NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM

STATE PROGRAM GUIDANCE

for

Development and Review of State Program Applications

and

Evaluation of State Legal Authorities

(40 C.F.R. Parts 122 - 125 and 403)

VOLUME ONE

July 29, 1986

Office of Water

United States Environmental Protection Agency

Washington D.C.

PREFACE

The NPDES State Program Guidance is the result of a two year effort by the Office of Water to assemble relevant EPA policy and guidance memoranda, case law and model documents, along with a clear and comprehensive discussion of federal NPDES requirements, and to reproduce these materials in an accessible and convenient format. Given the fundamental and increasing importance of NPDES State programs in the accomplishment of our mission under the Clean Water Act, we are pleased to be able to provide State agencies with this Guidance. The EPA Office of Water plans to update the Guidance as necessary by providing States and EPA Regional Offices with additional pages (or where appropriate, replacement pages) for inclusion in the looseleaf notebook.

I believe this document will be of use to State and federal personnel involved in the administration of programs to protect one of our nation's most valuable resources, clean water. In addition, because it sets out federal requirements and policies for the NPDES program, I believe this guidance will promote understanding, efficiency and consistency in the implementation of the NPDES program while continuing to strengthen the State-federal partnership.

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Introduction

The National Pollutant Discharge Elimination System (NPDES), established in 1972 under section 402 of the Federal Water Pollution Control Act (FWPCA)(33 U.S.C. §1251 et seq.), is now administered primarily by the States. To date, 37 States and Territories out of a possible 56 have received EPA approval for NPDES programs. Several of the remaining States are developing program applications. In addition, many of the approved programs are only authorized to administer the basic NPDES permitting program; under the 1977 Clean Water Act Amendments, these States must request approval of program modification to assume the pretreatment program and authority to regulate federal facilities. NPDES States also have the option of seeking authority to issue general permits for certain types of discharges.

State program development activity is not limited to these original program approvals. Most of the approved States began operating the NPDES program in the first three years of its existence. Since that time, federal law has undergone substantial amendment and revision. The NPDES regulations require approved States to modify their programs to reflect these changes. Similarly, State law may have changed since the original program approval through statutory or regulatory amendments or judicial decisions interpreting applicable requirements. These State changes also must be formally

transmitted to EPA with a request for program modification. To identify the need for legal revisions, and resolve any existing or potential problems resulting from lack of up-to-date authorities, EPA has initiated a program to review all existing State programs.

The purpose of this guidance is to provide assistance for persons preparing, reviewing, or evaluating State program applications, requests for modifications, and to measure the sufficiency of authorities for approved State programs. The NPDES regulations set out program requirements in some detail. This guidance is intended to supplement and clarify these regulations and policies and assist both State and EPA personnel in preparing and reviewing a program submission.

This guidance is a comprehensive delineation of the statutory, regulatory, programmatic, and resource requirements which States are expected to meet. It is intended to provide States with a clear and concise discussion of the requirements for a program submission and subsequent modifications. It is also expected that this guidance will aid EPA personnel in evaluating State legal authorities and ensure consistency in the level of scrutiny each program receives.

The State Program Guidance is divided into two distinct volumes. Volume One is a narrative discussion of the required legal authorities for State programs as well as the elements of a State program submission. It also discusses EPA's oversight of approved State programs. The first chapter of Volume One is background, and provides a capsulated history of the NPDES program, as related to State programs. The second chapter delineates the procedures to be followed for approval and modification of State programs. This Chapter also describes the program withdrawal process and the procedures for legal reviews of existing State programs. Finally, it discusses the criteria for determining whether a program modification needs to be publicly noticed.

Chapters Three, Four, and Five discuss the components of a State program application, including statutes, regulations, procedures (embodied in a program description), and the Memorandum of Agreement (MOA) between the State and the appropriate EPA Regional Administrator. Each of these Chapters is further subdivided into four subparts dealing with the requirements for NPDES, pretreatment, federal facilities, and general permits. Finally, Chapter Six contains a discussion of EPA's oversight of approved State programs.

While Volume One of the guidance explains EPA's NPDES State Program requirements, Volume Two contains a number of model program documents illustrating the contents of approved programs and the approval process. These include

model Attorney General's Statements for NPDES and pretreatment and a model MOA that States can easily use in developing their programs. Also included are examples of documents that EPA has approved in other States. Volume Two also includes other appendices addressing EPA policies and memoranda, pertinent case law, and opinions by EPA's Office of General Counsel, relevant to State programs. A final appendix provides checklists to be used by both drafters and reviewers as a practical tool for initially outlining, refining, and evaluating a State's submission.

This format should make it easy for users to find those parts of the guidance that are relevant to their particular needs. Persons preparing or reviewing program modifications need only look to those portions of the document which concern the particular modification sought. For example, a State preparing a pretreatment program need only look to the portion of each chapter dealing with pretreatment. EPA expects that by clearly setting out the federal requirements and explaining the approval/modification processes, program reviews will be improved through reduced complications and increased awareness of expectations.

CHAPTER ONE

SYNOPSIS OF THE STATUTORY AND REGULATORY REQUIREMENTS OF THE NPDES PROGRAM

A. Statutory Scheme

Congress established the NPDES program when it enacted the Federal Water Pollution Control Act (FWPCA) Amendments of 1972. Section 402 of that Act requires EPA to administer a national permit program to regulate discharges of pollutants into the waters of the United States and sets out the basic elements of that program.

The Act also allows States to request authority to administer the program in lieu of EPA. While the FWPCA does not explicitly require a State to apply for NPDES approval, the legislative history clearly reflects a Congressional intent that States be primarily responsible for administering the program. Under Section 402(b), EPA must approve a State's request to operate the permit program once it determines, after an independent review of the submission, that the State has adequate legal authorities, procedures, and the ability to administer the program. Section 402 also delineates the requirements for a State program submission and establishes the basic authorities which must be contained in a State program.

EPA is also directed by section 304(i) of the FWPCA to adopt procedural and programmatic requirements for State NPDES programs, including guidelines on monitoring, reporting,

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enforcement, personnel, and funding; and to develop uniform national forms for use by both EPA and approved States. Minimum State program requirements also include a prohibition against interested persons serving on a State permitting agency's board of directors or other body which approves all or portions of NPDES permits. Finally, at all times following approval, State programs must be consistent with minimum federal requirements, although they may always be more stringent. If a State program does not remain consistent, the Administrator may, after hearing, withdraw program approval.*

In 1977, the FWPCA was amended by the Clean Water Act Amendments of 1977. The resulting statute, codified at 33 U.S.C. §1251 et seq., is popularly known as the Clean Water Act (CWA). These amendments resulted in more comprehensive regulation of pollutant discharges with increased emphasis on the control of toxic pollutants. The amendments also mandate that States seeking NPDES authority must seek approval to administer a State pretreatment program and demonstrate that they have the authority under State law to regulate discharges from federal facilities located within the State.

In addition to imposing these requirements on new States seeking NPDES authority, the 1977 Amendments required

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*/ Note that the 1972 Act contained no requirement for States to develop pretreatment programs. Also, State programs could not regulate federal facilities within the State (See, EPA v. State Water Resources Control Board, 426 U.S. 200 (1979) noted in Appendix C).

States already approved to administer the NPDES program to develop pretreatment programs (see, section 54(c)(2) of the amendments). Since the CWA specifically required federal facilities to comply with applicable State requirements, State programs were also required to obtain federal facilities authority as well [See, Memorandum on "State Regulation of Federal Facilities" (Policy No. N-78) reproduced in Appendix A]. (See also, 40 C.F.R. §123.62(a)(4), 44 Fed. Reg. 32854, June 7, 1979). Although these requirements have been in effect for eight years, many States still have not modified their programs as required by the CWA.

B. Regulatory Scheme

Pursuant to its authority under section 304(i) of the statute, EPA promulgated initial State program regulations in 1972 (40 CFR Part 124, 37 Fed. Reg. 28390, December 18, 1972). EPA has revised its NPDES program regulations several times since then to clarify EPA policy, implement statutory changes, and reflect the outcome of legal challenges to the regulations (such as court decisions and settlement agreements). The most extensive of these revisions occurred in 1979 (44 Fed. Reg. 32854, June 7, 1979) and 1980 (45 Fed. Reg. 33290, May 19, 1980).

The 1979 revisions to the NPDES regulations expanded and clarified the regulations in response to the 1977 CWA amendments. Revisions included changes to the definition of "person" so as to encompass federal facilities, thus requiring

State programs to include authority to regulate these dischargers. Specific requirements relating to permit application forms, reflecting the increased emphasis on toxic pollutants, were also added. The revised NPDES regulations also created a class of permits known as general permits. Under the general permit program, one permit may be issued which regulates similar dischargers in a defined geographic area with the same effluent limitations. By covering numerous dischargers with one permit, the permitting authority can realize savings in time and resources otherwise expended if individual permits were issued to each discharger. While States are not required to seek general permit authority, as with other aspects of the federal program, a State is not automatically authorized to issue such permits, but must first request and receive approval of a program modification.

The 1980 revisions consolidated the permitting requirements of the NPDES program, the Hazardous Waste Management program under the Resource Conservation and Recovery Act (RCRA), the Underground Injection Control (UIC) program under the Safe Drinking Water Act (SDWA), the State Dredge or Fill (404) program under the CWA, and the Prevention of Significant Deterioration (PSD) program under the Clean Air Act. Consolidation was expected to streamline permitting application and issuance procedures in cases where a permittee would be subject to the requirements of more than one of the above programs.

In addition to the consolidation, the 1980 revisions added new provisions establishing minimum guidelines for public participation in State enforcement activities,* and expanded the application and reporting requirements for toxic pollutants. Finally, the consolidated regulations contained more detailed provisions regarding public notice and hearings. To reflect these revisions, EPA required that all State programs be modified within two years to incorporate the changes. To date, no State has requested program modification as required, although several States have made the necessary revisions. Since the Consolidated Permit Regulations, EPA has promulgated several other revisions, although most do not require extensive changes to approved programs.

On April 1, 1983, EPA promulgated new "deconsolidated" regulations for the NPDES program (48 Fed. Reg. 14146). While this revision changed the format of the NPDES regulations, it offered no substantive changes in the federal requirements. Table One indicates other recent changes to the NPDES Regulations.

Table One

Recent NPDES Revisions

Date	Cite	What
9/1/83	48 Fed. Reg. 39611	"Common Issues" Settlement Agreement

*/ This change came as a result of the holding in Citizens for a Better Environment v. EPA, 596 F.2d 720 (7th Cir. 1979) (See Appendix B).

Table One Continued

6/25/84	49 Fed. Reg. 25978	Compliance extention for 301(k) innovative technology
8/8/84	49 Fed. Reg. 31841	Delays submission of certain application data
9/20/84	49 Fed. Reg. 37007	Causes for permit modification based on secondary treatment
9/26/84	49 Fed. Reg. 37998	NPDES Settlement Agreement
2/19/85	50 Fed. Reg. 6939	Corrections
6/3/85	50 Fed. Reg. 23382	Secondary Treatment
8/26/85	50 Fed. Reg. 34648	State program reporting requirements

Pursuant to the Clean Water Act Amendments of 1977, EPA also promulgated general pretreatment regulations on June 26, 1978 (43 Fed. Reg. 27736). These rules regulate the introduction of pollutants to publicly owned treatment works (POTWs). All new State NPDES program submissions must include a pretreatment program. Similarly, EPA's general pretreatment regulations require existing State NPDES programs to be modified by March 27, 1980, to assume pretreatment authority over indirect dischargers. Table Two indicates the revisions to the General Pretreatment Regulations since their adoption.

Table Two

Recent Pretreatment Revisions

Date	Cite	What
1/28/81	46 Fed. Reg. 9404	Comprehensive revision
2/10/84	49 Fed. Reg. 5131	Suspension of "new source," "pass through" and "interference" definitions

Table Two Continued

7/10/84	49 Fed. Reg. 28058	"New Source" redefined
8/3/84	49 Fed. Reg. 31212	Removal Credits
9/25/85	50 Fed. Reg. 38809	Scope of FDF (PT) Variances

The current NPDES and pretreatment regulations contain the minimum criteria necessary for judging the sufficiency of a proposed State program. The regulations outline the elements of a State program submission and describe the requirements of activities such as permit issuance, compliance monitoring, enforcement, legal authorities, resources and State agency organization. State NPDES programs must meet these minimum requirements, although they may be more stringent. These regulatory requirements are discussed in detail in the following chapters of this guidance.

C. History of State NPDES Program Approvals

The first State NPDES program to be approved was California, on May 14, 1973. By the end of 1975, EPA had approved 28 State programs. An additional two programs were approved by the end of 1977. Thus, 30 State programs were approved before the 1977 CWA amendments went into effect. Of these 30 States, some have complied with the CWA requirements and updated their legal authorities although as of 1985, none had requested approval of their modifications as required. Most, but not all, these States have requested and received pretreatment and federal facilities approval as required. The first State to be approved for

pretreatment was Minnesota, on July 16, 1979, and the first State to be approved for federal facilities authority was California, on May 5, 1978.

At present, EPA has approved 37 State NPDES programs. Of these, 22 have been approved to administer pretreatment programs and 28 have been approved to regulate federal facilties. In addition, nine States have been authorized by EPA to issue general permits. (The approved NPDES States are listed in Volume II.)

The fact that so many programs were approved before the 1977 CWA amendments and the 1979 revisions to the regulations has resulted in serious consistency problems. Until now, EPA has been unable to undertake a systemtic evaluation and review of legal authorities in approved States. Although the CWA and the NPDES regulations require that States update their legal authorities to remain consistent with federal requirements, few States have done so. In addition, since EPA has not had the resources to perform reviews of the approved States, the complete scope of this problem is not known. This problem is discussed further under Oversight, below, and in Chapter VI.

D. Oversight

Upon EPA approval, the State takes over primary responsibility for issuance of permits and administration of the NPDES program in that State. Day-to-day program operation is the State's function. The approved State must continue to comply with all applicable requirements of the CWA and NPDES regulations.

Once EPA approves a State program, EPA's involvement is much more limited. EPA continues to provide legal and technical assistance in permit issuance and program administration and retains an active role in enforcement, although the State has primary responsibility for these activities. The Agency also supports State programs through federal grant funding under sections 106, 205(g) and 205(j) of the CWA. Of course, EPA continues to establish rules and develop effluent guidelines and pretreatment standards for direct and indirect dischargers. In large part, however, the federal role is to oversee State programs.

The CWA mandates an oversight function for EPA to ensure that State programs are at all times in conformity with federal requirements. In the past, EPA has carried out its oversight responsibilities largely through review of State-issued permits, annual negotiations relating to federal funding and State program performance, program audits and analysis of State enforcement and monitoring activities. However, EPA is also responsible for ensuring that State programs continue to meet the minimum criteria for legal authority and program performance. The Agency plans to direct an increased part of its resources and efforts to oversee these important elements.

Most of the State programs were approved at least eight years ago. However, not all of these programs have been reviewed since their initial approval by EPA, despite changes in both EPA and State statutes and regulations. As part of

EPA's program to meet its oversight obligations, the Agency has developed a program for the review of State statutory and regulatory authorities to assure that approved States have authority that satisfies the minimum federal requirements for State programs. These reviews will be carried out jointly by EPA Regions and Headquarters. Each review will be a comprehensive review of the State's statutory and regulatory authorities. States found to have inadequate authorities will be notified and are expected to amend their legal authorities promptly to conform with the federal requirements. The procedures for State legal reviews are discussed in detail in Chapter 2.

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PROCEDURES FOR STATE PROGRAM APPROVAL, MODIFICATION, REVIEW, AND WITHDRAWAL

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PROCEDURES FOR STATE PROGRAM APPROVAL, MODIFICATION, REVIEW, AND WITHDRAWAL

A. Approval of New State Programs

(1) Background on Program Approval Process

A State's decision to seek approval to administer the NPDES program triggers a process designed to ensure that the State Agency or Agencies implementing the program have sufficient legal authority, procedures, and resources to properly manage and operate the various aspects of the program. The contents of a State program submission are prescribed in 40 CFR Part 123, and are described in detail in the succeeding chapters of this document. Part A of this chapter addresses the process by which a submission for a new State program is assembled, and apprises the State of the steps EPA will follow in evaluating the documents, including public involvement, prior to a decision on approval. These procedures also apply to program modifications, such as the addition of a new program component (See Part B of this Chapter).

There are a number of phases and activities that must be jointly undertaken by EPA and the State. Each step is important to the successful approval of the proposed program, although they may not always occur in the order outlined below. Steps may also be repeated when necessary to develop an adequate program. The final submission must assure that the program will be operated in full compliance with the CWA.

Approvals of State programs and revisions thereto are a joint function of EPA Regional Offices and Headquarters (both the Office of General Counsel and Office of Water Enforcement and Permits). Early and frequent involvement of all concerned offices will ease program development, review, and approval.

(2) Elements of State Program Submission

The contents of a State program submission are prescribed in Section 402(b) of the CWA and 40 CFR Part 123. A State seeking approval of a new program must submit all of these documents. Generally, a State also must submit each of these documents where it requests a program modification, although the information required for modifications is generally less extensive. For example, a State seeking approval of a federal facility modification need only submit legal authority necessary to demonstrate their ability to regulate such facilities, not the entire State NPDES regulations, unless other sections may affect the State's authority. Similarly, where a State is requesting a program modification because of proposed changes to the State/EPA Memorandum of Agreement, the State needs to submit only that document, although EPA could ask for additional information. The following documents are the elements of a State program submission (see 40 CFR 123.21).

(a) Governor's Letter: A State program submission must include a request from the Governor of the State's program submission. For program modification, the request may be submitted by the State Director instead of the Governor.

(b) Attorney General's Statement: The State must submit a statement from the Attorney General (or independent legal counsel where the State Agency has such a position) certifying that adequate authority exists

under State law to administer the program. The State Attorney General must explain the basis for his certification of authority. The contents of an Attorney General's Statement are explained in detail in Chapters 3 and 4, and a model Statement is included in Volume II.

(c) Statutes and Regulations: The State must submit copies of all statutes and regulations that form the basis for the State program, including all authorities cited by the Attorney General. In addition, the State must submit any judicial decisions that may impact the adequacy of those authorities. Chapter 3 describes the required State statutory authority; Chapter 4 outlines minimun State regulations.

(d) Program Description: The State must submit a description of the procedures the State will follow to implement the program. This description must discuss organization, program and enforcement procedures, and State resources and funding. In addition, the State must submit copies of all forms to be used in the program. The contents of the Program Description are discussed in Chapter 5.

(e) Memorandum of Agreement: The State must submit a Memorandum of Agreement (MOA) between the State and EPA. This document outlines the respective program responsibilities of EPA and the State. The State must comply with all terms of the MOA. The contents of the MOA are set out in Chapter 5.

(3) Initial Program Development Process

(a) State Review of EPA Regulations and Guidance on State Programs

A State, interested in receiving EPA approval to operate the NPDES permit program in lieu of the federal program, should begin its efforts to formulate a program submission by educating itself on the program's purposes, scope, and requirements. This may be accomplished by examining EPA's NPDES and pretreatment regulations, including the procedures for public involvement, in 40 CFR Parts 122, 123, 124, 125 and 403. In addition to program requirements, States should look at related substantive

requirements that States must adopt, such as effluent limitations guidelines in 40 CFR Chapter I, Subchapter N. (These substantive requirements are referenced in §123.25(a).) The State should also become familiar with the contents of this State program guidance document.

Current federal law and EPA regulations prohibit approval of partial NPDES programs. Therefore, the State must require permits for all point source discharges of pollutants within its jurisdictional boundaries, including federal facilities. In addition, the State must operate and enforce a pretreatment program according to the regulations in 40 CFR Part 403. States are not required to request authority to issue general permits. However, if a State does not receive approval of a general permits program, the State may not issue such permits to satisfy the NPDES program requirements. Any general permits issued by a State which has not been approved by EPA to issue such permits are not considered to be NPDES permits.

(b) State's Self-Evaluation

Once the State acquaints itself with the breadth and purposes of the NPDES program, the next step is a self-analysis of its legal authority to administer such a program and an estimation of the resources needed to run it effectively. The State's legal analysis should examine statutes, regulations, and judicial decisions to determine whether there is a need for State statutory amendments or new regulations. This review must examine authorities in light of the State's plan to

administer the program. The State should also begin plans to obtain the resources necessary to administer the program.

(c) Meeting with EPA

At this point, if it has not already done so, the State should alert EPA of its intentions, and seek advice on submission development. It is generally helpful to meet and review the existing relevant State legal authorities, if any, and anticipated program needs with the staff at EPA. The Regional Office will inform EPA Headquarters of the State's plans. Whenever possible, meetings at this stage should also include EPA Headquarters, in order to assure that all EPA concerns are raised at an early stage with adequate opportunity for discussion and State response.

(d) EPA Feedback on State Program Development

Following this original consultation, EPA Headquarters and the Regional Office will collaborate on a set of written comments and suggestions appraising the State's legal authorities and identifying any issues and concerns which need to be resolved through additional legislative or regulatory actions. This review should describe all changes to legal authority necessary to meet Federal requirements. While these comments should identify all necessary changes, it is possible that changes in the State's intended procedures will require different legal authorities from those reviewed, thus leading to additional EPA comments. For example, EPA's review of a statute may reveal adequate authority to administer the pretreatment program based on a State-run permit program.

If the State later indicates that it does not plan to issue permits to all indirect dischargers, EPA must re-examine the statute and may have new comments.

(4) Program and Document Development Process

(a) State Incorporation of EPA Comments

After receiving EPA's comments on the State's statutes and regulations, the State should begin to revise its authorities to reflect these comments. If necessary to resolve issues, all parties may meet to discuss the needed State revisions. Since legislative enactments are the common source of delay in the approval process, these changes should be pursued quickly. If the State can address most of EPA's comments at this early juncture, the remainder of the processes, especially EPA reviews, are far more likely to proceed expeditiously. The State should also begin preparing the other documents required for the program submission.

(b) State Transmits Draft Submission to EPA Regional Office

Once EPA recommendations have been incorporated, the State will assemble a complete draft program submission. The components of this submission are discussed above in part A(2) of this Chapter (pg. 2-2). Once assembled, the draft submission is to be forwarded to the appropriate EPA Regional Office for detailed review and comment.

(c) EPA Review of Draft Submission

The EPA Regional Office will provide EPA Headquarters, which must concur in the decision to approve a State program, with copies of the State's draft submission. EPA will then carefully review the State's application to determine whether it is consistent with the CWA and to ensure that EPA's approval of the program, as proposed by the State, will not be susceptible to legal challenge. EPA Headquarters and the Regional Office will coordinate their findings and provide the State with written comments on each draft submitted. (It is possible that EPA will request and/or that the State will choose to submit several drafts in order to avoid delays in action on the formal submission or a decision that the formal submission is not complete.)

(d) State Incorporation of EPA's Draft Submission Comments

Upon receipt of EPA's comments on the State's draft program submission, the State will revise its documents as necessary to incorporate, or otherwise resolve, EPA's comments. If this is not done, the program submission cannot be approved.

(5) Formal Program Approval Process

(a) State's Formal Submission

Once all components of the draft submission are revised as necessary to address EPA comments, the Governor will formally transmit the final submission to the EPA Regional Administrator, as provided by 40 CFR 123.21. The State must submit three (3) copies. Assuming that all earlier activity

has been well coordinated between the State, the Region, and EPA Headquarters, the remainder of the process should proceed rapidly. However, if all necessary changes have not been made or if draft materials were not submitted to EPA for preliminary review, delays are likely.

(b) Final EPA Review and Public Comment

The procedures for reviewing a State's formal program submission are set out in 40 CFR 123.61. First, within thirty (30) days of receipt of the package, the Regional Administrator makes a determination of whether the submission is complete. This completeness determination may only be made with the concurrence of the Director of the Office of Water Enforcement and Permits and the Associate General Counsel for Water. In determining whether the program submission is complete, EPA will look beyond whether each document is present, and will also examine whether the State has addressed all minimum requirements for a State program. A State program submission will not be considered complete if the legal authority does not meet minimum requirements or if significant changes are need to other portions of the submission. If the submission is complete, EPA has ninety (90) days to approve or deny the request for State program approval, although this period can be extended if the State agrees. If the submission is incomplete, the 90-day clock will not commence until EPA receives the additional materials.

Once a completeness determination is made, EPA will publish notice of the submission in the Federal Register and

in enough of the largest newspapers in the State to attract State-wide attention. In addition, the notice must be mailed to all interested persons and government agencies. The hearing must provide a comment period of at least forty-five (45) days and indicate that a public hearing will be held within the State. The meeting must be held no less than thirty (30) days after being noticed in the Federal Register.* The notice must also indicate where and when the State's submission will be accessible to the public and indicate the cost of obtaining a copy. The notice shall also delineate the fundamental aspects of the State's proposed program. Finally, the notice must indicate whom an interested member of the public may contact for additional information.

(c) EPA's Decision

Following the public comment period, EPA will complete its final review of the submission, considering all public comments on the proposed program. The Regional Administrator, with Headquarters' concurrence by the Director of the Office of Water Enforcement and Permits and the Associate General Counsel for Water, then makes a determination on whether to approve the program.

(d) Notice of an Approved Program

If EPA approves the program, the Governor will be so notified and a public notice (including a summary of responses

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*/ The notice designating the time and place for the hearing may be included in the notice proposing approval.

to significant public comments) will be published in the Federal Register as well as mailed to all interested parties. The public notice must also explain the basis for EPA's decision. Following public notice, EPA generally turns its files over to the State Agency or Agencies which will be implementing the program and ends its permitting activities in the State. Note, however, that through the MOA, EPA and the State may agree that EPA will retain responsibility for certain permits in limited circumstances (such as where EPA has ongoing enforcement actions). This approach may not be used to authorize a partial program that would otherwise be prohibited by the Act.

In the event the program is not approved, EPA will notify the State and indicate the reasons for disapproval, and the revisions necessary for subsequent approval.

B. Program Modification Process

(1) State Program Modification Submission

Revisions to State programs may be necessary any time the State or federal programs change, such as the addition of a new program component (i.e., pretreatment, federal facilities or general permits), adoption of new or amended Federal laws (requiring changes to State laws), other changes to State laws, transfer of the program administration from one State Agency to another, and the adoption of revised State forms. Under federal rules, States must request a modification to their approved program in these cases prior to EPA review

and approval. Unless the CWA or EPA regulations specify a deadline for modifications to assure consistency with new or revised federal requirements, such modifications are expected to be made by approved States within a reasonable time. Program modification is often necessary to avoid inconsistencies between the State program and the CWA, and to assure the continuing validity of EPA's approval of the State program. Either EPA or the State may initiate the procedures for program modification.

The procedures for program modification are very similar to the original program approval process (See Part A of this chapter); States and EPA should follow those procedures, although some steps may be changed or omitted. There is one significant difference in process: for program reviews, the 30-day period for making completeness determination and the 90-day review period clock do not apply. There are no time limits for these actions in program revisions.

As with program approvals, early EPA involvement will facilitate action on program modification and eliminate delays. Program modifications may require the submission of a supplemental program description, MOA, Attorney General's Statement and copies of all legal authorities, where appropriate. EPA will determine the documentation necessary for each program modification (where the modification is to add a new program component, the State must submit all of these documents, although only in modified form).

(2) Substantial Modifications

Program modifications may be considered either substantial or non-substantial. If EPA determines the proposed modification is substantial, the NPDES regulations require that the modification be subjected to public notice and comment prior to EPA approval. For example, adding a pretreatment program is always considered a substantial modification (See, 40 CFR 403.10(h)). The Regional Administrator, with the concurrence of EPA Headquarters, will determine whether any other proposed modification is substantial by considering its scope, programmatic impact, and potential to arouse public interest or concern.

Public notices for substantial modifications must provide at least a thirty (30) day comment period, summarize the proposed revision and provide opportunity for the public to request a hearing. (Such hearings will be held where significant public interest is demonstrated.)

After consideration of the public comments and the requirements of the CWA, the Regional Administrator, with the concurrence of EPA Headquarters, will determine whether to approve or deny the modification. The modification does not become effective as a matter of federal law until approved by EPA. Approvals of substantial modifications will be publicly noticed in the Federal Register (as described above).

(3) Non-substantial Modifications

If the Regional Administrator, with concurrence of EPA Headquarters, determines that the proposed modification is not substantial, the Regional Administrator may approve or deny the revision, without public comment, by notice of his or her decision in a letter to the Governor or his designee (Program Director). Review of minor modifications should also be coordinated with EPA Headquarters. Minor changes in forms, procedures, and regulations will generally be considered non-substantial modifications. Proposed non-substantial modifications do not need to be subject to prior public notice in the Federal Register. Generally, final approval of non-substantial modifications need not be published either. However, any modification, substantial or not, which adds a component (e.g., federal facilities or general permit authority) to any State program will be published in the Federal Register.

C. Legal Review of Existing Programs

EPA has initiated a program to review the legal authorities for all approved State NPDES programs. It is expected that these reviews will need to be done periodically, perhaps every few years, depending on the degree to which federal and/or State law and program requirements change. These reviews are a joint Headquarters/Regional effort; Headquarters must concur in any determination of State program consistency or inconsistency with federal law. EPA will review the statutes and regulations in each State to determine whether they are

consistent with federal requirements. The required legal authorities are described in Chapters 3 and 4. The mechanisms for identifying and resolving deficiencies are set out in Chapter 6. This part outlines the review process. While reviews will focus on legal authorities, States and EPA will also review resources to determine whether they remain adequate.

(1) State self-evaluation

The first step in any legal review should be a State self-evaluation. The State should review statutes and regulations for consistency with federal requirements just as would be done for program approvals. The States should submit their conclusions on the legal analysis to EPA. In some cases, EPA may proceed directly to the next stage, in which case this step may be omitted.

(2) EPA Review of State Authorities

EPA will independently evaluate State legal authorities to determine consistency with federal requirements. The scope of this review will be the same as described for State self-evaluation, including State resources. The standard of review is the same as for approval of new programs; States are expected to have authorities that meet all federal requirements. Where the State has conducted its own self-evaluation, EPA will carefully consider the State's conclusions in formulating its comments. The review of State programs is a joint Regional/Headquarters activity; both offices must coordinate in preparing comments. EPA will then submit comments on the State's authority identifying needed revisions.

(3) State Revisions to Legal Authority and Resources

Once the State has received comments from the Region and Headquarters, the State will revise its statutes and regulations as necessary to address EPA's concerns. The State will then submit a request for program modification approval based upon these changes. In many cases, the State will also need to submit a revised Attorney General's statement addressing the modified authorities. EPA will act on this submission as described in Part B of this Chapter.

D. Withdrawal of State Programs

(1) Voluntary Withdrawal

According to 40 CFR 123.64(a), a State may, at any time, voluntarily transfer program responsibilities back to EPA by giving the Regional Administrator 180 days notice, and providing a plan for the orderly transfer of relevant program information necessary for EPA to administer the program. At least thirty (30) days in advance, the Regional Administrator must publish public notice of the transfer in the Federal Register and in enough of the largest newspapers of the State to provide statewide coverage, and mail notice to all permittees and other interested persons. A State may not return part of the NPDES program and retain other portions. If the program is transfered to EPA, the State must return the entire program.

(2) Involuntary Withdrawal

At all times after program approval, State programs must be consistent with the CWA and federal rules and must be

administered accordingly. Section 402(c)(3) of the CWA and EPA regulations (40 CFR 123.64(b)) allow the Agency to withdraw its approval of a State program which no longer complies with the requirements of the CWA and regulations thereunder. Program withdrawal is considered an extreme remedy but will be invoked in those cases where the State is unable or fails to take required corrective action to solve State program deficiencies. EPA will exercise great care to assure that the State is fully apprised of any program deficiency determinations by EPA at the earliest possible time and that a plan for corrective action on a reasonable schedule is developed. In some cases, EPA may decide to call for a public meeting to review EPA's concerns with a specific State program. EPA may not withdraw a part of the State program, leaving the State with partial authority. Any withdrawal applies to the entire approved program.

The Administrator may order the commencement of withdrawal proceedings on his own initiative or in response to a petition by an interested person alleging that the State has failed to comply with the requirements of the CWA or EPA regulations. Upon receipt of such a petition, the Administrator may undertake an initial, informal investigation to determine whether the State program is being administered in accordance with federal requirements. The Administrator may then either grant the petition and initiate the withdrawal process described below, or deny the petition.

(a) Criteria for Program Withdrawal

Grounds for initiating State program withdrawal proceedings are set out in 40 CFR 123.63, and include the following:

(1) The State's legal authorities no longer meet CWA requirements;

(2) The operation of the State program fails to comply with EPA regulations;

(3) The State's enforcement program fails to comply with EPA regulations; or

(4) The State program fails to comply with the terms of the Memorandum of Agreement.

(b) Procedures for Program Withdrawal

If the Administrator finds cause to commence withdrawal proceedings, he or she will issue an order designating the time and place for an adjudicatory hearing to be held. The order must also contain the issues to be considered at the hearing. The State has thirty (30) days to admit or deny the allegations. All parties may be represented by counsel and the party seeking withdrawal has the burden of coming forward with evidence of the allegations. Once the Presiding Officer has evaluated the record, he/she shall make a recommendation to the Administrator. Parties may file exceptions to this recommended decision. The Administrator must issue his/her decision within sixty (60) days of receiving the Presiding Officer's recommendation.

If the State Program is found to be deficient, the Administrator must provide up to ninety (90) days for the State to take corrective action. If this action is not

withdraw approval is a final agency action for purposes of judicial review.

A more detailed description of the withdrawal procedures may be found in 40 CFR 123.64(b)(3); also see Procedures for the Withdrawal of State NPDES Program Approval, General Counsel Opinion No. 78-7, April 18, 1978 in Volume II.

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STATUTORY AUTHORITY AND THE ATTORNEY GENERAL'S STATEMENT

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A. Background on the Statutory and Regulatory Requirements of the NPDES Permit Program

Section 402(b) of the CWA requires a State seeking EPA approval for NPDES authority to submit copies of all State statutes and regulations which will form the legal foundation for its permit program. EPA must review and evaluate the adequacy of these legal authorities to ensure their consistency with the Act and the NPDES and pretreatment regulations set out at 40 CFR Parts 122-125 and 403. The following sections of the Act are directly applicable to State programs: 304(i), 308(c), 309(c) and (d), 316(a), 318(c), 402(b), (d), (g), (h), and (j), 403(a) and 405(c).

States must have adequate statutory and regulatory authority to administer the NPDES program. The State must have authority at least as stringent as the federal requirements cited at 40 CFR 123.25 (including the pretreatment program). States can have additional authorities providing that they are not less stringent than those required by the federal program. State law can be more stringent, but States cannot use more stringent provisions to "trade off" for provisions that are less stringent than federal requirements. All State statutes and regulations must be in full force and effect by the time the program is approved. Of course a State seeking a modification to its program must have adequate legal authority to implement the modification.

Where a State is requesting program approval, Section 402(b) also requires that the Attorney General, (AG) or the chief

attorney in State agencies having benefit of independent legal counsel certify that in his or her opinion, the laws of the State provide adequate authority to carry out the program. (EPA regulations describe the specific content of these statements in 40 CFR 123.23.) This Attorney General's Statement must include a discussion of the State's legal basis for conducting each aspect of the program and address any significant differences between State and federal law.[1]/ The Attorney General's statement must cite to the specific statutory and regulatory provisions that provide the legal authority for each program element. However, citations alone are not adequate; the Attorney General must explain how each citation provides the requisite authority. These explanations need not be extensive where the provisions are clear on their face. Where appropriate to clarify authority, the AG should also cite to judicial decisions and other interpretations of State authority.

Whenever State regulations are cited, the underlying statutory authority for the regulation should also be cited. If administrative regulations are based upon a broad statutory provision, such as the "power to implement a pretreatment program," then the Attorney General must explain that such regulations do not violate any applicable doctrines under State law (e.g., the delegation of legislative authority to State administrative agencies).

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[1]/ In order to resolve any significant differences between State and federal law, the Attorney General must identify those federal requirements which have no corresponding provisions in State law as early in the program development process as possible.

There is no explicit requirement that a single State Agency have authority to operate the entire program. Although centralization of NPDES program functions is generally preferable, the CWA allows program functions to be managed by more than one State agency. However, if management of the program is shared, it cannot result in a gap in the State's total authority. The agencies, taken together, must have full authority to administer the program. In addition, each agency must have all necessary legal authority to control those discharges within its jurisdiction. The Attorney General should indicate which State agency will be responsible for performing each program task and how the several agencies will coordinate their activities.2/

Before developing the statement, it is suggested that the AG's office carefully review drafts of the program description so that the statement will address the activities which the State intends to undertake. In many instances, the adequacy of the legal authority will depend upon the approach the State agency intends to adopt. For example, a State may have adequate authority to regulate industrial users through State-issued permits; but the State agency has elected to administer the pretreatment program through POTWs (like the federal program). In this case, the AG must interpret the State's pretreatment

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2/ States contemplating this type of bifurcated management should take particular note of the conflict of interest provisions contained in section 304(i)(2)(D) of the Act (see, subsection B(1)(j), infra). Each agency having or sharing authority to issue, or in some way act upon permits, must satisfy the conflict of interest provisions.

authority in view of the program the State plans to administer.

The Attorney General's statement must be signed by the Attorney General or a representative of the AG who is authorized to sign and can bind the State by so doing. Alternatively, the Statement may be signed by an independent legal counsel. To qualify as independent legal counsel, the signatory must have full authority to represent the State agency in Court on all matters, including defending actions against the State and bringing actions to enforce against program violations.

A State must also submit an Attorney General's statement if it proposes to modify its program to add a new program component (i.e., pretreatment, federal facilities, or general permits). In these cases, the AG statement need only address authority for the component being sought, unless broader discussion is appropriate to explain the authority fully. An AG's statement may often be necessary at other times the State requests program modification, such as when the State amends or revises its statutory or regulatory authorities. In addition, EPA may require a supplemental Attorney General's statement to be prepared whenever it has reason to believe that circumstances surrounding a State program have changed (see, 40 CFR 123.63). For example, if State judicial decisions raise questions about the adequacy of State authorities, EPA can request a supplemental AG Statement to resolve ambiguities.

When the program approval or modification request is submitted, the Regional Administrator, in conjunction with the Director of the Office of Water Enforcement and Permits,

and the Associate General Counsel for Water, must make an independent determination as to the adequacy of State legal authorities. (Section 402(b) of the Act provides, in part, that "...[EPA] shall approve each such submitted program unless [it] determines that adequate authority does not exist..." to perform certain functions set forth in section 402(b).) The State Attorney General's certifications cannot be deemed to be absolutely dispositive of the sufficiency of a State's legal authority. However, EPA will give the Attorney General's statement the greatest possible weight when the adequacy of the State's program and legal authorities is assessed. Where the plain wording of statutory or regulatory authorities appears to conflict with federal requirements, EPA cannot approve the program unless the authority is revised or the AG demonstrates that the authority is adequate. If the AG's Statement leaves authority ambiguous, EPA will request clarification.

B. State Statutory Authority and the Contents of the Attorney General's Statement

The following discussion addresses the statutory authority required for State program approvals. Each of these topics must be discussed by the Attorney General in his or her statement. This discussion tracks the Model AG's statements for NPDES and pretreatment that EPA has developed. These models are reproduced in Volume II. For new programs and full program legal reviews, State authority must cover all topics addressed in this Chapter. Where States are modifying programs to add a new component, it is only necessary to look at the section dealing with that program element.

This Chapter also identifies many of the areas which frequently create stumbling blocks to program approval, and explains what constitutes adequate State authority. However, these problems areas will not be the only ones considered during EPA's review of the legal authorities. EPA will give added scrutiny to any State authority which appears to conflict with the requirements under section 402 and the federal NPDES regulations.

As discussed above, the Attorney General's statement must also cite to regulations providing the State's authority to administer the program. These regulatory requirements are discussed in Chapter 4.

(1) NPDES Requirements

(a) Authority to Issue Permits

(1) Existing and new point sources

The scope of State NPDES programs must be at least as broad as EPA's program. States must have authority to require all point source discharges, existing as well as new, to obtain permits.[3]/ States may not exclude types of point

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[3]/ EPA's NPDES regulations create an exception to the general requirement that States regulate all discharges. NPDES States need not have authority to regulate discharges on Indian lands. The inability to regulate these activities is not considered a partial program and is not an impediment to EPA approval (40 CFR 123.1(h)). In fact, EPA cannot authorize a State to regulate discharges on Indian lands unless the State demonstrates such authority. See also, EPA's Policy for Administration of Environmental Programs on Indian Reservations (11-8-84) and State Jurisdiction over Indians Living on Tribal Lands, General Counsel's Opinion No. 77-6 (5-31-77).

sources, as defined in the Act and EPA regulations, from the permit requirement.[4]/ For example, some States in the past have sought to exclude certain categories, types, or sizes of point sources from the basic requirement to obtain a permit. Other States have attempted to "grandfather" or exempt discharges already in existence, or provide automatic permits for existing dischargers. Such schemes are inconsistent with the CWA.

It is also not permissible for States to develop provisions for de jure permits (i.e., the discharger is authorized to discharge if, after a certain time period, the permitting authority has not acted on the discharger's permit application). This approach would allow issuance of a permit without notice and comment and without the permitting authority determining the appropriate permit limits. No facility may discharge without a valid NPDES permit issued in accordance with State regulations equivalent to the federal NPDES regulations unless it has been specifically excluded from regulation. However, States may allow NPDES permits to be continued after expiration where the permittee has filed a timely and complete application.

State authority to require dischargers to obtain NPDES permits must be based on the existence of a "discharge of pollutant, from a point source, into waters of the United States" (as these terms are defined in section 502 of the Act and 40 CFR 122.2 of the NPDES regulations). State

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4/ EPA regulations at 40 CFR 122.3 list several types of discharges as being excluded from the NPDES permit requirements. Most of these exemptions represent discharges that EPA has determined not to be point sources.

provisions that seem to require an additional demonstration, such as a showing of pollution, a public nuisance, harm to the environment, or violations of effluent or water quality standards, are not valid unless the State can demonstrate that they are in fact consistent with the CWA. Generally, where the State law requires an NPDES permit for any discharge that causes or may cause pollution, or otherwise predicates the regulatory requirements on such provisions, the State law does not meet federal requirements and must be changed.

State law requiring discharge permits also must provide adequate authority to issue permits regulating the disposal of pollutants into wells (see, CWA section 402(b)(1)(D)). This authority must enable a State to prevent pollution of ground and surface waters and protect public health and welfare by preventing or permitting discharges to wells. An approved State Underground Injection Control (UIC) program under section 1422 of the Safe Drinking Water Act will satisfy this requirement.

(2) Waters of the State

The State law must define "Waters of the State" as broadly as the NPDES regulations (see 40 CFR 122.2). This definition is very broad and encompasses virtually all surface waters. The State cannot limit the scope of the NPDES program by exclusions for waters "wholly on private property," or "non-continuous or intermittent" water bodies, etc., unless the State can demonstrate that those exclusions are not inconsistent with the Act. For example, some waters wholly on private property are considered waters of the U.S. because

of connections to interstate commerce, such as making them available for recreational use by the public. (There may also be pretreatment-related concerns with the definition of waters of the State. See Part B(2)(a), below.)

(b) Authority to Deny Permits in Certain Cases

No discharger has a right to an NPDES permit and State law may not provide dischargers with such a right. States also must have authority to deny permits. This authority cannot be limited by requiring the State to demonstrate "pollution" or similar environmental impact.

In addition, States must have authority to prohibit permit issuance in certain circumstances. The Act prohibits permit issuance in the four circumstances listed below; States must have the authority to deny permits in these circumstances even though the discharge would not violate any applicable effluent guideline or water quality standard. The following discharges are prohibited:

- Discharges which would conflict with an approved Area Management Plan (section 208(e));
- Discharges of radiological, chemical, or biological warfare agents, or high level nuclear wastes (section 301(f));
- Discharges which, in the judgment of the Army Corps of Engineers, would substantially impair anchorage and/or navigation (section 402(b)(6)); and
- Discharges where EPA has objected to the State's draft/proposed permit.

The federal rules also prohibit the issuance of permits in other situations (listed in §122.4). State law must provide

similar authority.

(c) Authority to Apply Federal Standards and Requirements to Direct Dischargers

(1) Technology-based Effluent Limitations Guidelines

Section 402(b)(1)(A) of the CWA requires States to have authority to adopt and apply federally promulgated, technology-based effluent limitations guidelines in their NPDES permits. The Attorney General's statement must describe the mechanism by which these standards will be adopted into State law and applied to dischargers. If the State must independently develop and promulgate its own effluent standards and limitations, they must be at least as stringent as the federal standards and the State must cite to the controlling statutory and regulatory authorities. States must require compliance with technology-based requirements no later than the deadline required under federal law. The applicable technology-based limitations are described below.

(i) Industrial Permittees

Pursuant to section 301(b) of the Act, existing point sources, other than publicly owned treatment works, are required to achieve pollutant reductions resulting from the application of the following federal effluent standards:

- By July 1, 1977, effluent limitations which require the application of the best practicable control technology currently available (BPT) for all pollutants;
- By July 1, 1984, effluent limitations which require the application of the best available technology economically achievable (BAT) for toxic pollutants, including the elimination of discharges of all pollutants where appropriate;
- By July 1, 1984, effluent limitations for conventional

pollutants which require the application of the best conventional control technology (BCT); and

By July 1, 1987, effluent limitations which require the application of the best available technology economically achievable (BAT) for nonconventional pollutants.

These requirements apply even where the permittee's discharge consists solely of sanitary waste equivalent in character to domestic sewage.

(ii) Municipal Permittees

State Agencies must require publicly owned treatment works (POTWs) to achieve secondary treatment no later than July 1, 1977 (Section 301(b)). However, section 301(i) allows POTWs to request an extension of the compliance deadline if they were awaiting construction grant awards and requested the extension in 1978. POTWs granted compliance extensions must comply with secondary treatment (and water quality-based limits, see below) no later than July 1, 1988. The State's authority to require compliance by POTWs may not be limited, such as by being dependent on funding availability.

(2) Water Quality-Based Effluent Standards

States must have authority to apply water quality standards, which are developed under State law and approved by EPA,[5/] in permits. These standards must be imposed in permits whenever they are more stringent than applicable technology-based limitations (CWA 301(b)(1)(C)). Compliance with water quality-based permit limits must be required by July 1, 1977. If new or revised water quality-based permit limits are developed

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5/ In the event a State fails to submit a water quality standard, or the standard as submitted or subsequently revised does not meet the requirements of section 303 of the Act, EPA is authorized to develop the standard in lieu of the State.

after that date, the State must have authority to require compliance within a reasonable time. The State's water-quality standards must implement the total maximum daily load allocations (TMDL) established under section 303(d), and the continuing planning process under section 303(e) of the Act. 6/ States also must have authority to impose in permits any more stringent water quality-based effluent limitations developed by EPA under section 302 of the Act where necessary to achieve water quality standards. Only EPA may establish water quality-based effluent limitations under section 302; this provision does not apply to State programs, except to the extent that States must ensure compliance with such limits. States may not incorporate provisions similar to those in section 302(b)(2) into State law. Those provisions are integral to the section 302 standard-setting process and have no application to water quality standards established under section 303.

(3) New Source Performance Standards

States are required to impose federal new source performance standards. These standards reflect the greatest degree of effluent reduction achievable through the application of the best available demonstrated control technology, processes, operating methods, or other alternatives, including, where applicable, a no-discharge requirement. States must require compliance with these standards upon commencement of discharge

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6/ The State process for developing water quality standards and TMDLs must be consistent with 40 CFR Part 131. These State procedures are not reviewed as part of the NPDES program approval or review except to the extent they are implemented through the NPDES permit process.

(see 40 CFR 122.29). In order for these standards to be imposed correctly, the State's definition of "new source" must be at least as stringent as EPA's (see, 40 CFR 122.2 and 122.29(a) and (b)).

(4) Toxic Pollutant Effluent Standards

States must have authority to apply federal toxic pollutant effluent standards under Section 307(a) to new and existing sources. Compliance with these standards must be achieved by the date specified in the standard (which is generally, no more than one year after promulgation). These standards appear in 40 CFR Part 129. Although new standards must apply regardless of their presence in existing NPDES permits, States also must have authority to modify permits to insert toxic pollutant limitations.

(5) Best Professional Judgment (BPJ) Effluent Limitations

EPA cannot approve a State program unless that State is authorized to fully implement all aspects of the NPDES program, even where an applicable federal effluent standard or limitation has not been promulgated (i.e., the State must be able to develop permit limitations based upon the best professional judgment (BPJ) of the permitting authority). When establishing BPJ limitations, the permitting authority must consider the statutory factors for the appropriate level of technology set out in section 304(b) of the Act (see also, 40 CFR 125.3(d)). In cases where EPA has promulgated an effluent guideline but the guideline does not address a particular pollutant present in the discharger's effluent, the State must

have authority to use a combination of effluent guidelines and BPJ to establish appropriate permit limitations for the entire discharge.

(6) Ocean Discharge Effluent Limitations

When permitting discharges into the territorial seas, States must have the authority to apply additional requirements derived from the ocean discharge criteria promulgated by the Administrator under section 403 of the Act (see, 40 CFR Part 125, Subpart M). Note that all discharges beyond the territorial seas (3 miles offshore) are outside State jurisdiction and are permitted by EPA.

(7) Compliance Schedules

States must have authority to incorporate compliance schedules in NPDES permits. These schedules must require compliance with applicable requirements no later than statutory deadlines. States may not impose or modify compliance schedules where those schedules would be inconsistent with federal requirements (such as extending beyond a statutory deadline).

(8) Variances

The CWA and EPA regulations authorize variances from applicable effluent limitations in several instances. States are not required to allow dischargers variances from such limitations, although they may do so. However, if a State authorizes variances, the State standards must be at least as stringent as federal requirements.

States also may not allow for variances that are not authorized under federal law, whether in the form of adjustments

to the permit or a separate State rulemaking that modifies the standard for a particular permittee. For example, a State could not allow for variances from water quality standards based upon economic impact, since these variances are not available under the Act. State procedures for acting on variances also must be consistent with federal requirements. Thus, States may not grant certain variances (e.g., Fundamentally Different Factors) although they may have authority to incorporate an FDF variance granted by EPA.

Variances from technology-based limitations for industrial facilities are authorized under CWA sections 301(c) (for non-conventional pollutants based upon economic impacts); 301(g) (for nonconventional pollutants where there are no water quality impacts; 301(k) (compliance extensions for innovative technology); 301(i)(2) (delay in POTW construction); and 316(a) (thermal). EPA also allows variances based upon fundamentally different factors at the permitted facility. POTWs are eligible for variances under section 301(h) (ocean discharge) and compliance extensions under section 301(i) (federal funding for POTW construction).

(d) Authority to Limit Permit Duration

The CWA establishes maximum permit terms of not more than five years. Permits may, of course, be issued with shorter terms. Notwithstanding the five year authorized term, a permit based upon BPT may not be issued with an expiration date later than the applicable BAT/BCT statutory deadline.

Under federal law, where a permit expires through no fault of the permittee, it is administratively continued if the

permittee filed a timely and complete application for a new permit. Although not required by the CWA, States may allow the terms of expired permits to be administratively continued in a similar manner. The Attorney General must assure EPA that authority to continue expired permits is consistent with the State's Administrative Procedure Act or other procedural laws, as well as the State's own NPDES regulations (see, 40 CFR 122.6).

(e) Authority For Entry, Inspection, and Sampling; and Applying Monitoring, Recording, and Reporting Requirements to Direct Dischargers

The Attorney General must indicate whether State law authorizes the Director to impose recording, reporting, monitoring, entry, inspection, and sampling requirements, and explain how these requirements will be imposed. The State must have authority to enter and inspect, at reasonable times, any premises on which an effluent source is located or records required by the CWA are kept. In practice, this means the States must be able to inspect any NPDES permittee. Thus, a State exclusion for private residence is generally not authorized since a private residence may be a discharger regulated by the program or may be a depository for records required to be kept under federal law.

(f) Authority to Require Notice of Introduction of Pollutants into Publicly Owned Treatment Works

States must have the authority to require POTWs to provide notice of the introduction of pollutants to the POTW by industrial users. This authority is fully discussed in the pretreatment section of this chapter (see Part B(2)(c), below at page 3-27).

(g) Authority to Issue Notices, Transmit Data and Provide Opportunity for Public Hearings

A State must have authority for public participation in the issuance of NPDES permits that is equivalent to federal requirements. The CWA contains several provisions encouraging or requiring public participation in a State's permit development process. Detailed requirements for public involvement are outlined in 40 CFR Part 124. These include authority for public notice and comment and opportunity for public hearing on all permits. It is expected that most States will choose to cover the detailed provisions for public participation in administrative regulations rather than statutory authorities. However, State statutory authority must be broad enough to allow development of regulations consistent with federal requirements. The State must ensure that draft permits and fact sheets be available for public review and comment. The notice and comment procedures also must apply when the State proposes to modify, terminate, and revoke and reissue permits. The State authority must ensure consideration of all relevent public comments before the State decides to issue or modify a permit, and a responsiveness summary of the significant comments must accompany the final permit notice.

A State may not limit the applicability of these public participation procedures. Thus, a State law which limits hearings or opportunities to comment to aggrieved applicants will not comply with the public participation requirements of the Act. Similarly, the opportunity to request a public hearing (non-adjudicatory) must be available to the citizenry as well as to the permit applicant. If held, a hearing must be

convened before rather than after a final decision on the permit.

(h) Authority to Provide Public Access to Information

The treatment of confidential business information has been a troublesome area in State program approvals. Some State laws deny the permitting authority access to "confidential" or "proprietary" information. Other laws require only that such information be withheld from the public. Many of these restrictions are inconsistent with the CWA.

Under the CWA, States must allow public access to all information from permittees except confidential business information. However, certain information is not eligible for confidential treatment. All permits and information required in permit applications must be made available (although information not required by the permit application does not fall within this category). In addition, information constituting effluent data must be made public. EPA has defined effluent data very broadly to include any information necessary to evaluate the discharge, determine effluent limits, ascertain compliance and allow meaningful public comment on permits (see, 40 CFR 2.302). Thus, where permit limits are based upon the facility's production, production data could not be claimed confidential if it met the criteria in Part 2.[7]/

State laws must be consistent with these broad public access to information requirements. States also may not create restrictions on the use of such information, including effluent data,

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[7]/ Federal effluent guidelines are often calculated on a production basis.

(e.g., making information received from a discharger inadmissible in an enforcement action against the discharger). The State must have authority to disclose any information, even trade secret information, to EPA. EPA's use of such disclosures would, of course, be subject to the appropriate requirements for public access in 40 CFR Part 2. Furthermore, disclosure is subject to protective orders issued by a court or Administrative Law Judge.

(i) Authority to Modify, Revoke and Reissue or Terminate Permits

States must be authorized to modify, revoke and reissue, or terminate permits for cause. Section 402(b)(1)(C) defines cause to include the following:

- Violation of any conditions of the permit;
- Obtaining a permit by misrepresentation or failure to disclose all relevant facts; and
- Changes in circumstances which require either a temporary or permanent reduction or elimination of the permitted discharge.

A complete listing of authorized causes for permit modification is set out in 40 CFR 122.62, and causes for termination at 40 CFR 122.64. States may not authorize permit modifications for less stringent limits where these would not be allowed under federal law.

(j) Authority to Enforce the Permit and the Permit Program

State law must provide for adequate enforcement authority, including the ability to enjoin violations and bring both civil and criminal action for any violations of permits or the permit program. Other sanctions, such as the ability to bring actions for damages, are allowed, but they must be addi-

tional rather than substitutes for these enforcement remedies.

The NPDES regulations outline the enforcement capabilities which must be included in a State program (see, 40 CFR 123.27). A State must have authority to seek injunctive relief in two instances. First, the State must be able to immediately restrain any unauthorized activity endangering the public health or the environment. Second, it must have authority to sue to enjoin any threatened or continuing violations without first revoking the permit. State penalty authority must allow the State to seek civil penalties in the amount of at least $5,000 per day of violation, seek criminal fines (for willful or negligent violations) in the amount of at least $10,000 per day of permit violation, and seek criminal fines for knowing false representations or certifications, or knowingly rendering monitoring devices inaccurate, in at least the amount of $5,000 for each instance of violation. Other provisions in the Act relating to criminal sanctions which States are encouraged to provide include the following:

* Imprisonment - section 309(c) provides for maximum imprisonment of one year (or six months for false statements); and

* Additional penalties - section 309(c) provides for a doubling of maximum fines and imprisonment terms for "second offenders".

The Attorney General must describe the State Agency's enforcement options in detail, covering each of the above points. In addition, since federal law includes criminal sanctions for persons who willfully or negligently violate effluent standards or limitations, water-quality standards,

or permit conditions, the Attorney General must indicate whether criminal fines or imprisonment, based upon negligent conduct, is permissible under State law. The Attorney General must also describe any limitation or prerequisites to enforcement actions. Such restrictions will be carefully reviewed to determine whether State authority still meets federal minimum requirements.

States also cannot provide additional defenses or rights to dischargers where not authorized by federal law. Thus, a State could not allow a permittee to challenge its permit limits in an enforcement proceeding and State law that provided such an option would be inconsistent with the federal requirements. Similarly, a State could not restrict its enforcement by limiting the use of information in an enforcement action.

Administrative enforcement mechanisms, such as informal orders (not directly enforceable by a court), may be used as a first response to a violation, but are not an acceptable substitute for the above-described formal enforcement capabilities. Furthermore, if provisions for administrative compliance orders, requiring the cessation of violations of permit conditions or allowing the administrative assessment of penalties for violations, are present in the State's law, the Attorney General must indicate whether these procedures must be exhausted before the State Agency is permitted to seek civil or criminal penalties, or injunctive relief. Note that the NPDES regulations require that injunctions be available without prior permit revocation of permits (see, 40 CFR 123.27). Of course, the Attorney General should also

describe any additional enforcement remedies available to the State, including citations to supporting legal authorities.

State programs must allow for public participation in the enforcement process. The NPDES regulations allow States to choose one of two basic options. The first option is for State law to provide for intervention as of right in any enforcement action. States choosing this option may not place restrictions on this right, other than jurisdictional limits such as standing. Alternatively, where State laws allow permissive intervention in State actions, the State may agree not to oppose such intervention in any enforcement proceeding. (Although the NPDES regulations specify only that the State will not oppose permissive intervention where authorized under State law, EPA has interpreted this option as being available only when permissive intervention is possible.) Under this option, the State also must agree to investigate and respond to citizen complaints and publish all settlement agreements for a public comment period of at least 30 days. A third option available to States is a hybrid of the first two. For example, a State may allow intervention through a rule analagous to Rule 24(a)(2) of the Federal Rules of Civil Procedure and provide an assurance by the appropriate State enforcement authority that it will not oppose intervention under the State analogue on the ground that the applicant's interest is adequately represented by the State. Such a hybrid public participation approach is consistent with federal requirements, even though it does not clearly fit within either of the options outlined in the regulation. These requirements were first added in 1979. Thus many approved States do not yet have the required authority.

(k) Conflict of Interest: State Board Memberships

The CWA requires that no State Board, Agency or organization which approves or acts on NPDES permit applications or portions thereof, may include among its membership, any person who receives, or has during the previous two years received, a significant portion of his income directly or indirectly from permit holders or applicants for an NPDES permit. "Significant portion of income" is defined in EPA's regulations as 10 percent or more of gross personal income for a calendar year, except that it means 50 percent or more of gross income if the recipient is over 60 years of age and is receiving that portion of income as a pension retirement or similar arrangement (see, 40 CFR 123.25(c)). "Permit holders or applicants for a permit" do not include State Agencies or Departments. All State programs must have conflict of interest protections which are at least as stringent as those of the CWA.

This statutory prohibition against conflicts of interest has been a problem in a number of States. Some States require permitting boards to have representatives of the regulated public. Other State boards are elected and could include members who receive income from permittees. These States' approaches are inconsistent with the explicit language of the Act. States must either establish the federal conflict prohibition or the Board must delegate its permitting and enforcement powers to a position that is prohibited from conflicts. Some States have sought to avoid the prohibition through recusal on matters affecting the permittee. This alternative is also not acceptable.

(k) Incorporation by reference

Although States seeking NPDES program approval are required to adopt administrative regulations similar to EPA's, there is no legal prohibition against a State doing so through incorporation by reference. Clearly, it is preferrable to have specific State regulations that explain applicable requirements fully, but States may choose instead to have a short incorporating provision. If a State chooses to pursue incorporation by reference, the Attorney General must certify that such an incorporation is proper and enforceable under State law and includes all of EPA's regulations which are applicable to States. The Attorney General should also explain the form, if any, that such incorporation must follow under State law and explain how the rules meet those requirements. The Attorney General should indicate, by means of a list, those federal regulations which the State has incorporated and explain how the list was generated. The Attorney General should pay particular attention to any attempt to incorporate federal law prospectively, that is, to incorporate revisions to federal law which are yet to occur. Most State Courts have held such incorporations invalid as unconstitutional delegations of legislative power and State authority. EPA will closely review any attempts to incorporate State law prospectively.

(2) Pretreatment Requirements

(a) Authority to Apply Federally Promulgated Categorical Pretreatment Standards to Industrial Users

States seeking pretreatment program approval must have authority to impose pretreatment standards on all industrial

users of publicly-owned treatment works (POTWs). Pretreatment standards include the general and specific prohibited discharges listed in 40 CFR 403.5, local limits developed by POTWs, and federally promulgated categorical pretreatment standards found in 40 CFR Subchapter N.

A State must be able to apply and enforce these pretreatment standards directly against any owner or operator of any source subject to them. Where the State regulates all industrial users (IUs) itself, either through regulations or State-issued permits to all industrial users, the requirement that the authority operate directly should not be a problem. However, most States will administer the pretreatment program like the federal program - with POTWs being approved to regulate industrial users of their system and the State primarily overseeing the POTWs' efforts. In these cases, the State cannot rely upon the POTW to impose the pretreatment requirements; such requirements must apply to all IUs irrespective of POTW action. Thus, a State scheme that allows the State only to enforce against the POTW when the industrial user violates a pretreatment requirement is impermissible. Similarly, if the State must take an intermediate step, such as issuing an order with pretreatment requirements or revoking the POTWs approved pretreatment program (or permit issued under that program), prior to acting, the State's authority does not meet federal requirements. Of course, a State permit system would be adequate, even though the requirements would only be applicable once imposed in the permit, if the State issued permits to all industrial users.

It must also be clear that the State has authority to apply pretreatment standards to industrial users. Many State statutes only authorize the State to regulate discharges to waters of the State. Unless the term discharge is defined clearly to include indirect discharges, it is unlikely that such authority is consistent with federal requirements. Industrial users do not discharge to waters, but instead to the POTW's sewer system. This has been a common problem in State pretreatment submissions. States are cautioned that an easy remedy, such as defining discharge to include indirect discharges, may result in requiring all industrial users to obtain permits (under State law), a result which the State may not have intended or desired. In addition, such a definition may have the absurd result of requiring water quality standards for sewer lines.

(b) Authority to Apply Pretreatment Requirements in NPDES Permits for Publicly Owned Treatment Works

State Agencies must have authority to apply the following pretreatment requirements in terms and conditions of NPDES permits issued to POTWs:

- Compliance schedules for local POTW pretreatment program development (40 CFR 403.8(d));
- Conditions of an approved local program (40 CFR 403.8(c))
- A modification clause allowing the POTW's permit to be reopened to incorporate either an approved local pretreatment program, or a compliance schedule for developing a local program (40 CFR 403.10(d));
- Effluent discharge limitations to be enforced against industrial users (40 CFR 403.5); and
- Conditions of an approved removal credit (demonstrated percentages of pollutant removal) (see, 40 CFR 403.7, and subsection (d), below).

Most States should have adequate statutory authority to impose these conditions in NPDES permits as part of their NPDES authority. This will frequently be a general authorization to include appropriate conditions in permits. However, these authorities should be reviewed to ensure against inconsistencies that would prevent imposition of these conditions.

(c) Authority to Require Notice of Introduction of Pollutants into Publicly-Owned Treatment Works

States must have the authority to require POTWs to provide notice of the introduction of pollutants to the POTW by industrial users. CWA section 402(b)(8) specifically requires permits to contain conditions requiring notice of new or increased discharges from industrial users who would be subject to either section 301 or 306 of the Act if they were discharging directly. The State must also be able to require notice of the anticipated impact of such discharges. Most States laws should meet this requirement through their power to incorporate conditions into NPDES permits, although the authority must still be reviewed to ensure that there are no restrictions. Since the NPDES regulations (40 CFR 122.42(b)) require such notices, States with NPDES authority will generally have adequate authority to meet this requirement.

(d) Authority to Make Determinations on Requests for Local Pretreatment Program Approval and Removal Allowances

Unless the State chooses to assume responsibility for implementing local POTW pretreatment programs, State law must authorize the State Agency to approve or deny municipal requests for local POTW pretreatment programs. The State must have authority to follow procedures equivalent to EPA's, including

allowing for public notice and comment (see, subsection (h), below). Local programs may not be approved where the POTW lacks either the authority or the procedures to administer and enforce the program against industrial users.

Although not required by the CWA, States may allow POTWs to make adjustments to the categorical pretreatment effluent limitations placed on industrial users based upon the consistent pollutant removal achieved by the treatment works. States choosing to allow POTWs to request and receive removal credits authority must be able to follow procedures similar to those used for local program approval. States are not required to grant removal credits.

(e) Authority to Make Determinations on Categorization of Industrial Users, and Requests for Fundamentally Different Factors Variances

State law must also authorize the State Agency to make a determination as to whether or not the industrial user falls within a particular category or subcategory. The category determination allows the industrial user to know which categorical standard is applicable to its discharge. The Attorney General must also describe the requirements that the State Agency must follow in making category determinations. States should note that under federal law (40 CFR 403.6(a)(4)), States must provide industrial users the right to appeal the decision to EPA. States that cannot provide for such appeals are not authorized to make category determinations. In any instance where a State lacks the authority to make category determinations, EPA will make the determination.

States may also choose to develop authority to act on requests for fundamentally different factors (FDF) variances for industrial users, although States may choose not to allow such variances. Under federal law, States may not grant FDF variances, but may only deny or recommend approval to EPA. States also may not grant State FDF variances under their own authority, since these could make the program less stringent than the federal program. The Attorney General must describe the State's FDF requirements and procedures.

(f) Authority to Apply Recording, Reporting and Monitoring Requirements

States must have authority to require industrial users and POTWs to submit reports, keep records, and install, use, and maintain monitoring equipment. The Attorney General must explain that the State has authority to require each report identified in the general pretreatment regulations (40 CFR 403.12) (see also subsection (c), above). These include baseline monitoring reports, compliance reports, and periodic reporting by industrial users. POTWs and industrial users must be required to sample, respectively, their influents and effluents. The Attorney General also must describe the requirements which the State agency must follow in order to accomplish the above activities.

It must be clear that the State's reporting and monitoring provisions apply to indirect discharges and are not limited to direct discharges. For example, some States have authority that allows imposition of these requirements to "point sources" or to "discharges to waters of the State." These provisions

generally will not provide adequate authority. The term point source usually applies only to direct discharges; the problems with "discharge" under the pretreatment program are discussed above in Part B(2)(a) of this chapter. If the State statute contains such provisions, the State must demonstrate that they apply to indirect discharges as well.

(g) Authority to Apply Entry, Inspection and Sampling Requirements

State law must provide authority to enable authorized representatives of the State and POTWs with approved pretreatment programs to enter and inspect at reasonable times any premises of a POTW or of an industrial user where an effluent source is located or in which any records are maintained. This must include authority to review and copy any records required to be maintained, inspect any monitoring equipment, and sample any industrial user's effluent. As discussed above (subsection (f)), it is important to ensure that the State's authority applies to indirect dischargers. The Attorney General must describe the requirements which the State Agency must follow in order to accomplish the above activities.

(h) Authority to Issue Notices, Transmit Data, and Provide Opportunity for Public Hearings and Public Access to Information

States must have authority to provide public notice and comment on requests for local pretreatment program approval and for removal credit authority. States must also provide an opportunity for public hearing on these decisions and public notice of the final decision. These public notices and comment provisions are similar to those for NPDES permits (described

above at Part B(1)(g)), and State notice provisions must be equivalent in scope, including the interested public, affected States and governmental agencies.

States also must have authority to provide public access to information from permittees and industrial users. All information, other than confidential business information, must be available to the public. As with NPDES information, effluent data may not be claimed confidential (this authority is the same as for direct dischargers, discussed above at Part B(1)(h)). The public also must have access to requests for local program approval and comments thereon. Finally, the State must have authority to transmit any requested information to EPA. The Attorney General must describe the requirements which State Agency must follow in order to accomplish the above activities.

(i) Authority to Enforce Against Violations of Pretreatment Standards and Requirements By Industrial Users

States must have authority to enforce against violations of any pretreatment standard or requirement by industrial users. (Enforcement authority is also required against POTWs, but since the POTW's requirements are all inserted into its permit, the authority to enforce against permit violations is adequate - see Part B(1)(j) of this chapter.) Pretreatment standards are broadly interpreted (as discussed above in Part B(2)(a)) to include categorical pretreatment standards, the specific and general prohibitions in the pretreatment regulations, and local limits. Pretreatment requirements include all other regulatory provisions imposed upon industrial users, such as reporting requirements. States must have authority to enforce directly against violations of any of these provisions.

State enforcement authority must consist of both civil and criminal penalties (equivalent to those for NPDES permit violations) and injunctive relief authority. (Enforcement authority for NPDES State programs is discussed above at Part B(1)(j).) As with the NPDES enforcement authority, a State may not substitute other mechanisms for the required authorities.

States also must have authority to join the POTW as a defendant in any action against one of its industrial users for violations of pretreatment requirements. The CWA in Section 309(f) authorizes EPA to join the POTW where it fails to initiate an enforcement action after receiving notice from EPA of its intent to enforce against the violation. States must have an equivalent provision (see also 40 CFR 403.5(e)). Generally, methods of ensuring that industrial users comply with section 307(b) of the Act vary from State to State. For example, a State could issue permits to all indirect dischargers and have enforcement authority against all permit violations. However, where the State does not issue permits to all industrial users, it normally must have regulatory requirements that impose pretreatment requirements, and must have authority to enforce those regulations.

The Attorney General must discuss the State's options for ensuring compliance with these requirements and the authority therefor. In examining this authority, it is important that State enforcement authority be consistent with the chosen regulatory scheme. Review of the enforcement language should

also make sure that the various provisions are consistent with one another. For example, if the State's civil authority applies to standards and regulations, but the criminal provision applies to conditions and limitations, the criminal authority does not appear adequate to cover violations of regulations, especially given strict interpretation of criminal statutes.

Finally, the State law must include provisions allowing the State to seek injunctive relief restricting or prohibiting the introduction of pollutants into a publicly owned treatment works in the event a condition of a permit for the discharge of pollutants from such a treatment works is violated.

(j) Incorporation by Reference

See discussion of incorporation by reference in Part B(1)(1) of this chapter.

(3) Authority Over Federal Facilities

Prior to the 1977 Amendments to the CWA, States were not allowed to exercise NPDES jurisdiction over discharges by federal facilities. (See, EPA v. California State Water Resources Control Board, 426 U.S. 200 (1976)). In the 1977 Amendments, Congress declared that all federal facilities must comply with applicable State law, thus requiring States approved to administer the NPDES program to regulate federal facilities within the State. Consequently any State whose program was approved before 1977 must modify its program to cover these facilities. Generally, this means that the definition of "person" must be broad enough to encompass federal facilities.

The Attorney General must therefore certify that there are no barriers, prohibitions, or exclusions on regulating federal facilities.

(4) General Permit Requirements

(a) Authority to Issue and Enforce General Permits

General permits are administrative tools designed to assist the permitting authority in meeting the mandates of the CWA. Unlike individual permits, general permits are not written for a particular facility at a specific location, but instead cover multiple facilities in similar, but not necessarily identical circumstances. For this reason, general permits are more akin to a rulemaking proceeding than traditional licensing.

If a State intends to issue general permits, the State must have authority which would allow such permits, although it need not specifically reference them. The primary considerations will normally be whether State law requires individual permits or could be interpreted more broadly. The Attorney General must assure EPA that the State's permitting authority does not require individual permits for all sources, and that issuance procedures for general permits are consistent with State law.

(b) Incorporation by Reference

See discussion of incorporation by reference in Part B(1)(1) of this chapter.

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REGULATORY AUTHORITIES

A. Background on NPDES Regulatory Requirements

(1) Reasons for Regulations

To attain program approval, the CWA requires that States have adequate legal authority to administer the various aspects of the program. Section 304(i) directs EPA to promulgate regulations which establish minimum elements for State programs including monitoring and reporting requirements, enforcement provisions, funding, personnel qualifications, and manpower requirements. The minimum legal authorities, including regulations which every NPDES program must have, are listed at 40 CFR 123.25 and are cross-referenced with the substantive NPDES regulations. The minimum legal requirements for State pretreatment programs are described at 40 CFR 403.10(f)(1).

While State provisions need not be identical to the corresponding federal provisions, they must establish requirements at least as stringent as the federal program. State provisions may be more stringent; however, the State may not make one requirement more lenient as a tradeoff for making other requirements more stringent. Of course, States may adopt additional requirements beyond the federal provisions as they see fit.

Neither the CWA nor EPA regulations explicitly require that a State enact regulations. But unless a State enacts a very specific and detailed statute, administrative regulations are

needed to clearly delineate all substantive and procedural requirements necessary to establish minimum legal authority for program approval. Administrative regulations, which flesh out program requirements, provide a State Director with guidance and uniform procedures to implement the NPDES and pretreatment programs, and alert permittees of the requirements and obligations the program imposes upon them. Finally, such rules guarantee the public an opportunity to participate in the program program development process. This chapter discusses the regulatory authority that States must adopt. Of course, a State may include all of these provisions in its statute.

- States must adopt each provision required by 40 CFR 123.25 in terms at least as stringent as those in the federal rules. Thus, State rules which require inclusion of conditions in permits under section 402 are not adequate unless they are valid incorporations by reference under State law (see below). Instead, the State regulations must contain specific provisions. Similarly, language such as "in accordance with CWA" does not establish a specific standard unless it incorporates the CWA and implementing regulations by reference.

This chapter discusses the various provisions required to be included in State regulations. Several sections are designated "optional" to indicate that States are not required to adopt them. However, if States elect to adopt provisions in these areas, State rules must be at least as stringent as federal requirements. Thus, States need not allow reduced procedural requirements for minor modifications to permits; if they choose

to allow these, however, they can only allow them where authorized by federal rules. In some cases, EPA strongly recommends that States adopt "optional" requirements to facilitate program comprehension by the regulated community and public (e.g., definitions).

(2) Incorporation by Reference

Several States have chosen to incorporate EPA regulations by reference rather than to promulgate a separate, equivalent set of State regulations. While incorporation by reference may make it more difficult for the public and regulated community to determine the applicable requirements, some States have chosen incorporation by reference to ease the administrative burdens of regulatory development. Although EPA discourages this practice because of the increased difficulty in determining requirements, there is no federal prohibition against it. However, many State courts have held that prospective incorporation by reference (automatic incorporation of future federal regulations) is an unconstitutional delegation of legislative authority. Ultimately, State law determines whether incorporation by reference of existing or future EPA regulations is permissible (see, Chapter Three, Part B(1)(j)).

At a miminum, an incorporation must provide sufficient detail for EPA to determine whether all applicable State program requirements have been included. Of course, the Memorandum of Agreement (MOA) and the program description must fully address the permitting procedures which the State intends to use. The MOA should also describe the mechanism for keeping the incorpor-

ation up-to-date and consistent with future changes in the federal law.

(3) Attorney General Involvement

As discussed in Chapter Three, the CWA requires the Attorney General to certify that the State has adequate legal authority to carry out the described State program. This discussion of legal authority necessarily encompasses State regulatory authority (see, 40 CFR 123.23(a)) and the Attorney General's statement must cite to those regulations. State agencies developing or revising program regulations are well advised to involve the Attorney General's office and EPA as early in the process as possible. Early participation by the State Attorney General and EPA will assist the State in narrowing the issues and minimizing delays in program approval. Proposed regulations must be circulated for EPA comment and, wherever possible, EPA's substantive comments should be incorporated (see, Chapter Two, above).

The structure of this chapter does not follow that of Chapter III even though these rules must be cited in the Attorney General's Statement. Rather, we have grouped the regulations into sections with common characteristics to assist persons developing programs. To a large extent, this chapter tracks the NPDES regulations.

B. Required State Program Regulations

(1) NPDES Regulations

(a) Program Scope and Definitions

(i) Definitions (40 CFR 122.2) (Optional)

Many terms used in the regulations are unique and will be unfamiliar to the general public. Others have precise meanings under the NPDES program that may be different from ordinary usage. The federal NPDES regulations define many of these terms. While State program regulations are not required to contain these definitions, in order that these rules be easily understood, EPA strongly recommends that State regulations include a definitions section. If the State elects to adopt these definitions, in either the State statute or the regulations, they must be consistent with the CWA and federal regulations. Even if the State does not adopt them as rules, the State's use of such terms in State regulations and interpretations of those requirements must be consistent with the federal definitions. The State should consult with EPA to determine which State and/or federal terms to define in the regulations.

(ii) Exceptions (40 CFR 122.3) (Optional)

EPA exempts seven types of discharges from NPDES requirements. Most of these exemptions are specifically required by the CWA; others reflect discharges that are not considered point sources under the Act. State regulations may also adopt these exceptions, if authorized by the State's statute, unless the State wishes to regulate these dischargers under the NPDES system. States may not, however, exclude any other discharges from regulations under the NPDES program. For example, a State could not exempt de minimis discharges of pollutants, since neither the CWA nor the NPDES regulations authorize such exclusions. The following are EPA exceptions:

- Sewage from vessels (this exception only applies to sewage; other discharges from vessels must be subject to the NPDES permit program);
- Dredge or fill material regulated under a §404 permit;
- The indirect discharge of pollutants into a POTW (these discharges are regulated under the pretreatment program);
- Discharges made in compliance with the instructions of an on-scene coordinator pursuant to a national oil and hazardous substances pollution plan, or pollution by oil and hazardous substances regulations (see, 40 CFR 1510, and 33 CFR 153.10(e));
- Non-point source agricultural and silvicultural activities;
- Irrigation return flows; and
- Any discharge into a privately owned treatment works (unless the Director requires otherwise under §122.44(m) - see Part B(1)(c)(iii) of this chapter). States may not categorically exempt all such discharges, but must have authority to require contributors to such treatment works to obtain NPDES permits at the Director's discretion.

(iii) Prohibitions (40 CFR 122.4)

State regulations must prohibit the issuance of an NPDES permit under the following circumstances:

- the CWA or implementing regulations will be violated;
- an EPA Regional Administrator has objected to issuance;
- the permit conditions will not ensure compliance with water quality requirements of all affected States;
- the Secretary of the Army believes anchorage and navigation would be substantially impaired;
- the discharge is a radiological, chemical, or biological warfare agent or high-level radioactive waste;
- the discharge is inconsistent with an approved CWA §208 area waste treatment management plan;
- For discharges to the territorial seas, contiguous zone, or oceans, insufficient information exists to make a reasonable judgment whether the discharge complies with promulgated ocean discharge degradation guidelines (40 CFR Part 125, Subpart M); and

- Where a discharge from a new source or a new discharger will cause or contribute to violation of water-quality standards.

Of course, States may prohibit issuance of a permit in other circumstances.

(iv) Effect of Permit Issuance (40 CFR 122.5)

States must, at a minimum, have regulations which clearly indicate that an NPDES permit conveys no property rights or exclusive discharge privilege to the permittee. States may also include a "permit as a shield" provision in State regulations. Under federal law (CWA §402(k) and 40 CFR 122.5), if a permittee complies with its permit, it is considered to be in compliance with section 301, 302, 306, 307, 318, 403, and 405 of the Act (except for toxic effluent standards under §307(a)). A permittee is authorized to discharge pollutants which are not limited in the permit (assuming that the pollutant's presence was disclosed in the permit application). Similarly, EPA's NPDES regulations do not allow new effluent standards, other than toxic standards developed under section 307(a) of the CWA, to be imposed until the permit is modified. This shield concept forces permit writers to draft permits that properly regulate pollutants in the permittee's discharge and provides some measure of certainty to the regulated community. States may choose not to provide this shield to dischargers (in so doing the State would be considered more stringent than the federal program).

(v) Confidentiality of Business Information (40 CFR 122.7)

The regulations must contain provisions for confidentiality of information. The State must ensure that the following information

cannot be claimed confidential and that it must be disclosed upon request:

- Name and address of the applicant;
- The completed permit application and all attachments (although the State may allow supplemental information requested by the Director, but not required by the permit application itself, to be claimed eligible for confidential treatment);
- The NPDES permit; and
- Effluent data, which is broadly interpreted to include information related to determining applicable effluent limitations and toxic, pretreatment, or new source performance standards, and whether the discharger is in compliance with those limits. For example, production data used to calculate permit limits and assess compliance with those limits may be considered effluent data (see, section 308(b) of the CWA and 40 CFR 2.302).

The State may deny confidential treatment to other information.

(b) Permit Application Requirements for All Dischargers

(i) Permit Applications (40 CFR 122.21)

State regulations must require any owner or operator proposing to discharge a pollutant from a point source to waters of the State (other than those discharges specifically exempted) to apply for an NPDES permit prior to commencing the discharge. (Since a new source may not discharge until it receives a permit, it is recommended that States require applications at least 180 days in advance.) If the owner and operator are different people, the State must require the operator to apply, although it may require both persons to apply. Similarly, any discharger operating under an existing NPDES permit has a duty to reapply for a new permit prior to the expiration date of the existing permit. (States may set an earlier deadline for reapplication.) The State regulations

must also specify that, except in the case of general permits, the State may not issue a permit before receiving a complete application form. (Note: NPDES States must also have authority to require users of a privately owned treatment works to obtain an individual permit and submit a permit application or to be a limited co-permittee on the treatment works permit (see, 40 CFR 122.44(m)).

The State must require all applicants to submit the information listed in 40 CFR 122.21(f). This information includes:

- The name, address, and location of the facility (and whether the facility is located on Indian land);
- The operator's name, address, telephone number, ownership status and status as federal, State, private, public, or other entity;
- A listing of all permits received or applied for under other federal and/or State environmental programs;
- A brief description of the business, and up to four standard industrial classification (SIC) codes* which best reflect the principal products or services provided by the facility; and
- A topographic map of the area where the facility is located extending at least one mile beyond property boundaries which depicts the outline of the facility, and all known surface water bodies, drinking-water wells, existing and proposed intake and discharge structures and hazardous waste wells used to inject fluids within a 1 mile of the facility's boundaries.

States must submit a copy of the application form they intend to use to obtain this information, which must at a minimum include the same information as the federal NPDES form (Form 1). Of course, State Agencies are free to modify EPA's NPDES application

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*/ SIC codes are developed and published by the Office of Management and Budget.

forms with the State's letterhead, etc., but they may not eliminate required information. (Additional information or application forms required of certain classes of dischargers are discussed below in Part B(1)(c).)

(ii) Signatories (40 CFR 122.22)

Signatory requirements are intended to ensure a high level of responsibility within the entity applying for a permit or submitting a report. The regulations must provide that all permit applications be signed as follows:

Corporations - By the president, secretary, treasurer, vice-president in charge of a principal business function, or any other person performing a similar policy-making function. However, if authority is properly delegated, a manager of a facility employing more than 250 persons, or having gross annual sales or expenditures exceeding $25 million (in second quarter 1980 dollars), may also sign the application.

Partnerships and Proprietorships - By any general partner or by the proprietor.

Municipalities, State, Federal and Other Public Agencies - By either a principal executive officer (Regional Administrator/Town Manager) or the ranking elected official (Mayor).

Also, all compliance monitoring reports required by the permit or other reports/information requested by the State agency must be signed by the person or position described above or their duly authorized representative. The NPDES regulations limit who may be named an authorized representative (see, 40 CFR 122.22(b)). States must apply similar limitations.

(iii) Certifications (40 CFR 122.22(d))

The regulations must require all persons signing an application or submitting a report or other required information

to certify the accuracy of the document. The rules also must specify the language to be used by the signatory. At a minimum, the State must require certification language equivalent to the following:

> "I certify, under penalty of law, that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted. Based on my inquiry of the person or persons who manage the system, or those persons directly responsible for gathering the information, the information submitted is, to the best of my knowledge and belief, true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations."

(iv) Recordkeeping (40 CFR 122.21(o))

The regulations must also require applicants to retain all data used to prepare permit applications for at least three years following the date the application is signed. This recordkeeping requirement extends to supplemental information requested by the State agency during the permit development process.

(c) Additional Application Information Required of Certain Dischargers (40 CFR Part 122 - Subpart B)

(i) Industrial and Commercial Discharges

Existing manufacturing, commercial, mining, and silvicultural dischargers must also submit a State application that requires at least the same information as federal NPDES Application Form 2-c or, for non-process discharges, Form 2-e (proposed October 1, 1984, 49 F.R. 38812). At a minimum the State must require the following information:

- The latitude and longitude of each outfall location;

- The name of the receiving water;
- A chart of the water flow through the facility depicting average intake and discharge flows which contribute to effluent and treatment;
- A description of operations or processes contributing to process wastewater, cooling water, and storm water runoff, and the treatment each receives;
- A description of the frequency, duration and flow rates of each intermittent or seasonal discharge occurrence (except for storm water runoff and leaks);
- If an applicable promulgated effluent limitation guideline requires production data, a reasonable measure of the applicant's actual production reported in the same unit of measurement as that in the guideline;
- A description of the requirements and compliance schedule for constructing or upgrading present treatment, if any;
- Quantitative and qualitative data describing the characteristics of the discharge, analyzed using the procedures set out in 40 CFR Part 136. (40 CFR 122.21(g)(7) outlines the minimum discharge data the State must require).
- A list of toxic pollutants which the discharger uses or manufactures as an intermediate or final product or by-product;
- Biological toxicity tests which the applicant knows or has reason to believe have been conducted within the last three years;
- Identity of the contract laboratory or consulting firm (if any) which analyzed the discharger's effluent for purposes of application preparation; and
- Any other information which the State agency reasonably deems necessary.

Certain silvicultural discharges and discharges to aquacultural projects are considered point sources under the NPDES program. These discharges also must submit application form 2-c or the State that meets federal requirements. State regulations must specify criteria at least as stringent as federal requirements for determining which of these facilities

are point sources within the meaning of the CWA and thus subject to NPDES permit requirements. The federal criteria are set out in 40 CFR 122.25 and 122.27.

(ii) Concentrated Animal Feeding Operations

Concentrated animal feeding operations (feedlots) are considered point sources under the CWA. The State regulations must contain criteria for designating which of these facilities are point sources (see 40 CFR 122.23 and Part 122 Appendix B). All point source feedlots must provide the information required on NPDES application Form 2-b or the State's form requiring the same minimum information, including the following:

- The type and number of animals in open confinement and/or housed under a roof;
- The number of acres used for confinement; and
- The design used for runoff diversion and control, if any, including acreage and storage capacity.

(iii) Concentrated Aquatic Animal Production Facilities

Concentrated aquatic animal production facilities (fish farms) are considered point sources under the CWA. The State regulations must contain criteria for determining which of those facilities are point sources (see 40 CFR 122.24 and Part 122 Appendix C). All point source fish farm facilities must provide the following information at a minimum:

- The maximum daily and average monthly flow from each outfall;
- The total number of ponds, raceways, and receiving waters;

- The total annual and maximum harvestable weight of each species of aquatic animal; and
- The calender month of maximum feeding, and the total mass of food fed during that month.

(iv) New Sources

Facilities which may qualify as new sources must also provide EPA and the State with sufficient information to determine whether the applicant is in fact a new source and, therefore, subject to new source performance standards. Interested persons must be able to challenge new source determinations by the permitting authority. States are not required to specify criteria to be used in the new source determinations, although it is recommended that they do so (see 40 CFR 122.29(b)). In determining whether a facility is a new source, States must use criteria equivalent to those in the federal rules.

States also must submit copies of the application forms new sources will be required to use. It is recommended that States have regulations that specify the information to be submitted. EPA recently proposed a revised new source form, 2-d (Oct. 1, 1984 49 F.R. 38812). States will be required to use this form once the final rules are promulgated.

(v) POTW Application Requirements

States must set application requirements for POTWs and submit the application form to be used. In addition to information on its discharge, each POTW should be required to list the dischargers which contribute flow to its flow.

(vi) Storm Water Discharges (40 CFR 122.26)

Storm water discharges are point sources under the NPDES program. State regulations must include storm water discharges as point sources covered by the program. EPA defines storm water point sources at 40 CFR 122.26(b). EPA recently proposed changes to these storm water requirements (August 12, 1985 50 F.R. 32548). Once these changes are promulgated as final rules, States will be required to modify their regulations accordingly.

(d) Permit Conditions and Effluent Limitations

The State's regulations must impose a variety of obligations and duties on dischargers and must specifically require that these be incorporated, either expressly or by reference, in NPDES permits. All permits must contain these minimum permit provisions, as discussed in detail below.

(i) Effluent Limitations (40 CFR 122.44, 125.3)

(A) Technology-Based Effluent Limitations

State regulations must require compliance by all dischargers with applicable technology-based requirements within the time frames specified in the CWA and NPDES regulations. These include the following deadlines for point sources other than POTWs:

- Best practicably control technology (BPT) by July 1, 1977.
- Best available technology economically achievable (BAT) for toxic pollutants and best conventional control technology (BCT) for conventional pollutants by July 1, 1984.
- BAT for nonconventional pollutants by July 1, 1987.

The regulations also must require that technology-based effluent limitations for municipal dischargers be based on secondary

treatment and require compliance with these limitations by July 1, 1977 (see, 40 CFR Part 133). Finally, new sources must be required to comply with applicable new source performance standards.

To implement these technology-based requirements, State regulations must adopt and apply EPA's national effluent limitations guidelines and new source performance standards (40 CFR Chapter I Subchapter N) and secondary treatment information requirements (40 CFR Part 133). State regulations must require State-issued permits to incorporate, at a minimum, limits based on these guidelines. If an effluent limitation guideline is not available or is inappropriate, the State must have authority to impose technology-based treatment requirements on a case-by-case basis using the permitting authority's best professional judgement (BPJ). The requirements and methodology for establishing BPJ limitations are set out in 40 CFR 125.3(c) and (d) (see also, §402(a)(1) of the CWA). The State agency also must be authorized to use a combination of effluent guidelines and BPJ limitations to derive permit limits where limits on pollutants not regulated in the guidelines are necessary to control the discharge.

When implementing these requirements, State law must ensure that permit limits are established for each point of discharge, and must prohibit treatment substitutes such as flow augmentation (dilution) as a means of complying with permit limits. State regulations must require that the permit contain limits on every toxic pollutant discharged at levels above BAT. This can be achieved through limits on each pollutant that is or may be

discharged, or through the use of indicator pollutants.

(B) Water-Quality-Based Effluent Limitations

State regulations must allow the permitting authority to include any requirement necessary to accomplish the following water quality objectives:

- o Achieve water quality standards established under section 303 of the CWA;
- o Attain or maintain a specified water quality through water quality-related effluent limits established by EPA under section 302 of the CWA;
- o Conform to applicable water quality requirements under section 401(a)(2) of the CWA when the discharge affects another State;
- o Impose compliance schedule requirements to meet other water-quality related requirements established under federal or State law;
- o Ensure consistency with the requirement of an EPA approved Water Quality Management Plan under section 208(b) of the CWA; and
- o Incorporate section 403(c) criteria for ocean discharges. (see, 40 CFR Part 125, Subpart D).

(C) Toxic Effluent Standards or Prohibitions (40 CFR 122.44(b), Part 129)

The "permit as a shield" defense authorized by 402(k) (see Part B(1)(a)(iv) of this chapter) is not available for dischargers violating EPA's toxic effluent standards or prohibitions. The regulations must adopt or incorporate EPA's toxic pollutant effluent standards or prohibitions promulgated under section 307(a) of the CWA (40 CFR Part 129). Violation of a duly promulgated toxic effluent limitation is an enforceable violation under the law, even before the State modifies the permit to include them. The State agency must have authority

to require compliance with these standards where the NPDES permit has not been modified to incorporate them.

(D) Compliance Schedules (40 CFR 122.47)

State regulations must provide authority to include schedules of compliance in NPDES permits leading to compliance with applicable effluent limits. New sources, new dischargers, and recommencing discharges may not be issued compliance schedules except in limited circumstances. Compliance schedules must require the permittee to comply as soon as possible, but not later than the applicable statutory deadline.

(ii) Calculation of Effluent Limitations (40 CFR 122.45, 122.50)

(A) Production-Based Effluent Limitations

State regulations must contain provisions for calculating effluent limits where the applicable effluent limitation guidelines are production-based. Permit limits for POTWs may be established using the treatment works design flow, although actual operation data may be substituted. However, design capacity may not be used for non-municipal dischargers subject to production-based effluent limitation guidelines. Instead, permit limits must be based on a reasonable measure of actual production. Generally, this should be a long-term average of the facility's production. Note that variable limits in permits (i.e., tiered limits) allowed if actual production is expected to vary during the permit term, although the State must include restrictions on the frequency and degree of variations and must require notice from the discharger prior to changing to different effluent limits.

(B) Limitations on Metals

The State regulations must specify the basis for calculating effluent limitations for metals. Generally, EPA must establish limitations for metals in terms of total recoverable metals. Exceptions to the norm are listed in 40 CFR 122.45(c), and include wherever the applicable effluent guideline regulate a different form of the metal. Most promulgated guidelines regulate total metals rather than total recoverable metals. State permits should specify the form of the metal upon which the limits are based.

(C) Limitations on Continuous Dischargers

The regulations must require that effluent limitations for non-municipal dischargers that discharge continuously be expressed in terms of "maximum daily" and "average monthly" limits. Effluent limitations pertaining to POTWs with continuous discharges are expressed as "average weekly" and "average monthly" limits, although States may also include other terms, such as daily maximum limits.

(D) Limitations on Non-Continuous Dischargers

Effluent limits for facilities with non-continuous discharges shall contain limitations which correspond to the frequency of the discharge. They must include such measures as are necessary and ensure that the appropriate effluent guidelines and water quality standards are met.

(E) Limits on Mass

State regulations must require that, except for the fol-

lowing situations, effluent limits be expressed in terms of mass:

- Limits involving pH, temperature, radiation or other pollutants which cannot appropriately be expressed by "mass";
- The applicable effluent guideline is expressed in another unit of measurement; or
- The permit limitations are established on a case-by-case (BPJ) basis and expressions in terms of mass are infeasible because the mass of the pollutant to be discharged is unrelated to a measure of the facility's operation.

Of course, States are free to develop permit conditions which are expressed both in mass and concentration measures.

(F) Limiting Pollutants in Intake Water

The regulations may allow an applicant to request that its effluent limitations be adjusted to reflect pollutants present in its intake water. In order to be eligible, the applicant must show either (i) the applicable effluent guidelines specifically authorize calculations on a net rather than gross basis; or (ii) its treatment system would enable the facility to comply with its permit limits in the absence of pollutants in the intake water. The regulations may not allow the granting of credit for intake water pollutants in excess of the pollutant's level in the facility's influent. Credit may only be granted to the extent the permittee needs the credit to meet its permit limits. Credit for generic pollutants is only allowed if the pollutants in the intake and effluent are similar. The intake water and discharge must involve the same water body, although the Director may modify this requirement (see 40 CFR 122.45(g)).

(G) Internal Waste Stream Limits

State regulations must authorize permit writers to impose effluent limitations or standards and monitoring requirements on internal waste streams when it is impracticable or infeasible to establish permit limitations at the point of discharge. The fact sheet for the draft permit must set forth the justifying circumstances whenever internal limits are required. (See 40 CFR 122.45(h) and 124.56.)

(H) Adjustment For Well Disposal, Land Application, or Discharge to POTWs

The discharge of process wastewater to wells, POTWs, or by land application is not treatment within the meaning of the CWA. Therefore, the regulations must require the State to adjust mass-based effluent limitations to reflect a reduction in effluent resulting from partial disposal through these methods. Under the NPDES regulations, this adjustment generally is a flow-proportional reduction in effluent limits based upon the diverted flow. (See, 40 CFR 122.50.)

(iii) Boilerplate Conditions (40 CFR 122.41)

EPA's regulations (40 CFR 122.41) require States to establish the duties and obligations listed below as boilerplate conditions in all NPDES permits. These provisions must be specified in State regulations and must be required to be included in any permit.

- Duty to comply with the permit conditions and §307(a) toxic standards or prohibitions (even if the permit is not modified to incorporate the toxic limit);
- Duty to properly operate and maintain the treatment facility;

- o Duty to reapply prior to expiration of the permit;
- o Duty to mitigate any noncompliance with the permit;
- o Statement that the permit does not convey property rights;
- o Statement that the permit may be modified, revoked and reissued or terminated for cause;
- o Duty to allow the State agency or its representatives to enter and inspect the permittee's premises, monitor or sample effluent, and examine and copy records;
- o Caveat that a discharger may not claim the need to halt or reduce activity in order to maintain compliance with the permit as a defense in an enforcement action;
- o Additional conditions which the Secretary of the Army considers necessary to protect navigation and anchorage;
- o Conditions requiring vessels transporting, handling, or storing pollutants to comply with any applicable Coast Guard regulations; and
- o Conditions specifying that the permittee is subject to the civil and criminal enforcement remedies of the CWA for any permit violation. (The State should specify the applicable provisions of the CWA. It is recommended that States also cite to equivalent State statutory provisions.)

(A) Additional Conditions for POTWs (40 CFR 122.42(b))

The State's regulations must contain authority to include the following conditions in POTW NPDES permits:

- o Duty to identify any significant indirect sources which may be subject to categorical pretreatment standards;
- o The permit must incorporate the requirements of a local pretreatment program (40 CFR 403), once it has been approved, including reporting requirements (40 CFR 122.44(j));
- o Any EPA-imposed conditions or restrictions on grant money (CWA sections 201 and 204) which are reasonably necessary to achieve effluent limitations (40 CFR 122.44(n)); and
- o Requirements under section 405 of the CWA and any other State or local regulations on the use or disposal of sewage sludge.

(B) Upset and Bypass

State regulations must require a prohibition on bypass to be included as a condition in all State permits. Bypass must be prohibited, even when in compliance with permit limits (except for essential maintenance). States may excuse bypasses that exceed permit limits only if the bypass was necessary to prevent severe property damage or loss of life and there were no feasible alternatives to the bypass. If States excuse these bypasses, they must require reporting equivalent to that required in the federal rules. (See 40 CFR 122.41(m).)

An upset is a temporary condition beyond the control of the permittee that causes the permit limits to be violated. State regulations may provide upset conditions in permits that allow permittees to claim upset as an affirmative defense to enforcement actions against a violation of technology-based effluent limits. If the State allows upsets, the State rules also must specify the pre-conditions to establishing the defense and require these to be incorporated into permits (e.g., notice, demonstration of cause, mitigation). These must be at least as stringent as the federal requirements. (See 40 CFR 122.41(n).)

(C) Other Conditions

State regulations must provide authority to include best management practices (BMPs) in NPDES permits. BMPs may be used to control toxic pollutant discharges from ancillary industrial activities. States also must have authority to impose these conditions where numerical limitations are infeasible

or when necessary to carry out the requirement of the CWA. (See 40 CFR 122.44(k).)

State regulations must also provide authority to include conditions in permits for privately owned treatment works affecting a user of the system. The user must be included as a limited co-permittee. As discussed above (Part B(1)(b)), the State also must have authority to require the users of the privately owned treatment works to obtain individual NPDES permits (see 40 CFR 122.44(m)).

(iv) Reporting and Monitoring Requirements (40 CFR 122.41, 122.44, 122.48)

State regulations must contain provisions for reporting and monitoring. The minimum requirements to be included in State rules are described below.

(A) Monitoring Conditions

State regulations must require that all permits contain requirements for the permittee to monitor its discharge. The State must have authority to require monitoring that is representative of the discharge.

- o Requirements concerning the proper use, maintenance and application of monitoring equipment (see 122.48(a));
- o Required monitoring activities (type, intervals, frequency, and test procedures to yield representative results of the discharger's activity. Monitoring frequency may be no less than annually (see, 40 CFR 122.41));
- o Requirements to monitor:
  - The mass (or other specified measurement) for each pollutant limited in the permit;
  - The volume of effluent discharged from each outfall; and

- Any other appropriate measurement (40 CFR 122.44(i));

- o Duty to provide relevant information the State agency requires, within a reasonable time;

- o Duty to allow the State agency to enter and inspect the permittee's premises, including monitoring or sampling effluent, and examine and copy records; and

- o Duty to retain monitoring data for at least three years.

States must also have authority in regulations to impose monitoring on internal waste streams, and where necessary to determine eligibility for credits based upon intake water pollutants. (See 40 CFR 122.44(i)(1)(iii).)

(B) Reporting Requirements

As discussed above, State regulations must require that all reports submitted pursuant to the NPDES permit be signed and certified by a person described in Part B(1)(b)(ii) of this chapter or by a duly authorized representative of that person. A person or position may only be authorized if he/it has responsibility for the overall operation of the treatment facility, or overall responsibility for environmental matters of the company, partnership, or agency.

State regulations must also require that the following reporting conditions be included in NPDES permits:

- o Duty to report monitoring data as specified by the permit, but in no case less frequently than once a year;

- o Monitoring data must be reported on a Discharge Monitoring Report (DMR) (EPA's national reporting form);

- o Duty to report progress with compliance schedules within 14 days after each scheduled milestone;

- o Duty to report any anticipated noncompliance with permit limits;
- o Duty to give the State Agency advance notice of any planned changes which may result in noncompliance;
- o Duty to report any noncompliance which may endanger public health or the environment within 24 hours and to follow up such reports with written notice within 5 days. Such noncompliance includes unanticipated bypasses,* upsets, or violations of specified maximum daily discharge limitations.

State regulations must also require permits issued to existing manufacturing, commerical, mining, and silvicultural facilities to include a duty to notify the State agency of new or increased toxic pollutant discharges not expressly regulated by the permit. The State may establish threshold notification levels that differ from EPA's levels as long as the levels are at least as stringent as those set out in the federal regulations at 40 CFR 122.42(a)).

In addition, States must require POTWs to notify the State agency of the introduction of pollutants from any indirect sources which would be required to obtain an NPDES permit if they discharged directly. POTWs also must be required to notify the State of any new or increased discharge of pollutants to the POTW, including changes in volume or character of pollutants.

(e) Other Permit Program Requirements

(i) Duration (40 CFR 122.46)

State regulations must specify the duration of NPDES permits. States may not allow permits to be written for periods longer than five years. States must have authority to issue permits for shorter periods where appropriate.

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*/ A permittee may not intentionally bypass its treatment system unless the bypass was unavoidable to prevent loss of life, personal injury or severe property damage.

States may not issue permits that extend past a statutory deadline unless those permits contain conditions implementing the applicable deadline.

(ii) Continuation (40 CFR 122.6) (Optional)

Under the federal regulations (and Administrative Procedure Act), the permit may be continued in effect beyond its expiration date if the permittee has filed a timely and complete application for renewal prior to expiration of the permit. States are not required to provide for continuation. However, if States elect to continue permits beyond their term, they must specify the requirements for continuation in regulations. These rules must be at least as stringent as federal requirements (e.g., may not allow continuation except where the applicant has filed a timely and complete renewal application).

(iii) Anti-Backsliding (40 CFR 122.44(l))

State regulations must prohibit the reissuance of a permit with less stringent limitations, standards, or conditions than those in the previous permit except where cause exists to modify the permit (see Part B(1)(h) of this chapter). This provision applies to permits based upon BPJ as well as guidelines or water quality standards.

(f) Variances From CWA Requirements (40 CFR 122.21, 124.62, Part 125)(Optional)

The CWA and NPDES regulations authorize several variances to the NPDES requirements. NPDES States are not required to allow dischargers to be granted any or all of these variances. However, if a State chooses to authorize variances, it must

have regulatory requirements and procedures equivalent to those required under federal law. States which do not adopt any or some of these variance provisions should make an affirmative statement to that effect in the program description.

States may not grant all of the variances listed below. Certain variances may only be granted by EPA; States opting to allow these variances may only deny or recommend approval to EPA. (The discussion below identifies which party may grant each variance.) If a State plans to allow its dischargers to obtain these variances, it must establish procedures for reviewing the requests and incorporating the approved variances into State permits.

(i) Non-POTW Variances

(A) Delay in POTW Construction (§301(i)(2))

This variance is available to a discharger that intends to connect to a POTW upon completion of the treatment works' construction. The request must have been filed by 6/26/78, or 180 days after the POTW files for a similar extension due to unavoidable construction delays, whichever is later, but in any event no later than 12/25/78. The State may grant such variances, which extend the compliance deadlines for BCT and BAT.

(B) Innovative Technology (§301(k))

The State may extend the statutory BCT and BAT compliance deadlines where the discharger intends to use "innovative treatment technology." The proposed technology must have the

potential for industry-wide application and produce either a significantly greater effluent reduction than would be achieved by BAT or achieve the same level of pollution reduction as BAT but at a significantly lower cost. A §301(k) request must be made before the end of the public comment period for the facility's NPDES permit and must demonstrate how the requirements of 40 CFR Part 125, Subpart C, and 40 CFR 124.13 have been met. State regulations may not allow compliance extentions beyond July 1, 1987.

(C) Thermal Discharge Variances (§316(a))

A request for a thermal variance must be filed with the permit application unless thermal effluent limitation guidelines have been established or the limitations are based on water quality standards. Where these latter circumstances are present, the request may be filed at any time before the close of the public comment period for the facility's NPDES permit.

(D) Fundamentally Different Factors (FDF) (40 CFR Part 125, Subpart D).

This variance allows a discharger which is fundamentally different from those facilities considered by EPA during the development of an otherwise applicable national effluent limitation guideline to request different effluent limitations. An FDF request must be made by the close of the public comment period for the facility's NPDES permit. The applicant may be any interested party and, as part of the request, must demonstrate how the requirements of 40 CFR Part 125, Subpart D, and 40 CFR 124.13 have been met. An FDF determination may result in

either more or less stringent effluent limits than those otherwise imposed under a guideline.

FDF requests for less stringent limitations may only be approved where compliance with effluent limitations guidelines would result in a removal cost wholly disproportionate to the removal cost considered during the guideline's development or where imposition of the guidelines would result in a fundamentally more adverse non-water quality environmental impact than those impacts considered during development of the guideline. In no case may the alternative limitations requested be less stringent than is justified by the demonstrated fundamental difference. In addition, the alternative limitations must comply with sections 208(e) and 301(b)(1)(C) of the Act, including water quality standards or other more stringent State regulations The factors which may qualify a facility as fundamentally different are set out in 40 CFR Part 125, Subpart D and must be specified in State regulations. Only EPA may grant FDF variances.

(E) Variances for Nonconventional Pollutants (CWA §301(c) and (g))

The §301(c) variance is available for dischargers who can show that the requested modification (to BAT guidelines for nonconventional pollutants) represents the maximum use of technology within the economic capability of the owner and will result in reasonable further progress toward eliminating the discharge of pollutants.

Under section 301(g), a discharger may request a variance

from BAT guidelines for nonconventional pollutants where it has complied with BPT limitations, and can demonstrate that the requested modification will not create an additional burden for other dischargers or interfere with aquatic life or human health in the vicinity of the discharge.

Applicants for 301(c) and 301(g) variances must have submitted an initial request to both the State Agency and EPA no later than 9/25/78 where the guideline in question was promulgated before 12/27/77; or within 270 days of a guideline's promulgation after 12/27/77. A final request, demonstrating how the requirements of 40 CFR Part 125, Subparts E and F, and 40 CFR 124.13 have been met, must be submitted no later than the close of the public comment period for the facility's NPDES permit. Only EPA may grant these variances.

(F) Adjustments to Water-Quality Standards (§302(b))

When EPA develops permit limitations based upon water-quality criteria which are more stringent than the applicable technology-based limitations pursuant to section 302 of the CWA, a permittee may request an adjustment if he can show that there is no reasonable relationship between the economic and social costs and the benefits to be obtained form the more stringent effluent limitation. This adjustment is not really a variance, but is actually part of EPA's standard-setting process State regulations should require requests for adjustments of water-quality related effluent limitations to be supported by adequate justification, and filed no later than the close of

public comment period for the facility's NPDES permit.

(ii) POTW Variances

(A) Delay in POTW Construction (§301(i))

States may grant POTWs a compliance extension under section 301(i) of the CWA. That section allows a POTW to request an extension of the municipal compliance deadline because of a delay in funding for construction. Such a request must have been filed by 6/26/78. Compliance with secondary treatment or water quality-based effluent limitations may not be extended beyond July 1, 1988.

(B) Marine Discharges (§301(h))

A POTW discharging to the territorial seas may request modification to otherwise applicable secondary treatment requirements in accordance with 40 CFR Part 125, Subpart G. Only EPA may grant these variances.

(C) Adjustments to Water Quality Standards (§302(b))

POTWs may also request adjustments to water-quality based effluent limitations established by EPA pursuant to §302. The requirements and procedures are the same as for non-POTW dischargers (see above).

(g) Procedures for Permit Applications, Permit Issuance and Public Participation

(i) Processing Permit Applications (40 CFR 124.3)

In order to receive program approval, the State must have regulations that require public involvement in the permit issuan process. The State Agency must not commence processing a

permit application until the applicant has fully satisfied the application requirements discussed in Part B(1)(b) of this chapter.

(ii) Draft Permit Development (40 CFR 124.6)

The State Agency must prepare either a notice of intent to deny the application, or a draft permit for every permit application it receives (a notice of intent to deny is a type of draft permit). Causes for permit denial are discussed at Part B(1)(h) of this chapter. Draft permits must also be prepared whenever the permit is modified, revoked and reissued, or terminated. A draft permit must include all of the following elements:

- o The boilerplate conditions set out in section B(1)(d) above;
- o Effluent limitations calculated and established from the requirements set out in section B(1)(d) above; and
- o All other appropriate provisions including compliance schedules and monitoring and reporting requirements.

(iii) Fact Sheet Development (40 CFR 124.8, 124.56)

State regulations must require that a fact sheet be prepared for permits issued to major dischargers, as well as certain other discharges as specified in 40 CFR 124.8(a). The purpose of the fact sheet is to explain the basis for any permit condition and thus allow meaningful public comments on the draft permit. Accordingly, the fact sheet must set out the following significant factual, legal, methodological, and policy questions considered in preparing the draft permit:

- o A brief description of the type of facility or activity being permitted;
- o The type and quantity of wastes or pollutants to be discharged;
- o A summary of the rationale for the permit limitations including an explanation of their basis and why BPJ limits or limits on toxic pollutants, internal waste streams, or indicator pollutants are applicable;
- o Reasons supporting or contravening a variance request including all calculations used; and
- o A description of the procedures for reaching a final decision including opportunity for public participation and a person to be contacted if more information is desired.

(iv) Public Notice and Comment Procedures (40 CFR 124.10, 124.11, 124.12)

The regulations must require that every fact sheet and draft permit be publicly noticed. The public notice must identify the name and address of the processing office, the name and address of the applicant, a brief description of the business conducted at the facility, a description of the general location of each outfall, and a description of the procedures for submitting comments. The notice must also provide for no less than a 30-day public comment period during which any interested person may submit written comments and request a public hearing. Subsequent notices (e.g., a notice announcing the scheduling of a public hearing, which must be issued at least 30 days prior to the hearing) must reference all previous notices relating to the permit. Finally, where the notice is for a public hearing, the notice must designate the date, time, and place of the hearing and specify its nature and purpose.

The State's regulations must specify that public comments will be considered before making a final decision; that significant comments will be responded to in writing and made available to the public; and that any provisions in the final permit which differ from the proposed permit will be noted and explained in the written response to comments.

(v) Distribution of Notice (40 CFR 124.10(c), (e))

States must specify how and to whom the public notice will be disseminated. State rules must assure that all notices will be mailed to the applicant, the U.S. Corps of Engineers, the U.S. Fish and Wildlife Service, the National Marine Fisheries Service and any other interested federal or State agencies with jurisdiction over wildlife, natural resources, coastal zone planning, or historic preservation. The notice should also be sent to all persons on the State's general mailing list, and any unit of local government having jurisdiction over the geographic area where the discharge will occur. In addition, notices for major facilities or general permits must be published in the daily or weekly newspapers within the area affected by the facility or permit. The regulations may also require notice by other means constituting legal notice under State law.

Finally, the regulations must require that copies of the permit application and draft permit (if any) be mailed to the applicant and interested persons, including local, State and federal agencies. See 40 CFR 124.10(c)(1)(i-iv) for a complete list of persons to be mailed these documents. Other persons

on the mailing list need only be sent the public notice unless they request additional information.

(h) Transferring, Modifying, Revoking and Reissuing, and Terminating Permits

(i) Transfers (40 CFR 122.61)

State program regulations must restrict transfer of NPDES permits and corresponding responsibilities upon change in ownership to the following two methods:

- The permit may be revoked and reissued, or modified to identify the new permittee using the modification procedures outlined below; or
- The permit may be automatically transfered if the existing permittee notifies the Director at least thirty (30) days in advance of the proposed transfer date, and produces a written agreement between the existing and new permittees containing a specific date for transfer of permit responsibilities, coverage, and liability; and the State Agency agrees.*

(ii) Modification (40 CFR 122.62, 124.5)

The State regulations must contain procedures and standards regarding permit modification. Unless the change is a minor modification under 40 CFR 122.63 (see below), the State agency must prepare a draft permit for public comment. See, 40 CFR 122.62. The State need not prepare a draft permit where the State denies the request for modification or revocation and reissuance, but need only provide notice to the person requesting the change.

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*/ The automatic transfer is effective only if the Director does not notify the existing and proposed permittees of his intent to modify or revoke and reissue the permit (see 40 CFR 122.61).

EPA's regulations limit the causes for permit modification. The State may adopt any or all of these causes as it sees fit. However, NPDES States may not create additional causes or justifications for modification, nor may they establish a general provision authorizing modification "for cause." State rules must specify the applicable causes for permit modification. EPA's causes for NPDES permit modifications (or, where the permittee agrees, for revocation and reissuance) are limited to the following:

- o Material and substantial alterations to the facility;
- o New information not available at the time of permit issuance that would justify different conditions;
- o New regulations or judicial decisions revising a regulation on which the permit was based.*
- o To incorporate an approved variance request;
- o To incorporate a section 307(a) toxic effluent standard or prohibition;
- o When required by a reopener condition in the permit;
- o When an eligible permittee requests effluent limitations on a "net basis", or where the discharger loses its eligibility for net limitations;
- o As necessary to require development of or incorporate conditions of an approved local pretreatment program;
- o Where the permittee demonstrates that the operation and maintenance cost of complying with BPJ effluent limitations is totally disproportionate from the operation and maintenance costs considered in the development of a subsequently promulgated effluent limitations guideline;
- o To correct technical mistakes or mistaken interpretations of law made in determining permit conditions;

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*/ Note that the permittee must request such modification within 90 days of publication of EPA's revisions in the Federal Register or of the judicial decision.

- When the discharger has installed treatment technology pursuant to a BPJ permit limitation, and has properly operated and maintained the facility, but has nevertheless been unable to achieve those limits, the permit may be modified to reflect the levels of pollutant control actually achieved, but in no case may the modified limits be less stringent than required by a subsequently promulgated effluent guideline;

- Upon failure of the permitting State to notify another State whose waters may be affected by a discharge from the permitting State pursuant to section 402(b);

- When the level of discharge of a pollutant, not limited by the permit, exceeds the level which can be achieved by the appropriate technology-based treatment requirements.

- To establish a "notification level" as provided in section B(1)(d), above.

- A compliance schedule may be modified when the Director believe good cause exists, however, in no case may an NPDES compliance schedule be modified to extend beyond an applicable CWA statutory deadline.

(iii) Causes for Minor Modification (40 CFR 122.63) (Optional)

In limited circumstances, States may modify a permit without public notice and comment, with the permittee's consent. However, these modifications are limited to minor changes in the permit conditions, such as correcting typographical errors or increasing monitoring frequency (although not decreasing). States may not adopt any causes for minor modification other than those listed in 40 CFR 122.63. However, States are not required to allow minor modifications.

(iv) Causes for Modification/Revocation and Reissuance (40 CFR 122.62(b))

Revocation and reissuance is similar to permit modification, but involves reopening the entire permit rather than just the provision intended to be modified. A permit may be reissued

with a new 5-year permit term, unlike a modification which may not change the permit duration. Revocation and reissuance follows the same process that is used for modification.

The State's regulations may allow permit modification, or revocation and reissuance, where cause for termination exists (as outlined below), but the State agency determines that modification or revocation and reissuance is more appropriate. In addition, a permit may be modified or revoked and reissued where the State Agency receives notice of a proposed transfer of permit responsibility as discussed under "Permit Transfers" above.

(v) Causes for Termination/Renewal Denial (40 CFR 122.64, 124.5)

State regulations may specify any number of causes for terminating permits or denying renewal. However, the regulations must allow the State Director to terminate a permit or deny a renewal application for at least the following causes:

- o Failure to comply with any of the permit conditions;
- o Failure to disclose all relevant information on a permit application or other misrepresention of any relevant facts at any time;
- o The facility or activity presents a danger to human health or the environment; or
- o A change occurs in the discharger's circumstances requiring a temporary or permanent reduction or elimination of the pollutants controlled by the permit.

If the Director tentatively decides to terminate a permit, the regulations must require issuance of a notice of intent

to terminate using the same procedures as those used for proposing draft permits (a determination to terminate a permit or deny renewal constitutes a type of draft permit; see, Part B(1)(g) of this chapter).

(i) Enforcement and Penalties For Permit Noncompliance (40 CFR 123.27)

Enforcement remedies must be specified in the State's statutes. Where authorized by State law, States may find it helpful to outline these provisions in the regulations. (As noted in Part B(1)(d)(i) of this chapter, these enforcement remedies should also be referenced in each permit.) The required enforcement authority is discussed in Chapter III.

The State program regulations must contain procedures for public participation in enforcement actions through either of the following methods:

(1) Allowing interested citizens the right to intervene in any civil or administrative actions as a matter of right; or

(2)(a) Not opposing interested citizen intervention where permissive intervention is provided under a State statute or regulation;

(b) Investigating and responding, in writing, to all citizen reports of violations; and

(c) Providing a 30 day public notice and comment period on any proposed enforcement settlements.

Option 2 is only available in States that allow permissive intervention.

(j) Incorporation of EPA Test Procedure Guidelines (40 CFR 122.21, 122.44, 403.12)

Whenever a permit requires a pollutant to be sampled and analyzed, the State regulations must require the permittee to use the EPA testing procedures set out in 40 CFR Part 136. It

is recognized that these guidelines will not address every situation. Therefore, approval of alternative testing procedures may be sought from the EPA Regional Administrator, through the State agency. The request will be forwarded to EPA's Environmental Monitoring and Support Laboratory in Cincinnati, Ohio for evaluation and a recommendation on the request.

(2) Pretreatment Requirements

State NPDES programs must include a pretreatment program to regulate indirect dischargers. In addition, all existing NPDES programs must be modified to include authority over such dischargers.

EPA rules require State NPDES programs to have regulations in effect at the time of program approval. This rule generally applies to State pretreatment programs as well (see, 40 CFR 403.10 (g)(1)(i)). However, EPA has created a limited exception to this requirement for States requesting program modifications to add the pretreatment program (see, 40 CFR 403.10(g)(iii)). There are two prerequisites to exercising this option. First, the State must have very specific statutory authority that meets EPA's statutory and regulatory criteria (the statutory criteria are discussed in Chapter III, Part B(2); the regulatory criteria are set out below). Thus, the statute must be more detailed than would normally be required for State program statutory authority (containing similar detail to that which regulations would be required to contain), and it must be self-implementing, that is, capable of being enforced directly without the need of administrative regulations.

Second, the program description must contain a detailed description of the procedures the State intends to use to administer the program (see, 40 CFR 403.10(f)). The Attorney General must also assure EPA that the State agency has a valid legal basis to enforce each of these procedures despite the absence of implementing regulations and without the need for any additional steps, such as issuing an order containing the applicable limits. Obviously, States are not likely to have a detailed statute which satisfies this "self-implementing" requirement. Therefore, most States are expected to promulgate regulations. The regulations required for pretreatment programs follow.

(a) Definitions (40 CFR 403.3)

Many of the terms used in the pretreatment regulations will be unfamiliar to the regulated community and the public. In order to eliminate any ambiguity, the State regulations should define terms that may be unclear. These definitions must be consistent with the definitions in 40 CFR 403.3. While the State need not adopt all of the definitions in that section, EPA requires the following terms be defined: Pass-through, interference, industrial user, new source, pretreatment, pretreatment standards, and pretreatment requirements. However, the State's use of the other terms must be consistent with federal rules. States are strongly encouraged to adopt all of the definitions in 40 CFR 403.3.

(b) Prohibited Discharges, Local Limits, and EPA Categorical Pretreatment Standards

The State must adopt regulations which make pretreatment standards directly applicable to indirect dischargers and enforceable by the State, even where the POTW administers an approved local program. These include national categorical pretreatment standards, prohibited discharge standards and local limits (see below). State regulations that apply pretreatment limitations for indirect dischargers through the POTW's NPDES permit are unacceptable unless the State statute specifically requires indirect dischargers to comply with such limitations, thus providing dischargers with notice of where to find applicable limits. The State must have authority to enforce pretreatment standards and requirements without any intermediary action (e.g., State regulations which require the issuance of an order, and only allow enforcement for violations of the order rather than the pretreatment requirement itself, are not consistent with EPA's requirements). States can, of course, elect to implement the pretreatment program through permits to all indirect dischargers.

(i) Prohibited Discharges (40 CFR 403.5)

State pretreatment regulations must include a general prohibition against discharges of pollutants which may pass through a POTW with less than adequate treatment, or which may interfere with the operation of the POTW. In addition, the State rules must contain specific discharge prohibitions, consistent with 40 CFR 403.5(b), against pollutants with

the following characteristics:

- o Inflammable substances;
- o Corrosive substances;
- o Viscous or dense substances which could block or interfere with the functions of the POTW;
- o Heat (exceeding 40° C or 104° F) sufficient to inhibit the biological treatment of a POTW; and
- o Slug loads.

(ii) Local Limits (40 CFR 403.5(c))

A POTW must be prepared to develop local limitations to control the introduction of pollutants to its treatment system. States must require POTWs developing local programs to establish, after notice and opportunity for public comment, specific numeric limits to implement the general and specific prohibited discharges (see above). Other POTWs must be required to develop and enforce local limits when they have experienced problems with pollutant pass-through or interference, and such problems are likely to recur. Local limitations must be enforceable by the State and EPA as well as the POTW.

(iii) National Pretreatment Standards (40 CFR Chapter I, Subchapter N)

States must adopt regulations that include the categorical pretreatment standards (promulgated in 40 CFR Chapter I, Subchapter N). These State rules must be made directly applicable to indirect dischargers.

(iv) Pretreatment Standards Implementation (40 CFR 403.6)

State regulations must contain provisions for implementing pretreatment standards. For example, the procedure for deter-

mining effluent limitations for facilities that combine wastestreams prior to treatment must be set out. A formula equivalent to EPA's combined wastestream formula is acceptable as would be a flow-weighted average approach, so long as it is at least as stringent as the formula. The State must also prohibit the use of dilution as a full or partial substitute for treatment.

State rules must allow indirect dischargers to request category determinations where the application of a categorical standard to the facility is uncertain or questioned. These procedures must include an opportunity to appeal any State categorical determination to the EPA Regional Administrator. A State's categorical determination may not be appealable under State law unless the Regional Administrator retains the right to make a final determination after all State court decisions are completed.

(c) Industrial Users Reporting Requirements (40 CFR 403.12)

(i) Information required

State rules must require reports from industrial users. At a minimum, the following reports must be required:

- o Baseline monitoring reports are required within 180 days of promulgation of an applicable categorical standard. This report should contain the following items:
  - Name and address of the discharger (owners and operators);
  - List of all environmentally related permits held by the discharger;
  - A brief description of the facility's operations, including the average rate of production and a flow system diagram;

- Measurements of the average and maximum daily process flow (gallons per day). Flow measurements for other waste streams are required where application of a combined wastestream formula may be appropriate;

- Description of the nature and concentration (or mass) of each pollutant in a regulated process. The State must require composite sampling (unless infeasible, in which case grab samples are allowed); and

- A compliance schedule based upon the shortest time necessary to bring the facility into compliance with pretreatment requirements. The schedule may not extend beyond the compliance date in an applicable categorical standard.

o Compliance schedule reports must be submitted for each milestone in the compliance schedule;

o Report of compliance with categorical standards. The State must require submission of these compliance reports at least every six months (June and December). These reports must contain information similar to the baseline monitoring report, noted above; and

o Slug loading report. Industrial users must be required to immediately notify the POTW of any slug loading which could interfere with the treatment works' functions.

States and POTWs may require reports in addition to those described above. They may also increase the frequency of reports or require additional information.

(ii) Monitoring

State regulations must require all monitoring and analysis to be conducted in accordance with EPA's standard test methods in 40 CFR Part 136. In the absence of approved test methods, industrial users may use other sampling and analytical techniques if approved by the Regional Administrator (see, B(1)(j), above). States may specify monitoring requirements on a case-by-case basis. States must require adequate monitoring of all indirect dischargers.

(iii) Signatories

States must have regulations that establish signatory requirements for all reports. Reports from POTWs must be signed by the principal executive officer, ranking elected official, or other duly authorized employee responsible for overall POTW operations.

States must require that reports from indirect dischargers be signed by a principal executive officer (no less than vice-president in authority) or, for partnerships or sole proprietorships, by a general partner or proprietor. In either case, the State may allow the responsible signatory to authorize a representative, responsible for overall operation of the facility originating the indirect discharge, to sign the reports.

(iv) Confidentiality (40 CFR 403.14)

States must require that pretreatment information be accessible to the public, although the State may allow for confidentiality of some business information. However, States must ensure that all effluent data are available to the public without restriction; such data may not be claimed confidential. Effluent data includes monitoring data, as well as such additional information as is necessary for the public to determine whether an indirect discharger is in compliance with applicable pretreatment standards. This includes production data used to calculate pretreatment requirements from applicable production-based categorical standards. Other information must be available to the extent required by the federal confidentiality provisions at 40 CFR 2.302.

(v) Recordkeeping

State pretreatment regulations must also require industrial users and POTWs to retain information for at least three years. Such information shall include all sampling and analytical data used in compiling the reports discussed above.

(d) POTW Pretreatment Programs (40 CFR 403.8)

A State must have regulations regarding the development of local POTW pretreatment programs. These regulations must indicate when local programs will be required, and delineate the procedures and criteria for development and approval of such programs.

Unless the State elects to operate a State-run pretreatment program, it should require all POTWs with flow greater than 5 million gallons per day, as well as those which receive pollutants that may pass through or interfere with the treatment works, to develop local programs. The State agency may also require other POTWs to develop local programs if the circumstances merit it. All currently identified POTWs must be required to develop programs by July 1, 1983; these programs should be either approved or on a compliance schedule for local program development at this time. However, those POTWs not yet identified should not be given more than two years for local program development. The State must regulate directly all industrial users that discharge to POTWs not required to develop pretreatment programs.

(i) Contents of a Local Program Submission (40 CFR 403.8, 403.9)

The State regulations must set out the requirements for local pretreatment programs, including the contents of a program approval request and the substantive criteria that must be met and against which the program will be evaluated. State rules that do not specify the criteria or merely indicate that a POTW have "adequate" authority and procedures are not sufficient.

First, the POTW must be required to have procedures and legal authority to administer a program. Legal authority must at a minimum enable the POTW to do the following:

- Require industrial users to comply with pretreatment requirements. Such authority must also enable the POTW to deny or condition the introduction of new, changed, or increased pollutant volumes and concentrations to itself;
- Control the introduction of pollutants to the POTW by contract, permit, or other mechanism;
- Require industrial users to develop compliance schedules to meet pretreatment requirements;
- Require the submission of notices and self monitoring reports to at least the same extent as required under federal law;
- Enter, inspect, and sample the effluent of an industrial user to ensure compliance independent of self-monitoring data;
- Seek remedies against noncomplying industrial users including injunctive relief and civil or criminal penalties; and
- Comply with the same confidentiality of information requirements as EPA and the State (see, Part B(1)(b)(v), above).

Second, the POTW must also be required to develop detailed administrative procedures to carry out the following:

- o Identify and locate industrial users subject to pretreatment requirements, including identifying the character and volume of pollutants;
- o Notify industrial users of applicable pretreatment standards;
- o Receive and analyze self monitoring reports to determine compliance with applicable requirements;
- o Randomly enter, inspect, and monitor industrial users to determine compliance independent of self-monitoring reports;
- o Investigate evidence of noncompliance; and
- o Publish (at least annually) a list of industrial users that have significantly violated pretreatment standards in the municipality's largest daily newspaper.

The POTW must be required to submit a statement from the city solicitor or comparable city official as part of a POTW's local program application. This statement must describe the city's legal authority to carry out each of the requirements identified above. The solicitor's statement also must explain the legal basis for the administrative procedures which the POTW intends to use to implement the program.

In addition, a complete POTW application must include copies of all statutes, ordinances, contracts, or other legal authorities that form the basis for the POTW's program, a description of the POTW's organization, and a description of the funding and personnel available to the POTW.

(ii) Approval Process (40 CFR 403.9, 403.11)

States must solicit public comment prior to approving or denying a local program request. After determining that the POTW has submitted a complete application, the State

must issue a public notice and provide an opportunity for the applicant, affected States, interested federal, State, or local agencies, and other interested persons to comment and request a public hearing. These procedures are the same as those for NPDES permit issuance (see above Part B(1)(g) of this chapter. The POTW's local program application must be made available to the public on request.

EPA may also comment during this time. States are prohibited from approving a local program if EPA objects in writing. The State regulations must also provide for interested persons to receive notice of the final determination on program approval.

Finally, State regulations must include procedures for modifying the POTW's NPDES permit to include conditions regarding its approved local program.

(e) Removal Credits (40 CFR 403.7)

State regulations may allow POTWs to request authority to adjust the national pretreatment standards otherwise applicable to their industrial users. These "removal credits" must be based upon the POTW's demonstrated ability to consistently remove pollutants introduced from industrial users.

States are not required to allow removal credits nor are POTWs required to request the authority to grant credits. However, if a State chooses to allow credits, the State regulations and criteria for acting upon the the removal credits requests must be at least as stringent as EPA's requirements (see 40 CFR 403.7).

Generally, only POTWs with approved local pretreatment programs may be granted removal credit authority. Industrial users may not request removal credit authority for a POTW and removal credits cannot be granted if it would cause the POTW to violate its NPDES permit or any applicable sludge requirements.

A POTW's request for removal credits must include the following items:

- o A list of pollutants for which credits are requested;
- o Data demonstrating consistent removal;
- o The proposed revised discharge limits;
- o Certification that the POTW has an approved local program;
- o A description of the POTW's sludge use and disposal plan, and a certification that the removal credit will not result in a violation of the plan; and
- o Certification that the credit will not cause a violation of the NPDES permit.

Removal credit requests must be acted upon in the same manner as local pretreatment program applications (see Part B(2)(d)(ii) of this chapter). They must be subjected to public notice and comment, and once a removal credit is approved, the POTW's NPDES permit must be modified to incorporate it as an enforceable condition. In addition, removal credit approvals must be re-evaluated each time the NPDES permit is reissued.

(f) Fundamentally Different Factors Variances (FDFs) (40 CFR 403.13)

EPA regulations provide for FDF variances from otherwise applicable categorical pretreatment standards. State programs may include procedures for allowing FDF variances, although

these are not required. If a State chooses to allow FDP variances, the State procedures must be consistent with EPA requirements. Under EPA rules, a State may deny but may not approve an FDF variance request. Only EPA may grant a variance. State procedures may authorize the State agency to recommend approval to EPA.

The requirements and criteria for FDP requests are identical to those applicable to requests from direct dischargers. These are fully discussed in Part B(1)(f) of this chapter and are not repeated here.

(g) Net/Gross Adjustments (40 CFR 403.16)

State regulations may allow for adjustment of pretreatment requirements based upon the presence of pollutants in the indirect discharger's influent. However, under the federal pretreatment regulations, only EPA is authorized to grant a net/gross adjustment. States choosing to allow net credits must be authorized to impose the adjusted pretreatment requirements once EPA has approved the request.

(h) Upset (40 CFR 403.16)

Although non-compliance with pretreatment requirements is generally a matter of strict liability, EPA regulations allow an industrial user which can demonstrate that the violation was caused by an upset (i.e., circumstances beyond the control of the industrial user) to plead the upset as an affirmative defense in an enforcement action. States may allow industrial

users to establish an affirmative defense of upset. If the State adopts upset provisions they must be at least as stringent as 40 CFR 403.16, and must include the same procedural prerequisites to estabishing the defense (e.g., demonstration of cause, 24 hour notice, mitigation).

(3) Federal Facilities (CWA §313)

The State program must have authority to regulate discharges from federal facilities within the State's jurisdiction. As discussed in Chapter III, Part B(3), frequently such authority can be established if the definition of person appearing in the State regulations is sufficiently broad to encompass federal facilities. Thus, a State definition that specifically references the federal government is adequate. Similarly, if the definition includes government entities, it meets federal requirements if the Attorney General's statement clearly indicates that this term is not limited to State agencies.

It is unnecessary for the State to develop a separate program for regulating federal facilities. One cautionary note is necessary, however. Prior to 1977, State programs were not authorized to regulate federal facilities. Therefore, regulations adopted prior to that time are likely not to contain adequate authority and will most likely need revisions to be consistent with EPA requirements.

(4) General Permits (40 CFR 122.28)

States approved to administer the NPDES program may seek approval to issue general permits. While EPA does not require States to seek this additional authorization, States cannot issue general NPDES permits without an adequate regulatory basis and EPA approval. States seeking general permits authority must have regulatory provisions equivalent to those of EPA.

The remainder of this section summarizes the requirements for general permits authority. For more detail on the nature and use of general permits, see the draft General Permits Program Guidance prepared by Permits Division, EPA HQ (a final version of this guidance will be issued soon).

(a) Sources

General permits may be written only to regulate storm water point sources or a group of point sources which all:

- o Involve the same or substantially similar types of operations;
- o Discharge the same types of waste;
- o Require the same effluent limitations or operating conditions;
- o Require the same or similar monitoring; and
- o In the opinion of the State agency, are more appropriately regulated by a general permit than individual permits.

(b) Scope

EPA's regulations limit the scope of general permits to existing geographic or political boundaries. It is assumed that the requirements of most State-issued general permits will have State-wide applications. However, State regulations must specify the possible scope of general permits.

(c) Coverage

State regulations must provide authority to do the following:

- Require a discharger, otherwise covered by a general permit, to apply for an individual permit;
- Provide an "opt out" mechanism for dischargers, otherwise eligible for general permit coverage, to request an individual permit; and
- Provide an opportunity for dischargers, currently holding individual permits, to request coverage under a proposed general permit.

In addition, the State regulations should delineate the criteria to be utilized by the State in determining which dischargers will qualify for coverage under general permits.

(d) Procedures

Regulations are required for a general permits program. These regulations must ensure that interested persons have an opportunity to petition the State agency requesting that dischargers, covered under a general permit, be required to obtain an individual permit.

State regulations may not automatically terminate individual permits when a general permit, regulating similar discharges, is issued. If a discharger has an existing permit, that permit must be revoked before the discharger may be covered under the general permit. The revocation must allow the same procedures that apply to the issuance or revocation of individual NPDES permits, including public notice and comment.

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THE PROGRAM DESCRIPTION AND MEMORANDUM OF AGREEMENT

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THE PROGRAM DESCRIPTION AND THE MEMORANDUM OF AGREEMENT

A. Background on the Program Description and the Memorandum of Agreement

(1) Program Description

Section 402(b) of the CWA requires a State requesting NPDES authority to "submit to the Administrator a full and complete description of the program it proposes to establish and administer under State law . . ." A program description must also be submitted for many program modifications, including whenever the State seeks to add a new program component. Section 304(i) of the CWA requires the Administrator to promulgate guidelines specifying the minimum requirements for a State program under section 402, including requirements for uniform national forms, monitoring and reporting, funding, manpower, and personnel. EPA has promulgated these guidelines in 40 CFR Parts 123 and 403 for the NPDES and pretreatment programs.

The program description is the primary mechanism by which the State explains how it intends to administer the NPDES program. While the regulations largely define the State's intended implementation, they cannot describe the State processes and policies, such as how the State plans to structure its enforcement program. The minimum elements

which must be included in the NPDES program description are set out in 40 CFR 123.22. These components include:

* a narrative description of the scope, structure and processes of the State program;
* a description of the organization and structure of the State Agency or Agencies which will be administering the program, including:
  - organization charts;
  - a description of the State Agency and staff who will carry out the program. This description should indicate the number, occupation and general duties of the employees though it need not include a complete job description for each employee;
  - an itemized account of the anticipated program costs for the first two years including the cost of program personnel and administrative and technical support;
  - a discussion of the amount and sources of funding that will be used to establish and administer the program for its first two years.
* A description of applicable State permitting, administrative, and judicial review procedures;
* Copies of the permit application and reporting forms which the State intends to use, except that if the State intends to use uniform national forms, it need only indicate its intention, and is not required to submit copies; and
* A complete description of the State's compliance tracking and enforcement programs.

Pretreatment program submissions also must contain a program description (in requests for full program approval, this would be part of the NPDES description). The pretreatment regulations at 40 CFR 403.10(f)(2) set out the procedures that States seeking approval of pretreatment programs must

have in place prior to program approval. These procedures must be described in the program description.

These procedures include the following:

- Procedures for identifying POTWs required to develop pretreatment programs and for identifying industrial users of cities that do not have local programs;
- Procedures for technical and legal assistance to POTWs;
- Process for developing compliance schedules for local program development;
- Procedures for sampling and analyzing POTW influent, effluent, and sludge;
- A system to investigate violations of pretreatment conditions in the POTW permit;
- Review and approval processes for local program and removal credits requests; and
- Procedures for reviewing Fundamentally Different Factors variance requests.

Each of these are explained in more detail below. This Chapter also describes other information that must be included in the program description.

(2) Memorandum of Agreement

The federal regulations require that State program submissions include a Memorandum of Agreement (MOA) between the Director of the State program and the Regional Administrator (see, 40 CFR 122.21(a)(4) and 123.24). The MOA is not required by the CWA. However, due to the technical and legal complexity of a State program, agreements between the State and EPA concerning program responsibilities are necessary. The NPDES regulations, therefore, require an MOA that consolidates all of the agreements rather than having them scattered in a variety of formats and locations.

The MOA is a critical element of a State program during the initial approval and start up of the State program, as well as ongoing program operation. It serves as a benchmark for program responsibilities and oversight. However, the MOA sets out broad, long-term program commitments. Specific agreements covering annual performance should be placed in other documents. These additional agreements must be consistent with the MOA.

The contents of MOA's are prescribed in 40 CFR 123.24, and include the following items:

- Provisions for the prompt transfer of pending permit applications and other information relevant to program operation, from EPA to the State agency;
- Provisions specifying the classes of permit applications, draft permits, and proposed permits to be sent to the Regional Administrator for review, comment, and where applicable, objection. The MOA should also specify the extent to which EPA will waive its right to review and object to State-issued permits under CWA sections 402(d-f). Note that 40 CFR 123.24(d) specifies certain classes of permits for which review may not be waived, and procedures to be followed for waiver;
- Provisions specifying the frequency and content of reports and other information which the State is required to submit to EPA. These procedures must implement the requirements of 40 CFR 123.43, governing transmission of information to EPA;
- Provisions addressing the State's compliance monitoring and enforcement program, including the coordination of compliance activities by the State and EPA and procedures to assure the coordination of enforcement activities;
- Provisions, where appropriate, for joint processing of permits for facilities or activities which require permits from both EPA and the State under different programs (see, 40 CFR 124.4); and
- Procedures for modification of the MOA.

In addition, the MOA should contain other provisions outlining the State and Federal responsibilities for administering the NPDES program. States and Regions should use the Model MOA set out in Volume 2.

B. Purpose and Contents

The program description and MOA, taken together, should explain program operation and clearly define the respective roles of EPA and the State, so that by examining these two documents EPA or the public can fully understand how the program will be run. Some overlap between the content of the two documents is expected since both address areas such as compliance monitoring, enforcement, permit issuance, and transfer of information. However, the two documents have different long term roles. The program description provides a narrative explanation of program administration, which is needed to explain the State's program at program approval and whenever modifications occur. The MOA is designed to be a long-term outline of these programmatic duties in the form of a binding contractual-type agreement between EPA and the State. It establishes the parameters for ongoing program administration. In addition, the MOA is a part of the program submission; MOA revisions must follow program modification procedures. (Since the MOA sets out these commitments in fairly general terms and since revisions are treated as program modifications the MOA is not suited for establishing day-to-day program

commitments or goals. These specific annual commitments are negotiated in the annual section 106 work plans. A more detailed discussion of these annual State/EPA Agreements may be found in Chapter 6.)

To the extent possible, we have attempted to delineate which commitments and descriptions must be included in each of these documents. However, there is no clear line between the two documents. If there are questions as to the proper location for certain elements, EPA and the State should look to the roles of each document to determine the preferred location, or should include the description in both.

(1) NPDES Authority

(a) Program Description

The program description explains the State's plans for operating the program. While the statutes and regulations establish the program's structure, many details of the State's plan cannot be answered solely by reviewing legal authority. The program description should describe routine administrative procedures and delineate the organization, operation, budget and funding sources of the State Agency. A detailed, carefully drafted program description is indispensable to EPA during the Agency's evaluation of a State submission. It also will reduce the amount of time necessary for EPA to review the submission by answering questions and clarifing issues that arise elsewhere in the submission. States seeking NPDES authority or modifying an existing NPDES program should prepare a program description that outlines the State's intent as fully as possible.

The program description of a State seeking full NPDES program approval must also encompass the State's pretreatment program, federal facilities authority and, if the State so desires, a general permit program. The pretreatment program may be described in a separate section, or as an integral part of the NPDES program. Normally, a program description will not be required of NPDES State simply seeking to extend its NPDES authority to include federal facilities.

(i) State Organization and Resources

(a) Organization and Structure

One important section of the program description, frequently not given enough attention, is the organization of the agency or agencies responsible for program administration. The program description should indicate the name of the agency or agencies involved, and the position each holds in the overall State governmental hierarchy. The submission should indicate the individual or entity to which the State Director reports. In addition, the submission should identify and indicate the scope and function of any advisory body which exerts some influence or contributes to policy development or decision-making regarding NPDES matters, and any other State offices that play a role in the administration of the NPDES program such as the Attorney General's office, and wildlife, natural resources, and coastal zone management offices.

The program description must clearly delineate the jurisdiction of the agency or agencies involved in the program. If

the State intends to have more than one agency responsible for the program, each agency must have clearly defined jurisdiction over a class of activities. Thus, a State may divide program administration by having one agency responsible for administration of the NPDES program for direct dischargers, and another responsible for the administration of the pretreatment program, or by having one agency with statewide jurisdiction over a special class of dischargers (such as oil and gas producers), while a second agency administers the program for all other dischargers. The division of responsibilities between the agencies and their procedures for coordination must be clearly set forth. In addition, it is highly recommended that one agency be designated a lead agency to facilitate communications between the State and EPA.

The program description must contain an organization chart for the agency or agencies which will be implementing the program(s). The discussion of organization and structure should track the organizational chart, discussing the division of functions and responsibilities in each office down to the branch section level or its equivalent.

The State must clearly describe which offices within the agency(s) will be responsible for administering different aspects of the program. For example, if a State has a Permits Section and a Compliance Section, the State should indicate which would be responsible for pretreatment activities. The State should also describe the procedures for coordination between the various groups. In the case of a State with

multiple agencies involved, this discussion should clearly explain the division of duties and detail the coordination and any overlap of responsibilities between the agencies.

(b) Resources and Funding

The CWA requires that States have adequate resources, including sufficient funding, and qualified personnel, before being approved to administer the NPDES program. The State must be able to show that it has the resources to operate the program as described.

The State agency must project its resource needs for the first two years of program administration. These resource needs should be set out in the form of a workload analysis. This analysis must address each component of the program (e.g., compliance monitoring, enforcement, permitting, and application processing) and translate the program functions into work-years or FTE's (full time employees). The State should use a reasonable estimate of the time necessary to perform each function and the number of times it will be necessary to perform each function. (For example, if the State estimates that permits for 40 industrial majors will be issued in the next two years and that each will require 30 work-days, then the State's estimated workload for this activity is 1200 work-days or 5.5 work-years. To the extent possible, the State should base its estimates of workload on the actual program needs in the next two years (e.g., number of permits to be issued, etc.). Where these numbers are less than the historical norm the State should use estimates closer to the average workload. In some cases, EPA may request the State to

explain the basis for its workload estimates.

The State must also describe staffing levels and relate these staff to the workloads identified through the workload analysis. There should be no double counting of available personnel (i.e., one person should not be identified as devoting a full workyear to two different program functions). Personnel splitting time between two or more functions must be clearly identified. The State must also identify persons who may be working in other programs part-time. Additional assistance from other offices must also be identified. For example, if technical expertise or legal support from other offices is required, the State must account for these arrangements and personnel allocations.

The State should clearly identify and staffing shortfalls and explain how they can be handled without impairing program performance. In reviewing these workload estimates, EPA will consider the overall State workload and the State's plan for program implementation to determine the adequacy of the State staff. State staffing and resources must be adequate to implement the State program; EPA will carefully review any staffing shortfalls to determine whether the State can implement the described program.

In addition to this workload analysis, the discussion of resources must contain an itemized listing of the expected costs of program establishment and operation, including the cost of administrative and technical support. Submissions received in

the past have frequently failed to provide sufficient detail of expected costs. It is critical that States seeking approval show realistic, detailed cost estimates for establishment and operation of the State program. This realistic cost evaluation is a good indication that the State has carefully planned its program and is aware of the complexities of program establishment and operation.

Once all of the program expenditures have been identified, the State must demonstrate its ability to fund the program. This requires a listing of financial sources, including federal grants such as the section 106, 205(g) and 205(j) funds.* The State agency should also indicate any restrictions or limitations upon the use of these Federal funds. It is suggested that this information be presented in the form of a balance sheet or two year budget. Any discrepancies between the total estimated funds and the total estimated costs of operating the program should be reconciled by the State.

There are no uniform numbers as to what will constitute adequate funding, given the wide variation in the size and complexity of State water pollution control programs. Instead, determinations of adequacy must be made on a case-by-case basis, taking into account not only the size of the State program, but also types and numbers of industries located in the State.

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*/ During its discussion of funding sources, the State should indicate whether the stated appropriations are proposed, or whether they have actually been approved by the State legislature.

The State also must identify the qualifications, training, and work experience required of its personnel administering the program. Positions and their qualifications must be identified by program function (e.g., permitting, compliance, enforcement, and pretreatment). Although States are not required to submit actual position descriptions for each position, such descriptions are helpful to EPA. In addition, the State must describe general minimum qualifications (academic and/or experience) required for personnel in each program area. The program description should delineate whether these positions have actually been filled, or if not, when they are scheduled to be filled. The State's specific needs should be considered in establishing minumum qualifications for program staff. For example, if a particular industry is a major part of the workload, knowledge of that industry may be crucial. Thus, in a State with many chemical manufacturers, personnel with chemical engineering and/or toxicology expertise probably would be required.

Adequate and qualified personnel are obviously an essential element of a State program. Since the NPDES regulations must be applied nationally, they contain only generic criteria for staffing and personnel qualifications. This provides the flexibility necessary to deal with the varied conditions among States (e.g., number, type, and complexity of permittees and/or indirect dischargers, water quality problems, extent of noncompliance, etc.). Although tailored to the State's individual circumstances, the description must be both comprehensive and detailed.

(ii) Scope and Program Procedures

The major part of the program description is a discussion of State's procedures and policies. To provide perspective on the program, the description should provide general background information addressing the size of the program, the number of dischargers to be regulated (list if possible), any pre-existing State discharge permit programs and their relationship to the NPDES program. The State should also outline the nature and extent of any NPDES activities that the State has been carrying out in conjunction with the Region prior to approval. For example, some unapproved States assist in the development of draft permits, or participate jointly with EPA in the inspection of dischargers. In addition, the program description should briefly discuss the relationship between the proposed NPDES program and related State water programs, such as groundwater protection, if any.

The narrative should call attention to any features of the proposed program that are not required under Federal law, and areas where the State has chosen to be more stringent than the Federal requirements. The State should also discuss the interrelationship between the NPDES program and the State's water quality requirements (i.e., how the State water quality standards will be incorporated into NPDES permits and how the State will address variances from these standards. Note, however, that the State may not allow variances except where authorized by the CWA).

Most importantly, the State must clearly set out the procedures that it intends to follow in implementing and administering the program. This discussion must explain how the State intends to fulfill its permit issuance responsibilities. For example, it must explain who is to be regulated and how that task is to be carried out, including public involvement in the process. The State also should include a discussion of permit issuance priorities. In explaining the State's procedures, the submission must clearly indicate which office(s) of the State agency will be responsible for each function.

State administration of the NPDES program may be divided into four basic elements as follows:

- Application process (including any preapplication procedures and new source requirements);
- Permit development and issuance;
- Compliance monitoring; and
- Enforcement.

The submission must explain the permit process in step-by-step detail. The State should explain its procedures for requiring permit applications, including for the submission of renewal applications by dischargers currently operating under permits, and the information to be required of applicants. To the extent the information is different from that required on NPDES application forms, the State should explain the differences. The State should also explain any special application procedures under the program. If different types of sources are subject to

different application requirements or proceedures, these should also be explained (e.g., State NEPA requirements applicable to new sources).

The State next must describe both the administrative procedures used to review and act upon permit applications and any scientific or technical evaluations to be performed at the outfall(s). The procedures utilized to develop draft permits must be clearly stated. These procedures may appear as a chart or a list if expedient. In any case, the reader should be able to follow the steps of permit development based upon the material provided. The description must discuss the derivation of permit conditions, including effluent limitations, water quality standards and any applicable pretreatment, toxic or sludge-related requirements in as much detail as possible. The State should specify any policies related to the imposition of certain types of limits, such as limits on toxic pollutants. In addition, the narrative should discuss the State's mechanism for developing monitoring requirements and other specific permit conditions. In describing development of the draft permit, States should also discuss their use of fact sheets and when these will be prepared. The federal rules do not require that States use fact sheets in all instances. Furthermore, special considerations for particular classes of dischargers such as POTW's, animal feedlots, silvicultural activities, and storm water discharges or separate storm sewers should be detailed. Finally, any other State-imposed requirements, such as construction permits

for new sources, which impact the permit issuance processes should also be explained.

Along with the permit development procedures, the State should describe those classes of discharges which will not be required to have NPDES permits. Of course, the State may not exclude any dischargers from permitting requirements that are not similarly exempted in the federal regulations.

After the application and permit development processes have been discussed, the narrative should provide a detailed explanation of the proposed permit issuance (public notice and comment) process, including the procedure for requesting and conducting public hearings. The description should specify who may comment upon permits and request hearings. The submission also must elaborate on EPA's role in reviewing State permits. Finally, the State must describe administrative and judicial review of decisions by the permitting authority, including which parties may challenge the permit decision.

The program description should also address the circumstances and procedures under which the State will transfer, modify, revoke and reissue, or terminate permits and which (if any) of the variances authorized under the CWA it intends to allow. The text should indicate the State's variance policies, as well as outlining the procedures for responding to variance requests. Additionally, the State should specify which office will be handling such requests.

Once the State has described the operation of its permit issuance process, it must delineate its proposed strategy for compliance monitoring. State compliance monitoring programs must have procedures for evaluating self-monitoring reports submitted by permittees to determine whether the discharger is in compliance with applicable requirements. In addition, States must have procedures for determining compliance by permittees independent of the discharger's self-monitoring. States must be capable of carrying out comprehensive surveys to ascertain noncompliance, have procedures to verify the accuracy of sampling and monitoring reports submitted by permittees, and ensure that reports indicating noncompliance are followed up. (See, 40 CFR 123.26 and 123.45). State programs also must have provisions for responding to complaints submitted by citizens. The program description must outline these procedures. The State should also describe the standard monitoring, recordkeeping, and reporting requirements to be included in State permits.

The State's description also should indicate the projected scope and frequency of inspections and outline the State's inspection priorities. At a minimum, State compliance monitoring programs must provide for annual inspection of all major dischargers.

The narrative must address the State's procedures for resolving identified violations. This strategy includes a discussion of the State's informal and formal enforcement remedies, strategy and policies, accompanied by an explanation

of the circumstances which must be present for the State to abandon informal efforts and resort to formal enforcement actions. The State should describe any procedures that must be followed in taking enforcement actions. Limitations and restrictions governing the use of these remedies, if any, must be disclosed. Thus, if State law requires that certain actions be taken prior to initiating enforcement actions, these must be explained in the program description. The discussion on the proposed enforcement program must include a synopsis of the relationship and coordination between the permitting office, the inspecting/compliance office, and State legal officials (e.g., the Attorney General's office). Finally, the enforcement discussion should address provisions made to ensure the public's right to participate in and have adequate notice of enforcement actions, as specified by 40 CFR 123.27(d). (These requirements are discussed in the statutory and regulations Chapters.)

The State must also address procedures regarding the transfer and protection of information. Specifically, the text should describe how the State will make all permits, permit applications and effluent data available to the public. The State shall describe what information may be deemed confidential. Furthermore, the program description must address issuance of the annual report on the NPDES program, as required by 40 CFR 123.45(b), as well as the State's involvement, or intention to become involved in the national computerized permit tracking system (Permit Compliance System). Moreover, the State should discuss its continuing planning process, as mandated by section

303(e) of the CWA, and address elements listed at 40 CFR 35.1500 et seq., including State priorities, water quality assessment and further planning responsibilities.

Finally, the program description must indicate that the State intends to update its program to be consistent with the changes in the federal NPDES program. The State should explain when and how the State will revise its program following changes to federal requirements. This is particularly important in instances in which the State has incorporated federal authorities by reference. This discussion should include the State's plans for a periodic self-analysis of its legal authorities and program effectiveness, as well as future intentions to expand of the State's program (i.e., plans to seek general permit authority).

(iii) State Program Forms

The permitting authority must provide copies of the permitting, application, and reporting forms that it intends to use, unless the State intends to use the uniform national forms. State forms must request the same basic information as is mandated by the EPA forms. States are encouraged to use EPA's national forms, and may modify them by substituting the State Agency's own letterhead in place of EPA's. States may attach additional forms to obtain more information. Copies of the national forms are included in the Models provided in Volume Two. Note that all State programs must use EPA's Discharge Monitoring Report (DMR) forms. A State planning to use EPA's forms need only indicate its intentions.

(b) Memorandum of Agreement

The MOA establishes the basis for cooperation and coordination between the State and EPA and for ensuring that the program is administered in an effective manner consistent with federal objectives and requirements. The MOA defines the State/EPA relationship and denotes the responsibilities of each party. It charts the procedures EPA and the State will follow in carrying out these various responsibilities and generally defines the manner in which the NPDES program will be administered. The MOA should also be used to clarify procedures where needed.

An MOA must be signed by the Director of the State agency and the appropriate EPA Regional Administrator (RA). The RA must receive the prior concurrence of the Director of the Office of Water Enforcement and Permits and the Associate General Counsel for Water, EPA Headquarters for any new program or substantial revisions (see, Chapter Two, above. Note that nonsubstantial MOA revisions also must be submitted to EPA Headquarters in advance to assure whether they should be deemed substantial.).

The contents of the Memorandum of Agreement are described below. EPA has developed a model MOA for use in State program which embodies normal State/EPA allocation of responsibility (See Volume 2 of the guidance). It is recommended that States use the model and revise it as necessary for the particular

program, generally by adding additional items. It is unlikely that commitments in the model would be deleted or modified, except where the State does not perform a particular program aspect (e.g., general permits).

The MOA should begin with a statement of the basis and implications of the Agreement. For example, both parties must indicate their intentions to be bound by its terms. The MOA must affirm that the State program will be managed in accordance with State and federal statutes, regulations, policies, guidance, the annual section 106 work plan and the State/EPA Enforcement Agreement (if separate from the MOA). The MOA may also acknowledge the State's right to be more stringent than the federal requirements. If the MOA is being updated or revised, it should include a provision explaining the relationship with the previous agreement (i.e., it must indicate whether it supercedes or supplements the prior document).

The main body of the MOA consists of a listing of the responsibilities and procedures which will be used to ensure coordination and cooperation between the State and EPA. The reader should consult Chapters Three and Four for more details on the legal requirements for implementing each task.

The State/EPA obligations are frequently divided according to program function, as follows:

(1) Permit Review and Issuance

* Transmission of permit files from EPA to State Agency;

- Suspension of EPA's permitting activities;
- Transfer of permit appeals cases to State Agency (optional);
- Transmission of pending applications, draft permits, public notices, and final permits, to EPA, including general permits if applicable, for its review and comment, including objection;
- Transmission of non-minor permit modifications to EPA for its review and comment/objection;
- Designation of permits waived by EPA, if any, and caveat allowing EPA to terminate waiver, or portion thereof, at any time. These should include a discussion of the procedures for review of and objection to State permits. Where EPA and the State agree that EPA will comment upon draft permits, the MOA should specify that all regulatory procedures normally applicable to proposed permits will apply to draft permits (see 40 CFR 123.44);
- Establishment of a major facilities list;
- Procedures for determining new source evaluations;
- Transmission of a monthly list of permits issued by the State;
- Procedures for evaluating variance requests under sections 301(c),(g),(h), and FDFs;
- Procedures for ensuring public involvement in permit review and issuance process; and
- A statement requiring permit information to be packaged in such a manner as to be easily adapted into the PCS data base.

(2) Enforcement Management System (EMS)

- State commitment to review permittee's monitoring reports and investigate complaints made by EPA and the public;
- State commitments to conduct inspections, including joint inspections with EPA;
- Affirmation that EPA and State will hold periodic enforcement conferences to determine priorities;

- State commitment to bring timely and appropriate enforcement actions as required in State/EPA Enforcement Agreements;

- State commitment to provide EPA with notice of proposed enforcement settlements, (See, 40 CFR 123.27(d)(2)(iii) (optional));

- Joint commitment to immediately notify the other party of situations creating a substantial endangerment to the public health or welfare, due to an actual or threatened direct discharge of pollutants;

- Statement acknowledging EPA's ability to conduct inspections and bring enforcement actions in the State (including section 504 emergency powers);

- EPA commitment to provide the State Agency with annual joint inspections list;

- EPA commitment to provide State with reports of all EPA (Regional Office) inspections in the State; and

- EPA commitment to provide the State with prior notice, and copies of all enforcement actions brought in the State.

(3) Financial Assistance

- Procedures for developing the annual 106 work plan and performance-based grants policy, if applicable;

- The MOA should note that the State shall undertake revisions to the MOA whenever the State or EPA determine the need for such revisions, since the MOA cannot be overridden by other State/EPA agreements;

(4) Confidentiality

- Procedures for treating confidential claims of trade secret information (except with respect to permit applications, permits, and effluent data);

(5) Program Oversight

- EPA commitment to audit or review State program performance, including permit quality reviews (PQR's) where appropriate, and to provide the State Agency with a copy of EPA's analysis;

- State commitment to seek legislation and promulgate regulations as necessary to preserve and maintain consistency and compliance with federal requirements;

- Procedures for updating and revising State regulations, including any incorporation of EPA regulations by reference, whenever federal rules are revised (unless the federal rules become less stringent) (see Chapter Four, above);

- State commitment to provide EPA with draft proposals for statutes, regulations, policies, etc., for its review and comment prior to their adoption; and

- State commitment to advise EPA of any plans to transfer or split NPDES responsibilities to another State Agency, or Agencies.

(6) Effective Date

The MOA should designate the Agreement's effective date if different from the date of the signatures.

(7) Amendment

Finally, an NPDES program MOA must designate procedures for amending, updating, and revising the document, including the need to public notice substantial revisions which are part of a program modification.

(2) Pretreatment Program

(a) Program Description

Pretreatment authority must be sought by any State seeking NPDES authority. Under the CWA Amendments of 1977 existing NPDES States also are required to seek pretreatment authority (see, section 54(c), P.L. 95-217, 91 Stat. 1591). The pretreatment program description may either be combined with the basic NPDES program description or drafted as a separate document.

The essential elements of the pretreatment program description are the same as those for the NPDES document. The pretreatment program description must address the scope and program procedures of the proposed program and the organization and structure of the State agency responsible for administering the program. It must include the number, occupations and duties of the employees; an itemized account of the anticipated costs of operating the program; a discussion of the sources of the funding, and a detailed description of the State's compliance tracking and enforcement programs, including a discussion of administrative and judicial remedies and authority.

(1) State Organization and Resources

The discussion of a State agency's organization and resources for the pretreatment program is very similar to that of the NPDES program, discussed above at Part B(1)(a)(i). The pretreatment program description should spell out the structure and division of duties between the agency or agencies administering the program. The State should provide organizational charts which designate the program responsibilties in the various offices, divisions, or branches of the agency.

The discussion of resources again should follow a similar scope and format as that discussed above for the NPDES program at Part B(1)(a). When considering program approval, EPA will be particularly concerned with assuring itself that the State's funding and staffing are adequate to meet the program's requirements. The cost estimates and sources of funding should be

clear and detailed, and the sources of funding should equal the amount of estimated costs. A workload analysis also must be included (see, Model Program Description, Volume Two), and realistic, carefully developed staffing information should be provided. For example, pretreatment programs must have personnel capable of reviewing POTW programs, baseline monitoring reports, industrial user surveys, adequacy of local ordinances, local limits and removal credit requests. Finally, as with the NPDES description, detailed information on each of the pretreatment positions must be provided, including required experience or qualifications.

(2) Scope and Program Procedures

As with the NPDES program description, the pretreatment description must explain how the program is to be implemented. The State must fully explain how it intends to administer the program. In addition, the State must discuss the procedures it intends to use in performing the tasks outlined in 40 CFR 403.10(f)(2). These required procedures are discussed below.

The State must generally describe the scope of the proposed program and the State's strategy for program implementation. Specifically, the discussion must indicate whether the State has elected to place the primary responsibility for regulating Industrial Users (IU's) on POTWs, whether the State Agency will implement the pretreatment requirements itself, or whether the State adopts a bifurcated approach with some POTWs (such as those with more industrial flow)

developing local programs while the State regulates the remainder of IU's through permits and/or regulations. If this latter approach is selected, the program description must fully discuss both the POTW and State components of the proposed regulatory scheme. If the State intends to require POTWs to develop local programs, the State must describe the criteria for selecting which cities will be required to develop programs and how the State will regulate IUs in cities that do not develop programs. The description should indicate the number of cities required to develop programs as well. This discussion should also address how these cities were identified and how new cities will be identified and notified of program development requirements. Finally, the State should discuss the imposition of compliance schedules in NPDES permits requiring local program development.

If the State intends to regulate any IUs directly, the submission must discuss how these IUs will be identified and notified of pretreatment requirements. The State must also describe the mechanism by which these dischargers will be regulated. If no IUs will be regulated directly, the State need only address its plans and procedures for oversight of local POTW program administration to insure that all IUs are identified and regulated.

The regulatory authority, be it the POTW or the State, must carry out industrial waste surveys to ascertain the

nature and content of industrial discharges to POTWs. Plans for the distribution and analysis of these surveys should be discussed in the program description. The State should also provide an explanation of its ability to keep track of indirect discharges commencing in the future.

If the State has elected to have POTW's develop local programs, the program description must clearly explain the criteria and procedures to be followed in approving local programs. Where local program administration is to be handled by the State agency, it should indicate the requirements the State will impose on POTWs. The program description should also detail the public participation provisions for local program approvals, as well as the requisite legal and programmatic considerations mandated by 40 CFR 403.8(f). In particular, the narrative should carefully describe the policies and criteria to be applied in the review of POTW legal authorities. As part of its review of POTW requests for program approval, the approval authority (i.e., the State) must independently evaluate the legal authorities which the POTW intends to use to implement its program. The State must describe who will be conducting such reviews and must commit to a conduct a complete and independent review of local authorities.

The narrative should set out the State's legal and technical assistance program for the development and implementation of local programs. This includes providing model ordinances, developing local limits, and evaluating compliance. In addition,

the submission should clearly explain the State's role in providing other assistance to POTWs, including legal and financial aid. If the State is currently assisting EPA in the administration of the State pretreatment program, the State's duties and responsibilities should be explained, and any other pretreatment related activities underway should be noted.

The document also should explain the State's policy and procedures for processing requests for category determinations, fundamentally different factors variances (FDF), revisions to categorical pretreatment standards (removal credits), and net/gross adjustments to categorical pretreatment standards. This should include a discussion of any public participation requirements and a description of the review process for each of these actions.

The State must discuss its program for compliance monitoring. In many respects, this program is comparable to the NPDES compliance monitoring program (see Part B(1)(a), above*). The scope of the program should also be comparable to that of the federal pretreatment program. The State must clearly delineate how it intends to review IU reports and determine appropriate responses. States must have procedures for evaluating compliance by IUs, even where the POTW has an approved pretreatment program. In these instances, the State may rely upon the POTW, but must

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*/ In the case of a joint NPDES/pretreatment program submission, the State need only describe pretreatment enforcement options to the extent that they differ from the State's NPDES enforcement program.

describe how it intends to oversee the local program and periodically conduct independent evaluations of IU reports to determine compliance.

The State must also describe its process for determining, independent of information supplied by POTWs or industrial users, whether the POTW and industrial users are in compliance with conditions incorporated into the POTW permit and pretreatment requirements imposed on the IU. The submission should elaborate on the nature and frequency of reporting requirements to be imposed upon POTWs and industrial users. It is also essential for the State to address its program for compliance inspections of both POTWs and industrial users, including regularly scheduled inspections as well as random or spot checks. States may rely on approved POTWs for some inspections, but must conduct an independent inspection program.

The State must also describe its enforcement program. This discussion should also explain the State Agency's back-up enforcement authority for those situations where a POTW cannot or will not properly enforce against an industrial user. This back-up authority must be available against both POTWs and IUs.

States with very detailed, self-implementing statutory authority need not promulgate pretreatment regulations (see, Chapter 4, Part B(2)). If a qualified State chooses the option of not promulgating regulations, the pretreatment portion of its program description must fully detailed explain

how the State will implement each and every provision of the federal pretreatment regulations as enforceable requirements. EPA does not expect that many States will qualify for program approval without detailed regulations.

(b) Memorandum of Agreement

An NPDES program submission (or existing NPDES States seeking pretreatment authority) will need to submit an MOA which addresses pretreatment responsibilities. In the case of existing MOA's, the reviewer should examine the language very carefully to ascertain that it contains no restrictions on the State's ability to assume pretreatment authority.

The MOA must define State and EPA responsibility in carrying out the establishment and enforcement of the pretreatment requirements for new and existing POTWs and indirect dischargers, under sections 307(b) and (c) of the CWA. The MOA should indicate that the State is responsible for enforcing the general and specific prohibited discharges; reviewing, approving and overseeing POTW programs (subject to EPA review and possible objection); incorporating local POTW program conditions into NPDES permits (unless the State is administering the local programs, in which case responsibility will lie with the State to regulate directly all indirect dischargers); and reviewing and approving modifications to categorical standards reflecting POTW pollutant removal. As with the basic NPDES program, the pretreatment MOA should generally indicate State procedures for carrying out monitoring and inspections of both POTWs and

indirect dischargers. These procedures must enable the State to independently verify data reported by POTWs and indirect dischargers.

The MOA must include a brief discussion of the State's procedures for reviewing IUs' requests for category determinations (see, 40 CFR 403.6), including provisiona allowing an appeal of the State's decision to EPA. The MOA must also specifically provide that no POTW program, or request for authority to grant removal credits, shall be approved if EPA's Regional Water Management Division Director objects during the evaluation period (see, 40 CFR 403.11(d)).

If the State wishes to allow IUs to request fundamentally different factors variances (FDF's), and net/gross adjustments, the MOA must note the basic policy and procedures for responding to these requests. The MOA should indicate that the State may deny FDF requests (if State law so allows) or recommend approval of the request to EPA, which is responsible for final decisions. It should also contain provisions for EPA review and actions on net/gross requests. Finally, the pretreatment MOA should provide that nothing in the MOA is intended to affect any pretreatment requirement established under State or local law, except that EPA may take action if State or local requirements are less stringent than federal law.

(3) Federal Facilities

(a) Program Description

The program description must, of course, address the State's regulation of federal facilities.* In many cases, this will simply entail indicating that the permitting of federal facilities was taken into account in developing funding and staffing estimates and that federal facilities will be handled similarly to all other direct discharges. However, if the State intends to follow any unique or special procedures with regard to permitting federal facilities (or dealing with indirect discharging federal facilities), these should be described. It is also helpful for the State to provide a listing of federal facilities within its jurisdiction.

(b) Memorandum of Agreement

Special attention should be paid to language relating to federal facilities authority in the MOA, particularly where an existing NPDES State is revising its program. To be acceptable for federal facilities authority, the MOA cannot restrict State authority with regard to regulation of, or enforcement against, federal facilities. Since prior to the 1977 Amendments, States were not authorized the regulate federal facilities, many MOAs for States approved before 1977 specifically prohibit State regulation of such sources under the NPDES program. Where the MOA limits the State's authority over federal facilities, it

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*/ The 1977 CWA amendments require approved NPDES States to seek federal facilities authority. See Memorandum on the Transfer of Authority Over Federal Facilites to NPDES States, (Nov. 28, 1978), contained in Volume II.

must be modified at the time the federal facilities authority request is approved. Among other provisions, the MOA should note that EPA reserves the right to enter and inspect federal facilities.

(4) General Permit Authority

Unlike pretreatment and federal facilities authority, general permit authority is an optional program and need not be contained in an NPDES submission. However, if States choose to issue such permits, EPA requires a program description and MOA modification to be included in all submissions requesting general permit authority.

(a) Program Description

The State must generally describe how it intends to administer its general permit program, including under what circumstances general permits are to be issued. It is important for the State to clearly set out its general permit strategy so that reviewers can determine whether it is consistent with the CWA. This includes specifying the classes of dischargers the State intends to permit (a list of general permits the State plans to develop will be invaluable to EPA personnel reviewing the program application), along with any restrictions on general permit coverage (such as discharger size or industry category) the State is imposing on itself.

The State must detail the procedures it will utilize to ascertain which dischargers are covered under a given general permit, as well as providing the approximate number of dischargers it intends to include under each permit, if known. Procedures for notifying dischargers of their eligibility for coverage under a general permit should also be indicated.

Furthermore, the document must discuss the public participation procedures for general permit issuance (these are required by 40 CFR Part 124). For example, the State must indicate whether it will provide public notice when a discharger, already regulated under an individual NPDES permit, requests coverage under a general permit and seeks to have its individual permit revoked.

The general permit program description should indicate staffing or resource implications of program approval. For example, general permits may free up some NPDES staffing and resources which may be redirected toward other areas of the program.

(b) Memorandum of Agreement

The MOA must detail the interrelationship between EPA and the State. Specifically, the document must address EPA review and comment/objection procedures for State general

permits since they are different from EPA review of individual NPDES permits.*

In the case of an NPDES State seeking to modify its program by adding general permit authority, the existing MOA must be revised if it contains language limiting its applicability to individual permits, or lacks a discussion on EPA review and comment/objection of State general permits.

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*/ General permits must be reviewed by the Director of the Office of Water Enforcement and Permits, EPA Headquarters, before they may be issued by the State agency (see, 40 CFR 123.43(b), 123.44(a)(2), and 123.45(i)).

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THE OVERSIGHT PROCESS

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THE OVERSIGHT PROCESS

A. Background On the Oversight Process

This Chapter addresses EPA oversight of State NPDES programs. State program oversight encompasses overall program operation and performance, including permitting and enforcement, as well as oversight to assure consistency of State NPDES legal authority with minimum federal NPDES requirements. This Chapter addresses primarily the legal aspects of State program oversight. This Chapter also addresses methods for resolving program deficiencies.

State programs must at all times be administered consistent with federal requirements. EPA is required by the CWA to oversee State programs after approval to ensure adequate consistency. Responsible and effective oversight is beneficial to both the approved States and EPA. In addition to ensuring that State programs are being run in accordance with the requirements of the CWA, the oversight process provides EPA with information on the day to day operation of the NPDES program. Among other uses, this type of information may be used to form the basis for reports to Congress on the effectiveness of current laws and justifying State grant funding levels and State-assistance programs. Federal oversight also provides a means by which to collect and exchange information between the States. More importantly, regular

State oversight enables EPA to identify State program problems before they reach the crisis stage, thus allowing easier resolution.

EPA's oversight activities are designed to help both the Agency and approved States evaluate the strengths and weaknesses of State programs and thus increase the program's effectiveness. In addition to issuing high quality NPDES permits without allowing backlogs of expired or unissued permits to develop, States must be able to manage a timely and effective enforcement program and a competent and effective pretreatment program. Operating such a comprehensive program requires up-to-date legal authorities, properly trained personnel in numbers sufficient to meet the program's needs, and adequate resources. Strengths and weaknesses are generally identified as falling within the following three classes: (1) programmatic performance, (2) legal authorities, or (3) resource levels.

(1) Programmatic Deficiencies

Programmatic deficiencies are those resulting from the State's failure properly to administer the program the State described in its program submission. Essentially, this means that the State is not complying with the requirements of the MOA (which sets out the State's commitments). Specific examples of these types of deficiencies include: an excessive backlog of expired permits, an inadequate permit issuance rate, deficient permits which do not contain all required conditions and limitations, failure by the State to comply

with NPDES regulations, including failure to comply with procedural requirements when issuing permits, failure to submit permits for Regional review or respond to the Region's comments, failure to run an effective enforcement program, and failure to properly administer the pretreatment program. In addition, an approved State's failure to seek pretreatment and federal facilities authority from EPA, as required by Federal law, is considered to be a programmatic deficiency.

(2) Legal Deficiencies

Legal deficiencies include outdated State legal authorities or improper revisions to those authorities. Many State programs have not been reviewed for legal sufficiency since their initial approval. Since most State programs were approved before 1977, this also means that many State programs may not have been updated to reflect requirements mandated by the 1977 CWA amendments. In addition, the federal regulations have undergone numerous and significant changes since these Amendments.

Legal deficiencies also may have occurred due to State changes to statutes or regulations subsequent to program approval, where the State did not request program modification to reflect those changes. Examples of such revisions include: statutory amendments eliminating or modifying a general conflict of interest bar to members of the State's permitting body; and creating permit variances not allowed under the CWA. Other States have experienced judicial decisions that affect State program operations.

States with outdated or inconsistent legal authorities are expected to review and revise those authorities to be consistent with federal requirements. EPA Regions and Headquarters are now implementing a program for periodic review of approved State legal authorities.

(3) Resource-Related Deficiencies

Resource problems include inadequate funding and insufficient or inadequately trained personnel. In some cases, State resource shortfalls appear to be the result of a shift in resources, previously committed to NPDES activities, to other State environmental programs. A shortage of qualified personnel can have an appreciable negative impact on program administration, particularly when there is a lack of qualified permit writers or properly trained inspectors. Resource deficiencies frequently will lead to serious problems in other aspects of program administration, leaving the State unable to properly operate the program. In such cases, EPA must require that proper funding and staffing be provided by the State as a condition of continued program approval.

In an effort to improve NPDES program quality through improved communication of EPA's expectations of State and Regional program performance, EPA has developed a comprehensive oversight policy for State NPDES programs. This policy will be reviewed and updated annually. (The FY 1987 Guidance for Oversight of NPDES Programs has been reproduced in Volume Two.) The guidance sets out goals

for State NPDES programs and defines an adequate NPDES program. When EPA oversees State program administration, the Agency will evaluate the State program against the objectives set out in the guidance. For example, the Guidance calls for States and Regions to issue high quality permits and maintain a low backlog. In its oversight of State programs, EPA will examine these aspects. The Guidance does not address specific annual commitments, although these are based upon the goals set out in the Guidance.

B. Statutory Basis

In creating the NPDES program, Congress clearly intended that the program be implemented largely by the States. Section 402(b) requires that a State, wishing to manage the NPDES program in lieu of EPA, demonstrate that it possesses the requisite authorities, procedures and resources to do so. For a detailed discussion of the approval process, see Chapter Two, above. The CWA is abundantly clear that EPA is expected to retain an important oversight responsibility following State program approval. EPA's fulfillment of this oversight duty is critical to achieving national consistency and the sucessful implementation of the NPDES program.

The statutory basis for EPA's oversight function is contained in section 402(c) of the CWA. Paragraph (c)(2) of that section states that "[a]ny State permit program under this section shall at all times be in accordance with this section and guidelines promulgated pursuant to section 304(i)(2)

of this Act." Paragraph (c)(3) states that if the Administrator determines, after hearing, that a State program is not being administered in accordance with federal requirements, he shall withdraw the program. In order to carry out this duty, the Administrator must continually oversee State program operation. Section 402 also requires State programs to fully comply with the federal regulations upon approval.

These statutory mandates are reiterated in Part 123 of the NPDES regulations which provides that "[a]ny State program approved by the Administrator shall at all times be conducted in accordance with the requirements of this part" (see, 40 CFR 123.1(f) and 123.62(e)). Part 123 also requires State legal authority to be revised to comply with new or revised federal authority. Such revisions are to be made within one year or, when statutory revisions are needed, within two years of the federal change. A State's failure to have up-to-date legal authorities can have a significant negative impact on the State program and result in deficient permits or legal challenges to the program's approval status. Out-of-date statutes and regulations can also have adverse effects on one of the primary goals of the CWA: general consistency among State water pollution control programs. Inadequate State legal authorities could give dischargers in one State an unfair advantage over dischargers in other States. Finally, inadequate or out-of-date legal authorities are grounds for EPA to withdraw its program approval (see, 40 CFR 123.63).

C. EPA and State Roles

The program description and the MOA should clearly set out the respective oversight roles of EPA and the State. For a complete discussion of these documents, see Chapter 5, above, and the Model MOA reproduced in Volume Two. Establishing responsibilities in writing clarifies the scope of anticipated program activities and provides a framework for the resolution of any disputes which may arise.

EPA's role in the oversight process originates with initial approval of the State program. At the time of approval, EPA reviews the State's submission to ascertain that the State has adequate funding, resources, organizational structure, and legal authority to run an effective program. However, EPA approval of the "paper program" is only the first step in assuring a quality State program. To ensure a smooth transition, EPA assists newly-approved States following approval. The MOA typically requires EPA to transfer its relevant files on permits and permittees to the State. In addition, EPA will provide technical assistance in developing effluent limitations and drafting permits. This assistance is available in the form of actual drafting of specific permits, and workshops and seminars for permit writers.

EPA ongoing oversight activities are designed to evaluate both the on-going State program operations and overall program planning and performance. The oversight of on-going program administration focuses on individual permits and compliance

activities. These activities include receiving and reviewing draft or proposed State permits, evaluating reports addressing compliance and enforcement activities, and participating in inspections of permitted facilities or indirect dischargers in the State.

For the broader perspective, EPA Regions conduct mid-year State program reviews and periodic audits of State performance. These inquiries allow EPA to assess program performance as a whole, focusing on the State's achievement of overall program goals. The mid-year review is often carried out in conjunction with the annual State-EPA agreement (SEA) and the section 106 grant funding negotiations.

The section 106 grant process involves the negotiation of a State work plan between EPA and the State. The section 106 funds are disbursed by EPA Regional offices based upon a formula determined by data reflecting the scope of each State's water quality problem. Generally, the EPA Regions provide targets for the completion of activities by the State agencies which receive the section 106 funds.

The 106 work plan designates commitments consistent with the essential State program activities defined in EPA's annual operating guidance and summarizes activities that the State and Region agree should be performed during the fiscal year. The work plan covers all activities which are supported by the annual section 106 grant. The work plan also indicates

.the level of grant resources to be devoted to specific tasks. It must also be consistent with the MOA. Generally, the plan is incorporated into an annual State/EPA Agreement (SEA). The SEA serves as a tool for joint State/EPA planning and evaluation. It establishes priorities, measures program successes, and indicates each party's formal commitments. The SEA thus may be broader than the section 106 workplan. However, the two documents are frequently similar and may be combined by some Regional Offices. The SEA is not required by federal law, and currently, only about half of the Regional offices implement SEAs with their approved States.

The State's responsibilities in the oversight process are largely informational, although EPA coordinates all its oversight activities with the State. Of course, the State is also required to submit copies of proposed and issued permits to EPA in accordance with the MOA. As noted in Chapter 2, the CWA and the MOA obligates the State to notify EPA of any proposed revisions to its legal authorities and submit a copy of the proposed revisions to EPA for review.

In summary, EPA's role in the oversight process is to analyze and assess program performance, based largely upon information supplied by the State itself. However, for various reasons, the necessary information is not always provided to the EPA Regions and Headquarters in a timely and consistent manner. These problems distort and reduce the effectiveness of the oversight process.

As is discussed in the following section, EPA is expand-

ing its State oversight activities relating to both program performance and legal authorities. It is anticipated that these activities will fulfill EPA's statutory obligation to ensure that State programs are in full compliance with the CWA, as well as identify those State programs with serious deficiencies. The results of these activities will in turn enable EPA to efficiently utilize its own resources in resolving those deficiencies.

D. Identification and Resolution of State Program Deficiencies

(1) Identification

The identification and resolution of deficiencies in State programs and legal authorities has not received priority attention until recently. However, the adequacy of State permit program performance is a critical link in achieving the Agency's mission under the CWA, and the adequacy of legal authorities is directly linked to the adequacy and defensibility of State-issued permits. Thus, the identification and correction of program deficiencies is an essential part of the oversight process.

In the past, problems with State programs have usually been brought to EPA's attention by a problem or challenge to a particular permit. For example, EPA might learn that a permit is unenforceable because the State lacks adequate regulations, or that a State is reluctant to take enforcement actions because of concerns about the adequacy of its authority. On other occasions, EPA learns of program deficiencies through letters or lawsuits from environmental groups, or these problems

are identified in the course of reviewing State legal authorities in response to a State's request for authority to administer a pretreatment or general permit program, or to regulate federal facilities. However, until now, the common denominator of virtually all deficiencies identified by EPA has been that they have been identified in a remedial or passive context. In many cases, these deficiencies have been brought to EPA's attention by outside parties. EPA's on-going oversight of State programs identifies many of the deficiencies that may need to be resolved. For example, EPA conducts regular reviews of State-issued permits, which may indicate that a number of permits are inadequate. However, these are generally individual instances where problems have occurred; EPA and the States generally can work out informal means to correct these day-to-day program operation problems.

On a separate track, EPA oversees programs to identify more significant concerns. Rather than being remedial, EPA's current oversight program is intended to be preventative in nature, and will attempt to locate and resolve potential deficiencies in State program operations and legal authorities before they actually come to pass. Although EPA continually oversees State programs, the Agency's current procedures for identifying State program problems rely upon the following two tools, each with a different emphasis. These tools, mid-year evaluations (which are focused on implementation problems) and legal reviews (which focus on legal authorities

and resources) are described below.

(a) Mid-Year Evaluations

Regional offices are expected to perform comprehensive evaluations of approved State programs at least once each year. This review is usually conducted prior to the Office of Water's (EPA Headquarters) mid-year evaluation of the Region. The Region's comprehensive review typically summarizes the results of the periodic program evaluations that have been performed during the preceeding year.

The Region's own review of the State's performance revolves around the SEA and section 106 grant negotiations discussed above. During these processes, priorities and commitments are established for the coming year. In addition, specific difficulties, peculiar to the State, should be identified and addressed in the SEA whenever posible.

At the conclusion of the annual review, the Region will prepare a written report outlining the State's accomplishments and indicating areas where improvements are needed, as well as summarizing agreements reached on the resolution of any problems identified during the process. Copies of these documents should be provided by the Region to the appropriate staff in the Office of Water Enforcement and Permits, EPA Headquarters.

(b) Legal Authority Reviews

Since the NPDES program is constantly evolving, there will always be a need to revise and update State programs.

State law should be reviewed periodically to ensure legal authorities are consistent and up-to-date. Many approved State legal authorities have neither been updated by the State nor reviewed by EPA since the time of initial program approval. To rectify this situation, EPA has developed a strategy for reviewing approved programs which calls for each Region to conduct a comprehensive evaluation of at least one approved State's legal authorities each year (See, Memorandum, "Review of Approved NPDES Programs," from the Director of the Office of Water Enforcement and Permits to EPA Regional Water Management Directors, reproduced in Volume Two). In addition, the FY 86 Guidance for Oversight of NPDES Programs calls for all approved State legal authorities to be reviewed by the end of FY 86 (this commitment also appeared in the FY 85 Guidance).

Once the individual States are selected and a priority for review is established, EPA will request each State to conduct a self-evaluation of its legal authorities. After each State completes an initial analysis of its legal authorities, EPA will conduct an independent review. These reviews will be coordinated between EPA Headquarters and Regional Offices and will be equivalent in scope to the review now carried out for new or modified NPDES programs. (The procedures for legal reviews are set out in Chapter 2, above.)

If EPA or a State identifies deficiencies in the State's legal authorities, EPA will work closely with the State to

remedy the deficiencies. If needed, EPA will provide legal support and assistance in drafting these revisions. It is anticipated that in many cases, EPA's concerns can be resolved by a well-documented opinion from the State Attorney General.

(2) Deficiency Resolution

Once a State program deficiency is identified, it must be resolved. The appropriate remedy or remedies will be selected by EPA after considering the nature and seriousness of the problem, the State's awareness of the problem, and the State's willingness to deal expeditiously with it. In many cases, the problem can be worked out informally by the joint efforts of the State and EPA. Whenever possible, EPA will accept a resolution of the problem which is the least disruptive and time-consuming. For example, with questions concerning State legal authority, EPA will generally accept an Attorney General's statement supported with adequate citations and case law as an alternative to requiring a more costly and time consuming statutory change. The tools EPA has at its disposal to resolve State program deficiencies include the following (in roughly escalating order):

(a) Informal Dialogue With State

Virtually all problem resolution efforts will begin with a discussion about the problem. The State will be advised as to what problems EPA perceives and what steps EPA believes should be taken to resolve the problem. EPA will attempt to determine the cause of the problem and recommend a plan for resolution. This may include technical assistance

or additional guidance from EPA or a recommendation that the State obtain contractor assistance. As with any of the deficiency resolution techniques discussed below, EPA's goal during these informal discussions is to help the State return to compliance with CWA requirements. However, EPA may indicate during these discussions that further action will be taken by EPA if the State fails to take prompt corrective action. In such situations, EPA will apply one or more of the remaining tools for deficiency resolution.

(b) Modification of State-EPA Agreement or MOA

In some cases, it may be effective for EPA and the State to address the problem in the SEA or annual section 106 grant (these two documents are described above at page 6-6), or amend the MOA to reflect program performance goals necessary to eliminate the problem. For certain problems, particularly those relating to information transfer, other procedural problems, or those deficiencies impacting the program over a long period of time, modification of the MOA may be an appropriate step. Other short-term performance problems (e.g., elimination of a specified backlog), are more appropriately addressed through the annual SEA/106 grant negotiation process. EPA may put specific State goals in these documents to be achieved during the following year. The State's performance can then be tracked against these commitments. Since the commitment is set out specifically, the State's compliance can be easily determined, as well as the need for further action. These documents may also be useful in

the resolution of enforcement or compliance deficiencies, particularly if the State needs to increase activities which may be included in the agreements as quantifiable outputs, such as compliance inspections or enforcement referrals.

(c) Conditioning Receipt of §106 Grant on Achievement of Specific Commitments

EPA intends to use performance-based grants, including the §106 grant, as a mangement tool to promote and recognize the effective performance of State NPDES programs (see, Administrator Thomas' May 31, 1985, Policy on Performance-Based Assistance). This policy is reproduced in Volume Two. It explicitly links the provision of EPA grant funds to effective State performance.

In the case of §106 funds, effective State performance is evidenced by the State achieving its work plan commitments. States with superior performance may be eligible for financial incentives, including supplemental funding, while States which fail to meet significant goals in their work plan may be subject to reductions in funding, restrictions on the use of federal funding, or adjustments to the schedule for release of funding (including witholding a portion of the grant until the commitment is met). Since a properly drafted work plan contains quantifiable outputs for each described activity, it provides an excellent basis for evaluating the State's progress toward meeting its commitments.

Regional Offices are required to review State progress

againsst the work plan throughout the year (see, 40 CFR 35.3150). If a State fails significantly to achieve the commitments contained in the work program, such as additional measures as discussed above, the Region should consider actions to encourage improved future State performance. As one means to encourage improved State performance, the Region should strongly consider a financial penalty such as a reduction of the grant award. This grant reduction is based upon the principle that funds are awarded to accomplish specific, mutually agreed tasks. If the State fails significantly in accomplishing the tasks, the funding should be reduced proportionately. Since there are no objective, automatic standards to be applied, the Region should use its best judgement in using grant reduction. Two important factors which should be considered are actual State performance compared to its output commitments and the prior history of State performance. In instances where a State has repeatedly failed to meet its commitments, the Region has little choice but to reduce grant funding. However, any reduction or elimination of grant funding must always be carried out in accordance with the Agency-wide policy on the subject, and should be reserved for instances of clearly inadequate performance.

(d) Review of State-issued permits

The CWA provides for EPA review of State-issued NPDES permits. EPA review ensures that EPA provides comment where appropriate to assure that State NPDES permits meet minimum

federal requirements. In addition, EPA can often provide information or data helpful to assist State permit writers in keeping up with new developments in control techniques in other parts of the nation. This procedure often has the additional benefit of helping State permit writers improve their skills, particularly if the permit review is carried out in conjunction with additional training or guidance.

Section 402(e) provides that, for certain classes, EPA may waive its review of all permits. The Agency's State program regulations establish the types of permits which may not be waived. These include major permits, general permits, permits for discharges which may affect another State and permits for discharges into the territorial seas (see, 40 CFR 123.24(d)). However, if a State often needs assistance in developing appropriate permit limits or is otherwise having difficulty issuing adequate permits, the Region should not waive its review to the maximum allowable extent. Instead, the Region should conduct a detailed review of any State-issued permits of concern, focusing attention on the aspects of permit development which are known to be troublesome for that State.

(e) Formal Audit of State Permitting and Compliance Activities

On occasion, it is necessary or appropriate for EPA to conduct a detailed review of State program performance and permit files. (This process is separate from the Agency's Permit Quality Review Program.) Where this is undertaken,

EPA will generally spend a period of time carefully evaluating the State's permit and/or pretreatment files. Audits can be both diagnostic (because a formal audit can help locate specific programmatic problems) and remedial since it may provide the basis for determining appropriate corrective action. The audit is most useful where a State program is known to be suffering from deficiencies in overall program operation or management but specific deficiencies have not yet been identified. A formal audit may be performed upon the entire State program, or its scope may be limited to a specific aspect, such as pretreatment. Upon completion of the audit, EPA will evaluate its findings. These will normally be submitted to the State in the form of a report. If deficiencies are found, EPA will generally seek agreement on prompt corrective action through one of the other mechanisms discussed in this part to resolve the problems, such as delineating commitments in the section 106 workplan.

(f) EPA veto of State-issued permits

As discussed above, EPA is empowered to review State-issued permits. In cases where EPA has exercised that authority, sections 402(a) and (c) of the CWA authorize EPA to object to (veto) proposed State permits which do not comply with federal requirements, such as a failure to issue adequate BPJ permits. Objection to State-issued permits is part of EPA's routine State program oversight and its use is not normally considered a remedy for State program deficiencies. Regions are expected to review permits and object when they fail to meet CWA requirements. See 40 CFR 123.44. The Region should

be prepared to issue the permit in the event that the State is unable to satisfy any important EPA concerns. It is essential that this tool be utilized where appropriate in order to ensure high quality NPDES permits and fulfill EPA's obligations for effective State program oversight. Once a State permit becomes effective, EPA's ability to require changes in its conditions is little better than that of any other interested party.

Where States have chronic permit quality problems, EPA will strongly consider increasing the scrutiny given to State permits, thus increasing the frequency of objections. For example, Regions sometimes submit informal comments to States on certain deficiencies rather than phrasing them as objections to the permit. Where the State continues to issue poor permits or does not address EPA's informal comments, the Region will begin to issue the comments as formal objections, requiring the State to address the concern to avoid the permit being vetoed after the 90-day period. Where appropriate, Regions also should consider increasing the scrutiny given to certain classes of permits that are normally not carefully reviewed.

(g) Cutting EPA-Provided Funding

This is the reduction or elimination of federal funding provided under the CWA. Cutting or reducing federal funding is a more serious and consequential sanction than the performance-based grants program discussed above, since the State cannot obtain the financial assistance merely by meeting stated

goals, and this procedure can result in the elimination of funding beyond just the §106 grant. A program with serious deficiencies often is already suffering from resource problems, and reduction or elimination of federal funding may only serve to exacerbate the problem. Therefore, cutting funding, as distinguished from the performance-based grant, should only be considered in serious cases where other remedies, including the use of performance-based grants, have failed to bring about improved program performance.

(h) EPA-State Consent Agreement

In cases where EPA has identified several different significant deficiencies in a State program, and informal methods have not resulted in improved State performance, an EPA-State consent agreement can be a useful tool to assist the State to return to compliance. Such an agreement is essentially a contract between the State and EPA, in which the State is required to carry out specified activities according to a schedule agreed to by the parties. For example, such an agreement might, in part, call for the State to submit revised NPDES regulations to EPA for review by a specified date. The schedule would eventually culminate with the promulgation of the final revised regulations by a set date. Such a schedule may also be developed to eliminate permit backlogs, require increased compliance or enforcement activities, or mandate increased State staffing of the program.

In order to be meaningful, the consent agreement must contain specific consequences for the State's failure to comply with the agreement. These consequences can include monetary penalties or other sanctions. For example, monetary penalties could include reduction of the State §106 grant by "X" dollars per each permit which the State commits to but fails to issue. Other sanctions might include the staging of a public fact finding hearing (see below) on program quality in the event the State misses any of the milestones specified in the agreement or, the initiation of withdrawal proceedings for certain types of violations. The consent agreement may also obligate EPA to provide financial, legal, technical, or management assistance to the State.

A consent agreement should be tailored to the specific circumstances of the case at hand, taking into account the State's particular strengths, weaknesses, and needs. A consent agreement can be used in conjunction with other remedies. Finally, the consent agreement may be a useful tool in helping to resolve actual or threatened legal actions brought by outside parties. For example, an environmental group, otherwise prepared to bring suit or file a petition for withdrawal, may be willing to settle in exchange for either having input into, or being made a party to, the terms of a State-EPA consent agreement.

(i) Federal Assumption of State Enforcement

Sections 309(a) and 402(i) of the CWA provide EPA with the authority to take enforcement action against dischargers

The withdrawal process does not have as its central purpose the return of the program to EPA nor does initiation of withdrawal proceedings mean that the program will actually be withdrawn. The withdrawal process is primarily a device to encourage the State to correct program deficiencies in order to retain NPDES authority. To date, EPA has not withdrawn any State NPDES programs. However, given the current emphasis upon State program quality, and recent activities by environmental groups (such as filing petitions requesting the withdrawal of a State program), EPA may consider withdrawal proceedings for any State which consistently operates its NPDES (including pretreatment) program in violation of the CWA.