ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 123

[FRL–5500–9]

RIN 2040–AC43

Amendment to Requirements for Authorized State Permit Programs Under Section 402 of the Clean Water Act

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: EPA is amending the regulations concerning the minimum requirements for federally authorized State permitting programs under Section 402 of the Clean Water Act. This amendment will explicitly require that all States that administer or seek to administer a program under this part must provide an opportunity for judicial review in State Court of final permit decisions (including permit approvals and denials) that is sufficient to provide for, encourage, and assist public participation in the permitting process. A State will meet this standard where State law allows an opportunity for judicial review that is equivalent to that available to obtain judicial review in federal court of federally-issued NPDES permits. A State will not meet this standard if it narrowly restricts the class of persons who may challenge the approval or denial of State-issued permits.

This rule is being issued because EPA has become aware of instances in which citizens are barred from challenging State-issued permits because of restrictive standing requirements in State law. The current regulations setting minimum requirements for State 402 permit programs do not explicitly address this problem. EPA believes this is a gap in the regulations setting minimum requirements for State 402 programs that needs to be addressed.

Today's rule is intended to ensure effective and meaningful public participation in the permit issuance process by establishing a minimum level of public participation among State water pollution control programs. When citizens have the opportunity to challenge executive agency decisions in court, their ability to influence permitting decisions through other required elements of public participation, such as public comments and public hearings on proposed permits, is enhanced. This rule will promote effective and meaningful public participation and will minimize the possibility of unfair and inconsistent treatment of similarly situated people potentially affected by State permit decisions.

This requirement does not apply to Indian Tribes. EPA will decide at a later time whether it should be extended to Tribes.

EFFECTIVE DATE: This rule is effective on June 7, 1996. Under EPA's State 402 program rules, States will have up to two years to adopt legislative changes, if necessary, to meet this requirement and maintain federal program authorization.

FOR FURTHER INFORMATION CONTACT: Robert Klepp, Office of Wastewater Management (OWM), Permits Division (4203), Environmental Protection Agency, 401 M Street, S.W., Washington, D.C. 20460, (202) 260–5805.

SUPPLEMENTARY INFORMATION:

Regulated Entities

Entities potentially regulated by this action are authorized State programs.

Category	Examples of regulated entities
State Government.	State NPDES Permit Issuing Authorities.

This table is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be regulated by this action. This table lists the types of entities that EPA is now aware could potentially be regulated by this action. Other types of entities not listed in the table could also be regulated. To determine whether your organization is likely to be regulated by this action, you should carefully read the applicability language of today's rule. If you have any questions regarding the applicability of this action to a particular entity, consult the person listed in the preceding **FOR FURTHER INFORMATION CONTACT** section.

Information in this preamble is organized as follows:

I. Summary and Explanation of Today's Action

1. Background

Congress enacted the Clean Water Act, 33 U.S.C. 1251 *et seq.* (''CWA'' or ''the Act''), ''to restore and maintain the chemical, physical, and biological integrity of the Nation's waters.'' Section 101(a), 33 U.S.C. 1251(a). To achieve this objective, the Act authorizes EPA, or a State approved by EPA, to issue permits controlling the discharge of pollutants to navigable waters. Section 402(a)(1), 33 U.S.C. 1342(a)(1). A State that wishes to administer its own permit program for discharges of pollutants, other than dredged or fill material, to navigable waters may submit a description of the program it proposes to administer to EPA for approval according to criteria set forth in the statute. Section 402(b), 33 U.S.C. 1342(b).

EPA's regulations at 40 CFR Part 123 establish minimum requirements for federally authorized State permit programs under § 402 of the CWA. Today, EPA is adding language to Part 123 that makes it clear that States that administer or seek to administer authorized 402 permitting programs must provide an opportunity for judicial review in State court of the final approval or denial of permits by the State that is sufficient to provide for, encourage, and assist public participation in the permitting process. A State will meet this standard if State law allows an opportunity for judicial review that is the same as that available to obtain judicial review of federally-issued permits in federal court (see § 509 of the Clean Water Act.) A State will not meet this standard if it narrowly restricts the class of persons who may challenge the approval or denial of permits (for example, if only the permittee can obtain judicial review, or if persons must demonstrate injury to a pecuniary interest in order to obtain judicial review, or if persons must have

a property interest in close proximity to a discharge or surface waters in order to obtain judicial review). States are free under today's rule to impose reasonable requirements that administrative remedies be exhausted in order to preserve the opportunity to challenge final permitting actions in State court. This rule does not apply to Tribal programs. EPA will decide at a later time whether it should be extended to Tribes.

2. Rationale and Authority

a. Restrictive Standing Requirements In States. EPA has become aware of instances in which citizens are barred from challenging State-issued permits because of restrictive standing requirements in State law. EPA believes this is a gap in the regulations setting minimum requirements for State 402 permit programs that needs to be addressed.

In 1993, a coalition of environmental groups filed two petitions requesting that EPA withdraw the Virginia State 402 permit program, citing a limitation on citizen standing, among other alleged deficiencies. In particular, they alleged that recent changes in the law in the State of Virginia had significantly narrowed the public's opportunity to challenge State-issued 402 permits. Virginia's State Water Control Law, the State law under which Virginia's authorized program is administered, authorizes only an ''owner aggrieved'' to challenge permits in court. VA Code 62.1–44.29.[1] The petitioners alleged that in 1990, the Virginia legislature amended and narrowed the statutory definition of ''owner.'' They also alleged that under three opinions of the Virginia Court of Appeals, only a permittee has standing to challenge the issuance or denial of a 402 permit in State court. *Environmental Defense Fund* v. *State Water Control Board,* 12 Va. App. 456, 404 S.E.2d 728 (1991), *reh'g en banc denied,* 1991 Va. App. LEXIS 129; *Town of Fries* v. *State Water Control Board,* 13 Va. App. 213, 409 S.E.2d 634 (1991). *See Citizens for Clean Air* v. *Commonwealth,* 13 Va. App. 430, 412 S.E.2d 715 (1991)(interpreting similar language in Virginia Air Pollution Control Law). They alleged that under these three decisions, riparian landowners, local governments that wish to draw drinking water from the waters in question, downstream permittees, local business and property owners' associations, local civic associations, and environmental organizations whose members use the waters in question may not challenge a State-issued permit in State court.

When EPA issued the regulations that delineate the elements of an approvable program, EPA did not contemplate that State law might limit the opportunity for interested citizens to challenge final permit decisions in State court to such a degree that it is substantially narrower than the opportunity afforded under § 509 of the Clean Water Act to challenge federally-issued permits, or to the point that adequate and effective public participation in the permit issuance process would be compromised. EPA now believes that this is the case in at least a limited number of States and, thus, believes it needs to specify standing requirements in Part 123.

b. Policy Concerns With Restrictive Standing Provisions. EPA believes that the ability to judicially challenge permits is an essential element of public participation under the Clean Water Act. Permits issued under § 402 (also known as National Pollutant Discharge Elimination System or NPDES permits) fall within the broad range of processes that are subject to the Congressional directive of § 101(e) that public participation be ''provided for, encouraged, and assisted by the Administrator and the States.'' Permits are a critical means of implementing the requirements and objectives of the Clean Water Act because they establish specific effluent limitations applicable to individual dischargers covered by the permits.

As EPA noted when it proposed today's rule on March 17, 1995 (60 FR 14588), when citizens are denied the opportunity to challenge executive agency decisions in court, their ability to influence permitting decisions through other required elements of public participation, such as public comments and public hearings on proposed permits, may be seriously compromised. If citizens perceive that a State administrative agency is not addressing their concerns about 402 permits because the citizens have no recourse to an impartial judiciary, that perception has a chilling effect on all the remaining forms of public participation in the permitting process. Without the possibility of judicial review by citizens, public participation before a State administrative agency could become a paper exercise. State officials will inevitably spend less time considering and responding to the comments of parties who have no standing to sue, but will be more attentive to the comments of parties who can challenge the administrative decision in court.

The United States Court of Appeals for the Fourth Circuit has agreed that ''broad availability of judicial review is necessary to ensure that the required public comment period serves its proper purpose. The comment of an ordinary citizen carries more weight if officials know that the citizen has the power to seek judicial review of any administrative decision harming him.'' *Virginia* v. *Browner,* No. 95–1052, slip op. at 17 (4th Cir. March 26, 1996) (upholding EPA's denial of Virginia's proposed permitting program under Title V of the Clean Air Act). The Fourth Circuit quoted from EPA's March 17, 1995 proposal to support that conclusion. Other courts also have recognized broadly that meaningful and adequate public participation is an essential part of a State program under Section 402. See *e.g.,* Natural Resources Defense Council v. *EPA,* 859 F.2d 156, 175–78 (D.C. Cir. 1988) (approving Part 123 regulations regarding citizen intervention in State enforcement actions); *Citizens for a Better Environment* v. *EPA,* 596 F.2d 720, *reh'g denied,* 596 F.2d 725 (7th Cir. 1979) (invalidating EPA approval of a State program in the absence of prior promulgation of guidelines regarding citizen participation in State enforcement actions).

These points are reinforced by comments received regarding the proposed rule. As described in more detail in the response to comments document that is included in the rulemaking record, many comments received by EPA expressed concerns that a State's failure to provide standing for non-dischargers to seek judicial review of permits creates an uneven playing field that may result in:

- A failure by a State permitting agency to adequately consider comments by citizens because it is not judicially accountable to them, while at the same time giving undue deference to those of a discharger who may bring an action in court;
- A reduction in public participation in the permit process because such participation is perceived as fruitless; and
- A government that is perceived by its citizens to be distant and unaccountable.

Moreover, the lack of adequate public participation increases the likelihood that States may issue permits with limits and conditions that are inadequate to protect the environment because permit writers will not have the benefit of the valuable insights and

[1] EPA notes that in April 1996, the Virginia legislature passed a bill that would amend certain Virginia statutes, including the Water Control Law, with respect to the availability of judicial review. EPA is assessing the impact of the bill, which is not yet effective as law.

information provided by public participants. Finally, today's rule also effectuates EPA's strong policy interest in deferring to State administration of authorized NPDES programs. EPA firmly believes that States should implement the NPDES program in lieu of the federal government. However, EPA just as firmly believes that the opportunity for citizen participation is a vital component of a State NPDES program. In authorizing State programs to act in lieu of the federal government, EPA must ensure that the implementation of the State program will be both substantively adequate and procedurally fair. Because this rule will provide additional assurance of State program adequacy and fairness, it will allow EPA to exercise less oversight of State programs and allow more State autonomy in implementing NPDES programs.

c. Legal Authority. EPA believes it has authority under the Clean Water Act to promulgate today's rule. Section 101(e) of the CWA provides, in part:

> Public participation in the development, revision, and enforcement of any regulation, standard, effluent limitation, plan, or program established by the Administrator or any State under this chapter shall be provided for, encouraged, and assisted by the Administrator and the States.

This language explicitly directs that both the Administrator and the States must provide for, encourage, and assist public participation in the development of any ''regulation, standard, effluent limitation, plan, or program'' established under the Act. Section 101(e) also requires that EPA, ''in cooperation with the States, shall develop and publish regulations specifying minimum guidelines for public participation in such processes.''

As EPA noted in the preamble to the March 17, 1995 proposed rule, Congress included the provisions relating to public participation in Section 101(e) because it recognized that ''[a] high degree of informed public participation in the control process is *essential* to the accomplishment of the objectives we seek—a restored and protected natural environment.'' S. Rep. 414, 92d Cong., 2d Sess. 12 (1972), reprinted in *A Legislative History of the Water Pollution Control Act Amendments of 1972*, Cong. Research Service, Comm. Print No. 1, 93d Cong., 1st Sess. (1973) (hereinafter cited as *1972 Legis. Hist.*) at 1430 (emphasis added).

The Senate Report observed further that the implementation of water pollution control measures would depend, ''to a great extent, upon the pressures and persistence which an interested public can exert upon the governmental process. The Environmental Protection Agency and the State should actively seek, encourage and assist the involvement and participation of the public in the process of setting water quality requirements and in their subsequent implementation and enforcement.'' *Id. See also* Senate Report at 72, *1972 Legis. Hist.* at 1490 (''The scrutiny of the public * * * is extremely important in insuring * * * a high level of performance by all levels of government and discharge sources.'').

Similarly, the House directed EPA and the States ''to encourage and assist the public so that it may fully participate in the administrative process.'' H. Rep. 911, 92d Cong., 2d Sess. 79, *1972 Legis. Hist.* at 766. The House also noted, ''steps are necessary to restore the public's confidence and to open wide the opportunities for the public to participate in a meaningful way in the decisions of government;'' therefore, public participation is ''specifically required'' and the Administrator is ''directed to encourage this participation.'' *Id.* at 819. Congressman Dingell, a leading sponsor of the CWA, characterized Section 101(e) as applying ''across the board.'' *1972 Legis. Hist.* at 108. See also *id.* at 249.

The Act reinforces the importance of the directive in § 101(e) by reiterating it repeatedly. *See e.g.,* § 402(b)(3) (State permit programs must provide for public notice and an opportunity for hearing before a State issues an NPDES permit); § 505(a) (''any citizen'' is authorized to bring enforcement suits); § 303(c)(1) (States are to hold public hearings in reviewing and revising State water quality standards); § 319 (a)(1) and (b)(1) (States are to notice and take public comment on nonpoint source management programs); § 320(f) (public review and comment required on plans for protection of estuaries).

Other provisions of the Act reinforce and confirm EPA's authority to promulgate today's rule. First, § 304(i) provides that EPA shall ''promulgate guidelines establishing the minimum procedural and other elements of any State program'' under § 402. Today's rule specifies such a requirement. Second, § 501(a) confers general authority on the Administrator to prescribe such regulations as are necessary to carry out her functions under the CWA. EPA believes it must heed the command of § 101(e) in carrying out the general authority provided by §§ 304(i) and 501(a). Finally, § 402(b)—the provision that establishes the statutory standards applicable to the approval of State permitting programs by the Administrator—itself contains an explicit requirement for public participation in the development of State permits. Section 402(b)(3) provides that EPA may disapprove a State NPDES program if adequate authority does not exist ''to insure that the public * * * receive notice of *each* application for a permit and to provide an opportunity for public hearing before a ruling on *each* such application'' (emphasis added). Section 402(b)(3) must be interpreted in light of the command of § 101(e) that public participation be ''provided for, encouraged, and assisted by the Administrator and the States.'' Especially in light of § 101(e), it is inconceivable that Congress intended the public hearing required by § 402(b)(3)—and other forms of public participation in the State administrative process—to be a meaningless exercise.

Thus, EPA believes it has authority to specify reasonable State court judicial review requirements for purposes of NPDES State program approval in order to ensure that the administrative process serves its intended purpose. Today's rule will help ensure a minimum level of public participation among State water pollution control programs and minimize the possibility for unfair and inconsistent treatment of similarly situated people potentially affected by State permit decisions. It will reduce pressures on States to compete against each other in a downward spiral towards less effective and overly restrictive judicial review provisions in State permit programs. At the same time, it will help to ensure that similar pollution sources in different States will be treated fairly and consistently.

3. Regulatory Language

The language of today's final rule differs from the language proposed on March 17, 1995. The proposed language would have required that ''[a]ll States that administer or seek to administer a program under this part must provide any interested person an opportunity for judicial review in State Court of the final approval or denial of permits by the State.'' The language of the proposal was based on § 509(b)(1) of the Clean Water Act, which provides that ''any interested person'' may obtain judicial review in the United States Court of Appeals of the Administrator's action in issuing or denying any permit under § 402 of the Clean Water Act. The intent of the proposal was to provide for meaningful public participation before the State permitting agency by ensuring that ''any interested person'' has the opportunity to judicially challenge final

action on State-issued permits to the same extent as if the permit were federally issued.

As is noted elsewhere in this preamble, a number of commenters (including several States) argued that the Clean Water Act does not authorize EPA to specify any standing requirement applicable to State 402 programs, or to impose the federal standing provisions contained in § 509 upon the States. Other commenters argued that EPA could provide for meaningful public participation before the State permitting agency without going so far as to prescribe that ''any interested person'' must be afforded standing by the States. Some of these commenters (including several States) stated that the proposed language was too rigid because a State might provide for meaningful public participation in the administrative process before the State permitting agency even though it does not precisely meet the ''any interested person'' test laid out in the proposal.

After considering these and related comments on the proposal, EPA decided to adopt a more flexible, functional test that is tied directly to the mandate of § 101(e). Today's rule provides that States seeking to administer an authorized program under § 402 of the Clean Water Act must provide an opportunity for judicial review in State court of the final approval or denial of permits by the State that is sufficient to provide for, encourage, and assist public participation in the permitting process.

A State will certainly meet this standard if it allows an opportunity for judicial review that is the same as that available to obtain judicial review in federal court of a federally-issued NPDES permit. As noted above and in the preamble to the proposed rule, § 509(b)(1) governs the availability of judicial review of federally-issued NPDES permits. The term ''interested person'' in Section 509(b) is intended to embody the injury in fact rule of the Administrative Procedure Act, as set forth by the Supreme Court in *Sierra Club* v. *Morton*, 405 U.S. 727 (1972). *Montgomery Environmental Coalition* v. *Costle*, 646 F.2d 568, 576–78 (D.C. Cir. 1980); *accord Trustees for Alaska* v. *EPA*, 749 F.2d 549, 554–55 (9th Cir. 1984); *see also Roosevelt Campobello Int'l Park Comm'n* v. *EPA*, 711 F.2d 431, 435 (1st Cir. 1983); S. Conference Rep. No. 1236, 92d Cong, 2d Sess. 146 (1972), *1972 Legis. Hist.* at 281, 329.

The majority of decisions on standing under the Clean Water Act and other environmental statutes have held that plaintiffs must at least satisfy the requirements of Article III. *See, e.g.*, *NRDC* v. *Texaco Ref. & Mktg., Inc.*, 2 F.3d 493, 505 (3d Cir. 1993); *NRDC* v. *Watkins*, 954 F.2d 974, 978 (4th Cir. 1992). As interpreted by the United States Supreme Court, the standing requirement of Article III contains three key elements:

> [A]t an irreducible minimum, Art. III requires the party who invokes the court's authority to ''show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant,''* * * and that the injury ''fairly can be traced to the challenged action'' and ''is likely to be redressed by a favorable decision * * *''

Valley Forge Christian College v. *Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982) (citations omitted). See also *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992).

With respect to the nature of the injury that an ''interested person'' must show to obtain standing, the Supreme Court held in *Sierra Club* v. *Morton*, 405 U.S. at 734–35, that harm to an economic interest is not necessary to confer standing. Harm to an aesthetic, environmental, or recreational interest is sufficient, provided that the party seeking judicial review is among the injured. This holding was most recently reaffirmed by the Supreme Court in *Lujan* v. *Defenders of Wildlife*, 504 U.S. at 562–63 (''[o]f course, the desire to use or observe an animal species, even for purely aesthetic purposes, is undeniably a cognizable interest for purposes of standing.'').

On the other hand, today's rule also provides that a State does not ''provide for, encourage, and assist'' public participation in the permitting process if it narrowly restricts the class of persons who may challenge the approval or denial of permits (for example, if only the permittee can obtain judicial review, or if persons must demonstrate injury to a pecuniary interest in order to obtain judicial review, or if persons must have a property interest in close proximity to a discharge or surface waters in order to obtain judicial review.) As the regulation itself makes clear, these are only examples of such deficiencies in State programs. EPA believes that if State law does not allow broad standing to judicially challenge State-issued NPDES permits—including standing based on injury to aesthetic, environmental, or recreational interests—the opportunity for judicial review will be insufficient to ensure that public participation before the State permitting agency will serve its intended purpose. See *Virginia* v. *Browner*, No. 95–1052, slip op. at 16–18 (4th Cir. March 26, 1996). At a minimum, ordinary citizens should be in a position of substantial parity with permittees with respect to standing to bring judicial challenges to State permitting decisions.

EPA will examine the opportunities for judicial review of State-issued 402 permits that are provided by State law, on a case-by-case basis, to determine whether or not the State adequately ''provides for, encourages, and assists'' public participation in the NPDES permitting process. EPA will look to the State Attorney General to provide a statement that the laws of the State meet the requirements of today's rule. 40 CFR 123.23.

Today's rule applies to final actions with respect to modification, revocation and reissuance, and termination of permits, as well as the initial approval or denial of permits.

4. Exhaustion of Administrative Remedies

Standing to judicially challenge permits should be distinguished from a requirement that potential litigants must exhaust administrative remedies in order to preserve their opportunity to bring judicial challenges. For example, federal regulations require that all persons must raise reasonably ascertainable issues during the public comment period on a draft 402 permit (40 CFR 124.13). Interested persons must request an evidentiary hearing on a permit decision they wish to challenge (40 CFR 124.74). Today's proposal does not affect the authority of States to adopt similar, reasonable requirements.

5. Consideration of Alternatives

In addition to the proposed approach (which would have required that State law provide any ''interested person'' an opportunity to challenge the approval or denial of 402 permits issued by States in State court), EPA also considered as an alternate approach, amending Part 123 to require that State law must provide an opportunity for judicial review of a final State permit action to permit applicants and any person who participated in the public comment process. EPA solicited comments on that approach. One commenter endorsed this alternate approach as a way to ensure that access to courts is limited to those who participated in the administrative process.

After considering that and related comments, EPA decided to adopt a more flexible, functional test that is tied directly to the mandate of § 101(e). This functional test and reasons for EPA's adoption of today's rule are described in more detail above at I.3. However, this rule does not affect States' ability to

adopt reasonable requirements that interested persons exhaust available administrative remedies, including participating in the submittal of public comments, to preserve their opportunity to challenge final permitting actions in State court.

6. Time Period for Compliance

Any approved State section 402 permit program which requires revision to conform to this part shall be so revised within one year of the date of promulgation of this regulation, unless a State must amend or enact a statute in order to make the required revision, in which case such revision shall take place within 2 years. New States seeking EPA authorization to operate the NPDES program must comply with this regulation at the time authorization is requested. This is consistent with current requirements for State programs found at § 123.62(e). In the March 17, 1995 proposal, EPA requested comment on whether a shorter time frame should be imposed than what is provided at § 123.62(e) to comply with this regulation.

Commenters were divided on the issue of the time frame for implementation. One commenter expressed concern that the two-year time frame is too short and does not allow enough time for a legislature to amend its rules in a reasoned and thoughtful manner. Another noted that a State would require a full two years to enact legislative changes and additional time to engage in administrative rulemaking, including providing public notice and conducting a hearing, to determine the level of participation that constitutes an ''interested person'' as proposed. Yet another commenter indicated that States would require a minimum of three years following promulgation to comply with the rule to have sufficient time to develop, adopt, implement, and receive EPA approval.

Other commenters stated that the two-year time frame is too long and that compliance with the rule should be undertaken immediately or, if a State needs to amend its statute, within the first legislative session. Another commenter added that a 1–2 year compliance period is unnecessary since legislation needed to comply with the rule is simple, straightforward and easily accomplished.

While EPA believes it has adequate authority under the CWA to impose a shorter time frame than that imposed under 40 CFR § 123.62(e), the Agency believes that the 1–2 year compliance period as required under its existing regulations is the most appropriate time frame for this rule because it provides States with adequate time to make necessary changes while taking into account the need for legislative action.

II. Summary of Response to Comments

A number of comments were received in response to the March 17, 1995 proposal. EPA's full response to those comments is provided in the response to comments document included in the record for this rulemaking. However, EPA has summarized its response to some of the major comments below.

1. EPA Authority to Require Standing

A number of commenters asserted that the Clean Water Act does not provide EPA with authority to prescribe State court judicial review requirements for NPDES permits. For the reasons set forth above, and as further detailed in the response to comments document, EPA believes that it has authority under the Clean Water Act to promulgate today's rule.

2. Judicial Review is Distinct from Public Participation

Commenters also contended that judicial review and public participation are not the same and treated differently in the CWA and applicable regulations. Thus, EPA may not impose judicial standing requirements to resolve public participation concerns.

For reasons set forth above and as further detailed in the response to comments document, EPA believes broad standing to challenge permits in court to be essential to meaningful public participation in NPDES programs. See *Virginia* v. *Browner,* No. 95–1052, slip op. at 17 (4th Cir. March 26, 1996).

3. Rule would Impermissibly Affect State Sovereignty

Commenters stated that the proposed rule would require that a State waive its sovereign immunity in a manner dictated by EPA in order to obtain approval of its NPDES program. Commenters argued that this is impermissible unless Congress has made its intent to do so unmistakably clear in the language of the Clean Water Act (the ''plain statement rule''). *Gregory* v. *Ashcroft,* 501 U.S. 452, 460 (1991); *Will* v. *Michigan Dep't of State Police,* 491 U.S. 58 (1989); *Atascadero State Hospital* v. *Scanlon,* 473 U.S. 234, 242 (1985). They stated that the Clean Water Act does not contain such a ''plain statement.''

Today's rule does not impermissibly impinge on a State's sovereign immunity, nor does the ''plain statement rule'' have any application here. This is because States voluntarily assume the NPDES program. Section 402 of the CWA provides that States that wish to obtain authorization from EPA to implement the NPDES program requirements may apply to EPA and, where they meet the requirements of § 402, be approved to operate a permit program in lieu of the federal program. States seek this authorization voluntarily, based on State interests; there is no mandate that they do so. However, in choosing to regulate in lieu of the federal government, a State must meet federal requirements set forth in the CWA and implementing regulations. These requirements will now include an explicit standing requirement. If a State finds any of these conditions for federal approval unacceptable, the State may decline the opportunity to implement the NPDES program and leave such implementation to the federal government. The Supreme Court has held that Congress may offer the States the choice of regulating an activity according to federal standards or having State law preempted by federal regulation (*New York* v. *U.S.,* 505 U.S. 144, 167 (1992) (specifically referring to the Clean Water Act); *Hodel* v. *Virginia Surface Mining & Reclamation Assn., Inc.,* 452 U.S. 264, 288 (1981)).

Similarly, the ''plain statement rule'' applied in such cases as *Gregory* v. *Ashcroft,* 501 U.S. 452 (1991), does not apply where Congress has provided a choice for the States. As the Court stated in *Gregory,* the requirement that Congress clearly state its intent to preempt traditional State sovereign powers ''is nothing more than an acknowledgment that the States retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere.'' *Id.* at 461. It is a rule of interpretation designed to avoid a potential constitutional problem. Here, however, as discussed above, there is no constitutional dilemma.

Because today's rule will be imposed only on States that voluntarily seek authorization (or choose to retain authorization) for a permit program under § 402, it does not interfere with State powers. Thus, no ''plain statement'' of Congressional intent is necessary. In any case, this rule has a minimal effect upon State standing, because it applies only to administration of the federally authorized State NPDES program, but does not affect State standing requirements in any other respect.

4. Potential Conflicts with the Tenth Amendment

Some commenters also argued that the proposal is suspect under the Tenth Amendment because it would expand the standing rights already afforded by State law, contrary to *FERC* v. *Mississippi,* 456 U.S. 742 (1982) (standing and appeal provisions of Public Utilities Regulatory Policies Act of 1978 upheld only because they did not expand standing rights afforded by State law).

For reasons similar to those explained in paragraph 3 above, the Agency does not believe this rule is suspect under the Tenth Amendment. The CWA is a federal program that draws on Commerce Clause authority to require nationwide adherence to federal standards protecting water quality. Section 402 of the CWA provides that States that wish to obtain authorization from EPA to implement the NPDES program requirements may apply to EPA and, where they meet the requirements of § 402, be approved to operate a permit program in lieu of the federal program. Similarly, to retain authorization, States must continue to meet federal requirements, including the new one promulgated today. States seek this authorization voluntarily. As noted above, the Supreme Court has held that Congress may offer the States the choice of regulating an activity according to federal standards or having State law preempted by federal regulation. *New York, Hodel.* Because States voluntarily choose to assume responsibility for the § 402 program, this rule does not require that States expand their standing rights.

The commenter's reliance on *FERC* v. *Mississippi* is misplaced. In fact, *FERC* supports the legality of today's rule. As in *New York* and *Hodel,* the *FERC* Court upheld federal conditions on State implementation of a federal program, including procedural requirements, on the grounds that the federal law in question, like the Clean Water Act, allowed States the choice to regulate according to federal requirements or leave implementation to the federal government. Recently, the U.S. Court of Appeals for the Fourth Circuit upheld a standing rule under the Clean Air Act (CAA) against similar Tenth Amendment challenges by the Commonwealth of Virginia. The Court found that the CAA did not compel States to modify their standing rules but merely induced them to do so through financial sanctions and imposition of federal requirements; this was found to not violate the Tenth Amendment. *Virginia* v. *Browner,* No. 95–1052, slip op. (4th Cir. March 26, 1996).

5. The Potential for Waste and Abuse of Judicial Resources

One commenter stated that Congress has expressed concern about the potential for waste and abuse involving State judicial resources (*e.g.,* being subject to harassing lawsuits) that could result from the proposed rule. (*1972 Legis. Hist.* at 467.)

Today's rule does not encourage harassing lawsuits. Instead, it effectively balances the CWA's strong policy favoring public participation in the development of water pollution controls (*see* CWA § 101(e)) with the policy to recognize, preserve, and protect the primary rights and responsibilities of the States to prevent, reduce, and eliminate pollution (*see* CWA § 101(b)). The rule ensures that citizens will be able to influence State permitting decisions through public participation as Congress intended. In addition, States may impose reasonable requirements that prospective plaintiffs exhaust administrative remedies in order to preserve their opportunity to challenge State-issued permits in State court.

In addressing comments on the proposed rule, EPA surveyed a number of States that provide citizen standing to challenge permits in State court (Connecticut, New Jersey, Maryland, Georgia, Michigan, Iowa, Colorado, California, and Washington) concerning the frequency of judicial permit appeals as compared to the total number of permits issued by the States in the last five calender years. EPA found the frequency of such judicial appeals to be very low particularly when compared to the total number of permits issued by those States. Four States (Iowa, Maryland, Michigan, and Connecticut) reported that they each had one permit judicially appealed within the last five years. The number of permits issued by each of those States during that time ranged from 116 (for Connecticut) to 1175 (for Iowa). Other States reported similar rates of State permit judicial appeals. EPA has also found very low rates of judicial permit appeals for NPDES permits that it issues in States that have not been authorized to issue NPDES permits. Finally, a number of commenters supported EPA's statement in the proposed rule that the Agency did not expect that any significant portion of permits would be challenged in State courts. *See* 60 FR at 14591. This information confirms EPA's belief that this rule will not impose a discernable burden on State judicial resources.

6. Suggested Revisions

Several commenters noted that the rule must clearly reflect the proper limits of standing to sue. In response to this and other related comments, EPA has decided not to specify, as proposed, that ''any interested person'' must be provided an opportunity for judicial review of State-issued permits in State court. Instead, the Agency has adopted a more flexible, functional final rule that is tied directly to the statutory language of § 101(e).

The final rule provides that States that administer or seek to administer an authorized NPDES program must provide an opportunity for judicial review in State court of State permitting decisions that is sufficient to provide for, encourage, and assist public participation in the permitting process. A State will meet this standard if State law allows an opportunity for judicial review that is the same as that available to obtain judicial review in federal court of federally-issued permits. States may demonstrate to EPA that even if their standing rules are not the same as these federal standing provisions, they are nevertheless broad enough to provide for, encourage, and assist public participation in the administrative process before the State permitting agency. A State will not meet this standard if it narrowly restricts the class of persons who may challenge the approval or denial of permits (for example, if only the permittee is able to obtain judicial review, or if a person must have a property interest in close proximity to a discharge or surface waters in order to obtain judicial review, or if the State requires that persons demonstrate injury to a pecuniary interest in order to obtain judicial review). (''A plaintiff need not show 'pecuniary harm' to have Article III standing; injury to health or to aesthetic, environmental, or recreational interests will suffice.'' *Virginia* v. *Browner,* No. 95–1052, slip op. at 17 (4th Cir. March 26, 1996), citing *United States* v. *Students Challenging Regulatory Agency Procedures (SCRAP),* 412 U.S. 669, 686–87 (1973); *Sierra Club* v. *Morton,* 405 U.S. 727, 734 (1972).)

EPA believes this approach will ensure the meaningfulness of public participation in the State permitting process, without prescribing a specific level of standing that all States must afford. Therefore, it should affect even fewer States than the proposal.

7. Time Frame for Compliance

This issue is addressed above.

8. Indian Tribes

EPA did not propose to subject Indian permitting programs under § 402 to the requirements of today's rule. However, EPA did solicit comment on this issue. Commenters raised several concerns with regard to the treatment of Indian Tribes under the proposal. A few commenters requested that the exemption for Tribes be removed from the rule and stated that to exclude Tribes would be ''outside the realm'' of the CWA. These commenters stated that Tribes should be treated as States under CWA § 518(e) and should not be exempted from the rule. Others suggested that one alternative for addressing Tribal NPDES permits is to use EPA's objection authority contained in CWA § 402(d). One commenter added that the rule is unnecessary with respect to Tribes because Tribes have already provided for public participation, including authorizing judicial review of Tribal administrative actions. The Agency is not subjecting Tribal permitting programs under § 402 to the requirements of this rule for the time being, as discussed in the proposal and in more detail in the response to comments document. The Agency will make a final determination at a later time whether to extend the requirements of today's rule to Indian Tribes.

With regard to the suggestion that EPA use its objection authority to oversee Tribal permit decisions, EPA does not agree that it should use its authority to review permits prior to issuance as a substitute for public participation in the permitting process. With respect to the necessity of this rule for Tribes, EPA appreciates that some Indian Tribes already provide for the participation of interested or aggrieved parties in permitting matters. While EPA does not as a general matter feel that Tribal procedures should be less rigorous with respect to public participation than State procedures, this rule does raise special issues regarding Federal Indian policy and law which EPA is still assessing. EPA may propose regulatory action in the future with respect to judicial review of Tribally-issued NPDES permits. This rule, however, would not preclude a Tribe from voluntarily including a judicial review process as part of its program application.

9. Virginia-Specific Issues

Some commentators raised the issue that this rule singles out the Commonwealth of Virginia, and that EPA is proposing this rule to avoid the process of deciding on a petition to withdraw Virginia's NPDES authorization. Based on general information, EPA believes that there may be a small number of States in addition to Virginia that have restrictive standing laws pertaining to State judicial review of State-issued NPDES permits. In addition, several other States have indicated in comments to the rule that they may have to revise their current program regulations in response to the proposal. Although today's rule provides more flexibility for State programs with respect to standing requirements than the proposal, EPA believes that a small number of States in addition to Virginia might need to revise their programs to comply with the final rule.

EPA has chosen to proceed with this rulemaking because the Agency believes that adequate public participation in authorized State NPDES permitting programs is fundamental to the effective implementation of the CWA, and that limitations or potential limitations upon such participation are best addressed through a regulation that will help ensure an appropriate opportunity for public participation in all authorized States. With respect to the Virginia withdrawal petition, it is EPA's view that the appropriate mechanism for addressing the citizen standing issues raised in that petition is to clarify the fundamental elements of effective public participation programs in a rulemaking. Other issues raised in the petition concerning the Virginia NPDES program will be resolved in a separate proceeding.

One commenter stated that Virginia citizens are given full and serious consideration when administrative decisions are made on permit conditions. This commenter added that judicial standing is granted to those who can demonstrate injury. Another stated that Virginia law does not imply a restriction on third-party private property rights; rather, third parties have a right to bring a claim before State court if their property is damaged or they are otherwise harmed by a permitted activity.

As discussed in more detail above, EPA has reason to believe that Virginia does not provide for an effective public participation program because it restricts standing to judicially contest final State-issued permits to the discharger.[2] Numerous commenters supported this concern, which they asserted results in a situation where citizen comments do not need to be taken seriously or can be ignored since citizens have no ability to challenge permits in court. In any case, today's rule is not about a single State or State program; rather, the rule is intended to ensure that all authorized NPDES programs provide the judicial standing necessary to ensure effective public participation in the permitting program. Moreover, today's rule does not require that a State meet a single standing formula; rather, a State must demonstrate that its access to courts is sufficiently broad to ensure adequate public participation in the permitting process.

[2] See footnote 1.

10. Impact of the Rule

Some commenters also questioned the impact of today's rule. One commenter stated that EPA must conduct a regulatory impact analysis (RIA) and request Office of Management and Budget review in accordance with E.O. 12866 or withdraw the rule. This commenter noted that the rule meets the definition of ''significant regulation'' and therefore must be assessed in an RIA. Another commenter stated that the rule affects small entities and EPA must prepare a Regulatory Flexibility Analysis. One commenter stated that further analysis is necessary to assess the potential impact of the rule.

EPA does not believe that the rule meets the definition of a significant regulatory action, as defined in E.O. 12866. The rule potentially impacts only very few States and is consistent with and effectuates the public participation provisions of the CWA. OMB has determined that this rule is not a ''significant regulatory action'' under the terms of E.O. 12866 and is therefore not subject to its review. With regard to the need for a Regulatory Flexibility Analysis, EPA notes that the rule applies to States with authorization to administer the NPDES permit program, and States are not considered small entities under the Regulatory Flexibility Act. Nor does the Agency believe that the rule will have a significant impact on small businesses due to the potential for such businesses to incur increased litigation costs. As described in more detail in responses to individual comments in the record for this rulemaking, EPA's experience with States that already provide broad standing to challenge permits indicates that ensuring appropriate criteria for standing in the few States that now unduly limit it will not result in a significant portion of permits being challenged in State court. Thus, a Regulatory Flexibility Analysis is not necessary.

Nothing in this rule or preamble should be construed as addressing the

standing of citizen plaintiffs under §§ 309 or 505 of the Clean Water Act.

11. Support for the Rule

Numerous commenters supported some or all of the rule. Many of them agreed with the Agency's proposal to include language stating that ''any interested person'' should be able to appeal pollutant discharge permits in State court. These commenters viewed the rule as necessary to ensure meaningful public participation, in the permitting process. As described above, EPA has chosen to not require that States explicitly adopt an ''interested person'' standard, but instead has decided to provide flexibility in this area consistent with the need for effective public participation.

Commenters stated that the rule is necessary to ensure meaningful public participation and expressed concern that if standing is not broadened in those States that unduly restrict it, citizen comments will not be taken seriously or may be ignored since citizens have no ability to challenge permits in court. Other commenters stated that the rule is necessary for citizens to challenge permit terms that directly impact their property rights and valuable State resources. Other commenters stated that the lack of meaningful public participation has a direct adverse impact on business. Other commenters stated that the rule would bring consistency, accountability, and credibility to the permitting process and significantly improve the quality of the final permits. EPA has addressed these comments in more detail in the response to comments document but notes that promulgation of this rule should address many of the concerns raised by these commenters.

III. Administrative Requirements

1. Compliance with Executive Order 12866

Under Executive Order 12866 (58 FR 51735, October 4, 1993), the Agency must determine whether the regulatory action is ''significant,'' and therefore subject to review by the Office of Management and Budget (OMB) and the requirements of the Executive Order. The Order defines ''significant regulatory action'' as one that is likely to lead to a rule that may:

(1) have an annual effect on the economy of $100 million or more, or adversely and materially affect a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or Tribal governments or communities;

(2) create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;

(3) materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or

(4) raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

EPA believes that only a very few authorized States may be impacted by this rule. This rule is consistent with and effectuates the public participation provisions of the CWA. It has been determined that this rule is not a ''significant regulatory action'' under the terms of Executive Order 12866 and is therefore not subject to OMB review. As a result, the Agency is not conducting a Regulatory Impact Analysis.

2. Unfunded Mandates Reform Act and Compliance With Executive Order 12875

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), P.L. 104–4, establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local, and Tribal governments and the private sector. Under section 202 of UMRA, EPA generally must prepare a written statement, including a cost-benefit analysis, for the proposed and final rules with ''federal mandates'' that may result in expenditures to State, local, and Tribal governments, in the aggregate, or to the private sector, of $100 million or more in any one year. Before promulgating an EPA rule for which a written statement is needed, § 205 of UMRA generally requires EPA to identify and consider a reasonable number of regulatory alternatives and adopt the least costly, most cost-effective or least burdensome alternative that achieves the objectives of the rule.

In addition, under § 203 of UMRA, before EPA establishes any regulatory requirements that may significantly or uniquely affect small governments, including Tribal governments, it must develop a small government agency plan. The plan must provide for notifying potentially affected small governments, enabling timely input in the development of EPA regulatory proposals with significant Federal intergovernmental mandates, and informing, educating, and advising small governments on compliance with the regulatory requirements.

The specific provisions of §§ 202 and 205 of UMRA do not apply because this rule does not contain any Federal mandates. As discussed above, the rule does not impose any enforceable duty on any State, local, or Tribal government or the private sector. Moreover, any duties arising from this rule are the result of participation in a voluntary Federal program. States are free to leave NPDES regulation to the federal government if they find the requirements in today's rule unacceptable. In any event, no mandates in this rule would result in the expenditure of $100 million or more in any one year by governmental or private entities. With respect to § 203 of UMRA, this rule will impact State governments only; there will be no significant impact or unique effect on small governments.

EPA did consult with States and Tribes during the proposal and the public comment period. The Agency contacted each State individually, seeking its views on the proposal. With regard to Indian Tribes, EPA also worked with representatives of Tribes as well as through the Agency's American Indian Environmental Office to assure a full opportunity for review and comment on the proposal and to ensure an understanding of Tribal concerns or issues raised by this rulemaking.

3. Paperwork Reduction Act

This rule does not contain information requirements subject to OMB review under the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.*

4. Regulatory Flexibility Act

Under the Regulatory Flexibility Act (RFA), 5 U.S.C. 601 *et seq.*, EPA must prepare a Regulatory Flexibility Analysis for regulations having a significant impact on a substantial number of small entities.

This rule applies only to States with authorization to administer the NPDES permit program. States are not considered small entities under the RFA. Therefore, pursuant to Section 605(b) of the Regulatory Flexibility Act, 5 U.S.C. 605(b), I certify that this final rule will not have a significant economic impact on a substantial number of small entities.

List of Subjects in 40 CFR Part 123

Environmental protection, Administrative practice and procedure, Water pollution control.

Dated: May 1, 1996.

Carol M. Browner,

Administrator.

For the reasons set forth in this preamble, part 123, Chapter I of Title 40 of the Code of Federal Regulations is to be amended as follows:

PART 123—[AMENDED]

1. The authority citation for part 123 continues to read as follows:

Authority: Clean Water Act, 33 U.S.C. 1251 *et seq.*

2. Section 123.30 is added to read as follows:

§ 123.30 Judicial review of approval or denial of permits.

All States that administer or seek to administer a program under this part shall provide an opportunity for judicial review in State Court of the final approval or denial of permits by the State that is sufficient to provide for, encourage, and assist public participation in the permitting process. A State will meet this standard if State law allows an opportunity for judicial review that is the same as that available to obtain judicial review in federal court of a federally-issued NPDES permit (see § 509 of the Clean Water Act). A State will not meet this standard if it narrowly restricts the class of persons who may challenge the approval or denial of permits (for example, if only the permittee can obtain judicial review, if persons must demonstrate injury to a pecuniary interest in order to obtain judicial review, or if persons must have a property interest in close proximity to a discharge or surface waters in order to obtain judicial review.) This requirement does not apply to Indian Tribes.

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