any permit issued for an existing injection well (other than Class II) requiring corrective action shall include a compliance schedule requiring any corrective action accepted or prescribed under paragraph (a) of this section to be completed as soon as possible.

(2) *New injection wells.* No permit for a new injection well may authorize injection until all required corrective action has been taken.

(3) *Injection pressure limitation.* The Director may require as a permit condition that injection pressure be so limited that pressure in the injection zone does not exceed hydrostatic pressure at the site of any improperly completed or abandoned well within the area of review. This pressure limitation shall satisfy the corrective action requirement. Alternatively, such injection pressure limitation can be part of a compliance schedule and last until all other required corrective action has been taken.

§ 122.45 Requirements for wells injecting hazardous waste.

(Applicable to State UIC programs, see § 123.7.)

(a) *Applicability.* The regulations in this section apply to all generators of hazardous waste, and to the owners or operators of all hazardous waste management facilities, using any class of well to inject hazardous wastes accompanied by a manifest. (See also § 122.36.)

(b) *Authorization.* The owner or operator of any well that is used to inject hazardous wastes accompanied by a manifest or delivery document shall apply for authorization to inject as specified in § 122.38 within 6 months after the approval of an applicable State program.

(c) *Requirements.* In addition to requiring compliance with the applicable requirements of this Part and 40 CFR Part 146, Subparts B–F, the Director shall, for each facility meeting the requirements of paragraph (b) of this section, require that the owner or operator comply with the following:

(1) *Notification.* The owner or operator shall comply with the notification requirements of Section 3010 of Pub. L. 94–580.

(2) *Identification number.* The owner or operator shall comply with the requirements of 40 CFR § 264.11.

(3) *Manifest system.* The owner or operator shall comply with the applicable recordkeeping and reporting requirements for manifested wastes in 40 CFR § 264.71.

(4) *Manifest discrepancies.* The owner or operator shall comply with 40 CFR § 264.72.

(5) *Operating record.* The owner or operator shall comply with 40 CFR § 264.73(a), (b)(1), and (b)(2).

(6) *Annual report.* The owner or operator shall comply with 40 CFR § 264.75.

(7) *Unmanifested waste report.* The owner or operator shall comply with 40 CFR § 264.75.

(8) *Personnel training.* The owner or operator shall comply with the applicable personnel training requirements of 40 CFR § 264.16.

(9) *Certification of closure.* When abandonment is completed, the owner or operator must submit to the Director certification by the owner or operator and certification by an independent registered professional engineer that the facility has been closed in accordance with the specifications in § 122.42(f).

(d) *Additional requirements for Class IV wells.* [Reserved].

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

§ 122.51 Purpose and scope of Subpart D.

(a) *Content of Subpart D.* The regulations in this Subpart contain the specific requirements for the NPDES permit program. They apply to EPA, and to approved States to the extent set forth in Part 123. Sections of this Subpart which are applicable to States are indicated at the section heading as follows: (applicable to State NPDES programs, see § 123.7). The regulations in this Subpart are supplemental to the requirements in Part 122, Subpart A, which apply to all programs.

(b) *Authority.* (1) 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."

(2) 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 this 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 this Act."

(3) Section 318(a) of CWA provides that "The Administrator is authorized, after public hearings, to permit the discharge of 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."

(4) 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 sewage 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."

(5) 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.

(6) Section 304(i) of CWA provides that the Administrator shall promulgate guidelines establishing uniform application forms and other minimum requirements for the acquisition of information from dischargers in approved States and establishing minimum procedural and other elements of approved State NPDES programs.

(7) 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."

(8) Section 101(e) of CWA 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."

(c) *Scope of the NPDES permit requirement.* The NPDES program requires permits for the discharge of "pollutants" from any "point source" into "waters of the United States." The terms "pollutant," "point source" and

"waters of the United States" are defined in § 122.3.

(1) *Specific inclusions.* The following are point sources requiring NPDES permits for discharges:

(i) Concentrated animal feeding operations as defined in § 122.54;

(ii) Concentrated aquatic animal production facilities as defined in § 122.55;

(iii) Discharges into aquaculture projects as set forth in § 122.56;

(iv) Discharges from separate storm sewers as set forth in § 122.57; and

(v) Silvicultural point sources as defined in § 122.58.

(2) *Specific exclusions.* The following discharges do not require NPDES permits:

(i) 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 used as an energy or mining facility, a storage facility or a seafood processing facility, or when secured to a storage facility or a seafood processing facility, or when 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.

(ii) Discharges of dredged or fill material into waters of the United States which are regulated under section 404 of CWA.

(iii) The introduction of sewage, industrial wastes, or other pollutants into publicly owned treatment works by indirect dischargers. Plans or agreements to switch to this method of disposal in the future do not relieve dischargers of the obligation to have and comply with permits until all discharges of pollutants to waters of the United States are eliminated. (See also § 122.10(c).) This exclusion does not apply to the introduction of pollutants to privately owned treatment works or to other discharges through pipes, sewers, or other conveyances owned by a State, municipality, or other party not leading to treatment works.

(iv) Any discharge in compliance with the instructions of an On-Scene Coordinator pursuant to 40 CFR § 1510 (The National Oil and Hazardous Substances Pollution Plan) or 33 CFR § 153.10 (e) (Pollution by Oil and Hazardous Substances).

(v) Any introduction of pollutants from non-point-source agricultural and silvicultural activities, including runoff from orchards, cultivated crops, pastures, range lands, and forest lands, but not discharges from concentrated animal feeding operations as defined in § 122.54, discharges from concentrated aquatic animal production facilities as defined in § 122.55, discharges to aquaculture projects as defined in § 122.56, and discharges from silvicultural point sources as defined in § 122.58.

(vi) Return flows from irrigated agriculture.

(vii) Discharges into a privately owned treatment works, except as the Director may otherwise require under § 122.62(m).

§ 122.52 Prohibitions.

(Applicable to State NPDES programs, see § 123.7.)

No permit may be issued:

(a) When the conditions of the permit do not provide for compliance with the applicable requirements of CWA, or regulations promulgated under CWA;

(b) When 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 § 123.76;

(d) When the imposition of conditions cannot ensure compliance with the applicable water quality requirements of all affected States;

(e) When, 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 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) Before the promulgation of guidelines under section 403(c) of CWA (for determining degradation of the waters of the territorial seas, the contiguous zone, and the oceans) unless the Director determines permit issuance to be in the public interest; or

(2) After promulgation of guidelines under section 403(c) of CWA, when insufficient information exists to made a reasonable judgment whether the discharge complies with them.

(i) To a new source or a new discharger, if the discharge from its construction or operation will cause or contribute to the violation of water quality standards. The owner or operator of a new source or new discharger proposing to discharge into a water segment which does not meet applicable water quality standards or is not expected to meet those standards even after the application of the effluent limitations required by section 301(b)(1)(A) and 301(b)(1)(B) of CWA, and for which the State or interstate agency has performed a pollutant load allocation for the pollutants to be discharged, must demonstrate, before the close of the public comment period, that:

(1) There are sufficient remaining pollutant load allocations to allow for the discharge; and

(2) The existing dischargers into that segment are subject to compliance schedules designed to bring the segment into compliance with applicable water quality standards.

§ 122.53 Application for a permit.

(Applicable to State NPDES programs except for paragraphs (b), (c) and (h); see § 123.7.)

(a) *Duty to apply.* Any person who discharges or proposes to discharge pollutants and who does not have an effective permit, except persons covered by general permits under § 122.59, excluded under § 122.51, or a user of a privately owned treatment works unless the Director requires otherwise under § 122.62(m), shall submit a complete application (which shall include a BMP program if necessary under 40 CFR § 125.102) to the Director in accordance with § 122.4, paragraphs (b) through (h) of this section, and Part 124.

(b) *Time to apply.* Any 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 Director. Persons proposing a new discharge are encouraged to submit their applications well in advance of the 180 day requirement to avoid delay. See also paragraph (h).

(c) *Duty to reapply.* (1) Any POTW with a currently effective permit shall submit a new application at least 180 days before the expiration date of the existing permit, unless permission for a later date has been granted by the Director. (The Director shall not grant permission for applications to be submitted later than the expiration date of the existing permit.)

(2) All other permittees with currently effective permits shall submit a new application in accordance with the table below:

Permit expires	Application requirement	Deadline for submission
On or before Nov. 30, 1980.	(1) If applicant has submitted new application before April 30, 1980, new application[1] is not required.	Not applicable.
	(2) If applicant has not submitted new application before April 30, 1980, applicant must submit new application[1].	Date on which permit expires.[2]
Dec. 1, 1980–May 31, 1981.	New application[1]	90 days before permit expires.[2,3]
On or after June 1, 1981.	New application[1]	180 days before permit expires.[3]

[1]The new application requirements are set forth in § 122.4(d) and in paragraphs (d) and (e) of this section. Applicants for EPA-issued permits must use Forms 1 and either 2b or 2c of EPA's consolidated permit application forms to apply under those sections.

[2]Applicants may request additional time for the submission of information required by paragraphs (d) (7), (9) and (10) of this section. The request must be in writing and must state the reasons this information could not be submitted on time. Based upon this request, the Director may extend the time to submit all or some of this information up to six months beyond the deadline for submission or June 30, 1981, whichever is earlier.

[3]The Director may grant permission to submit an application later than this date, but no later than the expiration date of the permit.

(d) *Application requirements for existing manufacturing, commercial, mining, and silvicultural dischargers.* Existing manufacturing, commercial, mining, and silvicultural dischargers applying for NPDES permits shall provide the following information to the Director, using application forms provided by the Director:

(1) *Outfall location.* The latitude and longitude to the nearest 15 seconds and the name of the receiving water.

(2) *Line drawing.* A line drawing of the water flow through the facility with a water balance, showing operations contributing wastewater to the effluent and treatment units. Similar processes, operations, or production areas may be indicated as a single unit, labeled to correspond to the more detailed identification under paragraph (d)(3) of this section. The water balance must show approximate average flows at intake and discharge points and between units, including treatment units. If a water balance cannot be determined (for example, for certain mining activities), the applicant may provide instead a pictorial description of the nature and amount of any sources of water and any collection and treatment measures.

(3) *Average flows and treatment.* A narrative identification of each type of process, operation, or production area which contributes wastewater to the effluent for each outfall, including process wastewater, cooling water, and storm water runoff; the average flow which each process contributes; and a description of the treatment the wastewater receives, including the ultimate disposal of any solid or fluid wastes other than by discharge. Processes, operations or production areas may be described in general terms (for example, "dye-making reactor", "distillation tower".) For a privately owned treatment works, this information shall include the identity of each user of the treatment works.

(4) *Intermittent flows.* If any of the discharges described in paragraph (d)(3) of this section are intermittent or seasonal, a description of the frequency, duration and flow rate of each discharge occurrence (except for storm water runoff, spillage, or leaks).

(5) *Maximum production.* If an effluent guideline promulgated under section 304 of CWA applies to the applicant and is expressed in terms of production (or other measure of operation), a reasonable measure of the applicant's actual production reported in the units used in the applicable effluent guideline. The reported measure must reflect the actual production of the facility as required by § 122.63(b)(2).

(6) *Improvements.* If the applicant is subject to any present requirements or compliance schedules for construction, upgrading or operation of waste treatment equipment, an identification of the abatement requirement, a description of the abatement project, and a listing of the required and projected final compliance dates.

(7) *Effluent characteristics.* Information on the discharge of pollutants specified in this subparagraph. When "quantitative data" for a pollutant is required, the applicant must collect a sample of effluent and analyze it for the pollutant in accordance with analytical methods approved under 40 CFR Part 136. When no analytical method is approved the applicant may use any suitable method but must provide a description of the method. When an applicant has two or more outfalls with substantially identical effluents, the Director may allow the applicant to test only one outfall and report that the quantitative data also applies to the substantially identical outfalls. The requirements in paragraphs (d)(7) (iii) and (iv) of this section that an applicant must provide quantitative data for certain pollutants known or believed to be present does not apply to pollutants present in a discharge solely as the result of their presence in intake water; however, an applicant must report such pollutants as present. Grab samples must be used for pH, temperature, cyanide, total phenols, residual chlorine, oil and grease, and fecal coliform. For all other pollutants, 24-hour composite samples must be used. An applicant is expected to "know or have reason to believe" that a pollutant is present in an effluent based on an evaluation of the expected use, production, or storage of the pollutant, or on any previous analyses for the pollutant. (For example, any pesticide manufactured by a facility may be expected to be present in contaminated storm water runoff from the facility.)

(i)(A) Every applicant must report quantitative data for every outfall for the followng pollutants:

(*1*) Biochemical Oxygen Demand (BOD_5)

(*2*) Chemical Oxygen Demand

(*3*) Total Organic Carbon

(*4*) Total Suspended Solids

(*5*) Ammonia (as N)

(*6*) Temperature (both winter and summer)

(*7*) pH

(B) At the applicant's request, the Director may waive the reporting requirements for one or more of the pollutants listed in paragraph (d)(7)(i)(A) of this section.

(ii) Each applicant with processes in one or more primary industry category (see Appendix A to Part 122) contributing to a discharge must report quantitative data for the following pollutants in each outfall containing process wastewater:

(A) The organic toxic pollutants in the fractions designated in Table I of Appendix D for the applicant's industrial category or categories unless the applicant qualifies as a small business under paragraph (d)(8) of this section. Table II of Appendix D lists the organic toxic pollutants in each fraction. The fractions result from the sample preparation required by the analytical procedure which uses gas chromotography/mass spectrometry. A determination that an applicant falls within a particular industrial category for the purposes of selecting fractions for testing is not conclusive as to the applicant's inclusion in that category for any other purposes.

(B) The pollutants listed in Table III of Appendix D (the toxic metals, cyanide, and total phenols).

(iii) Each applicant must report for each outfall quantitative data for the following pollutants, if the applicant knows or has reason to believe that the pollutant is discharged from the outfall:

(A) All pollutants listed in Table II or Table III of Appendix D (the toxic pollutants) for which quantitative data is not otherwise required under paragraph (d)(7)(ii) of this section except that an applicant qualifying as a small business under paragraph (d)(8) of this

section is not required to analyze for the pollutants listed in Table II of Appendix D (the organic toxic pollutants).

(B) All pollutants in Table IV of Appendix D (certain conventional and nonconventional pollutants).

(iv) Each applicant must indicate whether it knows or has reason to believe that any of the pollutants in Table V of Appendix D (certain hazardous substances and asbestos) is discharged from each outfall. For every pollutant expected to be discharged, the applicant must briefly describe the reasons the pollutant is expected to be discharged, and report any quantitative data it has for any pollutant.

(v) Each applicant must report qualitative data, generated using a screening procedure not calibrated with analytical standards, for 2,3,7,8-tetrachlorodibenzo-p-dioxin (TCDD) if it:

(A) Uses or manufactures 2,4,5-trichlorophenoxy acetic acid (2,4,5-T); 2-(2,4,5-trichlorophenoxy) propanoic acid (Silvex, 2,4,5,TP); 2-(2,4,5-trichlorophenoxy) ethyl 2,2-dichloropropionate (Erbon); O,O-dimethyl O-(2,4,5-trichlorophenyl) phosphorothioate (Ronnel); 2,4,5-trichlorophenol (TCP); or hexachlorophene (HCP); or

(B) Knows or has reason to believe that TCDD is or may be present in an effluent.

(6) *Small business exemption.* An applicant which qualifies as a small business under one of the following criteria is exempt from the requirements in paragraphs (d)(7)(ii)(A) or (d)(7)(iii)(A) of this section to submit quantitative data for the pollutants listed in Table II of Appendix D (the organic toxic pollutants):

(i) For coal mines, a probable total annual production of less than 100,000 tons per year.

(ii) For all other applicants, gross total annual sales averaging less than $100,000 per year (in second quarter 1980 dollars).

(9) *Used or manufactured toxics.* A listing of any toxic pollutant which the applicant does or expects that it will during the next 5 years use or manufacture as an intermediate or final product or byproduct.

(10) *Potential discharges.* A description of the expected levels of and the reasons for any discharges of pollutants which the applicant knows or has reason to believe will exceed two times the values reported in paragraph (d)(7) of this section over the next 5 years.

(11) *Biological toxicity tests.* An identification of any biological toxicity tests which the applicant knows or has reason to believe have been made within the last 3 years on any of the applicant's discharges or on a receiving water in relation to a discharge.

(12) *Contract analyses.* If a contract laboratory or consulting firm performed any of the analyses required by paragraph (d)(7) of this section, the identity of each laboratory or firm and the analyses performed.

(13) *Additional information.* In addition to the information reported on the application form, applicants shall provide to the Director, at his or her request, such other information as the Director may reasonably require to assess the discharges of the facility and to determine whether to issue an NPDES permit. The additional information may include additional quantitative data and bioassays to assess the relative toxicity of discharges to aquatic life and requirements to determine the cause of the toxicity.

(e) Application requirements for new and existing concentrated animal feeding operations and aquatic animal production facilities. New and existing concentrated animal feeding operations (defined in § 122.54) and concentrated aquatic animal production facilities (defined in § 122.55) shall provide the following information to the Director, using the application form provided by the Director:

(1) For concentrated animal feeding operations:

(i) The type and number of animals in open confinement and housed under roof.

(ii) The number of acres used for confinement feeding.

(iii) The design basis for the runoff diversion and control system, if one exists, including the number of acres of contributing drainage, the storage capacity, and the design safety factor.

(2) For concentrated aquatic animal production facilities:

(i) The maximum daily and average monthly flow from each outfall.

(ii) The number of ponds, raceways, and similar structures.

(iii) The name of the receiving water and the source of intake water.

(iv) For each species of aquatic animals, the total yearly and maximum harvestable weight.

(v) The calendar month of maximum feeding and the total mass of food fed during that month.

(f) *Application requirements for new and existing POTWs.* [Reserved.]

(g) *Application requirements for new sources and new dischargers.* [Reserved.]

(h) *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) 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 § 122.66, 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 Adminstrator 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 paragraph (h)(2)(i) of this section.

(3) The Regional Administrator shall issue a public notice in accordance with § 124.10 of the new source determination under paragraph (h)(2) of this section. If the Regional Administrator has determined that the facility is a new source, the notice shall state that the applicant must comply with the environmental review requirements of 40 CFR Part 6.600 *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.

(i) *Variance requests by non-POTWs.* A discharger which is not a publicly owned treatment works (POTW) may request a variance from otherwise applicable effluent limitations under any of the following statutory or regulatory provisions within the times specified in this paragraph:

(1) *Fundamentally different factors.* 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 § 124.10. The request shall explain how the requirements of § 124.13 and 40 CFR Part 125, Subpart D have been met.

(2) *Non-conventional pollutants.* 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, when those requirements were based on effluent limitation guidelines, must be made by:

(i) Submitting an initial request to the Regional Administrator, as well as to the State Director if applicable, stating the name of discharger, the permit number, the outfall number(s), the applicable effluent guideline, and whether the discharger is requesting a section 301(c) or section 301(g) modification or both. This request 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; and

(ii) Submitting a completed request no later than the close of the public comment period under § 124.10 demonstrating that the requirements of § 124.13 and the applicable requirements of Part 125 have been met.

(iii) Requests for variance from effluent limitations not based on effluent limitation guidelines, need only comply with paragraph (i)(2)(ii) of this section and need not be preceded by an initial request under paragraph (i)(2)(i) of this section.

(3) *Delay in construction of POTW.* 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 POTW into which the source is to discharge must have been requested on or before June 26, 1978, or 180 days after the relevant POTW requested an extension under paragraph (j)(2) of this section, whichever is later, but in no event may this date have been later than December 25, 1978. The request shall explain how the requirements of 40 CFR Part 125, Subpart J have been met.

(4) *Innovative technology.* An extension under CWA section 301(k) from the statutory deadline of section 301(b)(2)(A) for best available technology based on the use of innovative technology may be requested no later than the close of the public comment period under § 124.10 for the discharger's initial permit requiring compliance with section 301(b)(2)(A). The request shall demonstrate that the requirements of § 124.13 and Part 125, Subpart C have been met.

(5) *Water quality related effluent limitations.* 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 § 124.10 on the permit from which the modification is sought.

(6) *Thermal discharges.* 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, except that if thermal effluent limitations are established under CWA section 402(a)(1) or are based on water quality standards the request for a variance may be filed by the close of the public comment period under § 124.10. A copy of the request as required under 40 CFR Part 125, Subpart H, shall be sent simultaneously to the appropriate State or interstate certifying agency as required under 40 CFR Part 125. (See § 124.65 for special procedures for section 316(a) thermal variances.)

(j) *Variance requests by POTWs.* A discharger which is a publicly owned treatment works (POTW) may request a variance from otherwise applicable effluent limitations under any of the following statutory provisions as specified in this paragraph:

(1) *Discharges into marine waters.* A preliminary request for a modification under CWA section 301(h) of 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 request must be submitted in accordance with the filing requirements of 40 CFR Part 125, Subpart G, after that Subpart is promulgated, and shall demonstrate that all the requirements of 40 CFR Part 125, Subpart G have been met. (See § 124.64 for special rules for CWA section 301(h) modifications.)

(2) *Delay in construction.* An extension under CWA section 301(i)(1) of the statutory deadlines in CWA sections 301(b)(1)(B) or (b)(1)(C) based on delay in the construction of the POTW must have been requested on or before June 26, 1978.

(3) *Water quality based effluent limitation.* A modification under CWA section 302(b)(2) of the requirements under section 302(a) for achieving water quality based effluent limitations shall be requested no later than the close of the public comment period under § 124.10 on the permit from which the modification is sought.

(k) *Expedited variance procedures and time extensions.* (1) Notwithstanding the time requirements in paragraphs (i) and (j) of this section, the Director may notify a permit applicant before a draft permit is issued under § 124.6 that the draft permit will likely contain limitations which are eligible for variances. In the notice the Director may require the applicant as a condition of consideration of any potential variance request to submit a request explaining how the requirements of 40 CFR Part 125 applicable to the variance have been met and may require its submission within a specified reasonable time after receipt of the notice. The notice may be sent before the permit application has been submitted. The draft or final permit may contain the alternative limitations which may become effective upon final grant of the variance.

(2) A discharger who cannot file a complete request required under paragraphs (i)(2)(ii) or (i)(2)(iii) of this section may request an extension. The extension may be granted or denied at the discretion of the Director. Extensions shall be no more than 6 months in duration.

§ 122.54 Concentrated animal feeding operations.

(Applicable to State NPDES programs, see § 123.7.)

(a) *Permit requirement.* 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.

(2) 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.

(3) "Concentrated animal feeding operation" means an "animal feeding operation" which meets the criteria in Appendix B, or which the Director designates under paragraph (c) of this section.

(c) *Case-by-case designation of concentrated animal feeding operations.* (1) The Director may designate any animal feeding operation as a concentrated animal feeding operation upon determining that it is 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 relevant factors.

(2) No animal feeding operation with less than the numbers of animals set forth in Appendix B shall be designated as a concentrated animal feeding operation unless:

(i) Pollutants are discharged into waters of the United States through a manmade ditch, flushing system, or other similar manmade device; or

(ii) Pollutants are discharged directly into waters of the United States which originate outside of the facility and pass over, across, or through the facility or otherwise come into direct contact with the animals confined in the operation.

(3) A permit application shall not be required from a concentrated animal feeding operation designated under this paragraph until the Director has conducted an on-site inspection of the operation and determined that the operation should and could be regulated under the permit program.

§ 122.55 Concentrated aquatic animal production facilities.

(Applicable to State NPDES programs, see § 123.7.)

(a) *Permit requirement.* Concentrated aquatic animal production facilities, as defined in this section, are point sources subject to the NPDES permit program.

(b) *Definition.* "Concentrated aquatic animal production facility" means a hatchery, fish farm, or other facility which meets the criteria in Appendix C, or which the Director designates under paragraph (c) of this section.

(c) *Case-by-case designation of concentrated aquatic animal production facilities.* (1) The Director may designate any warm or cold water aquatic animal production facility as a concentrated aquatic animal production facility upon determining that it is a significant contributor of pollution to waters of the United States. In making this designation the Director shall consider the following factors:

(i) The location and quality of the receiving waters of the United States;

(ii) The holding, feeding, and production capacities of the facility;

(iii) The quantity and nature of the pollutants reaching waters of the United States; and

(iv) Other relevant factors.

(2) A permit application shall not be required from a concentrated aquatic animal production facility designated under this paragraph until the Director has conducted on-site inspection of the facility and has determined that the facility should and could be regulated under the permit program.

§ 122.56 Aquaculture projects.

(Applicable to State NPDES programs, see § 123.7.)

(a) *Permit requirement.* 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 permittee or permit applicant 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, and be harvested within a defined geographic area.

§ 122.57 Separate storm sewers.

(Applicable to State NPDES programs, see § 123.7.)

(a) *Permit requirement.* Separate storm sewers, as defined in this section are point sources subject to the NPDES permit program. Separate storm sewers may be permitted either individually or under a general permit (see § 122.59). 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 or operators of these 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.

(b) *Definition.* (1) "Separate storm sewer" means a conveyance or system of conveyances (including pipes, conduits, ditches, and channels) primarily used for collecting and conveying storm water runoff and which is either:

(i) Located in an urbanized areas as designated by the Bureau of the Census according to the criteria in 39 FR 15202 (May 1, 1974); or

(ii) Not located in an urbanized area but designated under paragraph (c) of this section.

(2) Except as provided in paragraph (b)(3) of this section, a conveyance or system of conveyances operated primarily for the purpose of collecting and conveying storm water runoff which is not located in an urbanized area and has not been designated by the Director under paragraph (c) of this section is not considered a point source and is not subject to the provisions of this section.

(3) Conveyances which discharge 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 are point sources that must obtain NPDES permits but are not separate storm sewers.

(4) Whether a system of conveyances is or is not a separate storm sewer for purposes of this section shall have no bearing on whether 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) The Director determines that a storm sewer is a significant contributor of pollution to the waters of the United States. In making this determination the Director shall consider the following factors:

(i) The location of the discharge with respect to waters of the United States;

(ii) The size of the discharge;

(iii) The quantity and nature of the pollutants reaching waters of the United States; and

(iv) Other relevant factors.

§ 122.58 Silvicultural activities.

(Applicable to State NPDES programs, see § 123.7.)

(a) *Permit requirement.* 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. 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, or road construction and maintenance from which there is natural runoff. 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 and Part 123, Subpart E).

(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, including the effluent limitations guidelines).

(3) "Log sorting and log storage facilities" means facilities whose discharges result from the holding of unprocessed wood, for example, logs or roundwood with bark or after removal of bark held 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, including the effluent limitations guidelines).

§ 122.59 General permits.

(Applicable to State NPDES programs, see § 123.7.)

(a) *Coverage.* The Director may issue a general permit in accordance with the following:

(1) *Area.* The general permit shall be written to cover a category of discharges described in the permit under paragraph (a)(2) of this section, except those covered by individual permits, within a geographic area. The area shall correspond to existing geographic or political boundaries, such as:

(i) Designated planning areas under sections 208 and 303 of CWA;

(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 designated by the Bureau of the Census according to criteria in 30 FR 15202 (May 1, 1974); or

(vii) Any other appropriate division or combination of boundaries.

(2) *Sources.* The general permit shall be written to regulate, within the area described in paragraph (a)(1) of this section, either:

(i) Separate storm sewers; or

(ii) A category of point sources other than separate storm sewers if the sources all:

(A) Involve the same or substantially similar types of operations;

(B) Discharge the same types of wastes;

(C) Require the same effluent limitations or operating conditions;

(D) Require the same or similar monitoring; and

(E) In the opinion of the Director, are more appropriately controlled under a general permit than under individual permits.

(b) *Administration.*—(1) *In general.* General permits may be issued, modified, revoked and reissued, or terminated in accordance with applicable requirements of Part 124 or corresponding State regulations. Special procedures for issuance are found at § 123.76 for States and § 124.58 for EPA.

(2) *Requiring an individual permit.* (i) The Director may require any person authorized by a general permit to apply for and obtain an individual NPDES permit. Any interested person may petition the Director to take action under this subparagraph. Cases where an individual NPDES permit may be required include the following:

(A) The discharge(s) is a significant contributor of pollution as determined by the factors set forth at § 122.57(c)(2);

(B) The discharger is not in compliance with the conditions of the general NPDES permit;

(C) A change has occurred in the availability of demonstrated technology or practices for the control or abatement of pollutants applicable to the point source;

(D) Effluent limitation guidelines are promulgated for point sources covered by the general NPDES permit;

(E) A Water Quality Management plan containing requirements applicable to such point sources is approved; or

(F) The requirements of paragraph (a) of this section are not met.

(ii) *For EPA issued general permits only,* the Regional Administrator may require any owner or operator authorized by a general permit to apply for an individual NPDES permit as provided in paragraph (b)(2)(i) of this section, only if the owner or operator has been notified in writing that a permit application is required. This notice shall include a brief statement of the reasons for this decision, an application form, a statement setting a time for the owner or operator to file the application, and a statement that on the effective date of the individual NPDES permit the general permit as it applies to the individual permittee shall automatically terminate. The Director may grant additional time upon request of the applicant.

(iii) Any owner or operator authorized by 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 an application under § 122.53, with reasons supporting the request, to the Director no later than 90 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. The request shall be processed under Part 124 or applicable State procedures. The request shall be granted by issuing of any individual permit if the reasons cited by the owner or operator are adequate to support the request.

(iv) When an individual NPDES permit is issued to an owner or operator otherwise subject to a general NPDES permit, the applicability of the general permit to the individual NPDES permittee is automatically terminated on the effective date of the individual permit.

(v) A source excluded from a general permit solely because it already has an individual permit may request that the individual permit be revoked, and that it be covered by the general permit. Upon revocation of the individual permit, the general permit shall apply to the source.

§ 122.60 Additional conditions applicable to all NPDES Permits.

(Applicable to State NPDES programs, see § 123.7.)

The following conditions, in addition to those set forth in § 122.7, apply to all NPDES permits:

(a) In addition to § 122.7(a) (duty to comply):

(1) The permittee shall comply with effluent standards or prohibitions established under section 307(a) of the Clean Water Act for toxic pollutants within the time provided in the regulations that establish these standards or prohibitions, even if the permit has not yet been modified to incorporate the requirement.

(2) The Clean Water Act provides that any person who violates a permit

condition implementing sections 301, 302, 306, 307, 308, 318, or 405 of the Clean Water Act is subject to a civil penalty not to exceed $100,000 per day of such violation. Any person who willfully or negligently violates permit conditions implementing sections 301, 302, 306, 307, or 308 of the Clean Water Act is subject to a fine of not less than $2,500 nor more than $25,000 per day of violation, or by imprisonment for not more than 1 year, or both.

(b) In addition to § 122.7(c) (duty to halt or reduce activity), upon reduction, loss, or failure of the treatment facility, the permittee shall, to the extent necessary to maintain compliance with its permit, control production or all discharges or both until the facility is restored or an alternative method of treatment is provided. This requirement applies, for example, when the primary source of power of the treatment facility fails or is reduced or lost.

(c) In addition to § 122.7(j) (monitoring):

(1) Monitoring must be conducted according to test procedures approved under 40 CFR Part 136, unless other test procedures have been specified in this permit.

(2) The Clean Water Act provides that any person who falsifies, tampers with, or knowingly renders inaccurate any monitoring device or method required to be maintained under this permit 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.

(d) In addition to § 122.7(k) (signatories): the Clean Water Act provides that any person who knowingly makes any false statement, representation, or certification in any record or other document submitted or required to be maintained under this permit, including monitoring reports or reports of compliance or non-compliance 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.

(e) In addition to § 122.7(l)(3) (monitoring reports):

(1) Monitoring results must be reported on a Discharge Monitoring Report (DMR).

(2) If the permittee monitors any pollutant more frequently than required by the permit, using test procedures approved under 40 CFR 136 or as specified in the permit, the results of this monitoring shall be included in the calculation and reporting of the data submitted in the DMR.

(3) Calculations for all limitations which require averaging of measurements shall utilize an arithmetic mean unless otherwise specified by the Director in the permit.

(f)(1) The following shall be included as information which must be reported within 24 hours under § 122.7(l)(5) (24-hour reporting):

(i) Any unanticipated bypass which exceeds any effluent limitation in the permit. (See § 122.60(g) below.)

(ii) Any upset which exceeds any effluent limitation in the permit.

(iii) Violation of a maximum daily discharge limitation for any of the pollutants listed by the Director in the permit to be reported within 24 hours. (See § 122.62(g).)

(2) The Director may waive the written report on a case-by-case basis if the oral report has been received within 24 hours.

(g) *Bypass*—(1) *Definitions.* (i) "Bypass" means the intentional diversion of waste streams from any portion of a treatment facility.

(ii) "Severe property damage" means substantial physical damage to property, damage to the treatment facilities which causes 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) *Bypass not exceeding limitations.* The permittee may allow any bypass to occur which does not cause effluent limitations to be exceeded, but only if it also is for essential maintenance to assure efficient operation. These bypasses are not subject to the provisions of paragraphs (g)(3) and (g)(4) of this section.

(3) *Notice.*—(i) *Anticipated bypass.* If the permittee knows in advance of the need for a bypass, it shall submit prior notice, if possible at least ten days before the date of the bypass.

(ii) *Unanticipated bypass.* The permittee shall submit notice of an unanticipated bypass as required in paragraph (f) of this section (24-hour notice).

(4) *Prohibition of bypass.* (i) Bypass is prohibited, and the Director may take enforcement action against a permittee for bypass, unless:

(A) Bypass was unavoidable to prevent loss of life, personal injury, or severe property damage;

(B) There were no feasible alternatives to the bypass, such as the use of auxiliary treatment facilities, retention of untreated wastes, or maintenance during normal periods of equipment downtime. This condition is not satisfied if the permittee could have installed adequate backup equipment to prevent a bypass which occurred during normal periods of equipment downtime or preventive maintenance; and

(C) The permittee submitted notices as required under paragraph (g)(3) of this section.

(ii) The Director may approve an anticipated bypass, after considering its adverse effects, if the Director determines that it will meet the three conditions listed above in paragraph (g)(4)(i) of this section.

(h) *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 constitutes an affirmative defense to an action brought for noncompliance with such technology-based permit effluent limitations if the requirements of paragraph (h)(3) of this section are met. No determination made during administrative review of claims that noncompliance was caused by upset, and before an action for noncompliance, is final administrative action subject to judicial review.

(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 properly operated; and

(iii) The permittee submitted notice of the upset as required in paragraph (f) of this section (24-hour notice).

(iv) The permittee complied with any remedial measures required under § 122.7(d).

(4) *Burden of proof.* In any enforcement proceeding the permittee seeking to establish the occurrence of an upset has the burden of proof.

§ 122.61 Additional conditions applicable to specified categories of NPDES permits.

(Applicable to state NPDES programs, see § 123.7.)

The following conditions, in addition to those set forth in § 122.7 and § 122.60, apply to all NPDES permits within the categories specified below:

(a) *Existing manufacturing, commercial, mining, and silvicultural dischargers.* In addition to the reporting requirements under § 122.7(l) and § 122.60, all existing manufacturing, commercial, mining, and silvicultural dischargers must notify the Director as soon as they know or have reason to believe:

(1) That any activity has occurred or will occur which would result in the discharge of any toxic pollutant which is not limited in the permit, if that discharge will exceed the highest of the following "notification levels:"

(i) One hundred micrograms per liter (100 μg/1);

(ii) Two hundred micrograms per liter (200 μg/1) for acrolein and acrylonitrile; five hundred micrograms per liter (500 μg/1) for 2,4-dinitrophenol and for 2-methyl-4,6-dinitrophenol; and one milligram per liter (1 mg/1) for antimony;

(iii) Five (5) times the maximum concentration value reported for that pollutant in the permit application in accordance with §122.53(d)(7) or § 122.53(d)(10); or

(iv) The level established by the Director in accordance with § 122.62(f).

(2) That they have begun or expect to begin to use or manufacture as an intermediate or final product or byproduct any toxic pollutant which was not reported in the permit application under § 122.53(d)(9).

(b) *Publicly owned treatment works.* All POTWs must provide adequate notice to the Director of the following:

(1) 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

(2) 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.

(3) For purposes of this paragraph, adequate notice shall include information on (i) the quality and quantity of effluent introduced into the POTW, and (ii) any anticipated impact of the change on the quantity or quality of effluent to be discharged from the POTW.

§ 122.62 Establishing NPDES permit conditions.

(Applicable to State NPDES programs, see § 123.7.)

In addition to the conditions established under § 122.8(a), each NPDES permit shall include conditions meeting the following requirements when applicable.

(a) *Technology-based effluent limitations and standards* based on effluent limitations and standards promulgated under section 301 of CWA or new source performance standards promulgated under section 306 of CWA, on case-by-case effluent limitations determined under section 402(a)(1) of CWA, or on a combination of the two, in accordance with § 125.3. For new sources or new dischargers, these technology based limitations and standards are subject to the provisions of § 122.67(d) (protection period).

(b) *Other effluent limitations and standards* under sections 301, 302, 303, 307, 318, and 405 of CWA. If any applicable toxic effluent standard or prohibition (including any schedule of compliance specified in such effluent standard or prohibition) is promulgated under section 307(a) of CWA for a toxic pollutant and that standard or prohibition is more stringent than any limitation on the 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. See also § 122.60(a).

(c) *Reopener clause:* for any discharger within a primary industry category (see Appendix A), requirements under section 307(a)(2) of CWA as follows:

(1) *On or before June 30, 1981:* (i) If applicable standards or limitations have not yet been promulgated, the permit shall include a condition stating that, if an applicable standard or limitation is promulgated under sections 301(b)(2) (C) and (D), 304(b)(2), and 307(a)(2) and that 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 revoked and reissued to conform to that effluent standard or limitation.

(ii) If applicable standards or limitations have been promulgated or approved, the permit shall include those standards or limitations. (If EPA approves existing effluent limitations or decides not to develop new effluent limitations, it will publish a notice in the Federal Register that the limitations are "approved" for the purpose of this regulation.)

(2) *After June 30, 1981,* any permit issued 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. These permits need not incorporate the clause required by paragraph (c)(1) of this section.

(3) The Director shall promptly modify or revoke and reissue any permit containing the clause required under paragraph (c)(1) of this section to incorporate an applicable effluent standard or limitation under sections 301(b)(2) (C) and (D), 304(b)(2), and 307(a)(2) which is promulgated or approved after the permit is issued if that effluent standard or limitation is more stringent than any effluent limitation in the permit, or controls a pollutant not limited in the permit.

(d) *Water quality standards and State requirements:* any requirements in addition to or more stringent than promulgated effluent limitations guidelines or standards under sections 301, 304, 306, 307, 318, and 405 of CWA 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 which meet the requirements of § 124.53 when EPA is the permit issuing authority; however, if a State certification is stayed by a court of competent jurisdiction or appropriate State board or agency, EPA shall include conditions in the permit which may be necessary to meet EPA's obligation under section 301(b)(1)(C) of CWA;

(4) Conform to applicable water quality requirements under section 401(a)(2) of CWA when the discharge affects a State other than the certifying State;

(5) Incorporate any more stringent limitations, treatment standards, or schedule 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 any other requirements, 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, when EPA is the permit issuing authority (see § 122.66).

(e) *Toxic pollutants:* limitations established under paragraphs (a), (b), or

(d) of this section, to control pollutants meeting the criteria listed in paragraph (e)(1) of this section. Limitations will be established in accordance with paragraph (e)(2) of this section. An explanation of the development of these limitations shall be included in the fact sheet under § 122.56(b)(1)(i).

(1) Limitations must control all toxic pollutants which:

(i) The Director determines (based on information reported in a permit application under § 122.53(d) (7) or (10) or in a notification under § 122.61(a)(1) or on other information) are or may be discharged at a level greater than the level which can be achieved by the technology-based treatment requirements appropriate to the permittee under § 125.3(c); or

(ii) The discharger does or may use or manufacture as an intermediate or final product or byproduct.

(2) The requirement that the limitations control the pollutants meeting the criteria of paragraph (e)(1) of this section will be satisfied by:

(i) Limitations on those pollutants; or

(ii) Limitations on other pollutants which, in the judgment of the Director, will provide treatment of the pollutants under paragraph (e)(1) of this section to the levels required by § 125.3(c).

(f) *Notification level:* a "notification level" which exceeds the notification level of § 122.61(a)(1) (i), (ii), or (iii), upon a petition from the permittee or on the Director's initiative. This new notification level may not exceed the level which can be achieved by the technology-based treatment requirements appropriate to the permittee under § 125.3(c).

(g) *Twenty-four hour reporting:* Pollutants for which the permittee must report violations of maximum daily discharge limitations under § 122.60(f)(3) (24-hour reporting) shall be listed as such in the permit. This list shall include any toxic pollutant or hazardous substance, or any pollutant specifically identified as the method to control a toxic pollutant or hazardous substance.

(h) *Durations* for permits, as set forth in §§ 122.9(a) and 122.64.

(i) *Monitoring requirements:* In addition to § 122.11, the following monitoring requirements:

(1) To assure compliance with permit limitations, requirements to monitor:

(i) The mass (or other measurement specified in the permit) for each pollutant limited in the permit;

(ii) The volume of effluent discharged from each outfall;

(iii) Other measurements as appropriate; including pollutants in internal waste streams under § 122.63(i); pollutants in intake water for net limitations under § 122.63(f); frequency, rate of discharge, etc., for noncontinuous discharges under § 122.63(e); and pollutants subject to notification requirements under § 122.61(a).

(iv) According to test procedures approved under 40 CFR Part 136 for the analyses of pollutants having approved methods under that Part, and according to a test procedure specified in the permit for pollutants with no approved methods.

(2) Requirements to report monitoring results with a frequency dependent on the nature and effect of the discharge, but in no case less than once a year.

(j) *Pretreatment program for POTWs.* Requirements for POTWs to:

(1) 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.

(2) Submit 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. The program shall require all indirect dischargers to the POTW to comply with the reporting requirements of 40 CFR Part 403.

(k) *Best management practices* to control or abate the discharge of pollutants when:

(1) Authorized under section 304(e) of CWA for the control of toxic pollutants and hazardous substances from ancillary 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 intent of CWA.

(l) *Reissued permits:*

(1) Except as provided in paragraph (l)(2) of this section when 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 § 122.15).

(2) When 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:

(i) 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 renewed or reissued permit may reflect the level of pollutant control actually achieved (but shall not be less stringent than required by the subsequently promulgated effluent limitation guidelines);

(ii) In the case of an approved State, State law prohibits permit conditions more stringent than an applicable effluent limitations guideline;

(iii) The subsequently promulgated effluent guidelines are based on best conventional pollutant control technology (section 301(b)(2)(E) of CWA);

(iv) 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 § 122.15; or

(v) There is increased production at the facility which results in significant reduction in treatment efficiency, in which case the permit limitations will be adjusted to reflect any decreased efficiency resulting from increased production and raw waste loads, but in no event shall permit limitations be less stringent than those required by subsequently promulgated standards and limitations.

(m) *Privately owned treatment works.* For a privately owned treatment works, any conditions expressly applicable to any user, as a limited co-permittee, that may be necessary in the permit issued to the treatment works to ensure compliance with applicable requirements under this Part. Alternatively, the Director may issue separate permits to the treatment works and to its users, or may require a separate permit application from any user. The Director's decision to issue a permit with no conditions applicable to any user, to impose conditions on one or more users, to issue separate permits, or to require separate applications, and the basis for that decision, shall be stated in the fact sheet for the draft permit for the treatment works.

(n) *Grants.* Any conditions imposed in grants made by the Administrator to POWs under sections 201 and 204 of CWA which are reasonably necessary for the achievement of effluent limitations under section 301 of CWA.

(o) *Sewage sludge.* Requirements under section 405 of CWA governing the disposal of sewage sludge from publicly

owned treatment works, in accordance with any applicable regulations.

(p) *Coast Guard.* When a permit is issued to a facility that may operate at certain times as a means of transportation over water, a condition that the discharge shall comply with any applicable regulations promulgated by the Secretary of the department in which the Coast Guard is operating, that establish specifications for safe transportation, handling, carriage, and storage of pollutants.

(q) *Navigation.* Any conditions that the Secretary of the Army considers necessary to ensure that navigation and anchorage will not be substantially impaired, in accordance with § 124.58.

§ 122.63 Calculating NPDES permit conditions.

(Applicable to State NPDES programs, see § 123.7.)

(a) *Outfalls and discharge points.* All permit effluent limitations, standards, and prohibitions shall be established for each outfall or discharge point of the permitted facility, except as otherwise provided under § 122.62(k)(2) (BMPs where limitations are infeasible) and paragraph (i) of this section (limitations on internal waste streams).

(b) *Production-based limitations.* (1) In the case of POTWs, permit limitations, standards, or prohibitions shall be calculated based on design flow.

(2) Except in the case of POTWs, calculation of any permit limitations, standards, or prohibitions which are based on production (or other measure of operation) shall be based not upon the designed production capacity but rather upon a reasonable measure of actual production of the facility, such as the production during the high month of the previous year, or the monthly average for the highest of the previous 5 years. For new sources or new dischargers, actual production shall be estimated using projected production. The time period of the measure of production shall correspond to the time period of the calculated permit limitations; for example, monthly production shall be used to calculate average monthly discharge limitations.

(c) *Metals.* All permit effluent limitations, standards, or prohibitions for a metal shall be expressed in terms of the total metal (that is, the sum of the dissolved and suspended fractions of the metal) unless:

(1) An applicable effluent standard or limitation has been promulgated under CWA and 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 § 125.3, 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.

(d) *Continuous discharges.* For continuous discharges all permit effluent limitations, standards, and prohibitions, including those necessary to achieve water quality standards, shall unless impracticable 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.

(e) *Non-continuous discharges.* Discharges which are not continuous, as defined in § 122.3, shall be particularly described and limited, considering the following factors, as appropriate:

(1) Frequency (for example, a batch discharge shall not occur more than once every 3 weeks);

(2) Total mass (for example, 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 (for example, not to exceed 2 kilograms of zinc per minute); and

(4) Prohibition or limitation of specified pollutants by mass, concentration, or other appropriate measure (for example, shall not contain at any time more than 0.1 mg/l zinc or more than 250 grams (1/4 kilogram) of zinc in any discharge).

(f) *Mass limitations.* (1) All pollutants limited in permits shall have limitations, standards, or prohibitions expressed in terms of mass except:

(i) For pH, temperature, radiation, or other pollutants which cannot appropriately be expressed by mass;

(ii) When applicable standards and limitations are expressed in terms of other units of measurement; or

(iii) If in establishing permit limitations on a case-by-case basis under § 125.3, limitations expressed in terms of mass are infeasible because the mass of the pollutant discharged cannot be related to a measure of operation (for example, discharges of TSS from certain mining operations), and permit conditions ensure that dilution will not be used as a substitute for treatment.

(2) Pollutants limited in terms of mass additionally may be limited in terms of other units of measurement, and the permit shall require the permittee to comply with both limitations.

(g) *Pollutants in intake water.* Except as provided in paragraph (h) of this section, effluent limitations imposed in permits shall not be adjusted for pollutants in the intake water.

(h) *Net limitations.* (1) Upon request of the discharger, effluent limitations or standards imposed in a permit shall be calculated on a "net" basis; that is, 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 40 CFR Subchapter N 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:

(A) The permittee to conduct additional monitoring (for example, for flow and concentration of pollutants) as necessary to determine continued eligibility for and compliance with any such adjustments; and

(B) The permittee to notify the Director if eligibility for an adjustment under this section has been altered or no longer exists. In that case, the permit may be modified accordingly under § 122.15.

(2) Permit effluent limitations or standards adjusted under this paragraph shall be calculated on the basis of the amount of pollutants present after any treatment steps have been performed on the intake water by or for the discharger. Adjustments under this paragraph shall be given only to the extent that pollutants in the intake water which are limited in the permit are not removed by the treatment technology employed by the discharger. In addition, effluent limitations or standards shall not be adjusted to the extent that the pollutants in the intake water vary physically, chemically, or biologically from the pollutants limited in the permit. Nor shall effluent limitations or standards be adjusted to the extent that the discharger significantly increases concentrations of pollutants in the intake water, even though the total amount of pollutants might remain the same.

(i) *Internal waste streams.* (1) When permit effluent limitations or standards imposed at the point of discharge are impractical or infeasible, effluent limitations or standards for discharges of pollutants may be imposed on internal waste streams before mixing with other waste streams or cooling water streams. In those instances, the

monitoring required by § 122.62(i) shall also be applied to the internal waste streams.

(2) Limits on internal waste streams will be imposed only when the fact sheet under § 124.56 sets forth the exceptional circumstances which make such limitations necessary, such as when the final discharge point is inaccessible (for example, under 10 meters of water), the wastes at the point of discharge are so diluted as to make monitoring impracticable, or the interferences among pollutants at the point of discharge would make detection or analysis impracticable.

(j) *Disposal of pollutants into wells, into POTWs, or by land application.* Permit limitations and standards shall be calculated as provided in § 122.65.

§ 122.64 Duration of certain NPDES permits.

(Applicable to State NPDES programs, see § 123.7.)

(a) On or before June 30, 1981, any permit issued to a discharger in a primary industry category (see Appendix A):

(1) Shall meet one of the following conditions:

(i) Expire on June 30, 1981;

(ii) Incorporate effluent standards and limitations applicable to the discharger which have been promulgated or approved under sections 301(b)(2) (C) and (D), 304(b)(2), and 307(a)(2) of CWA; or

(iii) Incorporate the "reopener clause" required by § 122.62(c)(1), and effluent limitations to meet the requirements of sections 301(b)(2) (A), (C), (D), (E), and (F) of CWA.

(2) Shall not be written to expire after June 30, 1981 unless the discharger has submitted to the Director the information required by § 122.53(d)(7)(ii).

(b) After June 30, 1981 a permit may be issued for the full term if the permit includes 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.

(c) A determination that a particular discharger falls within a given industrial category for purposes of setting a permit expiration date under paragraph (b) of this section 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 permit based on that determination is formulated.

§ 122.65 Disposal of pollutants into wells, into publicly owned treatment works, or by land application.

(Applicable to State NPDES programs, see § 123.7.)

(a) When part of a discharger's process wastewater 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 standards and limitations 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 (a)(1) of this section, 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.

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) of this section shall not apply to the extent that 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, land application, or disposal into POTWs.

(c) Paragraph (a) of this section does not alter a discharger's obligation to meet any more stringent requirements established under § 122.7, § 122.8, § 122.60, § 122.61, and § 122.62.

§ 122.66 New sources and new dischargers.

(a) *Definitions.* (1) "New source" and "new discharger" are defined in § 122.3.

(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 source or a new discharger.

(4) "Site" is defined in § 122.3;

(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, if these facilities or equipment are of such value as to represent a substantial commitment to construct. It excludes facilities or equipment used in connection with feasibility, engineering, and design studies regarding the source or water pollution treatment for the source.

(b) *Criteria for new source determination.* (1) The following construction activities result in a new source:

(i) Construction of a source on a site at which no other source is located, or

(ii) Construction on a site at which another source is located of a building, structure, facility, or installation from which there is or may be a discharge of pollutants if:

(A) the process or production equipment that causes the discharge of pollutants from the existing source is totally replaced by this construction, or

(B) the construction results in a change in the nature or quantity of pollutants discharged.

(2) Construction on a site at which an existing source is located results in a modification subject to § 122.15 rather than a new source if the construction does not create a new building, structure, facility, or installation from which there is or may be a discharge of pollutants but otherwise alters, replaces, or adds to existing process or production equipment.

(3) Construction of a new source as defined under § 122.3 has commenced if the owner or operator has: (i) Begun, or caused to begin as part of a continous on-site construction program:

(A) Any placement, assembly, or installation of facilities or equipment; or

(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 the paragraph.

(c) *Requirement for an Environmental Impact Statement.* (1) The issuance of an NPDES permit to 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 Part 6, Subpart F. EPA will determine whether an Environmental Impact Statement (EIS) is required under § 122.53(h) (special provisions for applications from new sources) and 40 CFR Part 6, Subpart F;

(ii) By an NPDES approved State is not a Federal action and therefore does not require EPA to conduct an environmental review.

(2) An EIS prepared under this paragraph shall include a recommendation either to issue or deny the permit.

(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, if any, which the permittee should take to prevent or minimize any adverse environmental impacts;

(3) The Regional Administrator shall issue, condition, 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 or finding of no significant impact.

(4)(i) No on-site construction of a new source for which an EIS is required shall commence before final Agency action in issuing 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 or irreversible adverse environmental impact. The provisions of any agreement entered into under this paragraph shall be incorporated as conditions of the NPDES permit when it is issued.

(ii) No on-site construction of a new source for which an EIS is not required shall commence until 30 days after issuance of a finding of no significant impact, unless the construction is determined by the Regional Administrator not to 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 paragraph (c)(4) of this section. If onsite 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.* (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.)

(1) Except as provided in paragraph (d)(2) of this section, any new discharger, the construction of which commenced after October 18, 1972, or new source which meets the applicable promulgated new source performance standards before the commencement of discharge, may 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 soonest ending 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 nonconstruction-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.

(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; for example, conditions based on water quality standards, or toxic effluent standards or prohibitions under section 307(a) of CWA; or

(ii) Additional permit conditions in accordance with § 125.3 controlling toxic pollutants or hazardous substances which are not controlled by new source performance standards. This includes permit conditions controlling pollutants other than those identified as toxic pollutants or hazardous substances when control of these pollutants has been specifically identified as the method to control the toxic pollutants or hazardous substances.

(3) When an NPDES permit issued to a source with a "protection period" under paragraph (d)(1) of this section will expire on or after the expiration of the protection period, that permit shall require the owner or operator of the source to comply 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 except when necessary to achieve compliance with requirements promulgated less than 3 years before the expiration of the protection period.

(4) The owner or operator of a new source, a new discharger which commenced discharge after August 13, 1979, or a recommencing discharger shall install and have in operating condition, and shall "start-up" all pollution control equipment required to meet the conditions of its permit before beginning to discharge. Within the shortest feasible time (not to exceed 90 days), the owner or operator must meet all permit conditions.

(5) After the effective date of new source performance standards, it shall be unlawful for any owner or operator of any new source to operate the source in violation of those standards applicable to the source.

Appendix A to Part 122—NPDES Primary Industry Categories

Any permit issued after June 30, 1981 to dischargers in the following categories shall include effluent limitations and a compliance schedule to meet the requirements of section 301(b)(2) (A), (C), (D), (E) and (F) of CWA, whether or not applicable effluent limitations guidelines have been promulgated. See §§ 122.62 and 122.64.

Industry Category

Adhesives and Sealants
Aluminum Forming
Auto and Other Laundries
Battery Manufacturing
Coal Mining
Coil Coating
Copper Forming
Electrical and Electronic Components

Electroplating
Explosives Manufacturing
Foundries
Gum and Wood Chemicals
Inorganic Chemicals Manufacturing
Iron and Steel Manufacturing
Leather Tanning and Finishing
Mechanical Products Manufacturing
Nonferrous Metals Manufacturing
Ore Mining
Organic Chemicals Manufacturing
Paint and Ink Formulation
Pesticides
Petroleum Refining
Pharmaceutical Preparations
Photographic Equipment and Supplies
Plastics Processing
Plastic and Synthetic Materials Manufacturing
Porcelain Enameling
Printing and Publishing
Pulp and Paper Mills
Rubber Processing
Soap and Detergent Manufacturing
Steam Electric Power Plants
Textile Mills
Timber Products Processing

Appendix B to Part 122—Criteria for Determining a Concentrated Animal Feeding Operation (§ 122.54)

An animal feeding operation is a concentrated animal feeding operation for purposes of § 122.54 if either of the following criteria are met.

(a) More than the numbers of animals specified in any of the following categories are confined:

(1) 1,000 slaughter and feeder cattle,

(2) 700 mature dairy cattle (whether milked or dry cows),

(3) 2,500 swine each weighing over 25 kilograms (approximately 55 pounds),

(4) 500 horses,

(5) 10,000 sheep or lambs,

(6) 55,000 turkeys,

(7) 100,000 laying hens or broilers (if the facility has continuous overflow watering),

(8) 30,000 laying hens or broilers (if the facility has a liquid manure handling system),

(9) 5,000 ducks, or

(10) 1,000 animal units; or

(b) More than the following number and types of animals are confined:

(1) 300 slaughter or feeder cattle,

(2) 200 mature dairy cattle (whether milked or dry cows),

(3) 750 swine each weighing over 25 kilograms (approximately 55 pounds),

(4) 150 horses,

(5) 3,000 sheep or lambs,

(6) 16,500 turkeys,

(7) 30,000 laying hens or broilers (if the facility has continuous overflow watering),

(8) 9,000 laying hens or broilers (if the facility has a liquid manure handling system),

(9) 1,500 ducks, or

(10) 300 animal units;

and either one of the following conditions are met: pollutants are discharged into navigable waters through a manmade ditch, flushing system or other similar manmade device; or pollutants are discharged directly into waters of the United States 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.

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.

The term "manmade" means constructed by man and used for the purpose of transporting wastes.

Appendix C to Part 122—Criteria for Determining a Concentrated Aquatic Animal Production Facility (§ 122.55)

A hatchery, fish farm, or other facility is a concentrated aquatic animal production facility for purposes of § 122.55 if it contains, grows, or holds aquatic animals in either of the following categories.

(a) 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:

(1) Facilities which produce less than 9,090 harvest weight kilograms (approximately 20,000 pounds) of aquatic animals per year; and

(2) Facilities which feed less than 2,272 kilograms (approximately 5,000 pounds) of food during the calendar month of maximum feeding.

(b) 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:

(1) Closed ponds which discharge only during periods of excess runoff; or

(2) Facilities which produce less than 45,454 harvest weight kilograms (approximately 100,000 pounds) of aquatic animals per year.

"Cold water aquatic animals" include, but are not limited to, the *Salmonidae* family of fish; e.g., trout and salmon.

"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.

Appendix D to Part 122—*NPDES Permit Application Testing Requirments (§ 122.53).*

Table I.—*Testing Requirements for Organic Toxic Pollutants by Industrial Category for Existing Dischargers*

Industrial category	GC/MS fraction [1]			
	Volatile	Acid	Base/neutral	Pesticide
Adhesives and Sealants	(*)	(*)	(*)	
Aluminum Forming	(*)	(*)	(*)	
Auto and Other Laundries	(*)	(*)	(*)	(*)
Battery Manufacturing	(*)		(*)	
Coal Mining	(*)	(*)	(*)	(*)
Coil Coating	(*)	(*)	(*)	
Copper Forming	(*)	(*)	(*)	
Electric and Electronic Components	(*)	(*)	(*)	(*)

Table I.—*Testing Requirements for Organic Toxic Pollutants by Industrial Category for Existing Dischargers*—Continued

Industrial category	GC/MS fraction [1]			
	Volatile	Acid	Base/neutral	Pesticide
Electroplating	(*)	(*)	(*)	
Explosives Manufacturing		(*)	(*)	
Foundries	(*)	(*)	(*)	
Gum and Wood Chemicals	(*)	(*)	(*)	(*)
Inorganic Chemicals Manufacturing	(*)	(*)	(*)	
Iron and Steel Manufacturing	(*)	(*)	(*)	
Leather Tanning and Finishing	(*)	(*)	(*)	(*)
Mechanical Products Manufacturing	(*)	(*)	(*)	
Nonferrous Metals Manufacturing	(*)	(*)	(*)	(*)
Ore Mining	(*)	(*)	(*)	(*)
Organic Chemicals Manufacturing	(*)	(*)	(*)	(*)
Paint and Ink Formulation	(*)	(*)	(*)	(*)
Pesticides	(*)	(*)	(*)	(*)
Petroleum Refining	(*)	(*)	(*)	(*)
Pharmaceutical Preparations	(*)	(*)	(*)	
Photographic Equipment and Supplies	(*)	(*)	(*)	(*)
Plastic and Synthetic Materials Manufacturing	(*)	(*)	(*)	(*)
Plastic Processing	(*)			
Porcelain Enameling	(*)		(*)	(*)
Printing and Publishing	(*)	(*)	(*)	(*)
Pulp and Paper Mills	(*)	(*)	(*)	(*)
Rubber Processing	(*)	(*)	(*)	
Soap and Detergent Manufacturing	(*)	(*)	(*)	
Steam Electric Power Plants	(*)	(*)	(*)	
Textile Mills	(*)	(*)	(*)	(*)
Timber Products Processing	(*)	(*)	(*)	(*)

[1] The toxic pollutants in each fraction are listed in Table II.
[*] Testing required.

Table II *Organic Toxic Pollutants in Each of Four Fractions in Analysis by Gas Chromatography/Mass Spectroscopy (GC/MS).*

Volatiles

1V acrolein
2V acrylonitrile
3V benzene
4V bis (chloromethyl) ether
5V bromoform
6V carbon tetrachloride
7V chlorobenzene
8V chlorodibromomethane
9V chloroethane
10V 2-chloroethylvinyl ether
11V chloroform
12V dichlorobromomethane
13V dichlorodifluoromethane
14V 1,1-dichloroethane
15V 1,2-dichloroethane
16V 1,1-dichloroethylene
17V 1,2-dichloropropane
18V 1,2-dichloropropylene
19V ethylbenzene
20V methyl bromide
21V methyl chloride
22V methylene chloride
23V 1,1,2,2-tetrachloroethane
24V tetrachloroethylene
25V toluene
26V 1,2-trans-dichloroethylene
27V 1,1,1-trichloroethane
28V 1,1,2-trichloroethane
29V trichloroethylene
30V trichlorofluoromethane
31V vinyl chloride

Acid Compounds

1A 2-chlorophenol
2A 2,4-dichlorophenol
3A 2,4-dimethylphenol
4A 4,6-dinitro-o-cresol
5A 2,4-dinitrophenol
6A 2-nitrophenol
7A 4-nitrophenol
8A p-chloro-m-cresol
9A pentachlorophenol
10A phenol
11A 2,4,6-trichlorophenol

Base/Neutral

1B acenaphthene
2B acenaphthylene
3B anthracene
4B benzidine
5B benzo(a)anthracene
6B benzo(a)pyrene
7B 3,4-benzofluoranthene
8B benzo(ghi)perylene
9B benzo(k)fluoranthene
10B bis(2-chloroethoxy)methane
11B bis(2-chloroethyl)ether
12B bis(2-chloroisopropyl)ether
13B bis(2-ethylhexyl)phthalate
14B 4-bromophenyl phenyl ether
15B butylbenzyl phthalate
16B 2-chloronaphthalene
17B 4-chlorophenyl phenyl ether
18B chrysene
19B dibenzo(a,h)anthracene
20B 1,2-dichlorobenzene
21B 1,3-dichlorobenzene
22B 1,4-dichlorobenzene
23B 3,3'-dichlorobenzidine
24B diethyl phthalate
25B dimethyl phthalate
26B di-n-butyl phthalate
27B 2,4-dinitrotoluene
28B 2,6-dinitrotoluene
29B di-n-octyl phthalate
30B 1,2-diphenylhydrazine (as azobenzene)
31B fluoranthene
32B fluorene
33B hexachlorobenzene
34B hexachlorobutadiene
35B hexachlorocyclopentadiene
36B hexachloroethane
37B indeno(1,2,3-cd)pyrene
38B isophorone
39B naphthalene
40B nitrobenzene
41B N-nitrosodimethylamine
42B N-nitrosodi-n-propylamine
43B N-nitrosodiphenylamine
44B phenanthrene
45B pyrene
46B 1,2,4-trichlorobenzene

Pesticides

1P aldrin
2P α-BHC
3P β-BHC
4P γ-BHC
5P δ-BHC
6P chlordane
7P 4,4'-DDT
8P 4,4'-DDE
9P 4,4'-DDD
10P dieldrin
11P α-endosulfan
12P β-endosulfan
13P endosulfan sulfate
14P endrin
15P endrin aldehyde
16P heptachlor
17P heptachlor epoxide
18P PCB-1242
19P PCB-1254
20P PCB-1221
21P PCB-1232
22P PCB-1248
23P PCB-1260
24P PCB-1016
25P toxaphene

Table III *Other Toxic Pollutants: Metals, Cyanide, and Total Phenols.*

Antimony, Total
Arsenic, Total
Beryllium, Total
Cadmium, Total
Chromium, Total
Copper, Total
Lead, Total
Mercury, Total
Nickel, Total
Selenium, Total
Silver, Total
Thallium, Total
Zinc, Total
Cyanide, Total
Phenols, Total

Table IV *Conventional and Nonconventional Pollutants Required to be Tested by Existing Dischargers if Expected to be Present.*

Bromide
Chlorine, Total Residual
Color
Fecal Coliform
Fluoride
Nitrate-Nitrite
Nitrogen, Total Organic
Oil and Grease
Phosphorus, Total
Radioactivity
Sulfate
Sulfide
Sulfite
Surfactants
Aluminum, Total
Barium, Total
Boron, Total
Cobalt, Total
Iron, Total
Magnesium, Total
Molybdenum, Total
Manganese, Total
Tin, Total
Titanium, Total

Table V *Toxic Pollutants and Hazardous Substances Required to be Identified by Existing Dischargers if Expected to be Present.*

Toxic Pollutants

Asbestos

Hazardous Substances

Acetaldehyde
Allyl alcohol
Allyl chloride
Amyl acetate
Aniline
Benzonitrile
Benzyl chloride
Butyl acetate
Butylamine
Captan
Carbaryl
Carbofuran
Carbon disulfide
Chlorpyrifos
Coumaphos
Cresol
Crotonaldehyde
Cyclohexane
2,4-D (2,4-Dichlorophenoxy acetic acid)
Diazinon
Dicamba
Dichlobenil
Dichlone
2,2-Dichloropropionic acid
Dichlorvos
Diethyl amine
Dimethyl amine
Dintrobenzene
Diquat
Disulfoton
Diuron
Epichlorohydrin
Ethanolamine
Ethion
Ethylene diamine
Ethylene dibromide
Formaldehyde
Furfural
Guthion
Isoprene
Isopropanolamine
Kelthane
Kepone
Malathion
Mercaptodimethur
Methoxychlor
Methyl mercaptan
Methyl methacrylate
Methyl parathion
Mevinphos
Mexacarbate
Monoethyl amine
Monomethyl amine
Naled
Napthenic acid
Nitrotoluene
Parathion
Phenolsulfanate
Phosgene
Propargite
Propylene oxide
Pyrethrins
Quinoline
Resorcinol
Strontium
Strychnine
Styrene
2,4,5-T (2,4,5-Trichloropbenoxy acetic acid)
TDE (Tetrachlorodiphenylethane)
2,4,5-TP [2-(2,4,5-Trichlorophenoxy) propanoic acid]
Trichlorofon
Triethylamine
Trimethylamine
Uranium
Vanadium
Vinyl Acetate
Xylene
Xylenol
Zirconium

PART 123—STATE PROGRAM REQUIREMENTS

Subpart A—General Program Requirements

Subpart B—Additional Requirements for State Hazardous Waste Programs

Subpart C—Additional Requirements for State UIC 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

Subpart F—Requirements for Interim Authorization of State Hazardous Waste Programs

Authority: Resource Conservation and Recovery Act, 42 U.S.C. 6901 *et seq.;* Safe Drinking Water Act, 42 U.S.C. 300(f) *et seq.;* Clean Water Act, 33 U.S.C. 1251 *et seq.*

Subpart A—General Program Requirements

§ 123.1 Purpose and scope.

(a) This part specifies the procedures EPA will follow in approving, revising, and withdrawing State programs under the following statutes and the requirements State programs must meet to be approved by the Administrator under:

(1) Section 3006(b) (hazardous waste-final authorization) and section 3006(c) (hazardous waste-interim authorization) of RCRA;

(2) Section 1422 (underground injection control—UIC) of SDWA;

(3) Sections 318, 402, and 405 (National Pollutant Discharge Elimination System—NPDES) of CWA; and

(4) Section 404 (dredged or fill material) of CWA.

(b) Subpart A contains requirements applicable to all programs listed in paragraph (a) except hazardous waste programs operating under interim authorization. All requirements applicable to hazardous waste programs operating under interim authorization are contained in Subpart F. (References in this subpart to "programs under this Part" do not refer to hazardous waste programs operating under interim authorization.) Subpart A includes the elements which must be part of submissions to EPA for program approval, the substantive provisions which must be present in State programs for them to be approved, and the procedures EPA will follow in approving, revising, and withdrawing State programs. Subpart B contains additional requirements for States seeking final authorization under RCRA. Subpart C contains additional requirements for State UIC programs. Subpart D specifies additional requirements for State NPDES programs. Subpart E specifies additional requirements for State section 404 programs.

(c) State submissions for program approval must be made in accordance with the procedures set out in Subpart A and, in the case of State 404 programs with the procedures set out in Subpart E. (Submissions for interim authorization shall be made in accordance with Subpart F.) This includes developing and submitting to EPA a program description (§ 123.4), an Attorney General's statement (§ 123.5), a Memorandum of Agreement with the Regional Administrator (§ 123.6) and with the Secretary in the case of section 404 programs (§ 123.99).

(d) The substantive provisions which must be included in State programs for them to be approved include requirements for permitting, compliance evaluation, enforcement, public participation, and sharing of information. The requirements are found both in Subpart A (§§ 123.7 to 123.11) and in the program specific subparts. Many of the requirements for State programs are made applicable to States by cross-referencing other EPA regulations. In particular, many of the provisions of Parts 122 and 124 are made applicable to States by the references contained in § 123.7.

(e) Upon submission of a complete program, EPA will conduct a public hearing, if interest is shown, and determine whether to approve or disapprove the program taking into consideration the requirements of this Part, the appropriate Act and any comments received.

(f) The Administrator shall approve State programs which conform to the applicable requirements of this Part.

(g) 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.

(h) Any State program approved by the Administrator shall at all times be conducted in accordance with the requirements of this Part.

(i) States are encouraged to consolidate their permitting activities. While approval of State programs under this Part will facilitate such consolidation, these regulations do not require consolidation. Each of the four programs under this Part may be applied for and approved separately.

(j) Partial State programs are not allowed under NPDES, 404, or RCRA (for programs operating under final authorization). However, in many cases States will lack authority to regulate activities on Indian lands. This lack of authority does not impair a State's ability to obtain full program approval in accordance with this Part, i.e., inability 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), when the State program is unable to regulate activities on Indian lands within the State. EPA, or in the case of section 404 programs the Secretary, will administer the program on Indian lands if the State does not seek this authority.

[Note.—States are advised to contact the United States Department of the Interior, Bureau of Indian Affairs, concerning authority over Indian lands.]

(k) Except as provided in § 123.32, 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. Where an approved State program has a greater scope of coverage than required by Federal law the additional coverage is not part of the Federally approved program.

[Note.—For example, when a State requires permits for discharges into publicly owned treatment works, these permits are not NPDES permits. Also, State assumption of the section 404 program is limited to certain waters, as provided in § 123.91(c). The Federal program operated by the Corps of Engineers continues to apply to the remaining waters in the State even after program approval. However, this does not restrict States from regulating discharges of dredged or fill materials into those waters over which the Secretary retains section 404 jurisdiction.]

§ 123.2 Definitions.

The definitions in Part 122 apply to all subparts of this Part, including Subpart F.

§ 123.3 Elements of a program submission.

(a) Any State that seeks to administer a program under this Part shall submit to the Administrator at least three copies of a program submission. The submission shall contain the following:

(1) A letter from the Governor of the State requesting program approval;

(2) A complete program description, as required by § 123.4, describing how the State intends to carry out its responsibilities under this Part;

(3) An Attorney General's statement as required by § 123.5;

(4) A Memorandum of Agreement with the Regional Administrator as required by § 123.6, and, in the case of State section 404 programs, a Memorandum of Agreement with the Secretary as required by § 123.99;

(5) Copies of all applicable State statutes and regulations, including those governing State administrative procedures;

(6) The showing required by § 123.39(c) (RCRA programs only) and § 123.54(b) (UIC programs only) of the State's public participation activities prior to program submission.

(b) Within 30 days of receipt by EPA of a State program submission, EPA will notify the State whether its submission is complete. If EPA finds that a State's submission is complete, the statutory review period (i.e., the period of time allotted for formal EPA review of a proposed State program under the appropriate Act) shall be deemed to have begun on the date of receipt of the State's submission. If EPA finds that a State's submission is incomplete, the statutory review period shall not begin until all the necessary information is received by EPA.

(c) If the State's submission is materially changed during the statutory review period, the statutory review period shall begin again upon receipt of the revised submission.

(d) The State and EPA may extend the statutory review period by agreement.

§ 123.4 Program description.

Any State that seeks to administer a program under this part shall submit a description of the program it proposes to administer in lieu of the Federal program under State law or under an interstate compact. The program description shall include:

(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, each agency must have statewide jurisdiction over a class of activities. The responsibilities of each agency must be delineated, their procedures for coordination set forth, and an agency may be designated as a "lead agency" to facilitate communications between EPA and the State agencies having program responsibility. In the case of State RCRA programs, such a designation is mandatory (see paragraph (f)(4) of this section). When 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 carry out the State program, including the number, occupations, and general duties of the employees. The State need not submit complete job descriptions for every employee carrying out the State program.

(2) An itemization of the estimated costs of establishing and administering the program for the first two years after approval, including cost of the personnel listed in paragraph (b)(1) of this section, cost of administrative support, and cost of technical support.

(3) An itemization of the sources and amounts of funding, including an estimate of Federal grant money, available to the State Director for the first two years after approval to meet the costs listed in paragraph (b)(2) of this section, identifying any restrictions or limitations upon this funding.

(c) A description of applicable State procedures, including permitting procedures and any State administrative or judicial review procedures.

(d) Copies of the permit form(s), application form(s), reporting form(s), and manifest format the State intends to employ in its program. Forms used by States need not be identical to the forms used by EPA but should require the same basic information, except that State NPDES programs are required to use standard Discharge Monitoring Reports (DMR). The State need not provide copies of uniform national forms it intends to use but should note its intention to use such forms. State section 404 application forms must include the information required by § 123.94 and State section 404 permit forms must include the information and conditions required by § 123.97.

[Note.—States are encouraged to use uniform national forms established by the

Administrator. If uniform national forms are used, they may be modified to include the State Agency's name, address, logo, and other similar information, as appropriate, in place of EPA's.]

(e) A complete description of the State's compliance tracking and enforcement program.

(f) *State RCRA programs only.* In the case of State RCRA programs, the program description shall also include:

(1) A description of the State manifest tracking system, and of the procedures the State will use to coordinate information with other approved State programs and the Federal program regarding interstate and international shipments.

(2) An estimate of the number of the following:

(i) Generators;

(ii) Transporters: and

(iii) On- and off-site storage, treatment and disposal facilities, and a brief description of the types of facilities and an indication of the permit status of these facilities.

(3) If available, an estimate of the annual quantities of hazardous wastes:

(i) Generated within the State;

(ii) Transporters; and

State; and

(iii) Stored, treated, or disposed of within the State:

(A) on-site; and

(B) off-site.

(4) When 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.

(g) *State UIC programs only.* In the case of a submission for approval of a State UIC program the State's program description shall also include:

(1) A schedule for issuing permits within five years after program approval to all injection wells within the State which are required to have permits under this Part and Part 122;

(2) The priorities (according to criteria set forth in 40 CFR § 146.09) for issuing permits, including the number of permits in each class of injection well which will be issued each year during the first five years of program operation;

(3) A description of how the Director will implement the mechanical integrity testing requirements of 40 CFR § 146.08, including the frequency of testing that will be required and the number of tests that will be reviewed by the Director each year;

(4) A description of the procedure whereby the Director will notify owners and operators of injection wells of the requirement that they apply for and obtain a permit. The notification required by this paragraph shall require applications to be filed as soon as possible, but not later than four years after program approval for all injection wells requiring a permit;

(5) A description of any rule under which the Director proposes to authorize injections, including the text of the rule;

(6) For any existing enhanced recovery and hydrocarbon storage wells which the Director proposes to authorize by rule, a description of the procedure for reviewing the wells for compliance with applicable monitoring, reporting, construction, and financial responsibility requirements of §§ 122.41 and 122.42, and 40 CFR Part 146;

(7) A description of and schedule for the State's program to establish and maintain a current inventory of injection wells which must be permitted under State law;

(8) Where the Director has designated underground sources of drinking water in accordance with § 122.35(a), a description and identification of all such designated sources in the State;

(9) A description of aquifers, or parts thereof, which the Director has identified under § 122.35(b) as exempted aquifers, and a summary of supporting data;

(10) A description of and schedule for the State's program to ban Class IV wells prohibited under § 122.36; and

(11) A description of and schedule for the State's program to establish an inventory of Class V wells and to assess the need for a program to regulate Class V wells.

(h) *State 404 programs only.* In the case of a submission for approval of a section 404 program the State's program description shall also include:

(1) A description of State regulated waters.

[Note.—States should obtain from the Secretary an identification of those waters of the U.S. within the State over which the Corps of Engineers retains authority under section 404(g) of CWA.]

(2) A categorization, by type and quantity, of discharges within the State, and an estimate of the number of discharges within each category for which the discharger must file for a permit.

(3) An estimate of the number and percent of activities within each category for which the State has already issued a State permit regulating the discharge.

(4) In accordance with § 123.92(a)(6), a description of 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.

(5) A description of how the State section 404 agency(ies) will interact with other State and local agencies.

(6) A description of how the State will coordinate its enforcement strategy with that of the Corps of Engineers and EPA.

(7) Where more than one agency within a State has responsibility for administering the State program:

(i) A memorandum of understanding among all the responsible State agencies which establishes:

(A) Procedures for obtaining and exchanging information necessary for each agency to determine and assess the cumulative impacts of all activities authorized under the State program;

(B) Common reporting requirements; and

(C) Any other appropriate procedures not inconsistent with section 404 of CWA or these regulations;

(ii) A description of procedures for coordinating compliance monitoring and enforcement, distributing among the responsible agencies information received from applicants and permittees, and issuing reports required by section 404 of CWA or these regulations.

(8) Where several State 404 permits are required for a single project, a description of procedures for:

(i) Ensuring that all the necessary State 404 permits are issued before any of the permits go into effect; and

(ii) Concurrent processing and, where appropriate, joint processing of all of the necessary State 404 permits.

§ 123.5 Attorney General's statement.

(a) Any State that seeks to administer a program under 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 an 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 the specific statutes, administrative regulations, and, where appropriate, judicial decisions which demonstrate adequate authority. State statutes and regulations cited by the State Attorney General or independent legal counsel shall be in the form of lawfully adopted State statutes and regulations at the time the statement is signed and shall be fully effective by the time the program is approved. 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.

[Note.—EPA will supply States with an Attorney General's statement format on request.]

(b) When a State seeks authority over activities on Indian lands, the statement shall contain an appropriate analysis of the State's authority.

(c) *State NPDES programs only.* In the case of State NPDES programs, the Attorney General's statement shall certify that the State has adequate legal authority to issue and enforce general permits if the State seeks to implement the general permit program under § 122.59.

(d) *State section 404 programs only.*

(1) In the case of State section 404 programs the State Attorney General's statement shall contain an analysis of State law regarding the prohibition on taking private property without just compensation, including any applicable judicial interpretations, and an assessment of the effect such law will have on the successful implementation of the State's regulation of the discharge of dredged or fill material.

(2) In the case of State section 404 programs, where more than one agency has responsibility for administering the State program, the Attorney General's Statement shall include certification that each agency has full authority to administer the program within its category of jurisdiction and that the State as a whole has full authority to administer a complete State section 404 program.

§ 123.6 Memorandum of Agreement with the Regional Administrator.

(a) Any State that seeks to administer a program under this Part shall submit a Memorandum of Agreement. The Memorandum of Agreement shall be executed by the State Director and the Regional Administrator and shall become effective when approved by the Administrator. In addition to meeting the requirements of paragraph (b) of this section, the Memorandum of Agreement may include other terms, conditions, or agreements consistent with this Part and relevant to the administration and enforcement of the State's regulatory program. The Administrator shall not approve any Memorandum of Agreement which contains provisions which restrict EPA's statutory oversight responsibility.

(b) The Memorandum of Agreement shall include the following:

(1) Provisions for the prompt transfer from EPA to the State of pending permit applications and any other information relevant to program operation not already in the possession of the State Director (e.g., support files for permit issuance, compliance reports, etc.). When existing permits are transferred from EPA to the State for administration, the Memorandum of Agreement shall contain provisions specifying a procedure for transferring the administration of these permits. If a State lacks the authority to directly administer permits issued by the Federal government, a procedure may be established to transfer responsibility for these permits.

[Note.—For example, EPA and the State and the permittee could agree that the State would issue a permit(s) identical to the outstanding Federal permit which would simultaneously be terminated.]

(2) Provisions specifying classes and categories of permit applications, draft permits, and proposed permits that the State will send to the Regional Administrator for review, comment and, where applicable, objection.

[Note.—The nature and basis of EPA review of State permits and permit applications differs among the programs governed by this Part. See §§ 123.38 (RCRA), 123.75 (NPDES) and 123.101 (404).]

(3) Provisions specifying the frequency and content of reports, documents and other information which the State is required to submit to EPA. The State shall allow EPA to routinely review State records, reports, and files relevant to the administration and enforcement of the approved program. State reports may be combined with grant reports where appropriate. These procedures shall implement the requirements of § 123.74 (NPDES programs only) and § 123.100 (404 programs only).

(4) Provisions on the State's compliance monitoring and enforcement program, including:

(i) Provisions for coordination of compliance monitoring activities by the State and by EPA. These may specify the basis on which the Regional Administrator will select facilities or activities within the State for EPA inspection. The Regional Administrator will normally notify the State at least 7 days before any such inspection; and

(ii) Procedures to assure coordination of enforcement activities.

(5) When 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. See § 124.4.

[Note.—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 (but not required) to consider steps to coordinate or consolidate their own permit programs and activities.]

(6) Provisions for modification of the Memorandum of Agreement in accordance with this Part.

(c) The Memorandum of Agreement, the annual program grant 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 through the procedures set forth in this part. The State/EPA Agreement may not override the Memorandum of Agreement.

[Note.—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. However, 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.]

(d) *State RCRA prorgrams only.* In the case of State RCRA programs the Memorandum of Agreement shall also provide that:

(1) EPA may conduct compliance inspections of all generators, transporters, and HWM facilities in each year for which the State is operating under final authorization. The Regional Administrator and the State Director may agree to limitations on compliance inspections of generators, transporters, and non-major HWM facilities.

(2) No limitations on EPA compliance inspections of generators, transporters, or non-major HWM facilities under paragraph (d)(1) of this section shall restrict EPA's right to inspect any generator, transporter, or HWM facility which it has cause to believe is not in compliance with RCRA; however, before conducting such an inspection, EPA will normally allow the State a reasonable opportunity to conduct a compliance evaluation inspection.

(3) The State Director shall promptly forward to EPA 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 of and comment on draft permits and/or permit applications for non-major HWM facilities. The State Director shall supply EPA copies of final permits for all major HWM facilities.

(4) The Regional Administrator shall promptly forward to the State Director information obtained prior to program approval in notifications provided under

section 3010(a) of RCRA. The Regional Administrator and the State Director shall agree on procedures for the assignment of EPA identification numbers for new generators, transporters, treatment, storage, and disposal facilities.

(5) The State Director shall review all permits issued under State law prior to the date of program approval and modify or revoke and reissue them to require compliance with the requirements of this Part. The Regional Administrator and the State Director shall establish a time within which this review must take place.

(e) *State NPDES programs only.* In the case of State NPDES programs the Memorandum of Agreement shall also specify the extent to which EPA will waive its right to review, object to, or comment upon State-issued permits 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" of permits, no waiver of review may be granted for the following discharges:

(1) Discharges into the territorial sea;

(2) Discharges which may affect the waters of a State other than the one in which the discharge originates;

(3) Discharges proposed to be regulated by general permits (see § 122.59);

(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 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 of non-process wastewater may be waived regardless of flow.

(f) *State section 404 programs only.* (1) In the case of State section 404 programs, the Memorandum of Agreement with the Regional Administrator shall also specify:

(i) The categories (including any class, type, or size within such categories) of discharges for which EPA will waive review of State-issued permit applications, draft permits, and draft general permits. While the Regional Administrators 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:

(A) Discharges which may affect the waters of a State other than the one in which the discharge originates;

(B) Major discharges;

(C) Discharges into critical areas established under State or Federal law including fish and wildlife sanctuaries or refuges, National and historical monuments, wilderness areas and preserves, National and State parks, components of the National Wild and Scenic Rivers system, the designated critical habitat of threatened or endangered species, and sites identified or proposed under the National Historic Preservation Act;

(D) Discharges proposed to be regulated by general permits; or

(E) Discharges known or suspected to contain toxic pollutants in toxic amounts under section 307(a)(1) of CWA or hazardous substances in reportable quantities under section 311 of CWA.

(ii) A definition of major discharges.

(2) In the case of State section 404 programs, where more than one agency within a State has responsibility for administering the program, all of the responsible agencies shall be parties to the Memorandum of Agreement.

(g) *State NPDES and Section 404 programs only.* Whenever a waiver is granted under paragraphs (e) or (f)(1) of this section, the Memorandum of Agreement shall contain:

(1) A statement that the Regional Administrator retains the right to terminate the waiver as to future permit actions, in whole or in part, at any time by sending the State Director written notice of termination; and

(2) A statement that the State shall supply EPA and, in the case of State section 404 programs, the Corps of Engineers, the U.S. Fish and Wildlife Service, and the National Marine Fisheries Servcie (unless receipt is waived in writing), with copies of final permits.

§ 123.7 Requirements for permitting.

(a) All State programs under this Part must have legal authority to implement each of the following provisions and must be administered in conformance with each; except that States are not precluded from omitting or modifying any provisions to impose more stringent requirements:

(1) § 122.4—(Application for a permit), except in the case of § 122.4(d) for State section 404 programs;

(2) § 122.6—(Signatories);

(3) § 122.7—(Applicable permit conditions);

(4) § 122.8—(Establishing permit conditions);

(5) § 122.9—(Duration);

(6) § 122.10(a)—(Schedules of compliance);

(7) § 122.11—(Monitoring requirements);

(8) § 122.13 (a) and (b)—(Effect of permit);

(9) § 122.14—(Permit transfer);

(10) § 122.15—(Permit modification);

(11) § 122.16—(Permit termination);

(12) § 122.18—(Noncompliance reporting);

(13) § 122.19 (b)-(d)—(Confidential information);

(14) § 124.3(a)—(Application for a permit);

(15) § 124.5 (a), (c), (d), and (f)—(Modification of permits), except as provided in § 123.100(b)(2) for State section 404 programs;

(16) § 124.6 (a), (c), (d), and (e)—(Draft permit), except as provided in § 123.100(b)(2) for State section 404 programs;

(17) § 124.8—(Fact sheets), except as provided in § 123.100(b)(2) for State section 404 programs;

(18) § 124.10 (a)(1)(ii), (a)(1)(iii), (a)(1)(v), (b), (c), (d), and (e)—(Public notice);

(19) § 124.11—(Public comments and requests for hearings);

(20) § 124.12(a)—(Public hearings); and

(21) § 124.17 (a) and (c)—(Response to comments).

[Note.—States need not implement provisions identical to the above listed provisions or the provisions listed in §§ 123.7 (b)-(d). Implemented provisions must, however, establish requirements at least as stringent as the corresponding listed provisions. While States may impose more stringent requirements, they may not make one requirement more lenient as a tradeoff for making another requirement more stringent; for example, by requiring that public hearings be held prior to issuing any permit while reducing the amount of advance notice of such a hearing.

State programs may, if they have adequate legal authority, implement any of the provisions of Parts 122 and 124. See, for example, § 122.5(d) (continuation of permits) and § 124.4 (consolidation of permit processing).

(b) *State RCRA programs only.* Any State hazardous waste program shall have legal authority to implement each of the following provisions and must be administered in conformance with each, except that States are not precluded from omitting or modifying any provisions to impose more stringent requirements:

(1) § 122.21(d)(2)—(Specific inclusions);

(2) § 122.22—(Application for a permit);
(3) § 122.24—(Contents of Part A);
(4) § 122.25—(Contents of Part B);

[Note.—States need not use a two part permit application process. The State application process must, however, require information in sufficient detail to satisfy the requirements of §§ 122.24 and 122.25.]

(5) § 122.26—(Permit by rule);
(6) § 122.27—(Emergency permits);
(7) § 122.28—(Additional permit conditions);
(8) § 122.29—(Establishing permit conditions); and
(9) § 122.30—(Interim permits for UIC wells).

(c) *State UIC programs only.* State UIC programs shall have legal authority to implement each of the following provisions and must be administered in conformance with each; except that States are not precluded from omitting or modifying any provisions to impose more stringent requirements:
(1) § 122.32—(Classification of injection wells);
(2) § 122.33—(Prohibition of unauthorized injection);
(3) § 122.34—(Prohibition of movement of fluids into underground sources of drinking water);
(4) § 122.35—(Identification of underground sources of drinking water and exempted aquifers);
(5) § 122.36—(Elimination of Class IV wells);
(6) § 122.37—(Authorization by rule);
(7) § 122.38—(Authorization by permit);
(8) § 122.39—(Area permits);
(9) § 122.41—(Additional permit conditions);
(10) § 122.42—(Establishing permit conditions);
(11) § 122.44—(Corrective action); and
(12) § 122.45—(Requirements for wells managing hazardous wastes).

(d) *State NPDES programs only.* State NPDES programs shall have legal authority to implement each of the following provisions and must be administered in conformance with each; except that States are not precluded from omitting or modifying any provisions to impose more stringent requirements:
(1) § 122.52—(Prohibitions);
(2) § 122.53 (a), (d)–(g) and (i)–(k)—(Application for a permit);
(3) § 122.54—(Concentrated animal feeding operations);
(4) § 122.55—(Concentrated aquatic animal production facilities);
(5) § 122.56—(Aquaculture projects);
(6) § 122.57—(Separate storm sewers);
(7) § 122.58—(Silviculture);
(8) § 122.59—(General permits), *provided that* States which do not seek to implement the general permit program under § 122.59 need not do so;
(9) § 122.60—(Conditions applicable to all permits);
(10) § 122.61—(Conditions applicable to specified categories of permits);
(11) § 122.62—(Establishing permit conditions);
(12) § 122.63—(Calculating NPDES conditions);
(13) § 122.64—(Duration of permit);
(14) § 122.65—(Disposal into wells);
(15) § 124.56—(Fact sheets);
(16) § 124.57(a)—(Public notice);
(17) § 124.59—(Comments from government agencies);
(18) Subparts A, B, C, D, H, I, J, K and L of Part 125; and
(19) 40 CFR Parts 129, 133, and Subchapter N.

[Note.—For example, a State may impose more stringent requirements in an NPDES program by omitting the upset provision of § 122.60 or by requiring more prompt notice of an upset.]

(e) *State NPDES and 404 programs only.* (1) State NPDES and 404 permit programs shall have an approved continuing planning process under 40 CFR § 35.1500 and shall assure that the approved planning process is at all times consistent with CWA.

(2) State NPDES and 404 programs 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.

(i) For the purposes of this paragraph:

(A) "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.

(B) "Significant portion of income" means 10 percent or more of gross personal income for a calendar year, except that it means 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.

(C) "Permit holders or applicants for a permit" does not include any department or agency of a State government, such as a Department of Parks or a Department of Fish and Wildlife.

(D) "Income" includes retirement benefits, consultant fees, and stock dividends.

(ii) For the purposes of this subparagraph, income is not received "directly or indirectly from permit holders or applicants for a permit" when it is derived from mutual fund payments, or from other diversified investments for which the recipient does not know the identity of the primary sources of income.

§ 123.8 Requirements for compliance evaluation programs.

(a) State programs shall have procedures for receipt, evaluation, retention and investigation for possible enforcement of all notices and reports required of permittees and other regulated persons (and for investigation for possible enforcement of failure to submit these notices and reports).

(b) State programs shall have inspection and surveillance procedures to determine, independent of information supplied by regulated persons, compliance or noncompliance with applicable program requirements. The State shall maintain:

(1) A program which is capable of making comprehensive surveys of all facilities and activities subject to the State Director's authority to identify persons subject to regulation who have failed to comply with permit application or other program requirements. Any compilation, index, or inventory of such facilities and activities shall be made available to the Regional Administrator upon request;

(2) A program for periodic inspections of the facilities and activities subject to regulation. These inspections shall be conducted in a manner designed to:

(i) Determine compliance or noncompliance with issued permit conditions and other program requirements;

(ii) Verify the accuracy of information submitted by permittees and other regulated persons in reporting forms and other forms supplying monitoring data; and

(iii) Verify the adequacy of sampling, monitoring, and other methods used by permittees and other regulated persons to develop that information;

(3) A program for investigating information obtained regarding violations of applicable program and permit requirements; and

(4) Procedures for receiving and ensuring proper consideration of information 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 Director and State officers engaged in compliance evaluation shall have authority to enter any site or premises subject to

regulation or in which records relevant to program operation are kept in order to copy any records, inspect, monitor or otherwise investigate compliance with the State program including compliance with permit conditions and other program requirements. States whose law requires a search warrant before 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.

(e) *State NPDES programs only.* State NPDES compliance evaluation programs shall have procedures and ability for:

(1) Maintaining a comprehensive inventory of all sources covered by NPDES permits and a schedule of reports required to be submitted by permittees 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 priorities for further substantive technical evaluation;

(3) When warranted, conducting a substantive technical evaluation following the initial screening of all permit or grant-related compliance information to determine the appropriate agency response;

(4) Maintaining a management information system which supports the compliance evaluation activities of this Part; and

(5) Inspecting the facilities of all major dischargers at least annually.

§ 123.9 Requirements for enforcement authority.

(a) Any State agency administering a program shall have available the following remedies for violations of State program requirements:

(1) To restrain immediately and effectively any person by order or by suit in State court from engaging in any unauthorized activity which is endangering or causing damage to public health or the environment;

[Note.—This paragraph requires that States have a mechanism (e.g., an administrative cease and desist order or the ability to seek a temporary restraining order) to stop any unauthorized activity endangering 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 conditions, without the necessity of a prior revocation of the permit;

(3) To assess or sue to recover in court civil penalties and to seek criminal remedies, including fines, as follows:

(i) *State RCRA programs only.* (A) Civil penalties shall be recoverable for any program violation in at least the amount of $10,000 per day.

(B) Criminal remedies shall be obtainable against any person who knowingly transports any hazardous waste to an unpermitted facility; who treats, stores, or disposes of hazardous waste without a permit; or who makes any false statement or representation in any application, label, manifest, record, report, permit or other document filed, maintained, or used for purposes of program compliance. Criminal fines shall be recoverable in at least the amount of $10,000 per day for each violation, and imprisonment for at least six months shall be available.

(ii) *State UIC programs only.* (A) For all wells except Class II wells, civil penalties shall be recoverable for any program violation in at least the amount of $2,500 per day. For Class II wells, civil penalties shall be recoverable for any program violation in at least the amount of $1,000 per day.

(B) Criminal fines shall be recoverable in at least the amount of $5,000 per day against any person who willfully violates any program requirement, or, for Class II wells, pipeline (production) severance shall be imposable against any person who willfully violates any program requirement.

(iii) *State NPDES and section 404 programs only.* (A) Civil penalties shall be recoverable for the violation of any NPDES or section 404 permit condition; any NPDES or section 404 filing requirement; any duty to allow or carry out inspection, entry or monitoring activities; or any regulation or orders issued by the State Director. Such penalties shall be assessable in at least the amount of $5,000 per day for each violation.

(B) Criminal fines shall be recoverable against any person who willfully or negligently violates any applicable standards or limitations; any NPDES or section 404 permit condition; or any NPDES or section 404 filing requirement. Such fines shall be assessable in at least the amount of $10,000 per day for each violation.

[Note.—States which provide criminal remedies based on "criminal negligence," "gross negligence" or strict liability satisfy the requirement of paragraph (a)(3)(iii)(B) of this section.]

(C) Criminal fines shall be recoverable against any person who knowingly makes any false statement, representation or certification in any NPDES or section 404 form, in any notice or report required by an NPDES or section 404 permit, or who knowingly renders inaccurate any moitoring device or method required to be maintained by the Director. Such fines shall be recoverable in at least the amount of $5,000 for each instance of violation.

[Note.—In many States the State Director will be represented in State courts by the State Attorney General or other appropriate legal officer. Although the State Director need not appear in court actions he or she should have power to request that any of the above actions be brought.]

(b)(1) The maximum civil penalty or criminal fine (as provided in paragraph (a)(3) of this section) 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.

(2) The burden of proof and degree of knowledge or intent required under State law for establishing violations under paragraph (a)(3) of this section, 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.

[Note.—For example, this requirement is not met if State law includes mental state as an element of proof for civil violations.]

(c) Any civil penalty assessed, sought or agreed upon by the State Director under paragraph (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. If such 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 warrant. In the case of a penalty for a 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, defiance, or indifference to requirements of the law; plus

(4) An amount appropriate to recover unusual or extraordinary enforcement costs thrust upon the public; minus

(5) An amount, if any, appropriate to reflect any part of the noncompliance attributable to the government itself; 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).

[Note.—In addition to the requirements of this paragraph, the State may have other enforcement remedies. The following enforcement options, while not mandatory, are highly recommended:

Procedures for assessment by the State of the costs of investigations, inspections, or monitoring surveys which lead to the establishment of violations;

Procedures which enable the State to assess or to sue any persons responsible for unauthorized activities for any expenses incurred by the State in removing, correcting, or terminating any adverse effects upon human health and the environment resulting from the unauthorized activity, whether or not accidental;

Procedures which enable the State to sue for compensation for any loss or destruction of wildlife, fish or aquatic life, or their habitat, and for any other damages caused by unauthorized activity, either to the State or to any residents of the State who are directly aggrieved by the unauthorized activity, or both; and

Procedures for the administrative assessment of penalties by the Director.]

(d) Any State administering a program shall provide for public participation in the State enforcement process by providing either:

(1) Authority which allows intervention as of right in any civil or administrative action to obtain remedies specified in paragraphs (a) (1), (2) or (3) of this section by any citizen having an interest which is or may be adversely affected; or

(2) Assurance that the State agency or enforcement authority will:

(i) Investigate and provide written responses to all citizen complaints submitted pursuant to the procedures specified in § 123.8(b)(4);

(ii) Not oppose intervention by any citizen when permissive intervention may be authorized by statute, rule, or regulation; and

(iii) Publish notice of and provide at least 30 days for public comment on any proposed settlement of a State enforcement action.

§ 123.10 Sharing of information.

(a) Any information obtained or used in the administration of 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 section. 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 shall furnish to States with approved programs the information in its files not submitted under a claim of confidentiality which the State needs to implement its approved program. EPA shall furnish to States with approved programs information submitted to EPA under a claim of confidentiality, which the State needs to implement its approved program, subject to the conditions in 40 CFR Part 2.

§ 123.11 Coordination with other programs.

(a) Issuance of State permits under this Part may be coordinated with issuance of RCRA, UIC, NPDES, and 404 permits whether they are controlled by the State, EPA, or the Corps of Engineers. See § 124.4.

(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 (40 CFR Part 255) as responsible for the development and implementation of State solid waste management plans under section 4002(b) of RCRA (40 CFR Part 256).

§ 123.12 Approval process.

The process for EPA approval of State programs is set out in §§ 123.39 (RCRA), 123.54 (UIC), 123.77 (NPDES), and 123.104 (404).

§ 123.13 Procedures for revision of State programs.

(a) Either EPA or the approved State may initiate program revision. 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 EPA determines to be necessary under the circumstances.

(2) Whenever EPA determines that the proposed program revision is substantial, EPA 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 the Federal Register and in enough of the largest newspapers in the State to provide Statewide coverage. The public notice shall summarize the proposed revisions and provide for the opportunity to request a public hearing. Such a hearing will be held if there is significant public interest based on requests received.

(3) The Administrator shall approve or disapprove program revisions based on the requirements of this Part and of the appropriate Act.

(4) A program revision shall become effective upon the approval of the Administrator. Notice of approval of any substantial revision shall be published in the Federal Register. Notice of approval of non-substantial program revisions may be given by a letter from the Administrator to the State Governor or his designee.

(c) States with approved programs shall notify EPA whenever they propose to transfer all or part of any program from the approved State agency to any other State agency, and shall identify any new division of responsibilities among the agencies involved. The new agency is not authorized to administer the program until approved by the Administrator under paragraph (b) of this section. Organizational charts required under § 123.4(b) shall be revised and resubmitted.

(d) Whenever the Administrator has reason to believe that circumstances have changed with respect to a State program, he may request, and the State shall provide, a supplemental Attorney General's statement, program description, or such other documents or information as are necessary.

(e) *State RCRA programs only.* All new programs must comply with these regulations immediately upon approval. Any approved program which requires revision because of a modification to this Part or to 40 CFR Parts 122, 124, 260, 261, 262, 263, 264, 265 or 266 shall be so revised within one year of the date of promulgation of such regulation, unless a State must amend or enact a statute in order to make the required revision in which case such revision shall take place within two years.

(f) *State UIC programs only.* The State shall submit the information required under paragraph (b)(1) of this section within 270 days of any amendment to this Part or 40 CFR Parts 122, 124, or 146 which revises or adds any requirement

respecting an approved State UIC program.

(g) *State NPDES programs only.* All new programs must comply with these regulations immediately upon approval. Any approved State section 402 permit program which requires revision to conform to this Part shall be so revised within one year of the date of promulgation of these regulations, unless a State must amend or enact a statute in order to make the required revision in which case such revision shall take place within 2 years, except that revision of State programs to implement the requirements of 40 CFR Part 403 (pretreatment) shall be accomplished as provided in 40 CFR § 403.10. In addition, approved States shall submit, within 6 months, copies of their permit forms for EPA review and approval. Approved States shall also assure that permit applicants, other than POTWs, either (1) whose permits expire after November 30, 1980 or (2) whose permits expire before November 30, 1980 and who have not reapplied for a permit prior to April 30, 1980, submit, as part of their application, the information required under §§ 122.4(d) and 122.53 (d) or (e), as appropriate.

(h) *State section 404 programs only.* The Regional Administrator shall consult with the Corps of Engineers, the U.S. Fish and Wildlife Service, and the National Marine Fisheries Service regarding any substantial program revision, and shall consider their recommendations prior to approval of any such revision.

§ 123.14 Criteria for withdrawal of State programs.

(a) The Administrator may withdraw program approval when 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) When 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; or

(ii) Action by a State legislature or court striking down or limiting State authorities.

(2) When 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; or

(iii) Failure to comply with the public participation requirements of this Part.

(3) When 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 adequate enforcement penalties or to collect administrative fines when imposed; or

(iii) Failure to inspect and monitor activities subject to regulation.

(4) When the State program fails to comply with the terms of the Memorandum of Agreement required under § 123.6.

§ 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 (or the Secretary in the case of section 404 programs) (such as permits, permit files, compliance files, reports, permit applications) 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, other regulated persons 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 § 123.55.

(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 as set forth in § 123.14. The Administrator shall respond in writing to any petition to commence withdrawal proceedings. He may conduct an informal investigation of the allegations in the petition to determine whether 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 hearing under this paragraph.

(2) *Definitions.* For purposes of this paragraph the definitions of "Act," "Administrative Law Judge," "Hearing," "Hearing Clerk," and "Presiding Officer" in 40 CFR § 22.03 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 of 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 40 CFR Part 22 (Consolidated Rules of Practice) are applicable to proceedings under this paragraph:

(i) § 22.02—(use of number/gender);

(ii) § 22.04(c)—(authorities of Presiding Officer);

(iii) § 22.06—(filing/service of rulings and orders);

(iv) § 22.07(a) and (b)—*except 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) § 22.08—*however,* substitute "order commencing proceedings" for "complaint"—(Ex Parte contacts);

(vi) § 22.09—(examination of filed documents);

(vii) § 22.11(a), (c) and (d), *however,* motions to intervene must be filed within 15 days from the date the notice

of the Administrator's order is first published—(intervention);

(viii) § 22.16 *except that,* service shall be in accordance with paragraph (b)(4) of this section, the first sentence in § 22.16(c) shall be deleted, and, the word "recommended" shall be substituted for the word "initial" in § 22.16(c)—(motions);

(ix) § 22.19(a), (b) and (c)—(prehearing conference);

(x) § 22.22—(evidence);

(xi) § 22.23—(objections/offers of proof);

(xii) § 22.25—(filing the transcript); and

(xiii) § 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, and 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 in the Office of the Hearing Clerk, upon payment of costs. 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, at the discretion of the Presiding Officer, be permitted to make a limited appearance by making an oral or written statement of his/her position on the issues within such limits and on such conditions as may be fixed by the Presiding Officer, but he/she may not otherwise participate in the proceeding.

(6) *Rights of parties.* All parties to the proceeding may:

(i) Appear by counsel or other representative in all hearing and pre-hearing proceedings;

(ii) 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, and reply briefs, the Presiding Officer shall evaluate the record before him/her, 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 supporting brief.

(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 and regulations 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 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 appropriate corrective action and file a certified statement thereof within the time prescribed by the Administrator, the Administrator shall issue a supplementary order withdrawing approval of the State program. If the State takes 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, nor does it affect the validity of actions by the State prior to withdrawal.

Subpart B—Additional Requirements for State Hazardous Waste Programs

§ 123.31 Purpose and scope.

(a) This Subpart specifies additional requirements a State program must meet in order to obtain final authorization under section 3006(b) of RCRA. All of the requirements a State program must meet in order to obtain interim authorization under section 3006(c) of RCRA are specified in Subpart F.

(b) States approved under this Subpart are authorized to administer and enforce their hazardous waste program in lieu of the Federal program.

(c) States may apply for final authorization at any time after the initial promulgation of Phase II. State programs under final authorization may not take effect until the effective date of Phase II.

(d) States operating under interim authorization may apply for and receive final authorization as specified in paragraph (c) of this section. Notwithstanding approval under Subpart F, such States must meet all the requirements of Subpart A and this subpart in order to qualify for final authorization.

(e) States need not have been approved under Subpart F in order to qualify for final authorization.

§ 123.32 Consistency.

To obtain approval, a State program must be consistent with the Federal program and State programs applicable in other States and in particular must comply with the provisions below. For purposes of this section the phrase "State programs applicable in other States" refers only to those State hazardous waste programs which have received final authorization under this Part.

(a) Any aspect of the State program which unreasonably 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 authorized to operate under the Federal or an approved State program shall be deemed inconsistent.

(b) Any aspect of State law or of the State program which has no basis in human health or environmental protection and which acts as a prohibition on the treatment, storage or disposal of hazardous waste in the State may be deemed inconsistent.

(c) If the State manifest system does not meet the requirements of this Part, the State program shall be deemed inconsistent.

§ 123.33 Requirements for identification and listing of hazardous wastes.

The State program must control all the hazardous wastes controlled under 40 CFR Part 261 and must adopt a list of hazardous wastes and a set of characteristics for identifying hazardous wastes equivalent to those under 40 CFR Part 261.

§ 123.34 Requirements for generators of hazardous wastes.

(a) The State program must cover all generators covered by 40 CFR Part 262. States must require new generators to contact the State and obtain an EPA identification number before they perform any activity subject to regulation under the approved State hazardous waste program.

(b) The State shall have authority to require and shall require all generators to comply with reporting and recordkeeping requirements equivalent to those under 40 CFR §§ 262.40 and 262.41. States must require that generators keep these records at least 3 years.

(c) The State program must require that generators who accumulate hazardous wastes for short periods of time prior to shipment off-site do so in containers meeting DOT shipping requirements under 49 CFR Parts 173, 178 and 179 or accumulate such wastes in tanks in accordance with State storage standards authorized by EPA under the approved State program.

(d) The State program must require that generators comply with requirements that are equivalent to the requirements for the packaging, labeling, marking, and placarding of hazardous waste under 40 CFR §§ 262.30 to 262.33, and are consistent with relevant DOT regulations under 49 CFR Parts 172, 173, 178 and 179.

(e) The State program shall provide requirements respecting international shipments which are equivalent to those at 40 CFR § 262.50, except that advance notification of international shipments, as required by 40 CFR § 262.50(b)(1), shall be filed with the Administrator. The State may require that a copy of such advance notice be filed with the State Director, or may require equivalent reporting procedures.

[Note.—Such notices shall be mailed to Hazardous Waste Export, Division for Oceans and Regulatory Affairs (A–107), U.S. Environmental Protection Agency, Washington, D.C. 20460.]

(f) The State must require that all generators of hazardous waste who transport (or offer for transport) such hazardous waste off-site:

(1) Use a manifest system that ensures that interstate and intrastate shipments of hazardous waste are designated for delivery, and, in the case of intrastate shipments, are delivered to facilities that are authorized to operate under an approved State program or the Federal program;

(2) Initiate the manifest and designate on the manifest the storage, treatment, or disposal facility to which the waste is to be shipped;

(3) Ensure that all wastes offered for transport are accompanied by the manifest, except in the case of shipments by rail or water specified in 40 CFR §§ 262.23(c) and 263.20(e). The State program shall provide requirements for shipments by rail or water equivalent to those under 40 CFR §§ 262.23(c) and 263.20(e).

(4) Investigate instances where manifests have not been returned by the owner or operator of the designated facility and report such instances to the State in which the shipment originated.

(g) In the case of interstate shipments for which the manifest has not been returned, the State program must provide for notification to the State in which the facility designated on the manifest is located and to the State in which the shipment may have been delivered (or to EPA in the case of unauthorized States).

(h) The State must follow the Federal manifest format (40 CFR § 262.21) and may supplement the format to a limited extent subject to the consistency requirements of the Hazardous Materials Transportation Act (49 U.S.C. 1801 et seq.).

§ 123.35 Requirements for transporters of hazardous wastes.

(a) The State program must cover all transporters covered by 40 CFR Part 263. New transporters must be required to contact the State and obtain an EPA identification number from the State before they accept hazardous waste for transport.

(b) The State shall have the authority to require and shall require all transporters to comply with recordkeeping requirements equivalent to those found at 40 CFR § 263.22. States must require that records be kept at least 3 years.

(c) The State must require the transporter to carry the manifest during transport, except in the case of shipments by rail or water specified in 40 CFR § 263.20(e), and to deliver wastes only to the facility designated on the manifest. The State program shall provide requirements for shipments by rail or water equivalent to those under 40 CFR § 263.20(e).

(d) For hazardous wastes that are discharged in transit, the State program must require that transporters notify appropriate State, local, and Federal agencies of such discharges, and clean up such wastes, or take action so that such wastes do not present a hazard to human health or the environment. Those requirements shall be equivalent to those found at 40 CFR §§ 263.30 and 263.31.

§ 123.36 Requirements for hazardous waste management facilities.

The State shall have standards for hazardous waste management facilities which are equivalent to 40 CFR Parts 264 and 266. These standards shall include:

(a) Technical standards for tanks, containers, waste piles, incineration, chemical, physical and biological treatment facilities, surface impoundments, landfills, and land treatment facilities;

(b) Financial responsibility during facility operation;

(c) Preparedness for and prevention of discharges or releases of hazardous waste; contingency plans and emergency procedures to be followed in the event of a discharge or release of hazardous waste;

(d) Closure and post-closure requirements including financial requirements to ensure that money will be available for closure and post-closure monitoring and maintenance;

(e) Groundwater monitoring;

(f) Security to prevent unauthorized access to the facility;

(g) Facility personnel training;

(h) Inspections, monitoring, recordkeeping, and reporting;

(i) Compliance with the manifest system, including the requirement that facility owners or operators return a signed copy of the manifest to the generator to certify delivery of the hazardous waste shipment;

(j) Other requirements to the extent that they are included in 40 CFR Parts 264 and 266.

§ 123.37 Requirements with respect to permits and permit applications.

(a) State law must require permits for owners and operators of all hazardous waste management facilities required to obtain a permit under 40 CFR Part 122 and prohibit the operation of any hazardous waste management facility without such a permit, *except that* States may, if adequate legal authority exists, authorize owners and operators of any facility which would qualify for interim status under the Federal program to remain in operation until a final decision is made on the permit application. Where State law authorizes such continued operation it shall require compliance by owners and operators of such facilities with standards at least as stringent as EPA's interim status standards at 40 CFR Part 265.

(b) The State must require all new HWM facilities to contact the State and obtain an EPA identification number before commencing treatment, storage, or disposal of hazardous waste.

(c) All permits issued by the State shall require compliance with the standards adopted by the State under § 123.36.

(d) All permits issued under State law prior to the date of approval of final authorization shall be reviewed by the State Director and modified or revoked and reissued to require compliance with the requirements of this Part.

§ 123.38 EPA review of State permits.

(a) The Regional Administrator may comment on permit applications and draft permits as provided in the Memorandum of Agreement under § 123.6.

(b) Where EPA indicates, in a comment, that issuance of the permit would be inconsistent with the approved State program, EPA shall include in the comment:

(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 conditions which the permit would include if it were issued by the Regional Administrator).

(c) A copy of any comment shall be sent to the permit applicant by the Regional Administrator.

(d) The Regional Administrator shall withdraw such a comment when satisfied that the State has met or refuted his or her concerns.

(e) Under section 3008(a)(3) of RCRA, EPA may terminate a State-issued permit in accordance with the procedures of Part 124, Subpart E, or bring an enforcement action in accordance with the procedures of 40 CFR Part 22 in the case of a violation of a State program requirement. In exercising these authorities, EPA will observe the following conditions:

(1) The Regional Administrator may take action under section 3008(a)(3) of RCRA against a holder of a State-issued permit at any time on the ground that the permittee is not complying with a condition of that permit.

(2) The Regional Administrator may take action under section 3008(a)(3) of RCRA against a holder of a State-issued permit at any time on the grounds that the permittee is not complying with a condition that the Regional Administrator in commenting on the permit application or draft permit stated was necessary to implement approved State program requirements, whether or not that condition was included in the final permit.

(3) The Regional Administrator may not take action under section 3008(a)(3) of RCRA against a holder of a State-issued permit on the ground that the permittee is not complying with a condition necessary to implement approved State program requirements unless the Regional Administrator stated in commenting on the permit application or draft permit that that condition was necessary.

(4) The Regional Administrator may take action under section 7003 of RCRA against a permit holder at any time whether or not the permit holder is complying with permit conditions.

§ 123.39 Approval process.

(a) 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;

(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 time interested members of the public may 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. 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;

(6) Briefly outline the fundamental aspects of the State program; and

(7) Identify a person that an interested member of the public may contact with any questions.

(b) If the proposed State program is substantially modified after the public comment period provided in paragraph (a)(4) of this section, the State shall, prior to submitting its program to the Administrator, provide an opportunity for further public comment in accordance with the procedures of paragraph (a) 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.

(c) After complying with the requirements of paragraphs (a) and (b) of this section the State may submit, in accordance with § 123.3, a proposed program to EPA for approval. Such formal submission may only be made after the date of promulgation of Phase II. The program submission shall include copies of all written comments received by the State, a transcript, recording, or summary of any public hearing which was held by the State, and 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.

(d) Within 90 days from the date of receipt of a complete program submission for final authorization, the Administrator shall make a tentative determination as to whether or not he expects to grant authorization to the State program. 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 paragraph (a)(1) of this section. Notice of the tentative determination of authorization shall also:

(1) Indicate that a public hearing will be held by EPA no earlier than 30 days after notice of the tentative determination of authorization. The notice may require persons wishing to present testimony to file a request with the Regional Administrator, who may cancel the public hearing if sufficient

public interest in a hearing is not expressed;

(2) Afford the public 30 days after the notice to comment on the State's submission and the tentative determination; and

(3) Note the availability of the State submission for inspection and copying by the public.

(e) Within 90 days of the notice given pursuant to paragraph (d) 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 will grant final authorization only after the effective date of Phase II. The Administrator shall give notice of this final determination in the Federal Register and in acccordance with paragraph (a)(1) of this section. The notification shall include a concise statement of the reasons for this determination, and a response to significant comments received.

Subpart C—Additional Requirements for State UIC Programs

§ 123.51 Purpose and scope.

(a) This Subpart describes additional substantive and procedural requirements for State UIC programs authorized under section 1422 of SDWA.

(b) States 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. 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.

[Note.—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.]

(d) If a State can demonstrate to EPA's satisfaction that there are no underground injections within the State for one or more classes of injection wells (other than Class IV wells) subject to SDWA and that such injections cannot legally occur in the State until the State has developed an approved program for those classes of injections, the State need not submit a program to regulate those injections and a partial program may be approved. The demonstration of legal prohibition shall be made by either explicitly banning new injections of the class not covered by the State program or providing a certification from the State Attorney General that such new injections cannot legally occur until the State has developed an approved program for that class. The State shall submit a program to regulate both those classes of injections for which a demonstration is not made and Class IV wells.

(e) When a State UIC program is fully approved by EPA to regulate all classes of injections, 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. States which have partially approved programs have authority to enforce any violation of the approved portion of their program. EPA retains authority to enforce violations of State underground injection control programs, 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.

§ 123.52 Requirement to obtain a permit.

States may authorize certain well injections by rule rather than by permit. Any authorization by rule shall comply with § 122.37.

§ 123.53 Progress reports.

States shall submit to the Administrator 6 months after the date of promulgation of these regulations 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 Administrator may prescribe the manner and form of the report.

§ 123.54 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 and to any other persons whom the agency has reason to believe are interested;

(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 may 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) Identify a person that an interested member of the public may contact for further information.

(b) After complying with the requirements of paragraph (a) of this section any State may submit a proposed UIC program under section 1422 of SDWA and § 123.3 of this Part to EPA for approval. Such a submission shall include a showing of compliance with paragraph (a) of this section, copies of all written comments received by the State, a transcript, recording or summary of any public hearing which was held by the State, and 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. A copy of the responsiveness summary shall be sent to those who testified at the hearing, and others upon request.

(c) After determining that a State's submission for UIC program approval is complete the Administrator shall issue public notice of the submission in the Federal Register and in accordance with paragraph (a)(1) of this section. Such notice shall:

(1) Indicate that a public hearing will be held by EPA no earlier than 30 days after notice of the hearing. The notice may require persons wishing to present testimony to file a request with the Regional Administrator, who may cancel the public hearing if sufficient public interest in a hearing is not expressed;

(2) Afford the public 30 days after the notice to comment on the State's submission; and

(3) Note the availability of the State submission for inspection and copying by the public.

(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 taking into account any comments submitted. The Administrator shall give notice of this rule in the Federal Register and in accordance with paragraph (a)(1) of this section. If the Administrator determines not to approve the State program or to approve it only in part, the notice shall include a concise statement of the reasons for this determination. 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. The responsiveness summary shall be sent to those who testified at the public hearing, and to others upon request.

§ 123.55 Procedures for withdrawal of State UIC programs.

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. Notice of such public hearing shall be published in the Federal Register and in enough of the largest newspapers in the State to attract statewide attention, and mailed to persons on appropriate State and EPA mailing lists. 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 persons shall be given opportunity to make written or oral presentations on the State's program at the public hearing.

(c) *Notice to State of Findings.* Wherein 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.

Subpart D—Additional Requirements for State NPDES Programs

§ 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 prohibit (except as provided in § 122.51(c)(2)) all point source discharges of pollutants, all discharges into aquaculture projects, and all 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, except as authorized by a permit in effect under the State program or under section 402 of CWA. NPDES authority may be shared by two or more State agencies but each agency must have Statewide jurisdiction over a class of activities or discharges. When more than one agency is responsible for issuing permits, each agency must make a submission meeting the requirements of § 123.3 before EPA will begin formal review.

(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, with the consent of the State, retain jurisdiction until the matter is resolved.

§ 123.72 Control of disposal of pollutants into wells.

State law must provide authority to issue permits to control the disposal of pollutants into wells. Such authority shall enable the State 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 conditions. A program approved under section 1422 of SDWA satisfies the requirements of this section.

[Note.—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.]

§ 123.73 Receipt and use of Federal information.

Upon approving a State permit program, EPA shall send to the State agency administering the permit program 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. When 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.

§ 123.74 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. Proposed permits shall be prepared by State agencies unless agreement to the contrary has been reached under § 123.75(j). The Memorandum of Agreement shall provide for the following:

(1) Prompt transmission to the Regional Administrator of a copy of all complete permit applications received by the State Director, except those for which permit review has been waived under § 123.6(e). The State shall supply EPA with copies of permit applications for which permit review has been waived whenever requested by EPA;

(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 or general permit, including a copy of each proposed or draft permit and any conditions, requirements, or documents which are related to the proposed or draft permit or which affect the authorization of the proposed permit, except those for which permit review has been waived under § 123.6(e). The State shall supply EPA with copies of notices for which permit review has been waived whenever requested by EPA; and

(3) Transmission to the Regional Administrator of a copy of every issued permit following issuance, along with any and all conditions, requirements, or documents which are related to or affect the authorization of the permit.

(b) The State shall transmit a copy of each draft general permit or proposed general permit, except those for separate storm sewers, to the EPA Deputy Assistant Administrator for Water Enforcement at the same time the draft general permit or proposed general permit is transmitted to the Regional Administrator under paragraph (a)(2) of this section.

(c) The State program shall provide for transmission by the State Director to EPA of:

(1) Notices from publicly owned treatment works under § 122.61(b) 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 of a draft permit and a summary of any significant comments presented at any hearing on any draft permit, except those comments regarding permits for which permit review has been waived under § 123.6(e) and for which EPA has not otherwise requested receipt, 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 objecting to the tentative determination and draft permit have been presented at the hearing or in writing pursuant to the public notice.

(d) 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.

§ 123.75 EPA review of and objections to State permits.

(a)(1) The Memorandum of Agreement shall provide a period of time (up to 90 days from receipt of proposed permits) in which the Regional Administrator may make general comments upon, objections to, or recommendations with respect to proposed permits. EPA reserves the right to take 90 days to supply specific grounds for objection, notwithstanding any shorter period specified in the Memorandum of Agreement, when a general objection is field within the review period specified in the Memorandum of Agreement. The Regional Administrator shall send a copy of any comment, objection or recommendation to the permit applicant.

(2) In the case of general permits, EPA shall have 90 days from the date of receipt of the proposed general permit to comment upon, object to or make recommendations with respect to the proposed general permit, and is not bound by any shorter time limits set by the Memorandum of Agreement for general comments, objections or recommendations. The EPA Deputy Assistant Administrator for Water Enforcement may comment upon, object to, or make recommendations with respect to proposed general permits, except those for separate storm sewers, on EPA's behalf.

(b)(1) Within the period of time provided under the Memorandum of Agreement for making general comments upon, objections to or recommendations with respect to proposed permits, the Regional Administrator shall notify the State Director of any objection to issuance of a proposed permit (except as provided in paragraph (a)(2) of this section for proposed general permits). This notification shall set forth in writing the general nature of the objections.

(2) Within 90 days following receipt of a proposed permit to which he or she has objected under paragraph (b)(1) of this section, 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 Regional Administrator or the EPA Deputy Assistant Administrator for Water Enforcement, shall set forth in writing and transmit to the State Director:

(i) A statement of the reasons for the objection (including the section of CWA or regulations thereunder that support the objection), and

(ii) The actions that must be taken by the State Director to eliminate the objection (including the effluent limitations and conditions which the permit would include if it were issued by the Regional Administrator).

[Note.—Paragraphs (a) and (b) of this section, in effect, modify 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, when an agreement provides for an EPA review period of less than 90 days, EPA must file a general objection, in accordance with paragraph (b)(1) of this section, within the time specified in the agreement. This general objection must be followed by a specific objection within the 90-day period. This modification to MOA's allows EPA to provide detailed information concerning acceptable permit conditions, as required by section 402(d) of CWA. To avoid possible confusion, MOA's should be changed to reflect this arrangement.]

(c) The Regional Administrator's objection to the issuance of a proposed permit 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;

[Note.—For example, the Regional Administrator may object to a permit not requiring the achievement of required effluent limitations by applicable statutory deadlines.]

(2) In the case of a 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; 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.

(d) 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 § 123.74;

(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 § 123.74, 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 interested persons an opportunity to comment on the basis for the objection;

(e) 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. A public hearing in accordance with the procedures of §§ 124.12 (c) and (d) shall be held, and public notice provided in accordance with § 124.10, whenever requested by the State or the interstate agency which proposed the permit or if warranted by significant public interest based on requests received.

(f) A public hearing held under paragraph (e) of this section shall be conducted by the Regional Administrator, and, at the Regional Administrator's discretion, with the assistance of an EPA panel designated by the Regional Administrator, in an orderly and expeditious manner.

(g) Following 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.

(h)(1) If no public hearing is held under paragraph (e) of this section and the State does not resubmit a permit revised to meet the Regional Administrator's objection within 90 days of receipt of the objection, the Regional Administrator may issue the permit in accordance with Parts 121, 122, and 124 of this chapter and any other guidelines and requirements of CWA.

(2) If a public hearing is held under paragraph (e) of this section, the Regional Administrator does not withdraw the objection, 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 (g) of this section, the Regional Administrator may issue the permit in accordance with Parts 121, 122, and 124 of this chapter and any other guidelines and requirements of CWA.

(3) Exclusive authority to issue the permit passes to EPA when the times set out in this paragraph expire.

(i) In the case of proposed general permits for discharges other than from separate storm sewers insert "or the EPA Deputy Assistant Administrator for Water Enforcement" after "Regional Administrator" whenever it appears in paragraphs (c)–(h) of this section.

(j) The Regional Administrator may agree, in the Memorandum of Agreement under § 123.6, to review draft permits rather than proposed permits. In such a case, a proposed permit need not be prepared by the State and transmitted to the Regional Administrator for review in accordance with this section unless the State proposes to issue a permit which differs from the draft permit reviewed by the Regional Administrator, the Regional Administrator has objected to the draft permit, or there is significant public comment.

§ 123.76 Prohibition.

State permit programs shall provide that no permit shall be issued when the Regional Administrator has objected in writing under § 123.75.

§ 123.77. 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 persons on appropriate State and EPA mailing lists and all permit holders and applicants within the State. The 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. The Regional Administrator shall suspend the issuance of permits by EPA as of the date of program approval.

(d) If the Administrator disapproves the State program he or she shall notify the State of the reasons for 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 CWA (regulating discharges of dredged or fill material). Because EPA does not operate the section 404 program, the permit requirements in Parts 122 and 124 are relevant to section 404 programs only to the extent they are made applicable to State section 404 programs in § 123.7(a). Additional permit application and processing requirements applicable to State 404 programs are set out in this Subpart.

(b) The requirements for State section 404 programs 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 § 123.92, the State program must regulate all discharges of dredged or fill material into State regulated waters. State section 404 programs are limited under section 404(g)(1) of CWA to coverage of such State regulated waters. See the definition of "State regulated waters" in § 122.3.

(d) Under section 404(h)(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. If the Secretary has retained jurisdiction and if a 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.

§ 123.92 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 subpart:

(1)(i) 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, as defined in paragraph (a)(1)(iii) of this section.

(ii) To fall under this exemption, the activities specified in paragraph (a)(1)(i) of this section must be part of an established (i.e., on-going) farming, silviculture, or ranching operation. Activities on areas lying fallow as part of a conventional rotational cycle are part of an established operation. Activities which bring an area into farming, silviculture, or ranching use are not part of an established operation. An operation ceases to be established when the area on which it was conducted has been coverted to another use or has lain idle so long that modifications to the hydrological regime are necessary to resume operations. If an activity takes place outside the waters of the United States, or if it does not involve a discharge, it does not need a section 404 permit, whether or not it is part of an established farming, silviculture, or ranching operation.

(iii)(A) *Cultivating* means physical methods of soil treatment employed within established farming, ranching and silviculture lands on farm, ranch, or forest crops to aid and improve their growth, quality or yield.

(B) *Harvesting* means physical measures employed directly upon farm, forest, or ranch crops within established agricultural and silvicultural lands to bring about their removal from farm, forest, or ranch land, but does not include the construction of farm, forest, or ranch roads.

(C)(*1*) *Minor Drainage* means:

(*i*) The discharge or dredged or fill material incidental to connecting upland drainage facilities to waters of the United States, adequate to effect the removal of excess soil moisture from upland croplands. (Construction and maintenance of upland (dryland) facilities, such as ditching and tiling, incidental to the planting, cultivating, protecting, or harvesting of crops, involve no discharge of dredged or fill material into waters of the United States, and as such never require a section 404 permit.);

(*ii*) The discharge of dredged or fill material for the purpose of installing ditching or other such water control facilities incidental to planting, cultivating, protecting, or harvesting of rice, cranberries or other wetland crop species, where these activities and the discharge occur in waters of the United States which are in established use for such agricultural and silvicultural wetland crop production;

(*iii*) The discharge of dredged or fill material for the purpose of manipulating the water levels of, or regulating the flow or distribution of water within, existing impoundments which have been constructed in accordance with applicable requirements of CWA, and which are in established use for the production of rice, cranberries, or other wetland crop species;

[Note.—The provisions of paragraphs (a)(1)(iii)(C)(*1*)(*ii*) and (*iii*) of this section apply to areas that are in established use exclusively for wetland crop production as well as areas in established use for conventional wetland/non-wetland crop rotation (*e.g.*, the rotations of rice and soybeans) where such rotation results in the cyclical or intermittent temporary dewatering of such areas.]

(*iv*) The discharge of dredged or fill material incidental to the emergency removal of sandbars, gravel bars, or other similar blockages which are formed during flood flows or other events, where such blockages close or constrict previously existing drainageways and, if not promptly removed, would result in damage to or loss of existing crops or would impair or prevent the plowing, seeding, harvesting or cultivating of crops on land in established use for crop production. Such removal does not include enlarging or extending the dimensions of, or changing the bottom elevations of, the affected drainageway as it existed prior to the formation of the blockage. Removal must be accomplished within

one year of formation of such blockages in order to be eligible for exemption.

(2) Minor drainage in waters of the U.S. is limited to drainage within areas that are part of an established farming or silviculture operation. It does not include drainage associated with the immediate or gradual conversion of a wetland to a non-wetland (*e.g.*, wetland species to upland species not typically adapted to life in saturated soil conditions), or conversion from one wetland use to another (for example, silviculture to farming). In addition, minor drainage does not include the construction of any canal, ditch, dike or other waterway or structure which drains or otherwise significantly modifies a stream, lake, swamp, bog or any other wetland or aquatic area constituting waters of the United States. 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.

(D) *Plowing* means all forms of primary tillage, including moldboard, chisel, or wide-blade, plowing, discing, harrowing, and similar physical means utilized on farm, forest or ranch 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 surficial materials in a manner which changes any area of the waters of the United States to dry land. For example, the redistribution of surface materials by blading, grading, or other means to fill in wetland areas is not plowing. Rock crushing activities which result in the loss of natural drainage characteristics, the reduction of water storage and recharge capabilities, or the overburden of natural water filtration capacities do not constitute plowing. Plowing will never involve a discharge of dredged or fill material.

(E) *Seeding* means the sowing of seed and placement of seedlings to produce farm, ranch, or forest crops and includes the placement of soil beds for seeds or seedlings on established farm and forest lands.

(2) Maintenance, including emergency reconstruction of recently damaged parts, of currently serviceable structures such as dikes, dams, levees, groins, riprap, breakwaters, causeways, bridge abutments or approaches, and transportation structures. Maintenance does not include any modification that changes the character, scope, or size of 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 (but not construction) of drainage ditches. A simple connection of an irrigation return or supply ditch to waters of the U.S. and related bank stabilization measures are included within this exemption. Where a trap, weir, groin, wall, jetty or other structure within waters of the U.S., which will result in significant discernable alterations to flow or circulation, is constructed as part of the connection, such construction requires a 404 permit.

(4) Construction of temporary sedimentation basins on a construction site which does not include placement of fill material into waters of the U.S. 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 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) Any activity with respect to which a State has an approved program under section 208(b)(4) of CWA which meets the requirements of sections 208(b)(4) (B) and (C).

(6) 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 (BMPs) 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 BMPs which must be applied to satisfy this provision shall include those detailed BMPs described in the State's approved program description pursuant to the requirements of § 123.4(h)(4), and shall also include the following baseline provisions:

(i) Permanent roads (for farming or forestry activities), temporary access roads (for mining, forestry, or farm purposes) and skid trails (for logging) in waters of the U.S. shall be held to the minimum feasible number, width, and total length consistent with the purpose of specific farming, silvicultural or mining operations, and local topographic and climatic conditions;

(ii) 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 minimize discharges of dredged or fill material into waters of the U.S.;

(iii) The road fill shall be bridged, culverted, or otherwise designed to prevent the restriction of expected flood flows;

(iv) The fill shall be properly stabilized and maintained during and following construction to prevent erosion;

(v) Discharges of dredged or fill material into waters of the United States to construct a road fill shall be made in a manner that minimizes the encroachment of trucks, tractors, bulldozers, or other heavy equipment within waters of the United States (including adjacent wetlands) that lie outside the lateral boundaries of the fill itself;

(vi) In designing, constructing, and maintaining roads, vegetative disturbance in the waters of the U.S. shall be kept to a minimum;

(vii) The design, construction and maintenance of the road crossing shall not disrupt the migration or other movement of those species of aquatic life inhabiting the water body;

(viii) Borrow material shall be taken from upland sources whenever feasible;

(ix) The discharge shall not take, or jeopardize the continued existence of, a threatened or endangered species as defined under the Endangered Species Act, or adversely modify or destroy the critical habitat of such species;

(x) Discharges into breeding and nesting areas for migratory waterfowl, spawning areas, and wetlands shall be avoided if practical alternatives exist;

(xi) The discharge shall not be located in the proximity of a public water supply intake;

(xii) The discharge shall not occur in areas of concentrated shellfish production;

(xiii) The discharge shall not occur in a component of the National Wild and Scenic River System;

(xiv) The discharge of material shall consist of suitable material free from toxic pollutants in toxic amounts; and

(xv) All temporary fills shall be removed in their entirety and the area restored to its original elevation.

(b) If any discharge of dredged or fill material resulting from the activities listed in paragraphs (a) (1)–(6) of this section contains any toxic pollutant listed under section 307 of CWA such discharge shall be subject to any applicable toxic effluent standard or

prohibition, and shall require 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) of this section must have a permit if it is part of an activity whose purpose is to convert 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 the United States may be impaired or the reach of such waters reduced. 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.

[Note.—For example, a permit will be required for the conversion of a cypress swamp to some other use or the conversion of a wetland from silvicultural to agricultural use when there is a discharge of dredged or fill materials into waters of the United States in conjunction with construction of dikes, drainage ditches or other works or structures used to effect such conversion. A discharge which elevates the bottom of waters of the United States without converting it to dry land does not thereby reduce the reach of, but may alter the flow or circulation of, waters of the United States.]

(d) Federal projects which qualify under the criteria contained in section 404(r) of CWA (Federal projects authorized by Congress where an EIS has been submitted to Congress prior to authorization or an appropriation) are exempt from State section 404 permit requirements, but may be subject to other State or Federal requirements.

§123.93 Prohibitions.

No permit shall be issued by the State Director in the following circumstances:

(a) When the 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) When the Regional Administrator has objected to issuance of the permit under section 404(j) of CWA and the objection has not been resolved.

(c) When, 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) When 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, and the discharge would fail to comply with the Administrator's actions under that authority.

§ 123.94 Permit application.

(a) *Publicity and preapplication consultation.* The State Director shall 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. The State Director is encouraged to include preapplication consultation as part of this program to assist applicants in understanding the requirements of the environmental guidelines issued under section 404(b)(1) of CWA (40 CFR Part 230) and in fulfilling permit application requirements.

(b) *Application for permit.* Except when an activity is authorized by a general permit under § 123.95 or is exempt from the requirement to obtain a permit under § 123.92, 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. State application forms are subject to EPA review and approval.

(c) *Content of Application.* A complete application shall include the following information:

(1) A complete description of the proposed activity including:

(i) Name, address, and phone number of the applicant; the names, addresses, and phone numbers of owners of properties adjacent to the site; and, if appropriate, the location and dimensions of adjacent structures;

(ii) A description of 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; and the extent (in acres) of the area of waters of the United States to be filled or used for disposal;

(iii) The purpose and intended use of the proposed activity (including whether it is water-dependent); a description of the use of any structures to be erected on the fill; and a schedule for the proposed activity;

(iv) A list of the approvals required by other Federal, interstate, State and local agencies for the activity, including all approvals or denials received; and

(v) A vicinity map identifying the proposed disposal site and the local jurisdiction closest to the disposal site.

(2) Information about the disposal site needed to evaluate compliance with 40 CFR Part 230, including the following:

(i) A description of known alternatives to the proposed discharge, including alternative disposal sites, construction methods, methods of discharge, and reasons for rejecting the alternatives;

(ii) A description of special aquatic sites, public use areas, wildlife refuges, and public water supply intakes in the affected or adjacent areas that may require special protection or preservation;

(iii) Plants, fish, shellfish, and wildlife in the disposal site which may be dependent on water quality and quantity;

(iv) Uses of the disposal site which might affect human health and welfare; and

(v) A description of technologies or management practices by which the applicant proposes to minimize adverse environmental effects of the discharge. Guidelines for minimizing the adverse effects of discharges of dredged or fill material are found in 40 CFR Part 230.

[Note.—The State shall provide permit applicants with guidance, either through the application form or on an individual basis, regarding the level of detail of information and documentation required under this paragraph. The level of detail shall be reasonably commensurate with the type and size of discharge, proximity to critical areas, likelihood of presence of long-lived toxic chemical substances, and degree of environmental degradation.]

(3) One original set of drawings and maps, or one set of drawings and maps of reproducible quality, including:

(i) A map showing the following in plan view:

(A) Location of the activity site including latitude, 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 the closest practicable access to the site;

(E) North arrow;

(F) Arrows showing flow and circulation patterns;

(G) Existing shorelines or ordinary high watermark;

(H) Location of known wetlands;

(I) Water depths and bottom configuration around the project;

(J) Delineation of disposal site;

(K) Size-relationship between the proposed disposal site and affected waters (*e.g.*, a ¼ acre fill in a 15-acre wetland);

(L) Location of previously used dredged material disposal sites with remaining capacity in the vicinity of the

project. The map must indicate retention levees, weirs, and any other devices for retaining dredged or fill materials; and

(M) 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.

(ii) A cross-sectional view of the proposed project showing the following:

(A) Water elevations;

(B) Water depths at waterward face of proposed work, or if dredging is proposed, showing dredging grade;

(C) Cross-section of fill;

(D) Elevation of spoil areas;

(E) Location of wetlands; and

(F) Delineation of disposal site.

(iii) Notes on all maps or drawings submitted, including:

(A) A list of names of adjacent property owners whose property also adjoins the water and who are not shown in the plan view;

(B) 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, State and nearest incorporated municipality; name of applicant; number of the sheet and the total number of sheets in set; and date the drawing was prepared; and

(C) Graphic or numerical scale.

§ 123.95 General permits.

(a) *Coverage.* The State Director may issue a general permit for similar activities as specified in paragraph (b)(1) of this section within a defined geographic area as specified in paragraph (b)(2) of this section, if he or she determines that the regulated activities will cause only minimal adverse environmental effects when performed separately and will have only minimal cumulative adverse effects on the environment.

(b) *Conditions.* In addition to §§ 122.7 and 123.97, and the applicable requirements of § 123.98, each general permit shall contain conditions as follows:

(1) *Activities:* A specific description of the type(s) of activities which are authorized, including limitations for any single operation, to ensure that the requirements of paragraph (a) of this section are satisfied. At a minimum, these limitations shall include:

(i) The maximum quantity of material that may be discharged;

(ii) The type(s) of material that may be discharged;

(iii) The depth of fill permitted;

(iv) The maximum extent to which an area may be modified; and

(v) The size and type of structures that may be constructed.

(2) *Area:* A precise description of the geographic area to which the general permit applies, including, when appropriate, limitations on the types of waters or wetlands where operations may be conducted, to ensure that the requirements of paragraph (a) of this section are satisfied.

(3) *Notice:* The permit shall contain a requirement that no activity is authorized under the general permit unless the Director receives notice at least 30 days in advance of the date when the proposed activity is to commence. The Director may require any information in the notice necessary to determine whether the conditions of the general permit will be satisfied. If within 15 days of the date of submission of the notice the owner or operator has not been informed by the State Director of his or her intent to require an individual permit application, the owner or operator may commence operations under the general permit.

(c) *Requiring an individual permit.*

(1) Upon receiving notice under paragraph (b)(3) of this section, the State Director may require, at his discretion, that the owner or operator apply for an individual permit. Cases where an individual permit may be required include:

(i) The activity has more than a minimal adverse environmental effect;

(ii) The cumulative effects on the environment of the authorized activities are more than minimal; or

(iii) The discharger is not in compliance with the conditions of the general permit.

(2) When the State Director notifies the owner or operator within 15 days of receipt of notice under paragraph (b)(3) of this section that an individual permit application is required for that activity, the activity shall not be authorized by the general permit.

(3) The Director may require any person authorized under a general permit to apply for an individual permit.

§ 123.96 Emergency permits.

(a) *Coverage.* Notwithstanding any other provision of this Part or Part 124, the State Director may temporarily permit a specific dredge or fill activity if:

(1) An unacceptable hazard to life or severe loss of property will occur if an emergency permit is not granted; and

(2) The anticipated threat or loss may occur before a permit can be issued or modified under the procedures otherwise required by this Part and Part 124.

(b) *Requirements for issuance.* (1) The emergency permit shall incorporate, to the extent possible and not inconsistent with the emergency situation, all applicable requirements of §§ 122.7, 123.97 and 123.98.

(2) Any emergency permit shall be limited in duration to the time required to complete the authorized emergency action, not to exceed 90 days.

(3) The emergency permit must have a condition requiring restoration of the disposal site (for example, removal of fill, steps to prevent erosion). If more than 90 days from issuance is necessary to complete restoration, the permit may be extended for this purpose only.

(4) The emergency permit may be oral or written. If oral, it must be followed within five days by a written emergency permit.

(5) Notice of the emergency permit shall be published and public comments received in accordance with applicable requirements of §§ 124.10 and 124.11 as soon as possible but no later than 10 days after the issuance date.

(6) The emergency permit may be terminated at any time without process if the State Director determines that termination is appropriate to protect human health or the environment.

§ 123.97 Additional conditions applicable to all 404 permits.

The following conditions, in addition to those set forth in § 122.7, apply to all 404 permits:

(a) The permittee need not comply with the conditions of this permit to the extent and for the duration that such noncompliance is authorized in an emergency permit. (See § 123.96.)

(b) Activities are not conducted under the authority of this permit if they are not specifically identified and authorized in this permit.

(c) The permittee shall maintain the authorized work area in good condition and in accordance with the requirements contained in this permit.

(d) If any applicable water quality standards are revised or modified, or if a toxic effluent standard or prohibition under CWA section 307(a) is established for a pollutant present in the permittee's discharge and is more stringent than any limitation in the permit, the permit shall be promptly modified to conform to the standard, limitation or prohibition.

§ 123.98 Establishing 404 permit conditions.

In addition to the conditions established under § 122.8(a), each 404 permit shall include conditions meeting the following requirements, when applicable:

(a) *Identification.* A specific identification and description of the authorized activity, including:

(1) The name and address of the permittee and the permit application identification number;

(2) The use or purpose of the discharge;

(3) The type and quantity of the materials to be discharged;

(4) Any structures proposed to be erected on fill material; and

(5) The location and boundaries of the discharge site(s), including a detailed sketch and the name and a description of affected State regulated waters.

(b) *Environmental guidelines.* Provisions ensuring that the discharge will be conducted in compliance with the environmental guidelines issued under section 404(b)(1) of CWA (40 CFR Part 230), including conditions to ensure that the discharge will be conducted in a manner which minimizes adverse impacts upon the physical, chemical, and biological integrity of the waters of the United States, such as requirements for restoration or mitigation.

(c) *Water quality standards.* Any requirements necessary to comply with water quality standards established under applicable Federal or State law. If an applicable water quality standard is promulgated after the permit is issued, it shall be modified as provided in § 123.97(d).

(d) *Toxic effluent guidelines or prohibitions.* Requirements necessary to comply with any applicable toxic effluent standard or prohibition under section 307(a) of CWA or applicable State or local law. If an applicable toxic effluent standard or prohibition is promulgated after the permit is issued, it shall be modified as provided in § 123.97(d).

(e) *Best Management Practices.* Applicable BMPs approved by a Statewide CWA section 208(b)(4) agency as provided in the agreement described in § 123.102(a)(1).

(f) *General permits.* Any conditions necessary for general permits as required under § 123.95.

(g) *Commencement of work.* A specific date on which the permit shall automatically expire, unless previously revoked and reissued or modified or continued, if the authorized work has not been commenced.

§ 123.99 Memorandum of Agreement with the Secretary.

Before a State program is approved under this Part, the State shall enter into a Memorandum of Agreement with the Secretary. Where more than one agency within a State has responsibility for administering the State program, all of the responsible agencies shall be parties to the Memorandum of Agreement. The Memorandum of Agreement shall include:

(a) A description of State regulated waters, as identified by the Secretary.

(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, provided such procedures satisfy the requirements of this Part.

(c) An identification of those general permits, if any, issued by the Secretary, the terms and conditions of which the State intends to administer and enforce upon receiving approval of its program and a plan for transferring responsibility for these permits to the State, including procedures for the prompt transmission from the Secretary to the State Director of relevant information not already in the possession of the State Director including support files for permit issuance, compliance reports and records of enforcement actions. In many instances States will lack the authority to directly administer permits issued by the Federal government. However, procedures authorized under State law may be established to transfer responsibility for these permits.

(d) Procedures whereby the Secretary will, upon program approval, transfer to the State pending section 404 permit applications and other relevant information, not already in the possession of the State Director.

(e) 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.

(f) A provision 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.

(g) Those classes or categories, if any, of proposed State permits for which the Secretary waives the right to review.

(h) Other matters not inconsistent with this Part that the Secretary and the State deem appropriate.

[Note.—For example, where a 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.]

§ 123.100 Transmission of information to EPA and other Federal agencies.

(a) The Memorandum of Agreement under § 123.6 shall provide for the following:

(1) Prompt transmission to the Regional Administrator (by certified mail) and to the Corps of Engineers, the U.S. Fish and Wildlife Service, and the National Marine Fisheries Service of a copy of all complete permit applications received by the State Director, except those for which permit review has been waived under § 123.6(f)(1)(i). The State shall supply EPA, the Corps of Engineers, the U.S. Fish and Wildlife Service, and the National Marine Fisheries Service with copies of permit applications for which permit reivew has been waived whenever requested by such agencies. Where State law requires preparation of an environmental impact statement (EIS) or similar document, and such EIS or other document is available, the EIS or other document shall accompany the permit application when transmitted to the Regional Administrator.

(2) Prompt transmission to the Regional Administrator (by certified mail) and to the Corps of Engineers, the U.S. Fish and Wildlife Service, and the National Marine Fisheries Service of notice of every action taken by the State agency related to the consideration of any permit application, including a copy of each draft permit prepared, and any conditions, requirements, or documents which are related to the draft permit or which affect the authorization of the draft permit. A draft permit shall be prepared by the State and transmitted to EPA:

(i) At the time of transmission of the complete permit application, for discharges listed in § 123.6(f)(1)(i)(A)–(E);

(ii) Upon request of EPA in accordance with § 123.101(e)(3), for discharges not listed in § 123.6(f)(1)(i)(A)–(E), unless EPA has waived review under § 123.6(f)(1)(i).

(3) Prompt transmission to the Regional Administrator, the Corps of Engineers, the U.S. Fish and Wildlife Service, and the National Marine Fisheries Service of a copy of each draft general permit. A draft general permit shall be prepared by the State whenever the State intends to issue a general permit.

(4) Transmission to the Regional Administrator, the Corps of Engineers, the U.S. Fish and Wildlife Service, and the National Marine Fisheries Service of a copy of every issued permit following issuance, along with any and all conditions and requirements.

(b)(1) State section 404 programs shall comply with the draft permit requirements of §§ 124.6 (a), (c), (d), and (e) and 124.8 for those discharges which require a draft permit under paragraph (a)(2) of this section and for those discharges to be regulated by general permits. For discharges which require a draft permit under paragraph (a)(2) of this section, public review and EPA review, under § 123.101, shall be based on the permit application and the draft permit. For discharges to be regulated by general permits, public review and EPA review shall be based on the draft general permit.

(2) For all other discharges, public review and EPA review, if not waived under § 123.6(f)(1)(i), shall be based on the permit application. For these discharges, States need not comply with §§ 124.6 (a), (c), (d), and (e) or 124.8.

§ 123.101 EPA review of and objections to State permits.

(a) The Memorandum of Agreement shall provide that the Regional Administrator may comment upon, object to, or make recommendations with respect to permit applications, draft permits (if prepared under § 123.100), or draft general permits within 90 days of receipt. If the Regional Administrator intends to comment upon, object to, or make recommendations with respect to a permit application, draft permit, or draft general permit, he or she shall notify the State Director of his or her intent within 30 days of receipt. The Regional Administrator may notify the State within 30 days of receipt that there is no comment but reserve the right to object within 90 days of receipt, based on any new information brought out by the public during the comment period or at a hearing. The Regional Administrator shall send a copy of any comment, objection, or recommendation to the permit applicant.

(b) Within 90 days following receipt of a permit application, draft permit or draft general permit for which the Regional Administrator has provided notification under paragraph (a) of this section, the Regional Administrator may object to permit issuance. In order to object, the Regional Administrator shall set forth in writing and transmit to the State Director:

(1) A statement of the reason(s) for the objection (including the section of CWA or regulations thereunder that support the objection); and

(2) 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).

(c) When the State Director has received an objection to a permit application, draft permit, or draft general permit under this section and has taken the steps required by the Regional Administrator to eliminate the objection, a revised permit shall be prepared and 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.

(d) Any objection under this section must be based upon one or more of the following grounds:

(1) The permit application, draft permit, or draft general permit fails to apply, or to ensure compliance with, any applicable requirement of this Part;

(2) In the case of any permit application 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 (see § 123.102(c));

(3) The procedures followed in connection with processing the permit failed in a material respect to comply with procedures required by CWA, by this Part, by other regulations and guidelines thereunder, or by the Memorandum of Agreement;

(4) Any finding made by the State Director in connection with the draft permit or draft general permit misinterprets CWA or any guidelines or regulations thereunder, or misapplies them to the facts;

(5) Any provisions of the permit application, draft permit, or draft general 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 40 CFR Part 230, or by the draft permit or draft general permit;

(6) The information contained in the permit application is insufficient to judge compliance with 40 CFR Part 230; or

(7) 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.

(e) Prior to notifying the State Director of an objection based upon any of the grounds set forth in paragraph (d) of this section, the Regional Administrator:

(1) Shall consider all data transmitted pursuant to §§ 123.100 and 123.102.

(2) Shall, if the information provided is inadequate to determine whether the permit application, draft permit, or draft general 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, including a supplemented application, that the Regional Administrator determines are necessary for review. This request shall be made within 30 days of receipt of the State submittal under § 123.100. It shall constitute an interim objection to the issuance of the permit, and the period of time specified in the Memorandum of Agreement for the Regional Administrator's review shall be suspended from the date of the request and shall resume when the Regional Administrator has received such record or other information requested.

(3) May, in the case of discharges for which a draft permit is not automatically required under § 123.100(a)(2)(i), request within 30 days of receipt of the permit application that the State Director prepare a draft permit under § 123.100(a)(2)(ii). The draft permit shall be submitted to EPA and other Federal agencies, as required under § 123.100(a)(2). When a draft permit is prepared under this subparagraph, Federal and public review shall recommence under § 123.100(b)(1). The Regional Administrator's period for review shall begin upon receipt of the draft permit.

[Note.—It is anticipated that draft permits will be requested only in exceptional and/or complex cases.]

(4) May, at his or her discretion, and to the extent feasible within the period of time available under the Memorandum of Agreement, afford to interested persons an opportunity to comment on the basis for the objection.

(f) 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. A public hearing in accordance with the procedures of §§ 124.12 (c) and (d) shall be held, and public notice provided in accordance with § 124.10, whenever requested by the State issuing the permit, or if warranted by significant public interest based on requests received.

(g) A public hearing held under paragraph (f) of this section shall be conducted by the Regional

Administrator, and, at the Regional Administrator's discretion, with the assistance of an EPA panel designated by the Regional Administrator, in an orderly and expeditious manner.

(h) Following 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.

(i)(1) If no public hearing is held under paragraph (f) of this section and the State does not resubmit a permit revised to meet the Regional Administrator's objection or notify EPA of its intent to deny the permit within 90 days of receipt of the objection, the Secretary may issue the permit in accordance with the guidelines and regulations of CWA.

(2) If a public hearing is held under paragraph (f) of this section, the Regional Administrator does not withdraw the objection, and the State does not resubmit a permit revised to meet the Regional Administrator's objection or modified objection or notify EPA of its intent to deny the permit within 30 days of the date of the Regional Administrator's notification under paragraph (h) of this section, the Secretary may issue the permit in accordance with the guidelines and regulations of CWA.

§ 123.102 Coordination requirements.

(a) *General coordination.* (1) If the State has a Statewide CWA section 208(b)(4) regulatory program, the State Director shall develop an agreement with the agency designated to administer such program. The agreement shall include:

(i) A definition of the activities to be regulated by each program;

(ii) Arrangements providing the agencies an opportunity to comment on prospective permits, BMPs, and other relevant actions; and

(iii) Arrangements incorporating BMPs developed by the section 208(b)(4) program into section 404 permits, where appropriate.

(2) Where a CWA section 208(b)(4) program has been approved under section 208(b)(4)(C), no permit shall be required for activities for which the Administrator has approved BMPs under such approved program except as provided in §§ 123.92 (b) and (c). Until such section 208(b)(4) program has been approved by the Administrator, a person proposing to discharge must obtain an individual permit or comply with a general permit.

(3) The State Director shall consult with any State agency(ies) with jurisdiction over fish and wildlife resources.

(b) *Coordination with other Federal and Federal-State review processes.* State section 404 programs shall assure coordination of State section 404 permits with Federal and Federal-State water related planning and review processes.

(1) The State Director shall assure that the impact of proposed discharges will be consistent with the Wild and Scenic Rivers Act when the proposed discharge could affect portions of rivers designated wild, recreational, scenic, or under consideration for such designation.

(2) Agencies with jurisdiction over Federal and Federal-State water related planning and review processes, including the U.S. Army Corps of Engineers, the U.S. Fish and Wildlife Service, and the National Marine Fisheries Service, shall notify the Regional Administrator that they wish to comment on a permit application, draft permit, or draft general permit within 20 days of receipt by the Regional Administrator of the permit application, draft permit, or draft general permit. Such agencies should submit their evaluation and comments to the Regional Administrator within 50 days of receipt by the Regional Administrator of the permit application, draft permit, or draft general permit. The Regional Administrator may allow any such agency up to an additional 30 days to submit comments, upon request of such agency.

(3) All comments from the U.S. Army Corps of Engineers, the U.S. Fish and Wildlife Service, and the National Marine Fisheries Service on permit applications, draft permits, and draft general permits shall be considered by the Regional Administrator. If the Regional Administrator does not adopt a recommendation of any such agency, he shall consult with that agency. The final decision to object or to require permit conditions shall be made by the Regional Administrator.

(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.

[Note.—States are encouraged to receive and use information developed by the U.S. Fish and Wildlife Service as part of the National Wetlands Inventory as it becomes available.]

§ 123.103 Enforcement authority.

In addition to meeting the requirements of § 123.9, State section 404 programs shall include procedures which enable the State Director to immediately and effectively halt or remove any unauthorized discharges of dredged or fill material, including the authority to issue a cease and desist order, interim protective order, or restoration order to any person responsible for, or involved in, an unauthorized discharge.

§ 123.104 Approval process.

(a) Within 10 days of receipt of a complete State section 404 program submission under § 123.3, 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 persons on appropriate State, EPA, Corps of Engineers, U.S. Fish and Wildlife Service, and National Marine Fisheries Service 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 of the hearing 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 90 days of receipt of a complete program submission under § 123.3, the Corps of Engineers, the U.S. Fish and Wildlife Service, and the National Marine Fisheries Service shall

submit any comments on the State program.

(d) 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. The Administrator shall respond individually to comments received from the Corps of Engineers, the U.S. Fish and Wildlife Service, and the National Marine Fisheries Service.

(e) 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 and not identified in the program description under § 123.4(h)(1) as State regulated waters.

(f) 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 F—Requirements for Interim Authorization of State Hazardous Waste Programs

§ 123.121 Purpose and scope.

(a) This subpart specifies all of the requirements a State program must meet in order to obtain interim authorization under section 3006(c) of RCRA. The requirements a State program must meet in order to obtain final authorization under section 3006(b) of RCRA are specified in Subparts A and B.

(b) Interim authorization of State programs under this Subpart may occur in two phases. The first phase (Phase I) allows States to administer a hazardous waste program in lieu of and corresponding to that portion of the Federal program which covers identification and listing of hazardous waste (40 CFR Part 261), generators (40 CFR Part 262) and transporters (40 CFR Part 263) of hazardous wastes, and establishes preliminary (interim status) standards for hazardous waste treatment, storage and disposal facilities (40 CFR Part 265). The second phase (Phase II) allows States with interim authority for Phase I to establish a permit program for hazardous waste treatment, storage and disposal facilities in lieu of and corresponding to the Federal hazardous waste permit program (40 CFR Parts 264 and 266). States may apply for interim authorization either sequentially (application for interim authorization for Phase I followed by an amendment of that application for Phase II) or all at once (application for interim authorization for both Phases I and II at the same time) as long as they adhere to the schedule in § 123.122.

(c) The Administrator shall approve a State program which meets the applicable requirements of this Subpart.

(d) Upon approval of a State program for Phase II, the Administrator shall suspend the issuance of Federal permits for those activities subject to the approved State program.

(e) Any State program approved by the Administrator under this Subpart shall at all times be conducted in accordance with this Subpart.

(f) Lack of authority to regulate activities on Indian lands does not impair a State's ability to obtain interim authorization under this Subpart. EPA will administer the program on Indian lands if the State does not seek this authority.

[Note.—States are advised to contact the United States Department of Interior, Bureau of Indian Affairs, concerning authority over Indian lands.]

(g) Nothing is this Subpart precludes a State from:

(1) Adopting or enforcing requirements which are more stringent or more extensive than those required under this Subpart.

(2) Operating a program with a greater scope of coverage than that required under this Subpart. Where an approved program has a greater scope of coverage than required by Federal law the additional coverage is not part of the Federally approved program.

§ 123.122 Schedule.

(a) Interim authorization for Phase I shall not take effect until Phase I commences. Interim authorization for Phase II shall not take effect until Phase II commences.

(b) Interim authorization may extend for a 24-month period from the commencement of Phase II. At the end of this period all interim authorizations automatically expire and EPA shall administer the Federal program in any State which has not received final authorization.

(c) A State may apply for interim authorization at any time prior to expiration of the 6th month of the 24-month period beginning with the commencement of Phase II.

(1) States applying for interim authorization prior to the promulgation of Phase II shall apply only for interim authorization for Phase I.

(2) States applying for interim authorization after the promulgation of Phase II but before the commencement of Phase II may apply either for interim authorization for both Phase I and Phase II or only for interim authorization for Phase I.

(3) States applying for interim authorization after the commencement of Phase II shall apply for interim authorization for both Phase I and Phase II, unless they have already applied for interim authorization for Phase I.

(4) States which have received interim authorization for Phase I shall amend their original submission to meet the requirements for interim authorization for Phase II not later than 6 months after the effective date of Phase II.

(d) No State may apply for interim authorization for Phase II unless it has received interim authorization for Phase I or is simultaneously applying for interim authorization for both Phase I and Phase II.

§ 123.123 Elements of a program submission.

(a) States applying for interim authorization shall submit at least three copies of a program submission to EPA containing the following:

(1) A letter from the Governor of the State requesting State program approval;

(2) A complete program description, as required by § 123.124, describing how the State intends to carry out its responsibilities under this subpart;

(3) An Attorney General's statement as required by § 123.125;

(4) A Memorandum of Agreement with the Regional Administrator as required by § 123.126;

(5) An authorization plan as required by § 123.127;

(6) Copies of all applicable State statutes and regulations, including those governing State administrative procedures.

(b) Within 30 days of receipt by EPA of a State program submission, EPA will notify the State whether its submission is complete. If a State's submission is found to be complete, EPA's formal review of the proposed State program shall be deemed to have begun on the date of receipt of the State's submission. See § 123.135. If a State's submission is found to be incomplete, formal review shall not begin until all the necessary information is received by EPA.

(c) If the State's submission is materially changed during the formal review period, the formal review period shall recommence upon receipt of the revised submission.

(d) States simultaneously applying for interim authorization for both Phase I and Phase II shall prepare a single submission.

(e) States applying for interim authorization for Phase II shall amend their submission for interim authorization for Phase I as specified in §§ 123.124 to 123.127.

§ 123.124 Program description.

Any State that wishes to administer a program under this Subpart shall submit to the Regional Administrator a complete description of the program it proposes to administer in lieu of the Federal program under State law. A State applying only for interim authorization for Phase II shall amend its program description for interim authorization for Phase I as necessary to reflect the program it proposes to administer to meet the requirements for interim authorization for Phase II. The program description shall include:

(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 the program, each agency must have Statewide jurisdiction over a class of activities. The responsibilities of each agency must be delineated, their procedures for coordination set forth, and one of the agencies must 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 section 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, occupations, and general duties of the employees. 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, including cost of the personnel listed in paragraph (b)(1) of this section, cost of administrative support and cost of technical support.

(3) An itemization of the sources and amounts of funding, including an estimate of Federal grant money, available to the State Director to meet the costs listed in paragraph (b)(2) of this section identifying any restrictions or limitations upon this funding.

(c) A description of applicable State procedures, including permitting procedures, and any State appellate review procedures.

[Note.—States applying only for interim authorization for Phase I need describe permitting procedures only to the extent they will be utilized to assure compliance with standards substantially equivalent to 40 CFR Part 265.]

(d) Copies of the forms and the manifest format the State intends to use in its program. Forms used by the State need not be identical to the forms used by EPA, but should require the same basic information. If the State chooses to use uniform national forms it should so note.

(e) A complete description of the State's compliance monitoring and enforcement program.

(f) A description of the State manifest system if the State has such a system and of the procedures the State will use to coordinate information with other approved State programs and the Federal program regarding interstate and international shipments.

(g) An estimate of the number of the following:

(1) Generators;

(2) Transporters; and

(3) On- and off-site treatment, storage and disposal facilities including a brief description of the types of facilities and an indication, if applicable, of the permit status of these facilities.

§ 123.125 Attorney General's statement.

(a) Any State seeking to administer a program under this Subpart 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 § 123.124 and to meet the applicable requirements of this Subpart. This statement shall include citations to the specific statutes, administrative regulations, and, where appropriate, judicial decisions which demonstrate adequate authority. Except as provided in § 123.128(d), the State Attorney General or independent legal counsel must certify that the enabling legislation for the program for Phase I was in existence within 90 days of the promulgation of Phase I. In the case of a State applying for interim authorization for Phase II, the State Attorney General or independent legal counsel must certify that the enabling legislation for the program for Phase II was in existence within 90 days of the promulgation of Phase II. State statutes and regulations cited by the State Attorney General or independent legal counsel shall be lawfully adopted at the time the statement is signed and shall be fully effective by the time the program is approved. 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. In the case of a State applying only for interim authorization for Phase II, the Attorney General's statement submitted for interim authorization for Phase I shall be amended and recertified to demonstrate adequate authority to carry out all the requirements of this Subpart.

(b)(1) In the case of a State applying only for interim authorization for Phase I, the Attorney General's statement shall certify that the authorization plan under § 123.127(a), if carried out, would provide the State with enabling authority and regulations adequate to meet the requirements for final authorization contained in Phase I.

(2) In the case of a State applying for interim authorization for Phase II, the Attorney General's statement shall certify that the authorization plan under § 123.127(b), if carried out, would provide the State with enabling authority and regulations adequate to meet all the requirements for final authorization.

(c) Where a State seeks authority over activities on Indian lands, the statement shall contain an appropriate analysis of the State's authority.

§ 123.126 Memorandum of Agreement.

(a) The State Director and the Regional Administrator shall execute a Memorandum of Agreement (MOA). In addition to meeting the requirements of paragraph (b) of this section, and, if applicable, paragraph (c) of this section, the Memorandum of Agreement may include other terms, conditions, or agreements relevant to the administration and enforcement of the State's regulatory program which are not inconsistent with this subpart. No Memorandum of Agreement shall be approved which contains provisions which restrict EPA's statutory oversight responsibility. In the case of a State applying for interim authorization for

Phase II, the Memorandum of Agreement shall be amended and re-executed to include the requirements of paragraph (c) of this section and any revisions to the requirements of paragraph (b) of this section.

(b) The Memorandum of Agreement shall include the following:

(1) Provisions for the prompt transfer from EPA to the State of information obtained in notifications made pursuant to section 3010 of RCRA and received by EPA prior to the approval of the State program, EPA identification numbers for new generators, transporters, and treatment, storage, and disposal facilities, and any other information relevant to effective program operation not already in the possession of the State Director (e.g., pending permit applications, compliance reports, etc.).

(2) Provisions specifying the frequency and content of reports, documents, and other information which the State is required to submit to EPA. The State shall allow EPA to routinely review State records, reports, and files relevant to the administration and enforcement of the approved program. State reports may be combined with grant reports when appropriate.

(3) Provisions on the State's compliance monitoring and enforcement program, including:

(i) Provisions for coordination of compliance monitoring activities by the State and EPA. These may specify the basis on which the Regional Administrator will select facilities or activities within the State for EPA inspection. The Regional Administrator will normally notify the State at least 7 days before any such inspection; and

(ii) Procedures to assure coordination of enforcement activities.

(4) Provisions for modification of the Memorandum of Agreement in accordance with this Part.

(5) A provision allowing EPA to conduct compliance inspections of all generators, transporters, and HWM facilities during interim authorization. The Regional Administrator and the State Director may agree to limitations regarding compliance inspections of generators, transporters, and non-major HWM facilities.

(6) A provision that no limitations on EPA compliance inspections of generators, transporters, and non-major HWM facilities under paragraph (b)(5) of this section shall restrict EPA's right to inspect any HWM facility, generator, or transporter which it has cause to believe is not in compliance with RCRA; however, before conducting such an inspection, EPA will normally allow the State a reasonable opportunity to conduct a compliance evaluation inspection.

(7) A provision delineating respective State and EPA responsibilities during the interim authorization period.

(c) In the case of a State applying for interim authorization for Phase II, the Memorandum of Agreement shall also include the following:

(1) Provisions for prompt transfer from EPA to the State of pending permit applications and support files for permit issuance. 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. If a State lacks the authority to directly administer permits issued by the Federal government, a procedure may be established to transfer responsibility for these permits.

(2) Provisions specifying classes and categories of permit applications and draft permits that the State Director will send to the Regional Administrator for review and comment. The State Director shall promptly forward to EPA copies of permit applications and draft permits for all major HWM facilities. The Regional Administrator and the State Director may agree to limitations regarding review of and comment on permit applications and draft permits for non-major HWM facilities. The State Director shall supply EPA copies of final permits for all major HWM facilities.

(3) Where appropriate, provisions for joint processing of permits by the State and EPA for facilities or activities which require permits under different programs, from both EPA and the State.

§ 123.127 Authorization plan.

The State must submit an "authorization plan" which shall describe the additions and modifications necessary for the State program to qualify for final authorization as soon as practicable, but no later than the end of the interim authorization period. This plan shall include the nature of and schedules for any changes in State legislation and regulations; resource levels; actions the State must take to control the complete universe of hazardous waste listed or designated under section 3001 of RCRA as soon as possible; the manifest and permit systems; and the surveillance and enforcement program which will be necessary in order for the State to become eligible for final authorization.

(a) In the case of a State applying only for interim authorization for Phase I, the authorization plan shall describe the additions and modifications necessary for the State program to meet the requirements for final authorization contained in Phase I.

(b) In the case of a State applying for interim authorization for Phase II, the authorization plan under paragraph (a) of this section shall be amended to describe the further additions and modifications necessary for the State program to meet all the requirements for final authorization.

§ 123.128 Program requirements for interim authorization for Phase I.

The following requirements are applicable to States applying for interim authorization for Phase I. If a State does not have legislative authority or regulatory control over certain activities that do not occur in the State, the State may be granted interim authorization for Phase I provided the State authorization plan under § 123.127 provides for the development of a complete program as soon as practicable after receiving interim authorization.

(a) *Requirements for identification and listing of hazardous waste.* The State program must control a universe of hazardous wastes generated, transported, treated, stored, and disposed of in the State which is nearly identical to that which would be controlled by the Federal program under 40 CFR Part 261.

(b) *Requirements for generators of hazardous waste.* (1) This paragraph applies unless the State comes within the exceptions described under paragraph (d) of this section.

(2) The State program must cover all generators of hazardous wastes controlled by the State.

(3) The State shall have the authority to require and shall require all generators covered by the State program to comply with reporting and recordkeeping requirements substantially equivalent to those found at 40 CFR §§ 262.40 and 262.41.

(4) The State program must require that generators who accumulate hazardous wastes for short periods of time prior to shipment do so in a manner that does not present a hazard to human health or the environment.

(5) The State program shall provide requirements respecting international shipments which are substantially equivalent to those at 40 CFR § 262.50, except that advance notification of international shipment, as required by 40 CFR § 262.50(b)(1), shall be filed with the Administrator. The State may require that a copy of such advance notice be filed with the State Director, or may require equivalent reporting procedures.

[Note.—Such notices shall be mailed to Hazardous Waste Export, Division for

Oceans and Regulatory Affairs (A–107), U.S. Environmental Protection Agency, Washington, D.C. 20460.]

(6) The State program must require that such generators of hazardous waste who transport (or offer for transport) such hazardous waste off-site use a manifest system that ensures that inter- and intrastate shipments of hazardous waste are designated for delivery, and, in the case of intrastate shipments, are delivered only to facilities that are authorized to operate under an approved State program or the Federal program.

(7) The State manifest system must require that:

(i) The manifest itself identify the generator, transporter, designated facility to which the hazardous waste will be transported, and the hazardous waste being transported;

(ii) The manifest accompany all wastes offered for transport, except in the case of shipments by rail or water specified in §§ 262.23(c) and 263.20(e); and

(iii) Shipments of hazardous waste that are not delivered to a designated facility are either identified and reported by the generator to the State in which the shipment originated or are independently identified by the State in which the shipment originated.

(8) In the case of interstate shipments for which the manifest has not been returned, the State program must provide for notification to the State in which the facility designated on the manifest is located and to the State in which the shipment may have been delivered (or to EPA in the case of unauthorized States).

(c) *Requirements for transporters of hazardous wastes.* (1) This paragraph applies unless the State comes within the exceptions described under paragraph (d) of this section.

(2) The State program must cover all transporters of hazardous waste controlled by the State.

(3) The State shall have the authority to require and shall require all transporters covered by the State program to comply with recordkeeping requirements substantially equivalent to those found at 40 CFR § 263.22.

(4) The State program must require such transporters of hazardous waste to use a manifest system that ensures that inter- and intrastate shipments of hazardous waste are delivered only to facilities that are authorized under an approved State program or the Federal program.

(5) The State program must require that transporters carry the manifest with all shipments, except in the case of shipments by rail or water specified in 40 CFR § 263.20(e).

(6) For hazardous wastes that are discharged in transit, the State program must require that transporters notify appropriate State, local, and Federal agencies of the discharges, and clean up the wastes or take action so that the wastes do not present a hazard to human health or the environment. These requirements shall be substantially equivalent to those found at 40 CFR §§ 263.30 and 263.31.

(d) *Limited exceptions from generator, transporter, and related manifest requirements.* A State applying for interim authorization for Phase I which meets all the requirements for such interim authorization except that it does not have statutory or regulatory authority for the manifest system or other generator or transporter requirements discussed in paragraphs (b) and (c) of this section may be granted interim authorization, if the State authorization plan under § 123.127 delineates the necessary steps for obtaining this authority no later than the end of the interim authorization period under § 123.122(b). A State may apply for interim authorization to implement the manifest system and other generator and transporter requirements if the enabling legislation for that part of the program was in existence within 90 days of the promulgation of Phase I. If such application is made, it shall be made as part of the State's submission for interim authorization for Phase II. Until the State manifest system and other generator and transporter requirements are approved by EPA, all Federal requirements for generators and transporters (including use of the Federal manifest system) shall apply in such States and enforcement responsibility for that part of the program shall remain with the Federal Government. The universe of wastes for which these Federal requirements apply shall be the universe of wastes controlled by the State under paragraph (a) of this section.

(e) *Requirements for hazardous waste treatment, storage, and disposal facilities.* States must have standards applicable to HWM-facilities which are substantially equivalent to 40 CFR Part 265. State law shall prohibit the operation of facilities not in compliance with such standards. These standards shall include:

(1) Preparedness for and prevention of releases of hazardous waste controlled by the State under paragraph (a) of this section and contingency plans and emergency procedures to be followed in the event of a release of such hazardous waste;

(2) Closure and post-closure requirements;

(3) Groundwater monitoring;

(4) Security to prevent unknowing and unauthorized access to the facility;

(5) Facility personnel training;

(6) Inspection, monitoring, recordkeeping, and reporting;

(7) Compliance with the manifest system including the requirement that the facility owner or operator or the State in which the facility is located must return a copy of the manifest to the generator or to the State in which the generator is located indicating delivery of the waste shipment; and

(8) Other facility standards to the extent that they are included in 40 CFR Part 265, except that Subpart R (standards for injection wells) may be included in the State standards at the State's option.

(f) *Requirements for enforcement authority.* (1) Any State agency administering a program under this Subpart shall have the following authority to remedy violations of State program requirements:

(i) Authority to restrain immediately by order or by suit in State court any person from engaging in any unauthorized activity which is endangering or causing damage to public health or the environment;

(ii) To sue in courts of competent jurisdiction to enjoin any threatened or continuing violation of any program requirement, including, where appropriate, permit conditions, without the necessity of a prior revocation of the permit; and

(iii) For any program violation, to assess or sue to recover in court civil penalties in at least the amount of $1000 per day or to seek criminal fines in at least the amount of $1000 per day.

(2) Any State agency administering a program under this Subpart shall provide for public participation in the State enforcement process by providing either:

(i) Authority which allows intervention as of right in any civil or administrative action to obtain remedies specified in paragraph (f)(1) of this section by any citizen having an interest which is or may be adversely affected; or

(ii) Assurance that the State agency or enforcement authority will:

(A) Investigate and provide written responses to all citizen complaints submitted pursuant to the procedures specified in paragraph (g)(2)(iv) of this section;

(B) Not oppose intervention by any citizen where permissive intervention may be authorized by statute, rule, or regulation; and

(C) Publish and provide at least 30 days for public comment on any proposed settlement of a State enforcement action.

(g) *Requirements for compliance evaluation programs.* (1) A State program under this Subpart shall have procedures for receipt, evaluation, recordkeeping, and investigation for possible enforcement of all required notices and reports.

(2) A State program shall have independent inspection and surveillance authority and procedures to determine compliance or noncompliance with applicable program requirements. This shall include:

(i) The capability to make comprehensive surveys of any activities subject to the State Director's authority in order to identify persons subject to regulation who have failed to comply with program requirements;

(ii) A program for periodic inspections of the activities subject to regulation;

(iii) The capability to investigate evidence of violations of applicable program and permit requirements; and

(iv) Procedures for receiving and ensuring proper consideration of information 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.

(3) The State officers engaged in compliance evaluation activities shall have authority to enter any conveyance, vehicle, facility, or premises subject to regulation or in which records relevant to program operation are kept in order to inspect, monitor, or otherwise investigate compliance with the State program. States whose law requires a search warrant prior to entry conform with this requirement.

(4) 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.

§ 123.129 Additional program requirements for interim authorization for Phase II.

In addition to the requirements of § 123.128, the following requirements are applicable to States applying for interim authorization for Phase II.

(a) State programs must have standards applicable to hazardous waste management facilities that provide substantially the same degree of human health and environmental protection as the standards promulgated under 40 CFR Parts 264 and 266.

(b) State programs shall require a permit for owners and operators of those hazardous waste treatment, storage, and disposal facilities which handle any waste controlled by the State under § 123.128(a) and for which a permit is required under 40 CFR Part 122. The State program shall prohibit the operation of such facilities without a permit, provided States may authorize owners and operators of facilities which would qualify for interim status under the Federal program (if State law so authorizes) to remain in operation pending permit action. Where State law authorizes such continued operation it shall require compliance by owners and operators of such facilities with standards substantially equivalent to EPA's interim status standards under 40 CFR Part 265.

(c) All permits issued by the State under this section shall require compliance with the standards adopted by the State in accordance with paragraph (a) of this section.

(d) State programs shall have requirements for permitting which are substantially equivalent to the provisions listed in §§ 123.7(a) and (b).

(e) No permit may be issued by a State with interim authorization for Phase II with a term greater than ten years.

§ 123.130 Interstate movement of hazardous waste.

(a) If a waste is transported from a State where it is listed or designated as hazardous under the program applicable in that State, whether that is the Federal program or an approved State program, into a State with interim authorization where it is not listed or designated, the waste must be manifested in accordance with the laws of the State where the waste was generated and must be treated, stored, or disposed of as required by the laws of the State into which it has been transported.

(b) If a waste is transported from a State with interim authorization where it is not listed or designated as hazardous into a State where it is listed or designated as hazardous under the program applicable in that State, whether that is the Federal program or an approved State program, the waste must be treated, stored, or disposed of in accordance with the law applicable in the State into which it has been transported.

(c) In all cases of interstate movement of hazardous waste, as defined by 40 CFR Part 261, generators and transporters must meet DOT requirements in 49 CFR Parts 172, 173, 178, and 179 (e.g., for shipping paper, packaging, labeling, marking, and placarding).

§ 123.131 Progress reports.

The State Director shall submit a semi-annual progress report to the EPA Regional Administrator within 4 weeks of the date 6 months after Phase I commences, and at 6-month intervals thereafter until the expiration of interim authorization. The reports shall briefly summarize, in a manner and form prescribed by the Regional 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.

§ 123.132 Sharing of information.

(a) Any information obtained or used in the administration of 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 Subpart. 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 shall furnish to States with approved programs the information in its files not submitted under a claim of confidentiality which the State needs in order to implement its approved program. EPA shall furnish to States with approved programs information submitted to EPA under a claim of confidentiality, which the State needs in order to implement its approved program, subject to the conditions in 40 CFR Part 2.

§ 123.133 Coordination with other programs.

(a) Issuance of State permits under this Part may be coordinated, as provided in Part 124, with issuance of NPDES, 404, and UIC permits whether they are controlled by the State, EPA, or the Corps of Engineers.

(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 (40 CFR Part 255) as responsible for the development and implementation of

State solid waste management plans under section 4002(b) of RCRA (40 CFR Part 256).

§ 123.134 EPA review of State permits.

(a) The Regional Administrator may comment on permit applications and draft permits as provided in the Memorandum of Agreement under § 123.126.

(b) Where EPA indicates, in a comment, that issuance of the permit would be inconsistent with the approved State program, EPA shall include in the comment:

(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 conditions which the permit would include if it were issued by the Regional Administrator).

(c) A copy of any comment shall be sent to the permit applicant by the Regional Administrator.

(d) The Regional Administrator shall withdraw such comment when satisfied that the State has met or refuted his or her concerns.

(e) Under section 3008(a)(3) of RCRA, EPA may terminate a State-issued permit in accordance with the procedures of Part 124, Subpart E or bring an enforcement action in accordance with the procedures of 40 CFR Part 22 in the case of a violation of a State program requirement. In exercising these authorities, EPA will observe the following conditions:

(1) The Regional Administrator may take action under section 3008(a)(3) of RCRA against a holder of a State-issued permit at any time on the ground that the permittee is not complying with a condition of that permit.

(2) The Regional Administrator may take action under section 3008(a)(3) of RCRA against a holder of a State-issued permit at any time on the ground that the permittee is not complying with a condition that the Regional Administrator in commenting on the permit application or draft permit stated was necessary to implement approved State program requirements, whether or not that condition was included in the final permit.

(3) The Regional Administrator may not take action under section 3008(a)(3) of RCRA against a holder of a State-issued permit on the ground that the permittee is not complying with a condition necessary to implement approved State program requirements unless the Regional Administrator stated in commenting on the permit application or draft permit that that condition was necessary.

(4) The Regional Administrator may take action under section 7003 of RCRA against a permit holder at any time whether or not the permit holder is complying with the permit conditions.

§ 123.135 Approval process.

(a) Within 30 days of receipt of a complete program submission for interim authorization, the Regional Administrator shall:

(1) Issue notice in the Federal Register and in accordance with § 123.39(a)(1) of a public hearing on the State's application for interim authorization. Such public hearing will be held by EPA no earlier than 30 days after notice of the hearing, provided that if significant 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. The State shall participate in any public hearing held by EPA.

(2) Afford the public 30 days after the notice to comment on the State's submission; and

(3) Note the availability of the State's submission for inspection and copying by the public. The State submission shall, at a minimum, be available in the main office of the lead State agency and in the EPA Regional Office.

(b) Within 90 days of the notice in the Federal Register required by paragraph (a)(1) 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 will give notice of this final determination in the Federal Register and in accordance with § 123.39(a)(1). The notification shall include a concise statement of the reasons for this determination, and a response to significant comments received.

(c) Where a State has received interim authorization for Phase I the same procedures required in paragraphs (a) and (b) of this section shall be used in determining whether this amended program submission meets the requirements of the Federal program.

§ 123.136 Withdrawal of State programs.

(a) The criteria and procedures for withdrawal set forth in §§ 123.14 and 15 apply to this section.

(b) In addition to the criteria in § 123.14, a State program may be withdrawn if a State which has obtained interim authorization fails to meet the schedule for or accomplish the additions or revisions of its program set forth in its authorization plan.

§ 123.137 Reversion of State programs.

(a) A State program approved for interim authorization for Phase I shall terminate on the last day of the 6th month after the effective date of Phase II and EPA shall administer and enforce the Federal program in the State commencing on that date if the State has failed to submit by that date an amended submission pursuant to § 123.122(c)(4).

(b) A State program approved for interim authorization for Phase I shall terminate and EPA shall administer and enforce the Federal program in the State if the Regional Administrator determines pursuant to § 123.135(c) that a program submission amended pursuant to § 123.122(c)(4) does not meet the requirements of the Federal program.

PART 124—PROCEDURES FOR DECISIONMAKING

Subpart A—General Program Requirements

Sec.

Subpart B—Specific Procedures Applicable to RCRA Permits [reserved]

Subpart C—Specific Procedures Applicable to PSD Permits

Subpart D—Specific Procedures Applicable to NPDES Permits

Authority: Resource Conservation and Recovery Act, 42 U.S.C. § 6901 *et seq;* Safe Drinking Water Act, 42 U.S.C. § 300(f) *et seq;* Clean Water Act, 33 U.S.C. § 1251 *et seq;* and Clean Air Act, 42 U.S.C. § 1857 *et seq.*

Subpart A—General Program Requirements

§ 124.1 Purpose and scope.

(a) This Part contains EPA procedures for issuing, modifying, revoking and reissuing, or terminating all RCRA, UIC, PSD and NPDES "permits" other than RCRA and UIC "emergency permits" (see §§ 122.27 and 122.40) and RCRA "permits by rule" (§ 122.26). The latter kinds of permits are governed by Subpart A of Part 122. RCRA interim status and UIC authorization by rule are not "permits" and are covered by specific provisions in Subpart A of Part 122. This Part also does not apply to permits issued, modified, revoked and reissued or terminated by the Corps of Engineers. Those procedures are specified in 33 CFR Parts 320–327.

(b) Part 124 is organized into six subparts. Subpart A contains general procedural requirements applicable to all permit programs covered by these regulations. Subparts B through F supplement these general provisions with requirements that apply to only one or more of the programs. Subpart A describes the steps EPA will follow in receiving permit applications, preparing draft permits, issuing public notice, inviting public comment and holding public hearings on draft permits. Subpart A also covers assembling an administrative record, responding to comments, issuing a final permit decision, and allowing for administrative appeal of the final permit decision. Subpart B is reserved for specific procedural requirements for RCRA permits. There are none of these at present but they may be added in the future. Subpart C contains definitions and specific procedural requirements for PSD permits. Subpart D applies to NPDES permits until an evidentiary hearing begins, when Subpart E procedures take over for EPA-issued NPDES permits and EPA-terminated RCRA permits. Subpart F, which is based on the "initial licensing" provisions of the Administrative Procedure Act (APA), can be used instead of Subparts A through E in appropriate cases.

(c) Part 124 offers an opportunity for three kinds of hearings: a public hearing under Subpart A, an evidentiary hearing under Subpart E, and a panel hearing under Subpart F. This chart describes when these hearings are available for each of the five permit programs.

Hearings Available Under This Part

Programs	Subpart (A) Public hearing	Subpart (E) Evidentiary hearing	Subpart (F) Panel hearing
RCRA	On draft permit, at Director's discretion or on request (§ 124.12).	(1) Permit termination (RCRA section 3008). (2) With NPDES evidentiary hearing (§ 124.74(b)(2)).	(1) At RA's discretion in lieu of public hearing (§§ 124.12 and 124.111(a)(3)). (2) When consolidated with NPDES draft permit processed under Subpart F (§ 124.111(a)(1)(i)).
UIC	On draft permit, at Director's discretion or on request (§ 124.12).	With NPDES evidentiary hearing (§ 124.74(b)(2))	(1) At RA's discretion in lieu of public hearing (§§ 124.12 and 124.111(a)(3)). (2) When consolidated with NPDES draft permit processed under Subpart F (§ 124.111(a)(1)(i)).
PSD	On draft permit, at Director's discretion or on request (§ 124.12).	Not available (§ 124.71(c)).	When consolidated with NPDES draft permit processed under Subpart F if RA determines that CAA one year deadline will not be violated.
NPDES (other than general permit).	On draft permit, at Director's discretion or on request (§ 124.12).	(1) On request to challenge any permit condition or variance (§ 124.74). (2) At RA's discretion for any 301(h) request. (§ 124.64(b))	(1) At RA's discretion when first decision on permit or variance request (§ 124.111). (2) At RA's discretion when request for evidentiary hearing is granted under § 124.75(a)(2). (§§ 124.74(c)(8) and 124.111(a)(2)). (3) At RA's discretion for any 301(h) request (§ 124.64(b)).
NPDES (general permit)	On draft permit, at Director's discretion or on request (§ 124.12).	Not available (§ 124.71(a)).	At RA's discretion in lieu of public hearing (§ 124.111(a)(3)).
404	On draft permit or on application when no draft permit, at Director's discretion or on request (§ 124.12).	Not available (§ 124.71).	Not available (§ 124.111).

(d) This Part is designed to allow permits for a given facility under two or more of the listed programs to be processed separately or together at the choice of the Regional Administrator. This allows EPA to combine the processing of permits only when appropriate, and not necessarily in all cases. The Regional Administrator may consolidate permit processing when the permit applications are submitted, when draft permits are prepared, or when final permit decisions are issued. This Part also allows consolidated permits to be subject to a single public hearing under § 124.12, a single evidentiary hearing under § 124.75, or a single non-adversary panel hearing under § 124.120. Permit applicants may recommend whether or not their applications should be consolidated in any given case.

(e) Certain procedural requirements set forth in Part 124 must be adopted by States in order to gain EPA approval to operate RCRA, UIC, NPDES, and 404 permit programs. These requirements are listed in § 123.7 and signaled by the following words at the end of the appropriate Part 124 section or paragraph heading: (*applicable to State programs, see § 123.7*). Part 124 does not apply to PSD permits issued by an approved State.

(f) To coordinate decisionmaking when different permits will be issued by EPA and approved State programs, this Part allows applications to be jointly processed, joint comment periods and hearings to be held, and final permits to be issued on a cooperative basis whenever EPA and a State agree to take such steps in general or in individual cases. These joint processing agreements may be provided in the Memorandum of Agreement developed under § 123.6.

§ 124.2 Definitions.

(a) The definitions in Part 122 apply to this Part except for PSD permits which are governed by the definitions in § 124.41.

(b) For the purposes of Part 124, the term "Director" means the State Director or Regional Administrator and is used when the accompanying provision is required of EPA administered programs and of State programs under § 123.7. The term "Regional Administrator" is used when the accompanying provision applies exclusively to EPA-issued permits and is not applicable to State programs under § 123.7. While States are not required to implement these latter provisions, they are not precluded from doing so, notwithstanding use of the term "Regional Administrator."

(c) The term "formal hearing" means any evidentiary hearing under Subpart E or any panel hearing under Subpart F but does not mean a public hearing conducted under § 124.12.

§ 124.3 Application for a permit.

(a) (*Applicable to State programs, see § 123.7*). (1) Any person who requires a permit under the RCRA, UIC, NPDES, or PSD programs shall complete, sign, and submit to the Director an application for each permit required under §§ 122.21 (RCRA), 122.31 (UIC), 40 CFR 52.21 (PSD), and 122.51 (NPDES). Applications are not required for RCRA permits by rule (§ 122.26), underground injections authorized by rule (§ 122.37), NPDES general permits (§ 122.59) and 404 general permits (§ 123.95).

(2) The Director shall not begin the processing of a permit until the applicant has fully complied with the application requirements for that permit. See §§ 122.4, 122.22 (RCRA), 122.38 (UIC), 40 CFR 52.21 (PSD), and 122.53 (NPDES).

(3) Permit applications (except for PSD permits) must comply with the signature and certification requirements of § 122.6.

(b) In the case of a PSD permit issued to a facility or activity which 40 CFR § 52.21(k) exempts from the requirements of § 52.21 (l), (n), and (p), no proceedings under this Part shall be held to the extent that the Regional Administrator determines that proceedings providing the public with at least as much participation as this Part in the material determinations involved have already been held in the process of granting construction approval under the applicable State implementation plan. The Regional Administrator shall briefly document that finding and make it available to any member of the public upon request. The Regional Administrator shall prepare a draft permit under § 124.6 and follow the applicable procedures under this Part to the extent he or she is unable to make a finding under this subparagraph.

(c) The Regional Administrator shall review for completeness every application for an EPA-issued permit. Each application for an EPA-issued permit submitted by a new HWM facility, a new UIC injection well, a major PSD stationary source or major PSD modification, or an NPDES new source or NPDES new discharger should be reviewed for completeness by the Regional Administrator within 30 days of its receipt. Each application for an EPA-issued permit submitted by an existing HWM facility (both Parts A and B of the application), existing injection well or existing NPDES source should be reviewed for completeness within 60 days of receipt. Upon completing the review, the Regional Administrator shall notify the applicant in writing whether the application is complete. If the application is incomplete, the Regional Administrator shall list the information necessary to make the application complete. When the application is for an existing HWM facility, an existing UIC injection well or an existing NPDES source, the Regional Administrator shall specify in the notice of deficiency a date for submitting the necessary information. The Regional Administrator shall notify the applicant that the application is complete upon receiving this information. After the application is completed, the Regional Administrator may request additional information from an applicant but only when necessary to clarify, modify, or supplement previously submitted material. Requests for such additional information will not render an application incomplete.

(d) If an applicant fails or refuses to correct deficiencies in the application, the permit may be denied and appropriate enforcement actions may be taken under the applicable statutory provision including RCRA section 3008, SDWA sections 1423 and 1424, CAA section 167, and CWA sections 308, 309, 402(h), and 402(k).

(e) If the Regional Administrator decides that a site visit is necessary for any reason in conjunction with the processing of an application, he or she shall notify the applicant and a date shall be scheduled.

(f) The effective date of an application is the date on which the Regional Administrator notifies the applicant that the application is complete as provided in paragraph (c) of this section.

(g) For each application from a major new HWM facility, major new UIC injection well, major NPDES new source, or major NPDES new discharger, the Regional Administrator shall, no later than the effective date of the application, prepare and mail to the applicant a project decision schedule. (This paragraph does not apply to PSD permits.) The schedule shall specify target dates by which the Regional Administrator intends to:

(1) Prepare a draft permit;

(2) Give public notice;

(3) Complete the public comment period, including any public hearing;

(4) Issue a final permit; and

(5) In the case of an NPDES permit, complete any formal proceedings under Subparts E or F.

§ 124.4 Consolidation of permit processing.

(a)(1) Whenever a facility or activity requires a permit under more than one statute covered by these regulations, processing of two or more applications for those permits may be consolidated. The first step in consolidation is to prepare each draft permit at the same time.

(2) Whenever draft permits are prepared at the same time, the statements of basis (required under § 124.7 for EPA-issued permits only) or fact sheets (§ 124.8), administrative records (required under § 124.9 for EPA-issued permits only), public comment periods (§ 124.10), and any public hearings (§ 124.12) on those permits should also be consolidated. The final permits may be issued together. They need not be issued together if in the judgment of the Regional Administrator or State Director(s), joint processing would result in unreasonable delay in the issuance of one or more permits.

(b) Whenever an exisiting facility or activity requires additional permits under one or more of the statutes covered by these regulations, the permitting authority may coordinate the expiration date(s) of the new permit(s) with the expiration date(s) of the existing permit(s) so that all permits expire simultaneously. Processing of the subsequent applications for renewal permits may then be consolidated.

(c) Processing of permit applications under paragraphs (a) or (b) of this section may be consolidated as follows:

(1) The Director may consolidate permit processing at his or her discretion whenever a facility or activity requires all permits either from EPA or from an approved State.

(2) The Regional Administrator and the State Director(s) may agree to consolidate draft permits whenever a facility or activity requires permits from both EPA and an approved State.

(3) Permit applicants may recommend whether or not the processing of their applications should be consolidated.

(d) Whenever permit processing is consolidated and the Regional Administrator invokes the "initial licensing" provisions of Subpart F for an NPDES, RCRA, or UIC permit, any permit(s) with which that NPDES, RCRA or UIC permit was consolidated shall likewise be processed under Subpart F.

(e) Except with the written consent of the permit applicant, the Regional Administrator shall not consolidate processing a PSD permit with any other permit under paragraphs (a) or (b) of this section or process a PSD permit under Subpart F as provided in paragraph (d) of this section when to do so would delay issuance of the PSD permit more than one year from the effective date of the application under § 124.3(f).

§ 124.5 Modification, revocation and reissuance, or termination of permits.

(a) (*Applicable to State programs, see § 123.7*). Permits (other than PSD permits) may be modified, revoked and reissued, or terminated either at the request of any interested person (including the permittee) or upon the Director's initiative. However, permits may only be modified, revoked and reissued, or terminated for the reasons specified in §§ 122.15 or 122.16. All requests shall be in writing and shall contain facts or reasons supporting the request.

(b) If the Director decides the request is not justified, he or she shall send the requester a brief written response giving a reason for the decision. Denials of requests for modification, revocation and reissuance, or termination are not subject to public notice, comment, or hearings. Denials by the Regional Administrator may be informally appealed to the Administrator by a letter briefly setting forth the relevant facts. The Administrator may direct the Regional Administrator to begin modification, revocation and reissuance, or termination proceedings under paragraph (c) of this section. The appeal shall be considered denied if the Administrator takes no action on the letter within 60 days after receiving it. This informal appeal is, under 5 U.S.C. § 704, a prerequisite to seeking judicial review of EPA action in denying a request for modification, revocation and reissuance, or termination.

(c) (*Applicable to State programs, see § 123.7*). (1) If the Director tentatively decides to modify or revoke and reissue a permit under § 122.15, he or she shall prepare a draft permit under § 124.6 incorporating the proposed changes. The Director may request additional information and, in the case of a modified permit, may require the submission of an updated permit application. In the case of revoked and reissued permits, the Director shall require the submission of a new application.

(2) In a permit modification under this section, only those conditions to be modified shall be reopened when a new draft permit is prepared. All other aspects of the existing permit shall remain in effect for the duration of the unmodified permit. When a permit is revoked and reissued under this section, the entire permit is reopened just as if the permit had expired and was being reissued. During any revocation and reissuance proceeding the permittee shall comply with all conditions of the existing permit until a new final permit is reissued.

(3) "Minor modifications" as defined in § 122.17 are not subject to the requirements of this section.

(d) (*Applicable to State programs, see § 123.7*). If the Director tentatively decides to terminate a permit under § 122.16, he or she shall issue a notice of intent to terminate. A notice of intent to terminate is a type of draft permit which follows the same procedures as any draft permit prepared under § 124.6. In the case of EPA-issued permits, a notice of intent to terminate shall not be issued if the Regional Administrator and the permittee agree to termination in the course of transferring permit responsibility to an approved State under § 123.6(b)(1).

(e) When EPA is the permitting authority, all draft permits (including notices of intent to terminate) prepared under this section shall be based on the administrative record as defined in § 124.9.

(f) (*Applicable to State programs, see § 123.7*). Any request by the permittee for modification to an existing 404 permit (other than a request for a minor modification as defined in § 122.17) shall be treated as a permit application and shall be processed in accordance with all requirements of § 124.3.

(g)(1) [Reserved for PSD Modification Provisions]

(2) PSD permits may be terminated only by rescission under § 52.21(w) or by automatic expiration under § 52.21(s). Applications for rescission shall be

processed under § 52.21(w) and are not subject to this Part.

§ 124.6 Draft permits.

(a) (*Applicable to State programs, see § 123.7*). Once an application is complete, the Director shall tentatively decide whether to prepare a draft permit (except in the case of State section 404 permits for which no draft permit is required under § 123.100) or to deny the application.

(b) If the Director tentatively decides to deny the permit application, he or she shall issue a notice of intent to deny. A notice of intent to deny the permit application is a type of draft permit which follows the same procedures as any draft permit prepared under this section. See § 124.6(e). If the Director's final decision (§ 124.15) is that the tentative decision to deny the permit application was incorrect, he or she shall withdraw the notice of intent to deny and proceed to prepare a draft permit under paragraph (d) of this section.

(c) (*Applicable to State programs, see § 123.7*). If the Director tentatively decides to issue an NPDES or 404 general permit, he or she shall prepare a draft general permit under paragraph (d) of this section.

(d) (*Applicable to State programs, see § 123.7*). If the Director decides to prepare a draft permit, he or she shall prepare a draft permit that contains the following information:

(1) All conditions under §§ 122.7 and 122.8 (except for PSD permits);

(2) All compliance schedules under § 122.10 (except for PSD permits);

(3) All monitoring requirements under § 122.11 (except for PSD permits); and

(4) For:

(i) RCRA permits, standards for treatment, storage, and/or disposal and other permit conditions under § 122.28;

(ii) UIC permits, permit conditions under § 122.42;

(iii) PSD permits, permit conditions under 40 CFR § 52.21;

(iv) 404 permits, permit conditions under §§ 123.97 and 123.98;

(v) NPDES permits, effluent limitations, standards, prohibitions and conditions under §§ 122.60 and 122.61, including when applicable any conditions certified by a State agency under § 124.55, and all variances that are to be included under § 124.63.

(e) (*Applicable to State programs, see § 123.7*). All draft permits prepared by EPA under this section shall be accompanied by a statement of basis (§ 124.7) or fact sheet (§ 124.8), and shall be based on the administrative record (§ 124.9), publicly noticed (§ 124.10) and made available for public comment (§ 124.11). The Regional Administrator shall give notice of opportunity for a public hearing (§ 124.12), issue a final decision (§ 124.15) and respond to comments (§ 124.17). For RCRA, UIC or PSD permits, an appeal may be taken under § 124.19 and, for NPDES permits, an appeal may be taken under § 124.74. Draft permits prepared by a State shall be accompanied by a fact sheet if required under § 124.8.

§ 124.7 Statement of basis.

EPA shall prepare a statement of basis for every draft permit for which a fact sheet under § 124.8 is not prepared. The statement of basis shall briefly describe the derivation of the conditions of the draft permit and the reasons for them or, in the case of notices of intent to deny or terminate, reasons supporting the tentative decision. The statement of basis shall be sent to the applicant and, on request, to any other person.

§ 124.8 Fact sheet.

(*Applicable to State programs, see § 123.7.*)

(a) A fact sheet shall be prepared for every draft permit for a major HWM, UIC, 404, or NPDES facility or activity, for every 404 and NPDES general permit (§§ 123.95 and 122.59), for every NPDES draft permit that incorporates a variance or requires an explanation under § 124.56(b), 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 principal facts and the significant factual, legal, methodological and policy questions considered in preparing the draft permit. The Director shall send this fact sheet to the applicant and, on request, to any other person.

(b) The fact sheet shall include, when applicable:

(1) A brief description of the type of facility or activity which is the subject of the draft permit;

(2) The type and quantity of wastes, fluids, or pollutants which are proposed to be or are being treated, stored, disposed of, injected, emitted, or discharged.

(3) For a PSD permit, the degree of increment consumption expected to result from operation of the facility or activity.

(4) A brief summary of the basis for the draft permit conditions including references to applicable statutory or regulatory provisions and appropriate supporting references to the administrative record required by § 124.9 (for EPA-issued permits);

(5) Reasons why any requested variances or alternatives to required standards do or do not appear justified;

(6) A description of the procedures for reaching a final decision on the draft permit including:

(i) The beginning and ending dates of the comment period under § 124.10 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 final decision.

(7) Name and telephone number of a person to contact for additional information.

(8) For NPDES permits, provisions satisfying the requirements of § 124.56.

§ 124.9 Administrative record for draft permits when EPA is the permitting authority.

(a) The provisions of a draft permit prepared by EPA under § 124.6 shall be based on the administrative record defined in this section.

(b) For preparing a draft permit under § 124.6, the record shall consist of:

(1) The application, if required, and any supporting data furnished by the applicant;

(2) The draft permit or notice of intent to deny the application or to terminate the permit;

(3) The statement of basis (§ 124.7) or fact sheet (§ 124.8);

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

(5) Other documents contained in the supporting file for the draft permit.

(6) For NPDES new source draft permits only, any environmental assessment, environmental impact statement (EIS), finding of no significant impact, or environmental information document and any supplement to an EIS that may have been prepared. NPDES permits other than permits to new sources as well as all RCRA, UIC and PSD permits are not subject to the environmental impact statement provisions of section 102(2)(C) of the National Environmental Policy Act, 42 U.S.C. 4321.

(c) Material readily available at the issuing Regional Office or published material that is generally available, and that is included in the administrative record under paragraphs (b) and (c) of this section, need not be physically included with the rest of the record as long as it is specifically referred to in the statement of basis or the fact sheet.

(d) This section applies to all draft permits when public notice was given

after the effective date of these regulations.

§ 124.10 Public notice of permit actions and public comment period.

(a) *Scope.*

(1) The Director shall give public notice that the following actions have occurred:

(i) A permit application has been tentatively denied under § 124.6(b);

(ii) (*Applicable to State programs, see § 123.7*). A draft permit has been prepared under § 124.6(d);

(iii) (*Applicable to State programs, see § 123.7*). A hearing has been scheduled under § 124.12, Subpart E, or Subpart F;

(iv) An appeal has been granted under § 124.19(c);

(v) (*Applicable to State programs, see § 123.7*). A State section 404 application has been received in cases when no draft permit will be prepared (see § 123.100); or

(vi) An NPDES new source determination has been made under § 122.66.

(2) No public notice is required when a request for permit modification, revocation and reissuance, or termination is denied under § 124.5(b). Written notice of that denial shall be given to the requester and to the permittee.

(3) Public notices may describe more than one permit or permit action.

(b) *Timing (applicable to State programs, see § 123.7).* (1) Public notice of the preparation of a draft permit (including a notice of intent to deny a permit application) required under paragraph (a) of this section shall allow at least 30 days for public comment. For EPA-issued permits, if the Regional Administrator determines under 40 CFR Part 6, Subpart F that an Environmental Impact Statement (EIS) shall be prepared for an NPDES new source, public notice of the draft permit shall not be given until after a draft EIS is issued.

(2) Public notice of a public hearing shall be given at least 30 days before the hearing. (Public notice of the hearing may be given at the same time as public notice of the draft permit and the two notices may be combined.)

(c) *Methods (applicable to State programs, see § 123.7).* Public notice of activities described in paragraph (a)(1) of this section shall be given by the following methods:

(1) By mailing a copy of a notice to the following persons (any person otherwise entitled to receive notice under this paragraph may waive his or her rights to receive notice for any classes and categories of permits):

(i) The applicant (except for NPDES and 404 general permits when there is no applicant);

(ii) Any other agency which the Director knows has issued or is required to issue a RCRA, UIC, PSD, NPDES or 404 permit for the same facility or activity (including EPA when the draft permit is prepared by the State);

(iii) Federal and State agencies with jurisdiction over fish, shellfish, and wildlife resources and over coastal zone management plans, the Advisory Council on Historic Preservation, State Historic Preservation Officers, and other appropriate government authorities, including any affected States;

(iv) For NPDES and 404 permits only, any State agency responsible for plan development under CWA section 208(b)(2), 208(b)(4) or 303(e) and the U.S. Army Corps of Engineers, the U.S. Fish and Wildlife Service and the National Marine Fisheries Service;

(v) For NPDES permits only, any user identified in the permit application of a privately owned treatment works;

(vi) For 404 permits only, any reasonably ascertainable owner of property adjacent to the regulated facility or activity and 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;

(vii) For PSD permits only, affected State and local air pollution control agencies, the chief executives of the city and county where the major stationary source or major modification would be located, any comprehensive regional land use planning agency and any State, Federal Land Manager, or Indian Governing Body whose lands may be affected by emissions from the regulated activity;

(viii) Persons on a mailing list developed by:

(A) Including those who request in writing to be on the list;

(B) Soliciting persons for "area lists" from participants in past permit proceedings in that area; and

(C) Notifying the public of the opportunity to be put on the mailing list through periodic publication in the public press and in such publications as Regional and State funded newsletters, environmental bulletins, or State law journals. (The Director may update the mailing list from time to time by requesting written indication of continued interest from those listed. The Director may delete from the list the name of any person who fails to respond to such a request.)

(2) For major permits and NPDES and 404 general permits, publication of a notice in a daily or weekly newspaper within the area affected by the facility or activity; and for EPA-issued NPDES general permits, in the Federal Register;

[Note.—The Director is encouraged to provide as much notice as possible of the NPDES or 404 draft general permit to the facilities or activities to be covered by the general permit.]

(3) When the program is being administered by an approved State, in a manner constituting legal notice to the public under State law; *and*

(4) Any other method reasonably calculated to give actual notice of the action in question to the persons potentially affected by it, including press releases or any other forum or medium to elicit public participation.

(d) *Contents (applicable to State programs, see § 123.7).* (1) *All public notices.* All public notices issued under this Part shall contain the following minimum information:

(i) Name and address of the office processing the permit action for which notice is being given;

(ii) Name and address of the permittee or permit applicant and, if different, of the facility or activity regulated by the permit, except in the case of NPDES and 404 draft general permits under §§ 122.59 and 123.95;

(iii) A brief description of the business conducted at the facility or activity described in the permit application or the draft permit, for NPDES or 404 general permits when there is no application.

(iv) Name, address and telephone number of a person from whom interested persons may obtain further information, including copies of the draft permit or draft general permit, as the case may be, statement of basis or fact sheet, and the application; and

(v) A brief description of the comment procedures required by §§ 124.11 and 124.12 and the time and place of any hearing that will be held, including a statement of procedures to request a hearing (unless a hearing has already been scheduled) and other procedures by which the public may participate in the final permit decision.

(vi) For EPA-issued permits, the location of the administrative record required by § 124.9, the times at which the record will be open for public inspection, and a statement that all data submitted by the applicant is available as part of the administrative record.

(vii) For NPDES permits only, a general description of the location of each existing or proposed discharge point and the name of the receiving water. For draft general permits, this requirement will be satisfied by a map

or description of the permit area. For EPA-issued NPDES permits only, if the discharge is from a new source, a statement as to whether an environmental impact statement will be or has been prepared.

(viii) For 404 permits only,

(A) The purpose of the proposed activity (including, in the case of fill material, activities intended to be conducted on the fill), a description of the type, composition, and quantity of materials to be discharged and means of conveyance; and any proposed conditions and limitations on the discharge;

(B) The name and water quality standards classification, if applicable, of the receiving waters into which the discharge is proposed, and a general description of the site of each proposed discharge and the portions of the site and the discharges which are within State regulated waters;

(C) A description of the anticipated environmental effects of activities conducted under the permit;

(D) References to applicable statutory or regulatory authority; and

(E) Any other available information which may assist the public in evaluating the likely impact of the proposed activity upon the integrity of the receiving water.

(ix) Any additional information considered necessary or proper.

(2) *Public notices for hearings.* In addition to the general public notice described in paragraph (d)(1) of this section, the public notice of a hearing under § 124.12, Subpart E, or Subpart F shall contain the following information:

(i) Reference to the date of previous public notices relating to the permit;

(ii) Date, time, and place of the hearing;

(iii) A brief description of the nature and purpose of the hearing, including the applicable rules and procedures; and

(iv) For 404 permits only, a summary of major issues raised to date during the public comment period.

(e) *(Applicable to State programs, see § 123.7).* In addition to the general public notice described in paragraph (d)(1) of this section, all persons identified in paragraphs (c)(1) (i), (ii), (iii), and (iv) of this section shall be mailed a copy of the fact sheet or statement of basis (for EPA-issued permits), the permit application (if any) and the draft permit (if any).

§ 124.11 Public comments and requests for public hearings.

(Applicable to State programs, see § 123.7.)

During the public comment period provided under § 124.10, any interested person may submit written comments on the draft permit or the permit application for 404 permits when no draft permit is required (see § 123.100) and may request a public hearing, if no hearing has already been scheduled. 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 making the final decision and shall be answered as provided in § 124.17.

§ 124.12 Public hearings.

(a) *(Applicable to State programs, see § 123.7.)* The Director shall hold a public hearing whenever he or she finds, on the basis of requests, a significant degree of public interest in a draft permit(s). The Director also may hold a public hearing at his or her discretion, whenever, for instance, such a hearing might clarify one or more issues involved in the permit decision. Public notice of the hearing shall be given as specified in § 124.10.

(b) Whenever a public hearing will be held 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.

(c) Any person may submit oral or written statements and data concerning the draft permit. Reasonable limits may be set upon the time allowed for oral statements, and the submission of statements in writing may be required. The public comment period under § 124.10 shall automatically be extended to the close of any public hearing under this section. The hearing officer may also extend the comment period by so stating at the hearing.

(d) A tape recording or written transcript of the hearing shall be made available to the public.

(e) At his or her discretion, the Regional Administrator may specify that RCRA and UIC permits be processed under the procedures in Subpart F.

§ 124.13 Obligation to raise issues and provide information during the public comment period.

All persons, including applicants, who believe any condition of a draft permit is inappropriate or that the Director's tentative decision to deny an application, terminate a permit, or prepare a draft permit is inappropriate, must raise all reasonably ascertainable issues and submit all reasonably available arguments and factual grounds supporting their position, including all supporting material, by the close of the public comment period (including any public hearing) under § 124.10. All supporting materials shall be included in full and may not be incorporated by reference, unless they are already part of the administrative record in the same proceeding, or consist of State or Federal statutes and regulations, EPA documents of general applicability, or other generally available reference materials. Commenters shall make supporting material not already included in the administrative record available to EPA as directed by the Regional Administrator. (A comment period longer than 30 days will often be necessary in complicated proceedings to give commenters a reasonble opportunity to comply with the requirements of this section. Commenters may request longer comment periods and they should be freely established under § 124.10 to the extent they appear necessary.)

§ 124.14 Reopening of the public comment period.

(a) If any data information or arguments submitted during the public comment period, including information or arguments required under § 124.13, appear to raise substantial new questions concerning a permit, the Regional Administrator may take one or more of the following actions:

(1) Prepare a new draft permit, appropriately modified, under § 124.6;

(2) Prepare a revised statement of basis under § 124.7, a fact sheet or revised fact sheet under § 124.8 and reopen the comment period under § 124.14; or

(3) Reopen or extend the comment period under § 124.10 to give interested persons an opportunity to comment on the information or arguments submitted.

(b) Comments filed during the reopened comment period shall be limited to the substantial new questions that caused its reopening. The public notice under § 124.10 shall define the scope of the reopening.

(c) For RCRA, UIC, or NPDES permits, the Regional Administrator may also, in the circumstances described above, elect to hold further proceedings under Subpart F. This decision may be combined with any of the actions enumerated in paragraph (a) of this section.

(d) Public notice of any of the above actions shall be issued under § 124.10.

§ 124.15 Issuance and effective date of permit.

(a) After the close of the public comment period under § 124.10 on a draft permit, the Regional Administrator shall issue a final permit decision. The Regional Administrator shall notify the applicant and each person who has

submitted written comments or requested notice of the final permit decision. This notice shall include reference to the procedures for appealing a decision on a RCRA, UIC, or PSD permit or for contesting a decision on an NPDES permit or a decision to terminate a RCRA permit. For the purposes of this section, a final permit decision means a final decision to issue, deny, modify, revoke and reissue, or terminate a permit.

(b) A final permit decision shall become effective 30 days after the service of notice of the decision under paragraph (a) of this section, unless:

(1) A later effective date is specified in the decision; or

(2) Review is requested under § 124.19 (RCRA, UIC, and PSD permits) or an evidentiary hearing is requested under § 124.74 (NPDES permit and RCRA permit terminations); or

(3) No comments requested a change in the draft permit, in which case the permit shall become effective immediately upon issuance.

§ 124.16 Stays of contested permits conditions.

(a) *Stays.* (1) If a request for review of a RCRA or UIC permit under § 124.19 or an NPDES permit under § 124.74 or § 124.114 is granted or if conditions of a RCRA or UIC permit are consolidated for reconsideration in an evidentiary hearing on an NPDES permit under §§ 124.74, 124.82 or 124.114, the effect of the contested permit conditions shall be stayed and shall not be subject to judicial review pending final agency action. (No stay of a PSD permit is available under this section.) If the permit involves a new facility or new injection well, new source, new discharger or a recommencing discharger, the applicant shall be without a permit for the proposed new facility, injection well, source or discharger pending final agency action. See also § 124.60.

(2) Uncontested conditions which are not severable from those contested shall be stayed together with the contested conditions. Stayed provisions of permits for existing facilities, injection wells, and sources shall be identified by the Regional Administrator. All other provisions of the permit for the existing facility, injection well, or source shall remain fully effective and enforceable.

(b) *Stays based on cross effects.* (1) A stay may be granted based on the grounds that an appeal to the Administrator under § 124.19 of one permit may result in changes to another EPA-issued permit only when each of the permits involved has been appealed to the Administrator and he or she has accepted each appeal.

(2) No stay of an EPA-issued RCRA, UIC, or NPDES permit shall be granted based on the staying of any State-issued permit except at the discretion of the Regional Administrator and only upon written request from the State Director.

(c) Any facility or activity holding an existing permit must:

(1) Comply with the conditions of that permit during any modification or revocation and reissuance proceeding under § 124.5; and

(2) To the extent conditions of any new permit are stayed under this section, comply with the conditions of the existing permit which correspond to the stayed conditions, unless compliance with the existing conditions would be technologically incompatible with compliance with other conditions of the new permit which have not been stayed.

§ 124.17 Response to comments.

(a) *(Applicable to State programs, see § 123.7).* At the time that any final permit decision is issued under § 124.15, the Director shall issue a response to comments. States are only required to issue a response to comments when a final permit is issued. This response shall:

(1) Specify which provisions, if any, of the draft permit have been changed in the final permit decision, and the reasons for the change; and

(2) Briefly describe and respond to all significant comments on the draft permit or 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 decision as defined in § 124.18. 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 materials to the administrative record.

(c) *(Applicable to State programs, see § 123.7).* The response to comments shall be available to the public.

§ 124.18 Administrative record for final permit when EPA is the permitting authority.

(a) The Regional Administrator shall base final permit decisions under § 124.15 on 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 § 124.10 (including any extension or reopening under § 124.14);

(2) The tape or transcript of any hearing(s) held under § 124.12;

(3) Any written materials submitted at such a hearing;

(4) The response to comments required by § 124.17 and any new material placed in the record under that section;

(5) For NPDES new source permits only, any final environmental impact statement and any supplement to the final EIS;

(6) Other documents contained in the supporting file for the permit; and

(7) The final permit.

(c) The additional documents required under paragraph (b) of this section should be added to the record as soon as possible after their receipt or publication by the Agency. The record shall be complete on the date the final permit is issued.

(d) This section applies to all final RCRA, UIC, PSD, and NPDES permits when the draft permit was subject to the administrative record requirements of § 124.9 and to all NPDES permits when the draft permit was included in a public notice after October 12, 1979.

(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 § 124.17 ("Response to comments"), need not be physically included in the same file as the rest of the record as long as it is specifically referred to in the statement of basis or fact sheet or in the response to comments.

§ 124.19 Appeal of RCRA, UIC, and PSD permits.

(a) Within 30 days after a RCRA, UIC, or PSD final permit decision has been issued under § 124.15, any person who filed comments on that draft permit or participated in the public hearing may petition the Administrator to review any condition of the permit decision. Any person who failed to file comments or failed to participate in the public hearing on the draft permit may petition for administrative review only to the extent of the changes from the draft to the final permit decision. The 30-day period within which a person may request review under this section begins with the service of notice of the Regional Administrator's action unless a later date is specified in that notice. The petition shall include a statement of the reasons supporting that review, including a demonstration that any

issues being raised were raised during the public comment period (including any public hearing) to the extent required by these regulations and when appropriate, a showing that the 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 an important policy consideration which the Administrator should, in his or her discretion, review.

(b) The Administrator may also decide on his or her initiative to review any condition of any RCRA, UIC, or PSD permit issued under this Part. The Administrator must act under this paragraph within 30 days of the service date of notice of the Regional Administrator's action.

(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 conditions of the final permit decision become final agency action. Public notice of any grant of review by the Administrator under paragraph (a) or (b) of this section shall be given as provided in §124.10. Public 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 only to the person(s) requesting review.

(d) The Administrator may defer consideration of an appeal of a RCRA or UIC permit under this section until the completion of formal proceedings under Subpart E or F relating to an NPDES permit issued to the same facility or activity upon concluding that:

(1) The NPDES permit is likely to raise issues relevant to a decision of the RCRA or UIC appeals;

(2) The NPDES permit is likely to be appealed; and

(3) Either: (i) The interests of both the facility or activity and the public are not likely to be materially adversely affected by the deferral; or

(ii) Any adverse effect is outweighed by the benefits likely to result from a consolidated decision on appeal.

(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 agency action.

(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 or denied by EPA and agency review procedures are exhausted. A final permit decision shall be issued by the Regional Administrator: (i) When the Administrator issues notice to the parties that review has been denied; (ii) when the Administrator issues a decision on the merits of the appeal and the decision does not include a remand of 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 to exhaust administrative remedies.

(2) Notice of any final agency action regarding a PSD permit shall promptly be published in the Federal Register.

§ 124.20 Computation of time.

(a) Any time period scheduled to begin on the occurrence of an act or event shall begin on the day after the act or event.

(b) Any time period scheduled to begin before the occurrence of an act or event shall be computed so that the period ends on the day before the act or event.

(c) If the final day of any time period falls on a weekend or legal holiday, the time period shall be extended to the next working day.

(d) Whenever a party or interested person has the right or is required to act within a prescribed period after the service of notice or other paper upon him or her by mail, 3 days shall be added to the prescribed time.

§ 124.21 Effective date of Part 124.

(a) Except for paragraphs (b) and (c) of this section, Part 124 will become effective July 18, 1980. Because this effective date will precede the processing of any RCRA or UIC permits, Part 124 will apply in its entirety to all RCRA and UIC permits.

(b) All provisions of Part 124 pertaining to the RCRA program will become effective on November 19, 1980.

(c) All provisions of Part 124 pertaining to the UIC program will become effective July 18, 1980, but shall not be implemented until the effective date of 40 CFR Part 146.

(d) This Part does not significantly change the way in which NPDES permits are processed. Since October 12, 1979, NPDES permits have been the subject to almost identical requirements in the revised NPDES regulations which were promulgated on June 7, 1979. See *44 FR 32948*. To the extent this Part changes the revised NPDES permit regulations, those changes will take effect as to all permit proceedings in progress on July 3, 1980.

(e) This Part also does not significantly change the way in which PSD permits are processed. For the most part, these regulations will also apply to PSD proceedings in progress on July 18, 1980. However, because it would be disruptive to require retroactively a formal administrative record for PSD permits issued without one, §§ 124.9 and 124.18 will apply to PSD permits for which draft permits were prepared after the effective date of these regulations.

Subpart B—Specific Procedures Applicable to RCRA Permits [Reserved]

Subpart C—Specific Procedures Applicable to PSD Permits

§ 124.41 Definitions applicable to PSD permits.

Whenever PSD permits are processed under this Part, the following terms shall have the following meanings:

"Administrator," "EPA," and "Regional Administrator" shall have the meanings set forth in § 122.3, except when EPA has delegated authority to administer those regulations to another agency under the applicable subsection of 40 CFR § 52.21, the term "EPA" shall mean the delegate agency and the term "Regional Administrator" shall mean the chief administrative officer of the delegate agency.

"Application" means an application for a PSD permit.

"Appropriate Act and Regulations" means the Clean Air Act and applicable regulations promulgated under it.

"Approved program" means a State implementation plan providing for issuance of PSD permits which has been approved by EPA under the Clean Air Act and 40 CFR Part 51. An "approved State" is one administering an "approved program." "State Director" as used in § 124.4 means the person(s) responsible for issuing PSD permits under an approved program, or that person's delegated representative.

"Construction" has the meaning given in 40 CFR § 52.21.

"Director" means the Regional Administrator.

"Draft permit" shall have the meaning set forth in § 122.3.

"Facility or activity" means a "major PSD stationary source" or "major PSD modification."

"Federal Land Manager" has the meaning given in 40 CFR § 52.21.

"Indian Governing Body" has the meaning given in 40 CFR § 52.21.

"Major PSD modification" means a "major modification" as defined in 40 CFR § 52.21.

"Major PSD stationary source" means a "major stationary source" as defined in 40 CFR § 52.21(b)(1).

"Owner or operator" means the owner or operator of any facility or activity

subject to regulation under 40 CFR § 52.21 or by an approved State.

"Permit" or "PSD permit" means a permit issued under 40 CFR § 52.21 or by an approved State.

"Person" includes an individual, corporation, partnership, association, State, municipality, political subdivision of a State, and any agency, department, or instrumentality of the United States and any officer, agent or employee thereof.

"Regulated activity" or "activity subject to regulation" means a "major PSD stationary source" or "major PSD modification."

"Site" means the land or water area upon which a "major PSD stationary source" or "major PSD modification" is physically located or conducted, including but not limited to adjacent land used for utility systems; as repair, storage, shipping or processing areas; or otherwise in connection with the "major PSD stationary source" or "major PSD modification."

"State" means a State, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, and American Samoa and includes the Commonwealth of the Northern Mariana Islands.

§ 124.42 Additional procedures for PSD permits affecting Class I areas.

(a) The Regional Administrator shall provide notice of any permit application for a proposed major PSD stationary source or major PSD modification the emissions from which would affect a Class I area to the Federal Land Manager, and the Federal official charged with direct responsibility for management of any lands within such area. The Regional Administrator shall provide such notice promptly after receiving the application.

(b) Any demonstration which the Federal Land Manager wishes to present under 40 CFR § 52.21(q)(3), and any variances sought by an owner or operator under § 52.21(q)(4) shall be requested in writing, together with any necessary supporting analysis, by the end of the public comment period under §§ 124.10 or 124.118. (40 CFR § 52.21(q)(3) provides for denial of a PSD permit to a facility or activity when the Federal Land Manager demonstrates that its emissions would adversely affect a Class I area even though the applicable increments would not be exceeded. 40 CFR § 52.21(q)(4) conversely authorizes EPA, with the concurrence of the Federal Land Manager and State responsible, to grant certain variances from the otherwise applicable emission limitations to a facility or activity whose emissions would affect a Class I area.)

(c) Variances authorized by 40 CFR § 52.21(q)(5) through (q)(7) shall be handled as specified in those subparagraphs and shall not be subject to this Part. Upon receiving appropriate documentation of a variance properly granted under any of these provisions, the Regional Administrator shall enter the variance in the administrative record. Any decisions later made in proceedings under this Part concerning that permit shall be consistent with the conditions of that variance.

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 ordinarily will be made during the permit issuance process. Variances and other changes in permit conditions ordinarily will be decided through the same notice-and-comment and hearing procedures 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 (§ 122.54), concentrated aquatic animal production facilities (§ 122.55), separate storm sewers (§ 122.57), and certain other facilities covered by general permits (§ 122.59) 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 is required under this section, the Regional Administrator shall notify the discharger in writing of that decision and the reasons for it, and shall send an application form with the notice. The discharger must apply for a permit under § 122.53 within 60 days of notice. The question whether the initial designation was proper will remain open for consideration during the public comment period under § 124.11 or § 124.118 and in any subsequent hearing.

§ 124.53 State certification.

(a) Under CWA section 401(a)(1), 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) Applications received without a State certification shall be forwarded by the Regional Administrator 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 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 State will be deemed to have waived its right to certify unless that right is exercised within a specified reasonable time not to exceed 60 days from the date the draft permit is mailed to the certifying State agency unless the Regional Administrator finds that unusual circumstances require a longer time.

(d) State certification shall be granted or denied within the reasonable time specified under paragraph (c)(3) of this section. The State shall send a notice of its action, including a copy of any certification, to the applicant and the Regional Administrator.

(e) State certification shall be in writing and shall include:

(1) Conditions which are necessary to assure compliance with the applicable provisions of CWA sections 208(e), 301, 302, 303, 306, and 307 and with appropriate requirements of State law;

(2) When the State certifies a draft permit instead of a permit application, any conditions more stringent than those in the draft permit which the State finds necessary to meet the requirements listed in paragraph (e)(1) of this section. For each more stringent condition, the certifying State agency shall cite the CWA or State law references upon which that condition is based. Failure to provide such a citation waives the right to certify with respect to that condition; and

(3) A statement of the extent to which each condition of the draft permit can be made less stringent without violating the requirements of State law, including water quality standards. Failure to provide this statement for any condition waives the right to certify or object to any less stringent condition which may be established during the EPA permit issuance process.

§ 124.54 Special provisions for State certification and concurrence on applications for section 301(h) variances.

(a) When an application for a permit incorporating a variance request under CWA section 301(h) is submitted to a State, the appropriate State official shall either:

(1) Deny the request for the CWA section 301(h) variance (and so notify the applicant and EPA) and, if the State is an approved NPDES State and the permit is due for reissuance, process the permit application under normal procedures; or

(2) Forward a certification meeting the requirements of § 124.53 to the Regional Administrator.

(b) When EPA issues a tentative decision on the request for a variance under CWA section 301(h), and no certification has been received under paragraph (a) of this section, the Regional Administrator shall forward the tentative decision 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) of this section within such reasonable time, certification shall be waived and the State shall be deemed to have concurred in the issuance of a CWA section 301(h) variance.

(c) Any certification provided by a State under paragraph (a)(2) of this section shall constitute the State's concurrence (as required by section 301(h)) in the issuance of the permit incorporating a section 301(h) variance subject to any conditions specified therein by the State. CWA section 301(h) certification and concurrence under this section will not be forwarded to the State by EPA for recertification after the permit issuance process; States must specify any conditions required by State law, including water quality standards, in the initial certification.

§ 124.55 Effect of State certification.

(a) When certification is required under CWA section 401(a)(1) no final permit shall be issued:

(1) If certification is denied, or

(2) Unless the final permit incorporates the requirements specified in the certification under § 124.53 (d)(1) and (2).

(b) If there is a change in the State law or regulation upon which a certification is based, or if a court of competent jurisdiction or appropriate State board or agency 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 before final agency action on the permit, the permit shall be consistent with the 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 on request of the permittee only to the extent necessary to delete any conditions based on a condition in a certification invalidated by a court of competent jurisdiction or by an appropriate State board or agency.

(c) A State may not condition or deny a certification on the grounds that State law allows a less stringent permit condition. The Regional Administrator shall disregard any such certification conditions, and shall consider those conditions or denials as waivers of certification.

(d) A condition in a draft permit may be changed during agency review in any manner consistent with a certification meeting the requirements of § 124.53(d). No such changes shall require EPA to submit the permit to the State for recertification.

(e) Review and appeals of limitations and conditions attributable to State certification shall be made through the applicable procedures of the State and may not be made through the procedures in this Part.

(f) Nothing in this section shall affect EPA's obligation to comply with § 122.12. See CWA section 301(b)(1)(C).

§ 124.56 Fact sheets.

(Applicable to State programs, see § 123.7.)

In addition to meeting the requirements of § 124.8, NPDES fact sheets shall contain the following:

(a) Any calculations or other necessary explanation of the derivation of specific effluent limitations and conditions, including a citation to the applicable effluent limitation guideline or performance standard provisions as required under § 122.52 and reasons why they are applicable or an explanation of how the alternate effluent limitations were developed;

(b)(1) When the draft permit contains any of the following conditions, an explanation of the reasons why such conditions are applicable:

(i) Limitations to control toxic pollutants under § 122.62(e);

(ii) Limitations on internal wastestreams under § 122.63(i); or

(iii) Limitations on indicator pollutants under § 125.3(g).

(2) For every permit to be issued to a treatment works owned by a person other than a State or municipality, an explanation of the Director's decision on regulation of users under § 122.62(m).

(c) When appropriate, a sketch or detailed description of the location of the discharge described in the application; and

(d) For EPA-issued NPDES permits, the requirements of any State certification under § 124.53.

§ 124.57 Public notice.

(a) *Section 316(a) requests (applicable to State programs, see § 123.7).* In addition to the information required under § 124.10(d)(1), public notice of an NPDES draft permit for a discharge where a CWA section 316(a) request has been filed under § 122.53(i) shall include:

(1) A statement that the thermal component of the discharge is subject to effluent limitations under CWA sections 301 or 306 and a brief description, including a quantitative statement, of the thermal effluent limitations proposed under section 301 or 306; and

(2) A statement that a section 316(a) request 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 request.

(3) If the applicant has filed an early screening request under § 125.72 for a section 316(a) variance, a statement that the applicant has submitted such a plan.

(b) *Evidentiary hearings under Subpart E.* In addition to the information required under § 124.10(d)(2), public notice of a hearing under Subpart E shall 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) A statement of the following procedures:

(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 the 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 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 decision.

(c) *Non-adversary panel procedures under Subpart F.* (1) In addition to the information required under § 124.10(d)(2), mailed public notice of a draft permit to be processed under Subpart F shall include a statement that any hearing shall be held under Subpart F (panel hearing).

(2) Mailed public notice of a panel hearing under Subpart F shall include:

(i) 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;

(ii) A statement whether the recommended decision will be issued by the Presiding Officer or by the Regional Administrator;

(iii) The due date for filing a written request to participate in the hearing under § 124.117; and

(iv) The due date for filing comments under § 124.118.

§ 124.58 Special procedures for EPA-issued general permits for point sources other than separate storm sewers.

(a) The Regional Administrator shall send a copy of the draft general permit and the administrative record to the Deputy Assistant Administrator for Water Enforcement during the public comment period.

(b) The Deputy Assistant Administrator for Water Enforcement shall have 30 days from receipt of the draft general permit, or shall have until the end of the public comment period, whichever is later, to comment upon, object to, or make recommendations with respect to the draft general permit.

(c) If the Deputy Assistant Administrator for Water Enforcement objects to a draft general permit within the period specified in paragraph (b) of this section, the Regional Administrator shall not issue the final general permit until the Deputy Assistant Administrator for Water Enforcement concurs in writing with the conditions of the general permit.

§ 124.59 Conditions requested by the Corps of Engineers and other government agencies.

(*Applicable to State programs, see § 123.7.*)

(a) If during the comment period for an NPDES draft permit, 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 advised 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. If the conditions are stayed by a court of competent jurisdiction or by applicable procedures of the Corps of Engineers, those conditions shall considered stayed in the NPDES permit for the duration of that stay.

(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 § 122.12 and of the 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 and stays of NPDES permits.

In addition to the requirements of § 124.15, the following provisions apply to NPDES permits and to RCRA or UIC permits to the extent those permits may have been consolidated with an NPDES permit in a formal hearing:

(a)(1) If a request for a formal hearing is granted under §124.75 or § 124.114 regarding the initial permit issued for a new source, a new discharger, or a recommencing discharger, or if a petition for review of the denial of a request for a formal hearing with respect to such a permit is timely filed with the Administrator under § 124.91, the applicant shall be without a permit pending final Agency action under § 124.91.

(2) Wherever a source subject to this paragraph has received a final permit under § 124.15 which is the subject of a hearing request under § 124.74 or a formal hearing under § 124.75, the Presiding Officer, on motion by the source, may issue an order authorizing it to begin operation before final agency action if it complies with all conditions of that final permit during the period until final agency action. The Presiding Officer may grant such a motion in any case where no party opposes it, or, if a party opposes the motion, where the source demonstrates that (i) it is likely to prevail on the merits; (ii) irreparable harm to the environment will not result pending final agency action if it is allowed to commence operations before final agency action; and (iii) the public interest requires that the source be allowed to commence operations. All the conditions of any permit covered by that order shall be fully effective and enforceable.

(b) The Regional Administrator, at any time prior to the rendering of an initial decision in a formal hearing on a permit, may withdraw the permit and prepare a new draft permit under § 124.6 addressing the portions so withdrawn. The new draft permit shall proceed through the same process of public comment and opportunity for a public hearing 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 this section shall remain in effect.

(c)(1) If a request for a formal hearing is granted in whole or in part under § 124.75 regarding a permit for an existing source, or if a petition for review of the denial of a request for a formal hearing with respect to that permit is timely filed with the Administrator under § 124.91, the force and effect of the contested conditions of the final permit shall be stayed. The Regional Administrator shall notify, in accordance with § 124.75, the discharger and all parties of the uncontested conditions of the final permit that are enforceable obligations of the discharger.

(2) When 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) When a combination of technologies is contested, but a portion of the combination is not contested, that portion shall be identified as uncontested if compatible with the combination of technologies proposed by the requester.

(4) Uncontested conditions, if inseverable from a contested condition, shall be considered contested.

(5) Uncontested conditions shall become enforceable 30 days after the date of notice under paragraph (c)(1) of this section granting the request. If, however, a request for a formal hearing on a condition was denied and the denial is appealed under § 124.91, then that 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.

(6) Uncontested conditions shall include:

(i) Preliminary design and engineering studies or other requirements necessary to achieve the final permit conditions which do not entail substantial expenditures;

(ii) Permit conditions which will have to be met regardless of which party prevails at the evidentiary hearing;

(iii) When 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 that less stringent level of treatment are consistent with the measures required to attain the limits proposed by any other party; and

(iv) Construction activities, such as segregation of waste streams or installation of equipment, which would partially meet the final permit conditions and could also be used to achieve the discharger's proposed alternative conditions.

(d) If at any time after a hearing is granted and after the Regional Administrator's notice under paragraph (c)(1) of this section it becomes clear that a permit requirement is no longer contested, any party may request the Presiding Officer to issue an order identifying the requirements as uncontested. The requirement identified in such order shall become enforceable 30 days after the issuance of the order.

(e) When a formal 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 fully enforceable and effective until final agency action under § 124.91. (See § 122.5) Upon written request from the applicant, the Regional Administrator may delete requirements from the existing permit which unnecessarily duplicate uncontested provisions of the new permit.

(f) When issuing a finally effective NPDES permit the conditions of which were the subject of a formal hearing under Subparts E or 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 5 years after issuance under § 124.15(a).

[Note.—Extensions of compliance schedules under § 124.60(f)(2) 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 CWA 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, when application of an underlying technology is challenged, the stay for installation requirements relating to that technology would extend for the duration of the hearing.]

(g) For purposes of judicial review under CWA section 509(b), final agency action on a permit does not occur unless and until a party has exhausted its administrative remedies under Subparts E and F and § 124.91. Any party which neglects or fails to seek review under § 124.91 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 § 6.805.

§ 124.62 Decision on variances.

(*Applicable to State programs, see § 123.7.*)

(a) The Director may grant or deny requests for the following variances (subject to EPA objection under § 123.75 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 request 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 CWA section 301(c);

(3) A variance based upon certain water quality factors under CWA section 301(g); or

(4) A variance based on water quality related effluent limitations under CWA section 302(b)(2).

(c) The Regional Administrator may deny, forward, or submit to the EPA Deputy Assistant Administrator for Water Enforcement with a recommendation for approval, a request for a variance listed in paragraph (b) of this section that is forwarded by the State Director, or that is submitted to the Regional Administrator by the requester where EPA is the permitting authority.

(d) The EPA Deputy Assistant Administrator for Water Enforcement may approve or deny any variance request submitted under paragraph (c) of this section. If the Deputy Assistant Administrator approves the variance, the Director may prepare 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 decision under § 124.54.

§ 124.63 Procedures for variances when EPA is the permitting authority.

(a) In States where EPA is the permit issuing authority and a request for a variance is filed as required by § 122.53, the request shall be processed as follows:

(1) If at the time that a request for a variance is submitted the Regional Administrator has received an application under § 124.3 for issuance or renewal of that permit but has not yet prepared 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 § 124.62, shall give notice of a tentative decision on the request at the time the notice of the draft permit is prepared as specified in § 124.10, unless this would significantly delay the processing of the permit. In that case the processing of the variance request may be separated from the permit in accordance with paragraph (a)(3) of this section, and the processing of the permit shall proceed without delay.

(2) If at the time that a request for a variance is filed the Regional Administrator has given notice under § 124.10 of a draft permit 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 prepare a new draft permit including a tentative decision on the request, and the fact sheet required by § 124.8. However, if this will significantly delay the processing of the existing draft permit or the Regional Administrator, for other reasons,

considers combining the variance request and the existing draft permit inadvisable, the request may be separated from the permit in accordance with paragraph (a)(3) of this section, and the administrative disposition of the existing draft 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 request has been separated from a draft permit as described in paragraphs (a) (1) and (2) of this section, the Regional Administrator may prepare a new draft permit and give notice of it under § 124.10. This draft permit shall be accompanied by the fact sheet required by § 124.8 except that the only matters considered shall relate to the requested variance.

§ 124.64 Appeals of variances.

(a) When a State issues a permit on which EPA has made a variance decision, separate appeals of the State permit and of the EPA variance decision are possible. If the owner or operator is challenging the same issues in both proceedings, the Regional Administrator will decide, in consultation with State officials, which case will be heard first.

(b) Variance decisions made by EPA may be appealed under either Subparts E or F, provided the requirements of the applicable Subpart are met. However, whenever the basic permit decision is eligible only for an evidentiary hearing under Subpart E while the variance decision is eligible only for a panel hearing under Subpart F, the issues relating to both the basic permit decision and the variance decision shall be considered in the Subpart E proceeding. No Subpart F hearing may be held if a Subpart E hearing would be held in addition. See § 124.111(b).

(c) *Stays for section 301(g) variances.* If a request for an evidentiary hearing is granted on a variance requested under CWA section 301(g), or if a petition for review of the denial of a request for the hearing is filed under § 124.91, any otherwise applicable standards and limitations under CWA section 301 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 a 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 other than section 301(g) are governed by § 124.60.

§ 124.65 Special procedures for discharge into marine waters section 301(h).

(a) Where it is clear on the face of a section 301(h) request that the discharger is not entitled to a variance, the request shall be denied.

(b) In the case of all other section 301(h) requests the Administrator, or a person designated by the Administrator, may either:

(1) Give written authorization to a requester to submit information required by Part 125, Subpart G or the final request by a date certain, not to exceed 9 months, if:

(i) The requester proposes to submit new or additional information and the request demonstrates that:

(A) The requester made consistent and diligent efforts to obtain such information prior to submitting the final request;

(B) The failure to obtain such information was due to circumstances beyond the control of the requester; and

(C) Such information can be submitted promptly; or

(ii) The requester proposes to submit minor corrective information and such information can be submitted promptly; or

(2) Make a written request of a requester to submit additional information by a certain date, not to exceed 9 months, if such information is necessary to issue a tentative decision under § 124.62(a)(1).

All additional information submitted under this paragraph which is timely received, shall be considered part of the original request.

(c) The otherwise applicable sections of this Part apply to draft permits incorporating section 301(h) variance, except that because 301(h) permits may only be issued by EPA, the terms "Administrator or a person designated by the Regional Administrator" shall be substituted for the term "Director" as appropriate.

(d) No permit subject to a 301(h) variance shall be issued unless the appropriate State officials have concurred or waived concurrence pursuant to § 124.54. In the case of a permit issued to a requester in an approved State, the State Director may:

(1) Revoke any existing permit as of the effective date of the EPA-issued permit subject to a 301(h) variance; and

(2) Co-sign the permit subject to the 301(h) variance, if the Director has indicated an intent to do so in the written concurrence

§ 124.66 Special procedures for decisions on thermal variances under section 316(a).

(a) Except as provided in § 124.65, 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 §§ 124.15 and 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). Permit applicants who wish an early decision on these issues should request it and furnish supporting reasons at the time their permit applications are filed under § 122.53. The Regional Administrator will then decide whether or not to make an early decision. 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 or panel hearing under Subparts E or F.

(b) If the Regional Administrator, on review of the administrative record, determines that the information necessary to decide whether or not the CWA section 316(a) issue is not likely to be available in time for a decision on permit issuance, the Regional Administrator may issue a permit under § 124.15 for a term up to 5 years. This permit shall require achievement of the effluent limitations initially proposed for the thermal component of the discharge no later than the date otherwise required by law. 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. A new discharger may not exceed the thermal effluent limitation which is initially proposed unless and until its CWA section 316(a) variance request is finally approved.

(c) Any proceeding held under paragraph (a) of this section shall be publicly noticed as required by § 124.10 and shall be conducted at a time allowing the permittee to take necessary measures to meet the final compliance date in the event its request for modification of thermal limits is denied.

(d) Whenever the Regional Administrator defers the decision under CWA section 316(a), any decision under section 316(b) may be deferred.

Subpart E—Evidentiary Hearings for EPA-Issued NPDES Permits and EPA-Terminated RCRA Permits

§ 124.71 Applicability.

(a) The regulations in this Subpart govern all formal hearings conducted by EPA under CWA section 402, except for those conducted under Subpart F. They also govern all evidentiary hearings conducted under RCRA section 3008 in connection with the termination of a RCRA permit. This includes termination of interim status for failure to furnish information needed to made a final decision. A formal hearing is available to challenge any NPDES permit issued under § 124.15 except for a general permit. Persons affected by a general permit may not challenge the conditions of a general permit as of right in further agency proceedings. They may instead either challenge the general permit in court, or apply for an individual NPDES permit under § 122.53 as authorized in § 122.59 and then request a formal hearing on the issuance or denial of an individual permit. (The Regional Administrator also has the discretion to use the procedures of Subpart F for general permits. See § 124.111.)

(b) In certain cases, evidentiary hearings under this Subpart may also be held on the conditions of UIC permits, or of RCRA permits which are being issued, modified, or revoked and reissued, rather than terminated or suspended. This will occur when the conditions of the UIC or RCRA permit in question are closely linked with the conditions of an NPDES permit as to which an evidentiary hearing has been granted. See § 124.74(b)(2). Any interested person may challenge the Regional Administrator's initial new source determination by requesting an evidentiary hearing under this Part. See § 122.66.

(c) PSD permits may never be subject to an evidentiary hearing under this Subpart. Section 124.74(b)(2)(iv) provides only for consolidation of PSD permits with other permits subject to a panel hearing under Subpart F.

§ 124.72 Definitions.

For the purpose of this Subpart, the following definitions are applicable:

"Hearing Clerk" means The Hearing Clerk, U.S. Environmental Protection Agency, 401 M Street, S.W., Washington, D.C. 20460.

"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:

(a) 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, or which is factually related to such a case.

(b) 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 such action 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.

"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.

"Presiding Officer" for the purposes of this Subpart means an Administrative Law Judge appointed under 5 U.S.C. 3105 and designated to preside at the hearing. Under Subpart F other persons may also serve as hearing officers. See § 124.119.

"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 otherwise provided by regulation. Submissions shall be considered filed on the date on which they are mailed or delivered in person to the Regional Hearing Clerk.

(b) All 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 submission 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. This requirement does not apply to State or Federal statutes and regulations, judicial decisions published in a national reporter system, officially issued EPA documents of general applicability, and any other generally available reference material which may be incorporated by reference. Any party incorporating materials by reference shall provide copies upon request 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 or the relevant portions shall be indicated.

(4) Failure to comply with the requirements of this section or any other requirement in this Subpart may result in the noncomplying portions of the submission being excluded from consideration. 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 Regional Hearing Clerk to return the submission, together with a reference to the applicable regulations. A party whose materials have been rejected has 14 days to correct the errors and resubmit, unless the Regional Administrator or the Presiding Officer finds good cause to allow a longer time.

(d) The filing of a submission shall not mean or imply that it in fact meets all applicable requirements or that it contains reasonable grounds for the action requested or that the action requested is in accordance with law.

(e) The original of all statements and documents containing factual material, data, or other information shall be signed in ink and shall state the name, address, and the representative capacity of the person making the submission.

§ 124.74 Requests for evidentiary hearing.

(a) Within 30 days following the service of notice of the Regional Administrator's final permit decision under § 124.15, any interested person may submit a request to the Regional Administrator under paragraph (b) of this section for an evidentiary hearing to

reconsider or contest that decision. 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 adjudication. Information supporting the request or other written documents relied upon to support the request shall be submitted as required by § 124.73 unless they are already part of the administrative record required by § 124.18.

[Note.—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 § 124.91(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 or UIC permit. PSD permits may never be made part of an evidentiary hearing under Subpart E. This request is subject to all the requirements of paragraph (b)(1) of this section and in addition will be granted only if:

(i) Processing of the RCRA or UIC permit at issue was consolidated with the processing of the NPDES permit as provided in § 124.4;

(ii) The standards for granting a hearing on the NPDES permit are met;

(iii) The resolution of the NPDES permit issues is likely to make necessary or appropriate modification of the RCRA or UIC permit; and

(iv) If a PSD permit is involved, a permittee who is eligible for an evidentiary hearing under Subpart E on his or her NPDES permit requests that the formal hearing be conducted under the procedures of Subpart F and the Regional Administrator finds that consolidation is unlikely to delay final permit issuance beyond the PSD one-year statutory deadline.

(c) These 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 granted by the Presiding Officer, or upon order of the Presiding Officer *sua sponte* 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 conditions, as well as suggested revised or alternative permit conditions (including permit denials) which, in the judgment of the requester, would be required to implement the purposes and policies of the 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 the CWA.

(7) Identification of the permit obligations that are contested or are inseverable from contested conditions and should be stayed if the request is granted by reference to the particular contested conditions warranting the stay.

(8) Hearing requests also may ask that a formal hearing be held under the procedures set forth in Subpart F. An applicant may make such a request even if the proceeding does not constitute "initial licensing" as defined in § 124.111.

(d) If the Regional Administrator grants an evidentiary hearing request, in whole or in part, the Regional Administrator shall identify the permit conditions which have been contested by the requester and for which the evidentiary hearing has been granted. Permit 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 conditions in writing in accordance with § 124.60(c).

(e) The Regional Administrator must grant or deny all requests for an evidentiary hearing on a particular permit. All requests that are granted for a particular permit shall be combined in a single evidentiary hearing.

(f) 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)(1) Within 30 days following the expiration of the time allowed by § 124.74 for submitting an evidentiary hearing request, the Regional Administrator shall decide the extent to which, if at all, the request shall be granted, provided that the request conforms to the requirements of § 124.74, and sets forth material issues of fact relevant to the issuance of the permit.

(2) When an NPDES permit for which a hearing request has been granted constitutes "initial licensing" under § 124.111, the Regional Administrator may elect to hold a formal hearing under the procedures of Subpart F rather than under the procedures of this Subpart even if no person has requested that Subpart F be applied. If the Regional Administrator makes such a decision, he or she shall issue a notice of hearing under § 124.116. All subsequent proceedings shall then be governed by §§ 124.117 through 124.121, except that any reference to a draft permit shall mean the final permit.

(3) Whenever the Regional Administrator grants a request made under § 124.74(c)(8) for a formal hearing under Subpart F on an NPDES permit that does not constitute an initial license under § 124.111, the Regional Administrator shall issue a notice of hearing under § 124.116 including a statement that the permit will be processed under the procedures of Subpart F unless a written objection is received within 30 days. If no valid objection is received, the application shall be processed in accordance with §§ 124.117 through 124.121, except that any reference to a draft permit shall mean the final permit. If a valid objection is received, this Subpart shall be applied instead.

(b) If a request for a hearing is denied in whole or in part, the Regional Administrator shall briefly state the reasons. That denial is subject to review by the Administrator under § 124.91.

§ 124.76 Obligation to submit evidence and raise issues 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 § 124.18 as part of the preparation 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 party that were not submitted to the administrative record required by § 124.18 as part of the preparation 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; or that it could not have reasonably anticipated the relevance or materiality of the information sought to be introduced. Good cause exists for the introduction of data available on operation authorized under § 124.60(a)(2).

§ 124.77 Notice of hearing.

Public notice of the grant of an evidentiary hearing regarding a permit shall be given as provided in § 124.57(b) and by mailing a copy to all persons who commented on the draft permit, testified at the public hearing, or submitted a request for a hearing. Before the issuance of the 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) 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 nonadversary panel 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 or she does not designate himself or herself as a member of the Agency trial staff), and any of their staff participating in the decisional process. In the case of a non-adversary panel hearing, 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 which was not originally filed or stated in the administrative record or in the hearing. *Ex parte* communications do not include:

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

(ii) Discussions between the decisional body and either:

(A) Interested persons outside the Agency, or

(B) The Agency trial staff, *if* all parties have received prior written notice of the 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 in the hearing and any other interested person not employed by the Agency at the time of the communications, and any attorney of record for those persons.

(b)(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 on 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 on the merits of the proceedings.

(3) A member of the decisional body who receives or who makes or who knowingly causes to be made a communication prohibited by this subsection shall file with the Regional Hearing Clerk all written communications or memoranda stating the substance of all oral communications together with all written responses and memoranda stating the substance of all oral responses.

(c) Whenever any member of the decisionmaking body receives an *ex parte* communication knowingly made or knowingly caused to be made by a party or representative of a party in violation of this section, the person presiding at the stage of the hearing then in progress may, to the extent consistent with justice and the policy of the 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.

(d) The prohibitions of this section begin 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.

§ 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 requests that meet the requirements of §§ 124.74 and 124.76.

(b) After the expiration of the time prescribed in paragraph (a) of this section 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. No factual or legal issues, besides those raised by timely hearing requests, may be proposed except for good cause. A motion for leave 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 Presiding Officer shall grant the 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 is published shall be filed with the Regional Hearing Clerk.

(b) The party filing any submission shall also serve a copy of each submission upon the Presiding Officer and each party of record. Service shall be by mail or personal delivery.

(c) Every submission shall be accompanied by an acknowledgement of service by the person served or a certificate of service citing the date, place, time, and manner of service and the names of the persons served.

(d) The Regional Hearing Clerk shall maintain and furnish a list containing the name, service address, and telephone number of all parties and their attorneys or duly authorized representatives to any person upon request.

§ 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 assign 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 in a separate proceeding.

§ 124.83 Prehearing conferences.

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

(b) The Presiding Officer shall allow a reasonable period before the hearing begins for the orderly completion of all prehearing procedures and for the submission and disposition of all prehearing motions. Where the circumstances warrant, the Presiding Officer may 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) of this section, the following matters may be considered:

(1) Simplification, clarification, amplification, or limitation of the issues.

(2) Admission of facts and of the genuiness of documents, and stipulations of facts.

(3) 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 § 124.19 shall be received in evidence subject to the provisions of § 124.85(d)(2). 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) Matters subject to official notice may be taken.

(5) Scheduling as many of the following as are deemed necessary and proper by the Presiding Officer:

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

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

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

(6) Grouping participants with substantially similar interests to eliminate redundant evidence, motions, and objections.

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

(d) At a prehearing conference or at some other 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 § 124.18 shall be marked for identification as ordered by the Presiding Officer. Witnesses, proposed written testimony, and other evidence may be added or amended upon order of the Presiding Officer for good cause shown. 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 each 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 its favor upon any of the issues being adjudicated on the basis that there is no genuine issue of material fact for determination. This motion shall be filed at least 45 days before the date set for the hearing, except that upon good cause shown the 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 may 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 factual issues are decided by summary determination, no hearing will be held and the Presiding Officer shall prepare an initial decision under § 124.89. If summary determination is denied or if 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.

(f) Should it appear from the affidavits of a party opposing a motion for summary determination that he or she cannot for reasons stated present, by affidavit or otherwise, facts essential to justify his or her opposition, the Presiding Officer may deny the motion or order a continuance to allow additional affidavits or other information to be obtained or may make such other order as is just and proper.

§ 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.

[Note.—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.]

(2) The Agency has the burden of going forward to present an affirmative case in support of any challenged condition of a final permit.

(3) Any hearing participant who, by raising material issues of fact, contends:

(i) That particular conditions or requirements in the permit are improper or invalid, and who desires either:

(A) The inclusion of new or different conditions or requirements; or

(B) The deletion of those conditions or requirements; or

(ii) That the denial or issuance of a permit is otherwise improper or invalid, shall have the burden of going forward to present an affirmative case at the conclusion of the Agency case on the challenged requirement.

(b) The Presiding Officer shall conduct a fair and impartial hearing, take action to avoid unnecessary delay in the disposition of the proceedings, and maintain order. For these purposes, the Presiding Officer may:

(1) Arrange and issue notice of the date, time, and place of hearings and conferences;

(2) Establish the methods and procedures to be used in the development of the evidence;

(3) Prepare, after considering the views of the participants, written statements of areas of factual disagreement among the participants;

(4) Hold conferences to settle, simplify, determine, or strike any of the issues in a hearing, or to consider other matters that may facilitate the expeditious disposition of the hearing;

(5) Administer oaths and affirmations;

(6) Regulate the course of the hearing and govern the conduct of participants;

(7) Examine witnesses;

(8) Identify and refer issues for interlocutory decision under § 124.90;

(9) Rule on, admit, exclude, or limit evidence;

(10) Establish the time for filing motions, testimony, and other written evidence, briefs, findings, and other submissions;

(11) Rule on motions and other procedural matters pending before him, including but not limited to motions for summary determination in accordance with § 124.84;

(12) Order that the hearing be conducted in stages whenever the number of parties is large or the issues are numerous and complex;

(13) Take any action not inconsistent with the provisions of this Subpart for the maintenance of order at the hearing and for the expeditious, fair, and impartial conduct of the proceeding;

(14) Provide for the testimony of opposing witnesses to be heard simultaneously or for such witnesses to meet outside the hearing to resolve or isolate issues or conflicts;

(15) Order that trade secrets be treated as confidential business information in accordance with § 122.19 and 40 CFR Part 2; and

(16) Allow such cross-examination as may be required for a full and true disclosure of the facts. No cross-examination shall be allowed on questions of policy except to the extent required to disclose the factual basis for permit requirements, or on questions of law, or regarding matters (such as the validity of effluent limitations guidelines) that are not subject to challenge in an evidentiary hearing. No Agency witnesses shall be required to testify or be made available for cross-examination on such matters. In deciding whether or not to allow cross-examination, the Presiding Officer shall consider the likelihood of clarifying or resolving a disputed issue of material fact compared to other available methods. 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 issues. Written testimony shall be prepared in narrative form.

(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 § 124.18 shall be admitted and received in evidence. Upon motion by any party the Presiding Officer may direct that a witness be provided to sponsor a portion or portions of the administrative record. The Presiding Officer, upon finding that the standards in § 124.85(b)(3) have been met, shall direct the appropriate party to produce the witness for cross-examination. If a sponsoring witness cannot be provided, the Presiding Officer may reduce the weight accorded the appropriate portion of the record.

[Note.—Receiving the administrative record into evidence automatically serves several purposes: (1) it documents the prior course of the proceeding; (2) it provides a record of the views of affected persons for consideration by the agency decisionmaker; and (3) it provides factual material for use by the decisionmaker.]

(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, by means of a brief statement on the record describing the testimony excluded.

(4) When two or more parties have substantially similar interests 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 those 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.

§ 124.86 Motions.

(a) Any party may file a motion (including a motion to dismiss a particular claim on a contested issue), with the Presiding Officer on any matter relating to the proceeding. All motions shall be in writing 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 part 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 10 days by the Presiding Officer for good cause shown.

(c) Notwithstanding § 122.52, any party may file with the Presiding Officer a motion seeking to apply to the permit any regulatory or statutory provision issued or made available after the issuance of the permit under § 124.15. The Presiding Officer shall grant any motion to apply a new statutory provision unless he or she finds it contrary to legislative intent. The Presiding Officer may grant a motion to apply a new regulatory requirement when appropriate to carry out the purpose of CWA, and when 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 hearing record and shall be available to the public except as provided in § 122.19, in the Office of the Regional Hearing Clerk, as soon as it is received in that office.

(b) Evidentiary hearings shall be either stenographically reported verbatim or tape recorded, and thereupon transcribed. After the hearing, the reporter shall certify and file with the Regional Hearing Clerk:

(1) The original of the transcript, and

(2) The exhibits received or offered into evidence at the hearing.

(c) The Regional Hearing Clerk shall promptly notify each of the parties of the filing of the certified transcript of proceedings. Any party who desires a copy of the transcript of the hearing may obtain a copy of the hearing transcript from the Regional Hearing Clerk upon payment of costs.

(d) The Presiding Officer shall allow witnesses, parties, and their counsel an opportunity to submit such written proposed corrections of the transcript of any oral testimony taken at the hearing, pointing out errors that may have been made in transcribing the testimony, as are required to make the transcript conform to the testimony. Except in unusual cases, no more than 30 days shall be allowed for submitting such corrections from the day a complete transcript of the hearing becomes available.

§ 124.88 Proposed findings of fact and conclusions; brief.

Within 45 days after the certified transcript is filed, any party may file with the Regional Hearing Clerk proposed findings of fact and conclusions of law and a brief in support thereof. Briefs shall contain appropriate references to the record. A copy of these findings, conclusions, and brief shall be served upon all the other parties 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 under § 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 30 days after its service unless within that time:

(1) A party files a petition for review by the Administrator pursuant to § 124.91; or

(2) The Administrator *sua sponte* files a notice that he or she will review the decision pursuant to § 124.91.

§ 124.90 Interlocutory appeal.

(a) Except as provided in this section, appeals to the Administrator may be taken only under § 124.91. 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 10 days of service of notice of the order, ruling, or decision and shall state briefly the grounds relied on.

(b) The Presiding Officer may certify an order or ruling for appeal to the Administrator if:

(1) The order or ruling involves an important question on which there is substantial ground for difference of opinion, and

(2) Either:

(i) An immediate appeal of the order or ruling will materially advance the ultimate completion of the proceeding; or

(ii) A review after the final order is issued will be inadequate or ineffective.

(c) 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 automatically 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 5 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.

(d) In exceptional circumstances, 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.

(e) The failure to request an interlocutory appeal shall not prevent taking exception to an order or ruling in an appeal under § 124.91.

§ 124.91 Appeal to the Administrator.

(a)(1) Within 30 days after service of an initial decision, or a 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 the initial decision or denial, or 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. The petition shall include a statement of the supporting reasons and, when 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 review.

(2) Within 15 days after service of a petition for review under paragraph (a)(1) of this section, any other party to the proceeding may file a responsive petition.

(3) Policy decisions made or legal conclusions drawn 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 a request for an evidentiary hearing the Administrator may, *sua sponte*, review such decision. Within 7 days after the Administrator has decided under this section to review an initial decision or the denial of a request for an evidentiary hearing, notice of that decision shall be served by mail upon all affected parties and the Regional Administrator.

(c)(1) 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) of this section to review a decision, the Administrator may notify the parties that only certain issues shall be briefed.

(2) Upon granting a petition for review, the Regional Hearing Clerk shall promptly forward a copy of the record to the Judicial Officer and shall retain a complete duplicate copy of the record in the Regional Office.

(d) Notwithstanding the grant of a petition for review or a determination under paragraph (b) of this section to review a decision, the Administrator may summarily affirm without opinion an initial decision or the denial of a request for an evidentiary hearing.

(e) A petition to the Administrator under paragraph (a) of this section 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.

(f) If a party timely files a petition for review or if the Administrator *sua sponte* orders review, then, for purposes of judicial review, final Agency action on an issue occurs as follows:

(1) If the Administrator denies review or summarily affirms without opinion as provided in § 124.91(d), then the initial decision or denial becomes the final Agency action and occurs upon the service of notice of the Administrator's action.

(2) If the Administrator issues a decision without remanding the proceeding then the final permit, redrafted as required by the Administrator's original decision, shall be reissued and served upon all parties to the appeal.

(3) If the Administrator issues a decision remanding the proceeding, then final Agency action occurs upon completion of the remanded proceeding, including any appeals to the Administrator from the results of the remanded proceeding.

(g) 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 the petitioner's brief. The petitioner then may file a reply brief within 14 days of service of the responsive brief. Any person may file an *amicus brief* for the consideration of the Administrator within the same time periods that govern reply briefs. If the Administrator determines, *sua sponte*, to review an initial Regional Administrator's decision or the denial of a request for an evidentiary hearing, the Administrator shall notify the parties of the schedule for filing briefs.

(h) Review by the Administrator of an initial decision or the denial of an evidentiary hearing shall be limited to the issues specified under paragraph (a) of this section, except that after notice to all parties, the Administrator may raise and decide other matters which he or she considers material on the basis of the record.

Subpart F—Non-Adversary Panel Procedures

§ 124.111 Applicability.

(a) Except as set forth in this Subpart, this Subpart applies in lieu of, and to complete exclusion of, Subparts A through E in the following cases:

(1)(i) In any proceedings for the issuance of any NPDES permit which constitutes "initial licensing" under the Administrative Procedure Act, when the Regional Administrator elects to apply this Subpart and explicitly so states in the public notice of the draft permit under § 124.10 or in a supplemental notice under § 124.14. If an NPDES draft permit is processed under this Subpart, any other draft permits which have been consolidated with the NPDES draft permit under § 124.4 shall likewise be processed under this Subpart, except for PSD permits when the Regional Administrator makes a finding under § 124.4(e) that consolidation would be likely to result in missing the one year statutory deadline for issuing a final PSD permit under the CAA.

(ii) "Initial licensing" includes both the first decision on an NPDES permit applied for by a discharger that has not previously held one and the first decision on any variance requested by a discharger.

(iii) To the extent this Subpart is used to process a request for a variance under CWA section 301(h), the term "Adminstrator or a person designated by the Administrator" shall be substituted for the term "Regional Administrator".

(2) In any proceeding for which a hearing under this Subpart was granted under § 124.75 following a request for a formal hearing under § 124.74. See §§ 124.74(c)(8) and 124.75(a)(2).

(3) Whenever the Regional Administrator determines as a matter of discretion that the more formalized mechanisms of this Subpart should be used to process draft NPDES general permits (for which evidentiary hearings are unavailable under § 124.71), or draft RCRA or draft UIC permits.

(b) EPA shall not apply these procedures to a decision on a variance where Subpart E proceedings are simultaneously pending on the other conditions of the permit. See § 124.64(b).

§ 124.112 Relation to other subparts.

The following provisions of Subparts A through E apply to proceedings under this Subpart:

(a)(1) §§ 124.1 through 124.10.

(2) § 124.14 "Reopening of comment period."

(3) § 124.16 "Stays of contested permit conditions."

(4) § 124.20 "Computation of time."

(b)(1) § 124.41 "Definitions applicable to PSD permits."

(2) § 124.42 "Additional procedures for PSD permits affecting Class I Areas."

(c)(1) §§ 124.51 through 124.56.

(2) § 124.57 (c) "Public notice."

(3) §§ 124.58 through 124.66.

(d)(1) § 124.72 "Definitions," except for the definition of "Presiding Officer," see § 124.119.

(2) § 124.73 "Filing."

(3) § 124.78 *"Ex parte* communications."

(4) § 124.80 "Filing and service."

(5) § 124.85(a) (Burden of proof).

(6) § 124.86 "Motions."

(7) § 124.87 "Record of hearings."

(8) § 124.90 "Interlocutory appeal."

(e) In the case of permits to which this Subpart is made applicable after a final permit has been issued under § 124.15, either by the grant under § 124.75 of a hearing request under § 124.74, or by notice of supplemental proceedings

under § 124.14, §§ 124.13 and 124.76 shall also apply.

§ 124.113 Public notice of draft permits and public comment period.

Public notice of a draft permit under this Subpart shall be given as provided in §§ 124.10 and 124.57. At the discretion of the Regional Administrator, the public comment period specified in this notice may include an opportunity for a public hearing under § 124.12.

§ 124.114 Request for hearing.

(a) By the close of the comment period under § 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 the 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 notify each person requesting the hearing and the applicant, and shall provide public notice under § 124.57(c). If the Regional Administrator determines that a request does not meet the requirements of paragraph (a) of this section or does not present genuine issues of fact, the Regional Administrator may deny the request for the hearing and shall serve written notice of that determination on all persons requesting the hearing.

(c) The Regional Administrator may also decide before a draft permit is prepared under § 124.6 that a hearing should be held under this section. In such cases, the public notice of the draft permit shall explicitly so state and shall contain the information required by § 124.57(c). This notice may also provide for a hearing under § 124.12 before a hearing is conducted under this section.

§ 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 request are denied under that section, the Regional Administrator shall then prepare a recommended decision under § 124.124. Any person whose hearing request has been denied may then appeal that recommended decision to the Administrator as provided in § 124.91.

§ 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 § 124.57(c). The mailed notice shall include a statement which indicates whether the Presiding Officer or the Regional Administrator will issue the Recommended decision. The mailed notice shall also allow the participants at least 30 days to submit written comments as provided under § 124.118.

(b) The Regional Administrator may also give notice of a hearing under this section at the same time as notice of a draft permit under § 124.113. In that case the comment periods under §§ 124.113 and 124.118 shall be merged and held as a single public comment period.

(c) The Regional Administrator may also give notice of hearing under this section in response to a hearing request under § 124.74 as provided in § 124.75.

§ 124.117 Request to participate in hearing.

(a) Persons desiring to participate in any hearing noticed under this section, shall file a request to participate with the Regional Hearing Clerk before the deadline set forth in the notice of the grant of the hearing. Any person filing such a request becomes a party to the proceedings within the meaning of the Administrative Procedure Act. 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 nonbinding list of the persons to take part in the presentation.

(b) As soon as practicable, but in no event later than 2 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 party. All comments shall include any affidavits, studies, data, tests, or other materials relied upon for making any factual statements in the comments.

(b)(1) Written comments filed under paragraph (a) of this section shall constitute the bulk of the evidence submitted at the hearing. Oral statements at the hearing should be brief and in the nature of argument. They 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 party believes can more effectively be argued in the hearing context.

(2) Notwithstanding the foregoing, within two weeks prior to the deadline specified in paragraph (a) of this section for the filing of comments, any party 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 the party will be prejudiced if required to submit the comments in written form.

(c) Parties to any hearing may submit written material in response to the comments filed by other parties under paragraph (a) of this section at the time they appear at the panel stage of the hearing under § 124.120.

§ 124.119 Presiding Officer.

(a)(1)(i) Before giving notice of a hearing under this Subpart in a proceeding involving an NPDES permit, the Regional Administrator shall request that the Chief Administrative Law Judge assign an Administrative Law Judge as the Presiding Officer. The Chief Administrative Law Judge shall then make the assignment.

(ii) If all parties to such a hearing waive in writing their statutory right to have an Administrative Law Judge named as the Presiding Officer in a hearing subject to this subparagraph the Regional Administrator may name a Presiding Officer under paragraph (a)(2)(ii) of this section.

(2) Before giving notice of a hearing under this Subpart in a proceeding which does not involve an NPDES permit or a RCRA permit termination, the Regional Administrator shall either:

(i) Request that the Chief Administrative Law Judge assign an Administrative Law Judge as the Presiding Officer. The Chief Administrative Law Judge may thereupon make such an assignment if he concludes that the other duties of his office allow, or

(ii) Name a lawyer permanently or temporarily employed by the Agency and without prior connection with the proceeding to serve as Presiding Officer:

(iii) If the Chief Administrative Law Judge declines to name an Administrative Law Judge as Presiding Officer upon receiving a request under subparagraph (2)(i) of this section, the Regional Administrator shall name a Presiding Officer under paragraph (a)(2)(ii) of this section.

(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 §§ 124.113 and 124.118, the record of the panel hearing under § 124.120, and the administrative record, as defined in § 124.9 or in § 124.18 as the case may be shall be received in evidence, and

(3) Either upon motion or *sua sponte*, to change the date of the hearing under § 124.120, or to recess such a hearing until a future date. In any such case the notice required by § 124.10 shall be given.

§ 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 or responsibility in areas related to the hearing issue, at least two or whom shall not have taken part in writing the draft permit. If appropriate for the evaluation of new or different issues presented at the hearing, the panel membership, at the discretion of the Regional Administrator, may change or may include persons not employed by EPA.

(b) At the time of the hearing notice under § 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 and address 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. The 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 when the Presiding Officer determines, after consultation with the panel, that the 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 party may submit to the Presiding Officer written questions specifically directed to any person appearing or testifying in the hearing. The Presiding Officer, after consultation with the panel may, at his sole discretion, ask the written question so submitted.

(f) Within 10 days after the close of the hearing, any party shall submit such additional written testimony, affidavits, information, or material as they consider relevant or which the panel may request. 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 party to a panel hearing may submit a written request to cross-examine 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. 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 then-existing record, and the extent to which they are material to the decision on the application; and

(2) The person(s) to be cross-examined, and an estimate of the time necessary to conduct the cross-examination. This shall include a statement explaining how the cross-examination will resolve the disputed issues of material fact.

(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 request. Orders granting requests for cross-examination shall be served on all parties 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,

(c) In issuing this order, the Presiding Officer may determine that two or more parties 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 that case, the order shall simply assign time for cross-examination without further identifying the representative. If the designated parties fail to choose a single representative, the Presiding Officer may divide the assigned time among the representatives or issue any other order which justice may require.

(d) 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.

(e)(1) No later than the time set for requesting cross-examination, a party 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 this request at the time he or she issues (or would have issued) an order granting or denying a request for cross-examination, under paragraph (b) of this section. If the request for an alternative method is granted, the order shall specify the alternative and any other relevant information (such as 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 the request, require alternative means of clarifying the record to be used whether or not a request to do so has been made. The party requesting cross-examination shall

have one week to comment on the results of using the alternative method. After considering these comments the Presiding Officer shall issue an order granting or denying the request for cross-examination.

(f) The provisions of § 124.85(d)(2) apply to proceedings under this Subpart.

§ 124.122 Record for final permit.

The record on which the final permit shall be based in any proceeding under this Subpart consists of:

(a) The administrative record compiled under §§ 124.9 or 124.18 as the case may be;

(b) Any material submitted under § 124.78 relating to *ex parte* contacts;

(c) All notices issued under § 124.113;

(d) All requests for hearings, and rulings on those requests, received or issued under § 124.114;

(e) Any notice of hearing issued under § 24.116;

(f) Any request to participate in the hearing received under § 124.117;

(g) All comments submitted under § 124.118, any motions made under that section and the rulings on them, and any comments filed under § 124.113;

(h) The full transcript and other material received into the record of the panel hearing under § 124.120;

(i) Any motions for, or rulings on, cross-examination filed or issued under § 124.121;

(j) Any motions for, orders for, and the results of, any alternatives to cross-examination under § 124.121; and

(k) The full transcript of any cross-examination held.

§ 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 permit (if such person is urging that the draft or final permit 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 where appropriate. 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 or final permit should be modified. After the recommended decision has been filed, the Regional Hearing Clerk shall serve a copy of that 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 that decision or to any adverse order or ruling of the Presiding Officer to which that party objected, and may appeal those exceptions to the Administrator as provided in § 124.91, 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. That final decision shall include findings of fact; conclusions regarding material issue of law, fact, or discretion, as well as reasons therefore; and a modified 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 or her designee may consult with the Presiding Officer, members of the hearing panel, or any other EPA employee other than members of the Agency Trial Staff under § 124.78 in preparing the final decision. The Hearing Clerk shall file a copy of the decision on all parties.

§ 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 becomes 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 under this Subpart.

(b) The failure of the Administrator, Regional Administrator, or Presiding Officer to do any act within the time periods specified under this Part shall not waive or diminish any right, power, 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 under this Part the Administrator, Regional Administrator, or Presiding Officer, as the case may be, may grant that party such relief of a procedural nature (including extension of any time for compliance or other action) as may be appropriate.

Appendix A to Part 124—Guide to Decisionmaking Under Part 124

This Appendix is designed to assist in reading the procedural requirements set out in Part 124. It consists of two flow charts.

Figure 1 diagrams the more conventional sequence of procedures EPA expects to follow in processing permits under this Part. It outlines how a permit will be applied for, how a draft permit will be prepared and publicly noticed for comment, and how a final permit will be issued under the procedures in Subpart A.

This permit may then be appealed to the Administrator, as specified both in Subpart A (for RCRA, UIC, or PSD permits), or Subpart E or F (for NPDES permits). The first flow chart also briefly outlines which permit decisions are eligible for which types of appeal.

Part 124 also contains special "non-adversary panel hearing" procedures based on the "initial licensing" provisions of the Administrative Procedure Act. These procedures are set forth in Subpart F. In some cases, EPA may only decide to make those procedures applicable after it has gone through the normal Subpart A procedures on a draft permit. This process is also diagrammed in Figure 1.

Figure 2 sets forth the general procedure to be followed where these Subpart F procedures have been made applicable to a permit from the beginning.

Both flow charts outline a sequence of events directed by arrows. The boxes set forth elements of the permit process; and the diamonds indicate key decisionmaking points in the permit process.

The charts are discussed in more detail below.

Figure 1—Conventional EPA Permitting Procedures

This chart outlines the procedures for issuing permits whenever EPA does not make use of the special "panel hearing" procedures in Subpart F. The major steps depicted on this chart are as follows:

1. The permit process can begin in any one of the following ways:

a. Normally, the process will begin when a person applies for a permit under §§ 122.4 and 124.3.

b. In other cases, EPA may decide to take action on its own initiative to change a permit or to issue a general permit. This leads directly to preparation of a draft permit under § 124.6.

c. In addition, the permittee or any interested person (other than for PSD permits) may request modification, revocation and reissuance or termination of a permit under §§ 122.15, 122.16 and 124.5.

Those requests can be handled in either of two ways:

i. EPA may tentatively decide to grant the request and issue a new draft permit for public comment, either with or without requiring a new application.

ii. If the request is denied, an informal appeal to the Administrator is available.

2. The next major step in the permit process is the preparation of a draft permit. As the chart indicates, preparing a draft permit also requires preparation of either a statement of basis (§ 124.7), a fact sheet (§ 124.6) or, compilation of an "administrative record" (§ 124.9), and public notice (§ 124.10).

3. The next stage is the public comment period (§ 124.11). A public hearing under § 124.12 may be requested before the close of the public comment period.

EPA has the discretion to hold a public hearing, even if there were no requests during the public comment period. If EPA decides to schedule one, the public comment period will be extended through the close of the hearing. EPA also has the discretion to conduct the public hearing under Subpart F panel procedures. (See Figure 2.)

The regulations provide that all arguments and factual materials that a person wishes EPA to consider in connection with a particular permit must be placed in the record by the close of the public comment period (§ 124.13).

4. Section 124.14 states that EPA, at any time before issuing a final permit decision may decide to either reopen or extend the comment period, prepare a new draft permit and begin the process again from that point, or for RCRA and UIC permits, or for NPDES permits that constitute "initial licensing", to begin "panel hearing" proceedings under Subpart F. These various results are shown schematically.

5. The public coment period and any public hearing will be followed by issuance of a final permit decision (§ 124.15). As the chart shows, the final permit must be accompanied by a response to comments (§ 124.17) and be based on the administrative record (§ 124.18).

6. After the final permit is issued, it may be appealed to higher agency authority. The exact form of the appeal depends on the type of permit involved.

a. RCRA, UIC or PSD permits standing alone will be appealed directly to the Administrator under § 124.19.

b. NPDES permits which do not involve "initial licensing" may be appealed in an evidentiary hearing under Subpart E. The regulations provide (§ 124.74) that if such a hearing is granted for an NPDES permit and if RCRA or UIC permits have been consolidated with that permit under § 124.4 then closely related conditions of those RCRA or UIC permits may be reexamined in an evidentiary hearing. PSD permits, however, may never be reexamined in a Subpart E hearing.

c. NPDES permits which do involve "initial licensing" may be appealed in a panel hearing under Subpart F. The regulations provide that if such a hearing is granted for an NPDES permit, consolidated RCRA, UIC, or PSD permits may also be reexamined in the same proceeding.

As discussed below, this is only one of several ways the panel hearing procedures may be used under these regulations.

7. This chart does not show EPA appeal procedures in detail. Procedures for appeal to the Administrator under § 124.19 are self-explanatory; Subpart F procedures are diagrammed in Figure 2; and Subpart E procedures are basically the same that would apply in any evidentiary hearing.

However, the chart at this stage does reflect the provisions of § 124.60(b), which allows EPA, even after a formal hearing has begun, to "recycle" a permit back to the draft permit stage at any time before that hearing has resulted in an initial decision.

Figure 2—Non-Adversary Panel Procedures

This chart outlines the procedures for processing permits under the special "panel hearing" procedures of Subpart F. These procedures were designed for making decisions that involve "initial licensing" NPDES permits. Those permits include the first decisions on an NPDES permit applied for by any discharger that has not previously held one, and the first decision on any statutory variance. In addition, these procedures will be used for any RCRA, UIC, or PSD permit which has been consolidated with such an NPDES permit, and may be used, if the Regional Administrator so chooses, for the issuance of individual RCRA or UIC permits. The steps depicted on this chart are as follows:

1. Application for a permit. These proceedings will generally begin with an application, since NPDES initial licensing always will begin with an application.

2. Preparation of a draft permit. This is identical to the similar step in Figure 1.

3. Public comment period. This again is identical to the similar step in Figure 1. The Regional Administrator has the opportunity to schedule an informal public hearing under § 124.12 during this period.

4. Requests for a panel hearing must be received by the end of the public comment period under § 124.113. See § 124.114.

If a hearing request is denied, or if no hearing requests are received, a recommended decision will be issued based on the comments received. The recommended decision may then be appealed to the Administrator. See § 124.115.

5. If a hearing is granted, notice of the hearing will be published in accordance with § 124.116 and will be followed by a second comment period during which requests to participate and the bulk of the remaining evidence for the final decision will be received (§§ 124.117 and 124.118).

The regulations also allow EPA to move directly to this stage by scheduling a hearing when the draft permit is prepared. In such cases the comment period on the draft permit under § 124.113 and the prehearing comment period under § 124.118 would occur at the same time. EPA anticipates that this will be the more frequent practice when permits are processed under panel procedures.

This is also a stage at which EPA can switch from the conventional procedures diagrammed in Figure 1 to the panel hearing procedures. As the chart indicates, EPA would do this by scheduling a panel hearing either through use of the "recycle" provision in § 124.14 or in response to a request for a formal hearing under § 124.74.

6. After the close of the comment period, a panel hearing will be held under § 124.120, followed by any cross-examination granted under § 124.121. The recommended decision will then be prepared (§ 124.124) and an opportunity for appeal provided under § 124.125. A final decision will be issued after appeal proceedings, if any, are concluded.

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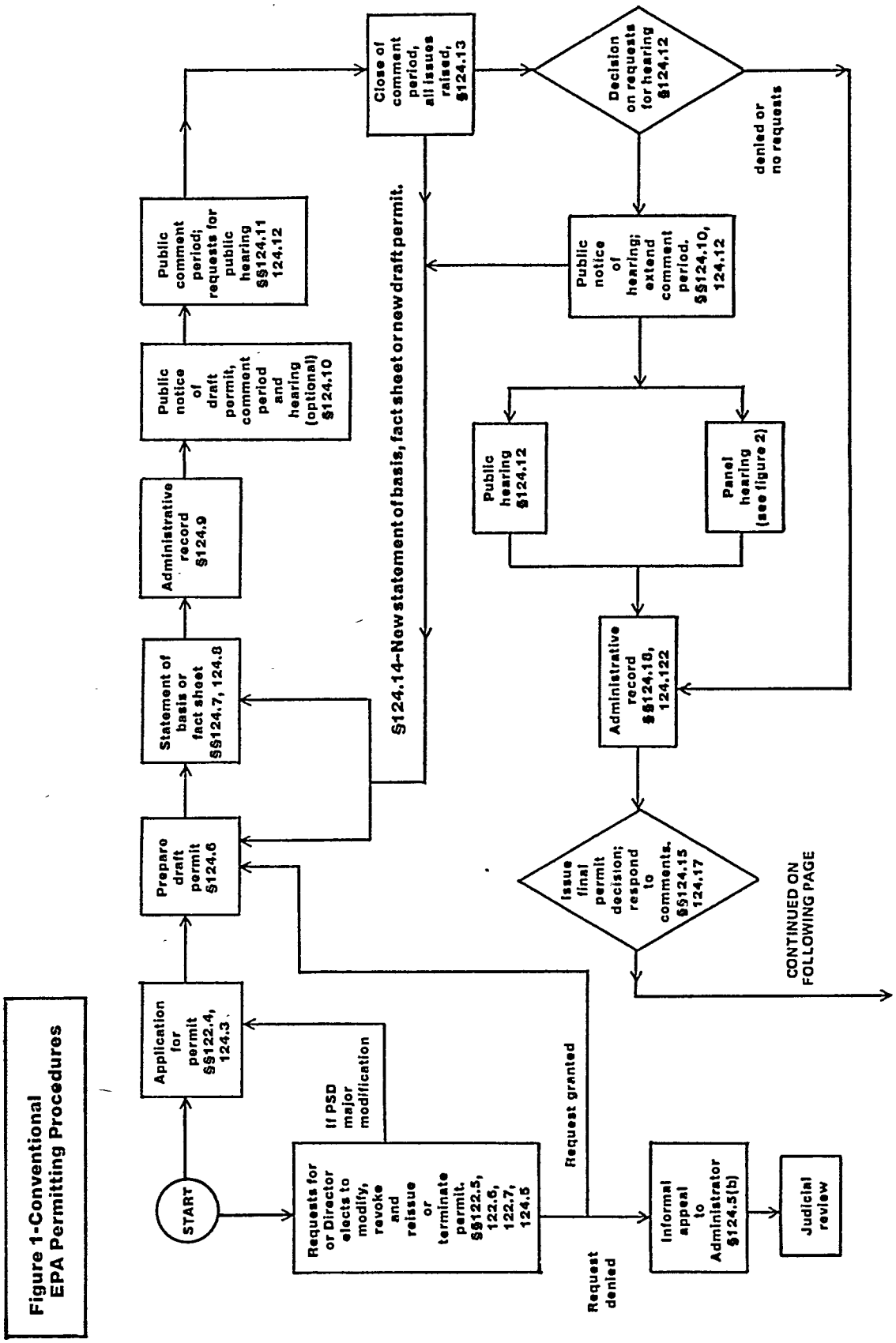
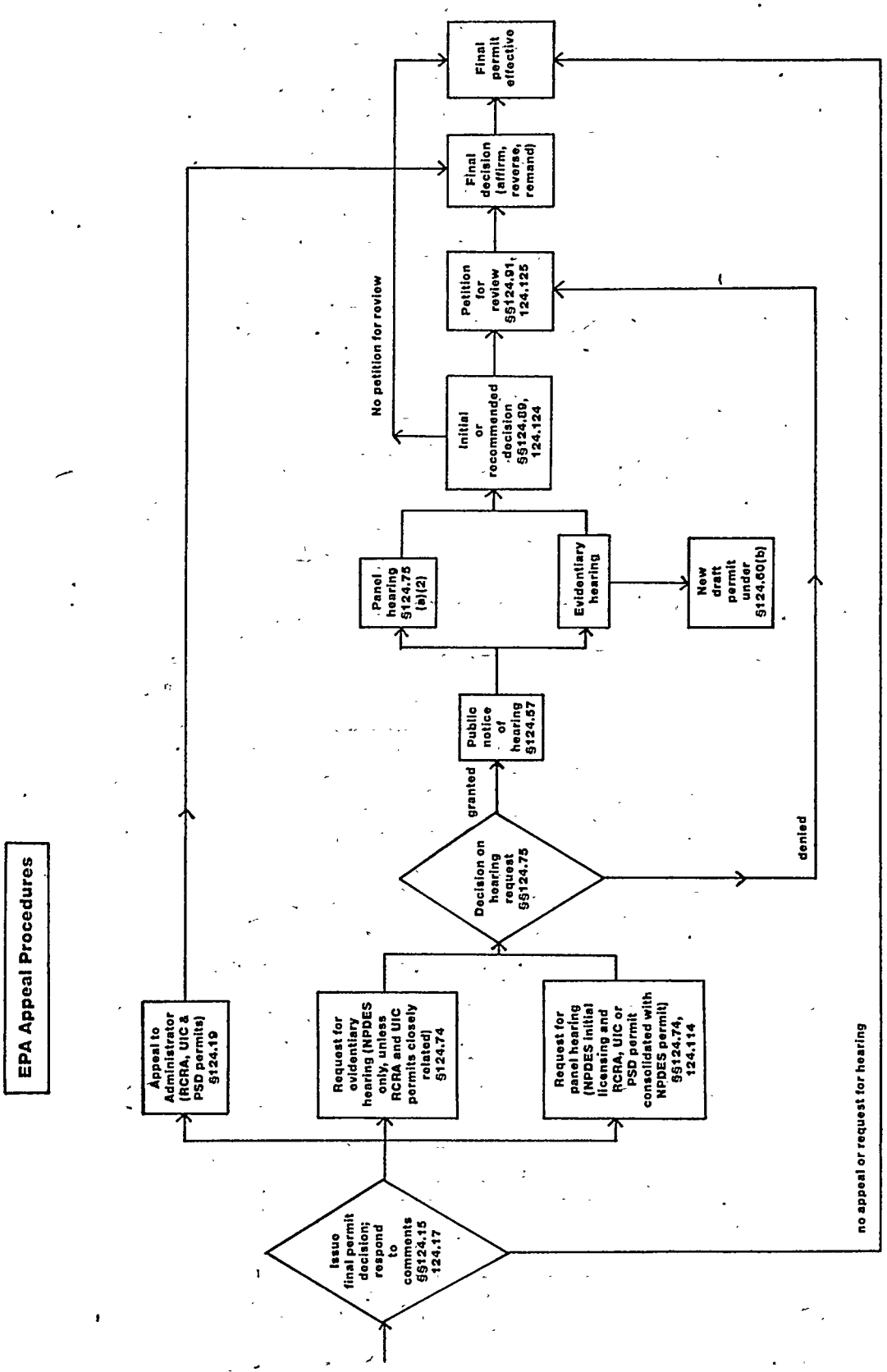


Figure 1-Conventional EPA Permitting Procedures



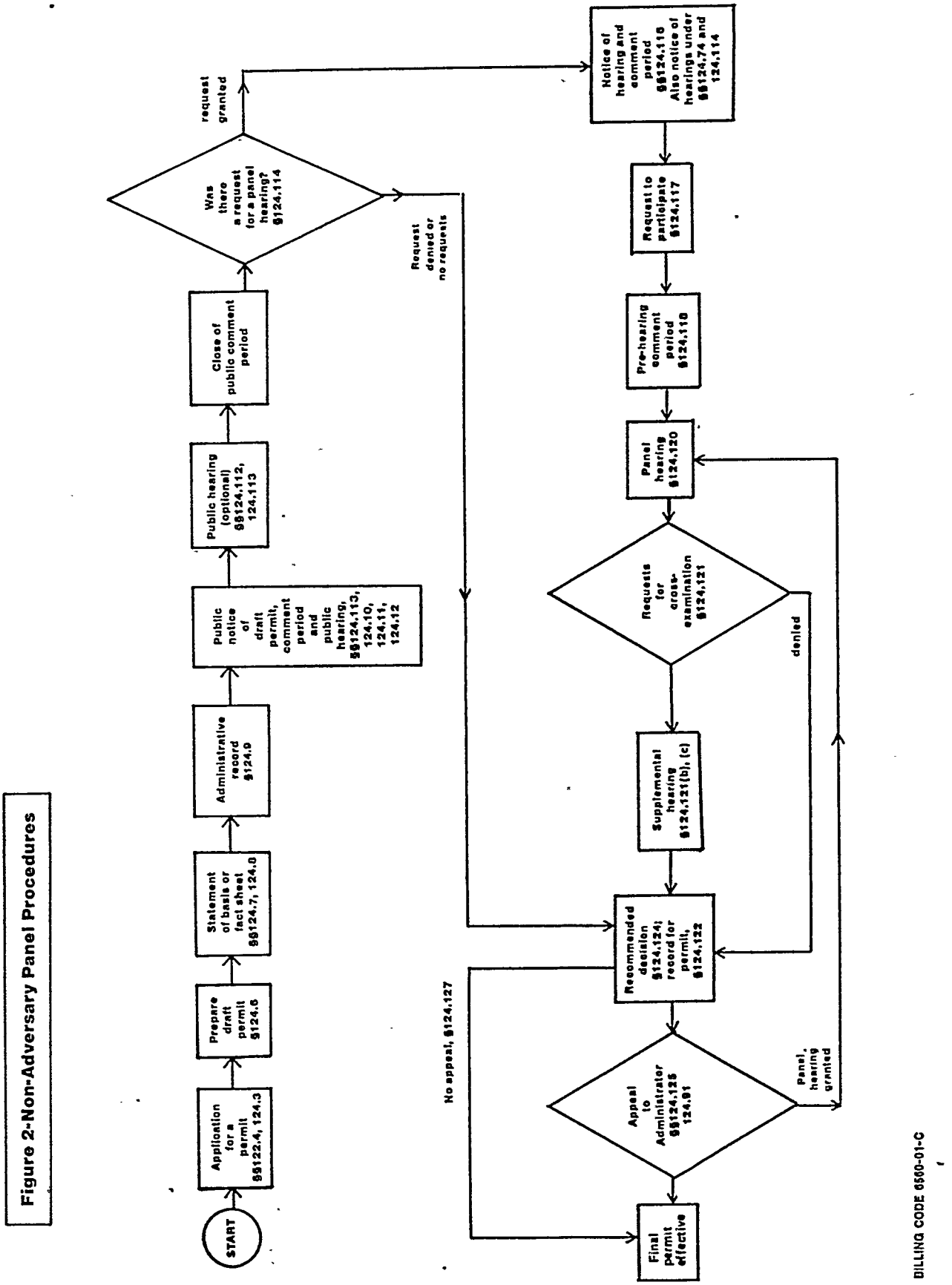


Figure 2-Non-Adversary Panel Procedures

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2. 40 CFR Part 125 is amended as follows:

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

A. Section 125.2 is revised to read as follows:

§ 125.2 Definitions.

For the purposes of this Part, any reference to "the Act" shall mean the Clean Water Act of 1977 (CWA). Unless otherwise noted, the definitions in Parts 122, 123 and 124 apply to this Part.

B. Section 125.3 is amended by:

1. Revising the introductory text of paragraphs (a), (a)(2), (b)(1) and (b)(2), and revising paragraph (c)(1).

2. Adding paragraphs (c)(4) and (g).

§ 125.3 Technology-based treatment requirements in permits.

(a) *General.* Technology-based treatment requirements under section 301(b) of the Act represent the minimum level of control that must be imposed in a permit issued under section 402 of the Act. (See §§ 122.60, 122.61 and 122.62 for a discussion of additional or more stringent effluent limitations and conditions.) Permits shall contain the following technology-based treatment requirements in accordance with the following statutory deadlines;

* * * * *

(2) For dischargers other than POTW's except as provided in § 122.67(d), effluent limitations requiring:

* * * * *

(b) *Statutory variances and extensions.* (1) The following variances from technology-based treatment requirements are authorized by the Act and may be applied for under § 122.53;

* * * * *

(2) The following extensions of deadlines for compliance with technology-based treatment requirements are authorized by the Act and may be applied for under § 122.53:

* * * * *

(c) * * *

(1) Application of EPA-promulgated effluent limitations developed under section 304 of the Act to dischargers by category or subcategory. These effluent limitations are not applicable to the extent that they have been remanded or withdrawn. However, in the case of a court remand, determinations underlying effluent limitations shall be binding in permit issuance proceedings where those determinations are not required to be reexamined by a court remanding the regulations. In addition, dischargers may seek fundamentally different factors variances from these effluent limitations under § 122.53 and Subpart D of this Part.

* * * * *

(4) Limitations developed under paragraph (c)(2) of this section may be expressed, where appropriate, in terms of toxicity (e.g., "The LC 50 for fat head minnow of the effluent from outfall 001 shall be greater than 25%."), provided that is shown that the limits reflect the appropriate requirements (for example, technology-based or water-quality-based standards) of the Act.

* * * * *

(g)(1) The Director may set a permit limit for a conventional pollutant at a level more stringent than the best conventional pollution control technology (BCT), or a limit for a nonconventional pollutant which shall not be subject to modification under section 301 (c) or (g) of the Act where:

(i) Effluent limitations guidelines specify the pollutant as an indicator for a toxic pollutant, or

(ii)(A) The limitation reflects BAT-level control of discharges of one or more toxic pollutants which are present in the waste stream, and a specific BAT limitation upon the toxic pollutant(s) is not feasible for economic or technical reasons;

(B) The permit identifies which toxic pollutants are intended to be controlled by use of the limitation; and

(C) The fact sheet required by § 124.56 sets forth the basis for the limitation, including a finding that compliance with the limitation will result in BAT-level control of the toxic pollutant discharges identified in paragraph (g)(1)(ii)(B) of this section, and a finding that it would be economically or technically infeasible to directly limit the toxic pollutant(s).

(2) The Director may set a permit limit for a conventional pollutant at a level more stringent than BCT when:

(i) Effluent limitations guidelines specify the pollutant as an indicator for a hazardous substance, or

(ii)(A) The limitation reflects BAT-level control of discharges (or an appropriate level determined under section 301(c) or (g) of the Act) of one or more hazardous substance(s) which are present in the waste stream, and a specific BAT (or other appropriate) limitation upon the hazardous substance(s) is not feasible for economic or technical reasons;

(B) The permit identifies which hazardous substances are intended to be controlled by use of the limitation; and

(C) The fact sheet required by § 124.56 sets forth the basis for the limitation, including a finding that compliance with the limitations will result in BAT-level (or other appropriate level) control of the hazardous substances discharges identified in paragraph (g)(2)(ii)(B) of this section, and a finding that it would be economically or technically infeasible to directly limit the hazardous substance(s).

(iii) Hazardous substances which are also toxic pollutants are subject to paragraph (g)(1) of this section.

(3) The Director may not set a more stringent limit under the preceding paragraphs if the method of treatment required to comply with the limit differs from that which would be required if the toxic pollutant(s) or hazardous substance(s) controlled by the limit were limited directly.

(4) Toxic pollutants identified under paragraph (g)(1) of this section remain subject to the requirements of §122.61(a)(1) (notification of increased discharges of toxic pollutants above levels reported in the application form).

C. Section 125.30 is amended by revising paragraph (b) to read as follows:

§ 125.30 Purpose and scope.

* * * * *

(b) In establishing national limits, EPA takes into account all the information it can collect, develop and solicit regarding the factors listed in sections 304(b), 304(g) and 307(b) of the Act. In some cases, however, data which could affect these national limits as they apply to a particular discharge may not be available or may not be considered during their development. As a result, it may be necessary on a case-by-case basis to adjust the national limits, and make them either more or less stringent as they apply to certain dischargers within an industrial category or subcategory. This will only be done if data specific to that discharger indicates it presents factors fundamentally different from those considered by EPA in developing the limit at issue. Any interested person believing that factors relating to a discharger's facilities, equipment, processes or other facilities related to the discharger are fundamentally different from the factors considered during development of the national limits may request a fundamentally different factors variance under § 122.53 (i)(1). In addition, such a variance may be proposed by the Director in the draft permit.

D. Section 125.72 is amended by revising paragraph (f) to read as follows:

§ 125.72 Early screening of applications for section 316(a) variances.

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(f) If an applicant desires a ruling on a section 316(a) application before the ruling on any other necessary permit terms and conditions, (as provided by § 124.65), it shall so request upon filing its application under paragraph (a) of this section. This request shall be granted or denied at the discretion of the Director.

[Note.—At the expiration of the permit, any discharger holding a section 316(a) variance should be prepared to support the continuation of the variance with studies based on the discharger's actual operation experience.]

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E. Section 125.92 is revised to read as follows:

§ 125.92 Requests for permit modification and issuance under section 301(i)(1) of the Act.

Any owner or operator of a publicly owned treatment works (POTW) that requires construction to achieve limitations under sections 301(b)(1)(B) or 301(b)(1)(C) of the Act may request, modification or issuance of a permit extending the date for compliance with these limitations in accordance with the provisions of § 122.53(j).

F. Section 125.95 is revised to read as follows:

§ 125.95 Requests for permit modification or issuance under section 301(i)(2) of the Act.

Any owner or operator of a point source other than a POTW that will not achieve the requirements of sections 301(b)(1)(A) and 301(b)(1)(C) of the Act because it was scheduled to discharge into a POTW that is presently unable to accept the discharge without construction, may request modification or issuance of a permit extending the date of compliance with these limitations in accordance with the provisions of § 122.53(i).

G. Section 125.104 is amended by revising paragraph (c) to read as follows:

§ 125.104 Best management practices programs.

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(c)(1) The BMP program must be clearly described and submitted as part of the permit application. An application which does not contain a BMP program shall be considered incomplete. Upon receipt of the application, the Director shall approve or modify the program in accordance with the requirements of this Subpart. The BMP program as approved or modified shall be included in the draft permit (§ 124.6). The BMP program shall be subject to the applicable permit issuance requirements of Part 124, resulting in the incorporation of the program (including any modifications of the program resulting from the permit issuance procedures) into the final permit.

(2) Proposed modifications to the BMP program which affect the discharger's permit obligations shall be submitted to the Director for approval. If the Director approves the proposed BMP program modification, the permit shall be modified in accordance with § 122.15, provided that the Director may waive the requirements for public notice and opportunity for hearing on such modification if he or she determines that the modification is not significant. The BMP program, or modification thereof, shall be fully implemented as soon as possible but not later than one year after permit issuance, modification, or revocation and reissuance unless the Director specifies a later date in the permit.

[Note.—A later date may be specified in the permit, for example, to enable coordinated preparation of the BMP program required under these regulations and the SPCC plan required under 40 CFR Part 151 or to allow for the completion of construction projects related to the facility's BMP or SPCC program.]

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