ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 22, 117, 122, 123, 124, 125, 144, 270, and 271

[FRL–5656–5]

Amendments to Streamline the National Pollutant Discharge Elimination System Program Regulations: Round Two

AGENCY: Environmental Protection Agency.

ACTION: Proposed rule.

SUMMARY: The Environmental Protection Agency (EPA) is today proposing revisions to the National Pollutant Discharge Elimination System (NPDES) regulations (40 CFR parts 122, 123, 124, and 125). This proposal is part of an agency-wide effort to respond to a directive issued by the President on February 21, 1995, which directed Federal agencies to review their regulatory programs to eliminate any obsolete, ineffective, or unduly burdensome regulations. In response to that directive, EPA initiated a detailed review of its regulations to determine which provisions were obsolete, duplicative, or unduly burdensome. On June 29, 1995, EPA issued a rule (60 FR 33926) which removed some regulatory provisions in the Office of Water program regulations (including certain NPDES provisions) that were clearly obsolete. Today's proposal is intended to further streamline NPDES and RCRA permitting procedures by revising requirements in parts 122, 124, and 125 to eliminate redundant regulatory language, provide clarification, and remove or streamline unnecessary procedures which do not provide any environmental benefits. Conforming changes to 40 CFR parts 22, 117, 144, 270, and 271 are also proposed in today's notice. These proposed revisions are identified and discussed in the **SUPPLEMENTARY INFORMATION** section below.

DATES: Written comments on this proposed rule must be received by or postmarked by February 10, 1997 to be considered timely.

ADDRESSES: Commenters are requested to submit written comments to: The NPDES Round II Streamlining Rule, Comment Clerk, Water Docket MC–4101; U.S. Environmental Protection Agency, 401 M Street, S.W., Washington, D.C. 20460. Commenters are requested to submit any references cited in their comments. Commenters are also requested to submit an original and three copies of their comments. Commenters who would like acknowledgment of receipt of their comments should include a self-addressed, stamped envelope. All comments must be postmarked or delivered by hand by the comment deadline. No facsimiles (faxes) will be accepted.

EPA will also accept comments electronically. Comments should be addressed to the following Internet address: ow-docket@epamail.epa.gov. Electronic comments must be submitted as an ASCII file avoiding the use of special characters and any form of encryption. Electronic comments will be transferred onto a paper version for the official record. EPA will attempt to clarify electronic comments if there is an apparent error in transmission. Comments provided electronically will be considered timely if they are submitted electronically by 11:59 P.M. (Eastern time) February 10, 1997. As EPA is experimenting with electronic commenting, commenters may want to submit both electronic comments and duplicate paper comments. This document has also been placed on the Internet for public review and downloading at the following location: gopher.epa.gov.

The public may inspect the administrative record for this rulemaking at EPA's Water Docket, Room M2616, 401 M Street, S.W., Washington, D.C. 20460, between the hours of 9 a.m. and 3:30 p.m. on business days. For access to docket materials, please call (202) 260–3027 for an appointment during the aforementioned hours. A reasonable fee will be charged for copying.

FOR FURTHER INFORMATION CONTACT: Thomas Charlton, Permits Division (4203), U.S. Environmental Protection Agency, 401 M Street, S.W., Washington, D.C. 20460, (202) 260–6960.

SUPPLEMENTARY INFORMATION:

Regulated Entities

Entities potentially regulated by this action are EPA, authorized State programs, and the Regulated Community.

Category	Examples of regulated entities
Federal Government	Federal NPDES Program.
State Government	State NPDES Program.
Private	NPDES Regulated Community.
Private	RCRA Regulated Community.

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.

Organization

Information in this preamble is organized as follows:

I. Background

On February 21, 1995, the President directed all Federal agencies and departments to conduct a comprehensive review of the regulations they administer and by June 1, 1995, identify those rules that are obsolete or unduly burdensome. EPA conducted a review of all of its rules, including those issued under the Federal Water Pollution Control Act, as amended (''FWPCA'') (33 U.S.C. 1158 and 1251 *et seq.*) (also cited below, as the Clean Water Act or ''CWA''), the Safe Drinking Water Act (''SDWA'') (42 U.S.C. 300f *et seq.*), and the Marine Protection, Research, and Sanctuaries Act (also known as the Ocean Dumping Act) (33 U.S.C. 1401 *et seq.*). In March and April of 1995, EPA solicited informal comments from the public, regulated entities, States, and municipalities on ways to identify rules that are obsolete, redundant, or unduly burdensome. Towards that end, a number of meetings were held in the Regions. On April 3, 1995, the Office of Water issued a preliminary report which identified those regulatory provisions that were amenable to streamlining.

As a result of this review, EPA issued a final rule on June 29, 1995 (60 FR 33926) which removed a number of regulatory provisions that were obsolete or redundant with other regulatory requirements. Today's proposal is a continuation of this effort by EPA to revise the NPDES program regulations in parts 122, 123, 124 and 125 to eliminate redundant requirements, remove superfluous language, provide clarification, and remove or streamline unnecessary procedures which do not provide any environmental benefits. Included in today's notice are proposed revisions which would revise the permit appeals process for EPA-issued NPDES permits by replacing the evidentiary hearing procedures found at part 124, subpart E with a direct appeal to the Environmental Appeals Board. This is not intended to affect the permit appeal procedures for State-authorized NPDES programs. Also contained in today's proposal are conforming changes to parts 22, 117, 144, 270, and 271. Today's proposal contains many of the revisions contained in EPA's June 1, 1995 report to the President. EPA also proposes in today's notice, amendments to its regulations that would correct typographical errors, drafting errors, and misplaced or obsolete references.

Today's proposal may, at times, print extensive portions of existing regulatory text without change. This is done to better describe the proposed revisions. For example, § 122.21(g)(7) is reprinted in its entirety to indicate where new paragraph headings are proposed to be inserted. However, EPA does not solicit, and will not respond to, comments on existing regulatory provisions not proposed to be amended, nor will such provisions be subject to judicial review upon promulgation of the final rule. EPA is soliciting comment only on the revisions described in this preamble.

II. Proposed Revisions

A. Revisions to Part 122

1. Purpose and Scope (40 CFR 122.1)

Section 122.1 provides a general description of the purpose and scope of the NPDES program regulations. Today, EPA proposes to amend this section to remove superfluous language and to provide better clarification. Paragraph (b)(2) states that concentrated animal feeding operations, concentrated aquatic animal production facilities, discharges into aquaculture projects, discharges of storm water, and silvicultural point sources are all point sources requiring NPDES permits for discharges. This information is already provided at §§ 122.23, 122.24, 122.25, 122.26, and 122.27. EPA proposes to remove paragraph (b)(2). Existing paragraphs (b)(3) and (b)(4) are proposed to be redesignated as (b)(2) and (b)(3) respectively. References to existing § 122.1(b)(3) are found at § 122.2 and § 124.1. Today's notice would insert a reference to 122.1(b)(2) in their place.

To provide better clarification, EPA is proposing to remove and revise language found at paragraphs (c), (d), (e), and (f) and place it in three new paragraphs (a)(3), (4), (5). Paragraphs (c), (d), (e), and (f) would be removed. By these revisions to § 122.1, EPA does not intend to change any existing substantive requirements of the NPDES program. EPA also proposes to provide a note at the end of this section to assist readers in contacting EPA if they have questions regarding the NPDES program or its rules. EPA may also provide for the electronic submission of queries concerning the NPDES program and solicits comment on that practice.

2. NPDES Program Definitions (40 CFR 122.2, 124.2)

In this proposed rule, EPA seeks to streamline the NPDES program definitions found at parts 122 and 124 by removing redundant or superfluous language found in its regulatory definitions.

a. EPA intends to amend § 122.2 to add references to definitions that are found elsewhere in parts 122 and 123. The inclusion of such references in a single location is intended to assist readers in finding specific provisions in the NPDES regulations. However, this action is not intended to expand the application of those definitions if they are restricted to a particular section. This proposed rule would provide references to the following terms.

Animal feeding operation
Aquaculture project
Bypass
Concentrated animal feeding operation
Concentrated aquatic animal feeding operation
Individual control strategy
Municipal separate storm sewer system
Silvicultural point source
Sludge only facility
Storm water
Storm water discharge associated with industrial activity
Upset

b. In 40 CFR 124.2, EPA intends to remove definitions that are already found in 122.2. This includes the terms, ''applicable standards and limitations'', ''variances'', and ''NPDES''. EPA believes such multiple definitions to be redundant because § 124.2(a) already provides that the definitions of § 122.2 (as well as definitions for the sludge management, UIC, PSD, 404, and RCRA programs) apply to part 124.

3. New Sources/New Dischargers (40 CFR 122.4, 124.56)

Section 122.4(i) prohibits the issuance of a permit to a new source or new discharger if the discharge would cause or contribute to a violation of water quality standards. A new source or new discharger may, however, obtain a permit for discharge into a water segment which does not meet applicable water quality standards by submitting information demonstrating that there is sufficient loading capacity remaining in waste load allocations (WLAs) for the stream segment to accommodate the new discharge and that existing dischargers to that segment are subject to compliance schedules designed to bring the segment into compliance with the applicable water quality standards.

EPA is proposing to revise these information submission requirements to

allow the Director to waive the present submittal of information requirements under § 122.4(i) where the permitting authority determines that it already has the required information. In many instances the information required to be submitted by the applicant (such as waste load allocations available or compliance schedules for existing discharges) may already be in the Director's files. Where the information is not available or current, the Director may not waive the requirement for the applicant to generate all supporting documentation. EPA notes that this information (as with any information which details how permit limits are derived) should be included in the fact sheet or statement of basis for the permit. See 40 CFR 124.7, 124.8, and 124.56. To underscore the importance of such information and to clarify an existing requirement, EPA also proposes to include an express requirement in §§ 122.4(i) and 122.56(b)(1) that information which demonstrates how the criteria for permit issuance in § 122.4(i) are met is included in the fact sheet for the permit. EPA notes that this revision merely clarifies existing requirements found at §§ 124.7, 124.8, and 124.56 and does not result in an increased burden to the regulated community or permit issuing authorities.

4. EPA Application Forms (40 CFR 122.1(d)(1), 122.21(a), 122.21(d), 122.26(c)(1))

EPA's regulations contain two provisions, §§ 122.1(d)(1) and 122.22(d) which require the use of EPA application forms for EPA-issued permits. In today's notice EPA proposes to consolidate these provisions and move them to a new location, § 122.21(a). Section 122.1(d)(1) requires that applicants for EPA-issued permits must submit applications on EPA application forms when available and indicates that most of the information requested on these application forms is required by EPA's regulations. The provision also indicates that the basic information required in the general form (Form 1) and the additional information required for NPDES applications (Forms 2A through 2D) are listed in § 122.21. Applicants for State-issued permits must use State forms which must require at a minimum the information listed in EPA's application regulations.

Similarly, § 122.21(d)(3)(i) requires that all applicants for EPA-issued permits, other than POTWs, new sources, and ''sludge-only facilities,'' must complete Forms 1 and either 2B or 2C of the consolidated permit application forms to apply under § 122.21. Section 122.21(d)(3)(ii) requires that in addition to any other applicable requirements in this part, all POTWs and other ''treatment works treating domestic sewage,'' including ''sludge-only facilities,'' must submit with their applications the information listed at 40 CFR 501.15 (a)(2) within the time frames established in paragraph § 122.21(c)(2) of this section. Finally, § 122.26(c)(1) requires storm water discharges associated with industrial activity to submit Form 1 and Form 2F.

Most of the requirements in these two paragraphs are duplicative. Consequently, EPA proposes to consolidate the requirements of §§ 122.1(d) and 122.1(d)(3) and place them in a new paragraph designated as § 122.21(a)(2). EPA believes paragraph (a) is a more appropriate location because it pertains to all permit applicants, whereas, paragraph (d) concerns situations involving permit reapplications. Section 122.1 is also not a particularly suitable location because it concerns the scope of the NPDES program and not application requirements. The requirements currently found at § 122.21(a) would be retained in new paragraph (a)(1). Section 122.21(d)(3) would be removed and reserved for future use. In § 122.21(c)(2)(i), EPA proposes to revise a reference to paragraph (d)(3)(ii) found in § 122.21(c)(2) (i) and (ii) to reflect those provisions' new location, paragraph (a)(2). EPA is also in the process of revising some of its application forms (60 FR 62546, Dec. 6, 1995). Those proposed revisions, once finalized, will be coordinated with the revisions proposed in today's notice. EPA also proposes to add language in proposed § 122.21(a)(2) to clarify which EPA forms may be required for a particular discharger. This new language will also allow for the possibility of electronic submittal of application information in the event that the Agency approves the electronic application submittal process. At that time, authorized-States would have the option of using electronic submission of application information. EPA notes that there are other ongoing efforts to update the EPA's forms which may result in nonsubstantive revisions to paragraph (a)(2).

5. Effluent Characteristics (40 CFR 122.21(g)(7))

Section 122.21(g)(7) requires that applicants for permits for existing manufacturing, commercial, mining, and silvicultural discharges must submit information on effluent characteristics. On November 16, 1990 (55 FR 48062), EPA revised § 122.21(g)(7) to add language which specifically addresses storm water application requirements. However, the addition of this language has made paragraph (g)(7) more difficult to read because there is a large amount of uninterrupted text and it is difficult to separate out requirements that are specific to storm water discharges. Today's proposal seeks to better clarify paragraph (g)(7) through the insertion of additional paragraph headings. No substantive changes to 40 CFR 122.21(g)(7) are intended by this revision. EPA also proposes to revise references to provisions in paragraph (g)(7) that are found elsewhere in the NPDES regulations (§§ 122.21(g)(8); 122.21 notes 1, 2, and 3; 122.26(c)(1)(i); and 122.26(d)(2)(iv)(C)(2)) to ensure those references reflect § 122.21(g)(7)'s new structure.

6. Signatories (40 CFR 122.22)

Section 122.22 requires that all permit applications for corporations shall be signed by a responsible corporate officer as defined in paragraphs (a)(1)(i) or (a)(1)(ii) of that section. Responsible corporate officer is defined at § 122.22(a)(1)(i) as a president, secretary, treasurer, or vice-president of the corporation in charge of a principal business function, or any other person who performs similar policy- or decision-making functions for the corporation. Paragraph (a)(1)(ii) provides that a responsible corporate officer may be the manager of one or more manufacturing, production, or operating facilities employing more than 250 persons or having gross annual sales or expenditures exceeding $25 million (in second-quarter 1980 dollars), if authority to sign documents has been assigned or delegated to the manager in accordance with corporate procedures.

These numeric criteria (250 individuals, 25 million in second quarter 1980 dollars) were added in 1983 (See 48 FR 39612 (Sept. 1, 1983)) to ensure that facility managers who sign permit applications have high level corporate knowledge of a corporation's pollution control operations and are authorized to make management decisions which govern the operation of the regulated facility. EPA did not intend signatories to include field supervisors or facility operators because at the time that rule was established, we believed such individuals might not have the ability to direct the activities of the corporation so as to ensure that necessary procedures are established or actions taken to gather complete and accurate information. EPA now believes these criteria to be obsolete because they do not apply well to current corporate

structures and facility operations in light of emerging trends in automation and decentralization. The use of such rigid indicators may operate to disqualify individuals who are best able to undertake the responsibility of ensuring that permit applications are accurate and complete. Today's proposal seeks to revise § 122.22(a)(1)(ii) to remove numerical criteria, and provide instead language which ensures that facility managers who sign permit applications have high level corporate knowledge of a corporation's pollution control operations and are authorized to make management decisions which govern the operation of the regulated facility including the ability to allocate resources, make major capital investments, and initiate and direct the development of other comprehensive measures to assure long term compliance with environmental laws and regulations.

Instead of numeric criteria, today's proposal provides that signatories to permit applications may include the manager of one or more manufacturing, production, or operating facilities, provided, (1) the manager is authorized to make management decisions which govern the operation of the regulated facility including the ability to allocate resources, make major capital investments, and initiate and direct other comprehensive measures to assure long term environmental compliance with environmental laws and regulations; (2) the manager can ensure that the necessary systems are established or actions taken to gather complete and accurate information for permit application requirements; and (3) the manager has been assigned or delegated authority to sign documents in accordance with corporate procedures.

EPA believes that today's proposed rule remains consistent with the intent of the September 1, 1983 rulemaking to ensure that permit application signatories are those who are best able to ensure that accurate, complete, and truthful permit applications are submitted, while allowing for greater flexibility in the use of signatories. However, EPA invites comment on whether other criteria would prove more appropriate in light of modern corporate management structures for determining signatories for permit applications under § 122.22(a)(1)(ii).

7. Group Permit Applications (40 CFR 122.26(c)(2))

The 1987 amendments to the Clean Water Act (CWA) added section 402(p) which established a two phase approach for addressing point source discharges of storm water. Under Section 402(p), Congress identified five classes of point source storm water discharges that would be included in Phase I of the Storm water program and required to obtain NPDES permits. These are:

- A discharge for which a permit has already been issued under this section prior to February 4, 1987;
- A discharge associated with industrial activity;
- A discharge from a municipal separate storm sewer system serving a population of 250,000 or more;
- A discharge from a municipal separate storm sewer system serving a population of 100,000 or more but less than 250,000; and
- A discharge for which the Administrator or the State determines that the storm water discharge contributes to a violation of a water quality standard or is a significant contributor of pollutants to waters of the U.S.

To implement the phase I provisions of Section 402(p) (1) through (5), EPA published final storm water permit application regulations on November 16, 1990 (55 FR 48063), as revised. For storm water discharges associated with industrial activity, EPA defined eleven categories comprising major groupings of industrial sectors that are identified either by standard industrial classification (SIC) code or through narrative descriptions. Industrial activities that fall within these eleven industrial categories and which have a point source discharge of storm water are required to seek a NPDES permit.

EPA anticipated that the implementation of the Phase I industrial program would cover over 100,000 facilities. To ensure the timely issuance of NPDES permits, EPA sought in the final rule to offer several NPDES administrative approaches to facilitate extended permit coverage as cost effectively and as efficiently as possible to large numbers of permittees. In the November 16, 1990 final rule, EPA provided that storm water discharges associated with industrial activity could pursue one of three permit application options including the submission of:

- An individual permit application;
- A notice of intent to be covered under a general permit; or
- A group permit application.

Today's revision focuses on group applications. This option allowed facilities with very similar activities to form groups to submit a joint application of which only ten percent of the group would have to submit monitoring information. EPA developed this option to accomplish the following goals:

- To establish a procedure where adequate information would be collected for developing permits for certain classes of storm water discharges;
- to reduce costs and administrative burdens on permit applicants;
- to reduce the amount of quantitative data by requiring such data from only selected facilities within a group; and
- to ease the burden on the permit issuing authority by consolidating information.

In response to the group application option, EPA received over 1200 group applications encompassing 65,000 industrial activities. Using the information provided by group applicants, EPA developed a multi-sector storm water general permit (MSGP) which was published on September 29, 1995 (and revised on February 9, 1996). The MSGP includes baseline conditions applicable to all industrial activities within 29 industrial sectors and conditions that are specific to each sector. The MSGP is available in States where EPA is the permitting authority. Industrial facilities seeking coverage under the MSGP must submit a single page notice of intent (NOI) to receive coverage. Where States have NPDES authority, the MSGP is available as a model to assist those States in providing permit coverage for storm water discharges in their jurisdictions. While the MSGP was initially developed through the group application process, it has evolved into a general permit whose coverage is available to all facilities that meet its eligibility requirements. It has also led to the development of a substantial body of information regarding the permitting and control of storm water discharges from industrial activity.

The group application process was designed to accommodate the initial influx of first-time permit applications from Phase I industrial activities and was based, in part, on the limited availability of storm water general permits in States. However, the deadlines for submitting group applications for Phase I facilities expired on October 1, 1992, and coverage under storm water general permits is now widely available. Forty States are authorized to issue storm water general permits. EPA issues storm water general permits for those States and jurisdictions that are without EPA authorization. Industrial facilities may readily obtain permit coverage by submitting a NOI to the appropriate permitting authority or through applying for an individual permit. Consequently, EPA believes the group

application option is no longer needed. General permits provide a more flexible approach to storm water coverage and can accomplish the goals of the group permit application process (i.e., more efficient monitoring, reduced application burdens) without requiring that applicants form into groups prior to applying for permit coverage.[1] EPA also believes that storm water pollution prevention plans (a principal requirement of most storm water general permits) will ensure that permit conditions are appropriate and applicable for the industrial activities covered. Consequently, today's notice proposes to eliminate the group application option at § 122.26(c)(2), and proposes conforming changes to paragraph (c)(1). The removal of the group application provisions will not impact EPA's ability to reissue the MSGP because it is a general permit.

8. General Permits (40 CFR 122.28)

EPA's NPDES general permit program arose out of the broad grant of authority in section 402(a) of the CWA and the decision of *NRDC* v. *Train*, 396 F.Supp. 1393, 1402 (D.D.C. 1975), *aff'd*, *NRDC* v. *Costle*, 568 F.2d 1369 (D.C. Cir. 1977) which recognized EPA's authority to employ administrative mechanisms, such as area (general) permits, to assist the Agency in the practical administration of the NPDES permit program. In 1979, EPA promulgated revisions to the NPDES regulations creating a class of permits referred to as ''general permits.'' 44 FR 32873 (June 7, 1979). Under the general permit program, the permitting authority may issue a permit to cover a class of similar dischargers or treatment works treating domestic sewage in a defined geographic area with the same effluent limitations.[2] General permits have proven to be a valuable tool by which to regulate classes of similar discharges. To improve administration and operation of the general permit program and to encourage more widespread use of general permits, the Agency is proposing to amend the general permit regulations to allow general permits to cover multiple categories of dischargers.

The current regulatory requirements for general permits are set out at 40 CFR 122.28, and allow the Director to issue a single permit covering more than one discharger (or treatment works treating domestic sewage) within a specific geographic area. Historically, certain regulatory restrictions have been applied to general permits. General permits have been limited to specific areas corresponding to certain geographic or political boundaries. 40 CFR 122.28(a)(1). Current regulations also provide that general permits may regulate storm water point sources, or a category of point sources other than storm water that involve substantially similar types of operations, discharge the same types of wastes or engage in the same types of sludge use or disposal practice, require the same effluent limitations, require the same or similar monitoring, and in the opinion of the permitting authority, are more appropriately controlled under a general permit than under individual permits. 40 CFR 122.28(a)(2). This provision has been generally interpreted as limiting coverage of non-storm water general permits to only a single category of point sources, such as a single industrial category covered under an effluent guideline. (EPA's regulations do allow general permits for storm water to regulate multiple categories of point sources.)

In today's notice, EPA seeks to revise § 122.28(a) (1) and (2) to clarify that a general permit for non-storm water dischargers may cover more than one category or subcategory of sources or treatment works treating domestic sewage. This revision will enable greater permit drafting flexibility and would allow the Director to write a general permit covering (as separate categories) permittees whose discharges or sludge use or disposal practices differ substantially, for example, regarding flow or pollutant load, as well as for those permittees with similar discharges or sludge use or disposal practices (a single category). In another case, the Director might designate different monitoring requirements for different categories based on discharge flow or frequency and provide for this without having to promulgate separate general permits for each group of dischargers or treatment works treating domestic sewage in the general category.

The types of operations conducted or wastes discharged within each category or subcategory authorized by the general permit (except for general permits for storm water discharges) would still have to be substantially the same. Within each identified category or subcategory, limitations would have to be identical for all covered dischargers or treatment works treating domestic sewage. In today's notice, EPA proposes to revise § 122.28 by adding a new paragraph, (a)(4), to require that general permits must clearly identify the applicable conditions for each category of dischargers or treatment works treating domestic sewage and provide that general permits may exclude specified sources or areas from coverage.

Today's proposal would also revise § 122.28 by adding a new paragraph, (a)(3), to provide that where dischargers (or treatment works treating domestic sewage) are subject to water quality-based limitations, the sources in that specific category or subcategory shall be subject to the same water quality-based effluent limitations. While this provision would appear at first to be redundant with existing provisions at § 122.28(a)(2)(i)(C) which require that non-storm water sources covered under a general permit must require the same effluent limitations, operating conditions, or standards for sewage sludge or disposal, the restrictions contained in proposed paragraph (a)(3) apply to storm water and non-storm water sources where water quality-based limits are involved. EPA is proposing to add this paragraph in part to clarify that general permit categories can be used to impose water quality-based limitations as well as technology-based limitations. However, paragraph (a)(3)'s requirement that sources in categories or subcategories be subject to the same water quality-based limits reflects EPA's position that general permits should not be used to provide permit coverage to loosely grouped categories of dissimilar discharges. While EPA has decided not to require that each category or subcategory covered under a general permit discharge to waters that are subject to the same water quality standards, permit writers may wish to consider such a categorization particularly when calculating general permit discharges as part of a waste load allocation.

Because the proposal would allow issuance of a single general permit to cover multiple categories of facilities, it would facilitate the use of general permits in areas with differing water quality requirements or standards. It may allow the permitting authority to issue general permits on a watershed or geographic basis to facilities with the same water quality requirements. The proposal would allow a permit drafted to cover a single category of dischargers or treatment works treating domestic sewage to cover different subcategories subject to different effluent limitations, standards, or conditions. This should reduce the burden on the permitting agency by decreasing the number of general permits issued. The proposal intends to provide flexibility to deal

[1] However, permittees may still be classified as belonging to specific sectors or categories for the purpose of coverage under a general permit. This may result in the imposition of sector or category-specific conditions.

[2] The provision allowing general permits to address treatment works treating domestic sewage was added by EPA's sewage sludge permit regulations issued on May 2, 1989 (54 FR 18716).

with the variations between the different dischargers or treatment works treating domestic sewage (or water quality based stream segments) covered under a single general permit. General permits are still subject to the same reporting and monitoring requirements, limitations, enforcement provisions, penalties, and other substantive requirements as individual permits.

9. Monitoring (40 CFR 122.41(j), 122.41(l)(4), 122.44(i)(1)(iv), 122.48)

Monitoring requirements for NPDES permits are currently found in different locations in EPA's regulations. Section 122.41(j)(1) requires that monitoring be representative of the monitored activity. Paragraph (j)(2) imposes requirements relating to the retention of monitoring records. Paragraph (j)(3) places requirements on what information will be provided in monitoring records. Paragraph (j)(4) requires that monitoring be conducted according to part 136 testing procedures unless otherwise specified. Paragraph (j)(5) imposes penalties for any person who falsifies, tampers with, or knowingly renders inaccurate monitoring devices or methods. Section 122.41(l)(4) addresses the reporting of monitoring results and provides specific requirements relating to Discharge Monitoring Reports (DMRs). Section 122.44(i) imposes requirements on monitoring methodologies. Finally, § 122.48 imposes requirements for recording and reporting of monitoring results.

EPA believes this arrangement to be confusing. To provide better clarification, EPA proposes to consolidate the monitoring provisions found at §§ 122.41 (j), (l)(4), and 122.44(i) and place them at § 122.48. In addition, a cross reference to the new consolidated monitoring requirements will be placed at 122.41(j) to ensure monitoring remains a standard condition for all NPDES permits. This revision is not intended to result in any substantive changes to monitoring requirements. EPA notes that the penalty provisions of 40 CFR 122.41(j)(5) (providing for penalties for falsifying, tampering or knowingly rendering inaccurate monitoring devices or methods) remain a standard condition of all EPA-issued NPDES permits. As described in more detail below, 40 CFR 122.41(j)(5) (proposed § 122.48(d) in today's notice) is not required for authorized State programs. However, 40 CFR 123.27 contains a similar prohibition against falsifying, tampering, or knowingly rendering inaccurate monitoring devices or methods which must be included in authorized State programs.

As part of this consolidation, EPA is combining the provisions currently found at §§ 122.41(j)(4) and 122.44(i)(1)(iv) at proposed § 122.48(a)(3). Both of these provisions require that monitoring be conducted in accordance with test procedures approved under 40 CFR part 136 unless an alternative test procedure has been approved under part 136. For sludge use or disposal, monitoring must be conducted in accordance with test procedures approved under part 136 unless otherwise specified in 40 CFR part 503. Both §§ 122.41(j)(4) and 122.44(i)(1)(iv) were once promulgated as single provision (See 44 FR 32910 (June 7, 1979) (codified then as 40 CFR 122.20 (a)–(c))) and were only broken out to conform to the organization of the consolidated permit regulations. See 45 FR 33340–4, 33355, 33357, 33448, and 33450 (May 19, 1980). EPA is also clarifying that where no test procedure has been approved under 40 CFR part 136, the Director shall specify a test method in the permit. This reflects the current requirements found at § 122.44(i)(1)(iv) and as also expressed in EPA's June 7, 1979 rulemaking. EPA believes this revision does not result in any substantive changes to the monitoring requirements but only clarifies its existing interpretation of them.

10. Effluent Guideline Limits in Permits (40 CFR 122.44(a))

Currently, § 122.44(a) is interpreted to require that where a facility is covered by a particular effluent guideline, any permit issued to that facility must contain effluent limitations for every pollutant or parameter listed in the guideline (also known as ''guideline-listed pollutants''). These limits would be required regardless of whether the facility would actually be discharging those parameters. Because permittees must also monitor for all parameters limited in a permit (see 40 CFR 122.44(i)(1)(i)), there are concerns that this requirement may subject many facilities to the unnecessary expense of monitoring for pollutants that they are not and will not be discharging.

To provide permit writers with more flexibility in reducing the burdens associated with unnecessary monitoring, EPA is proposing to revise § 122.44(a) so that it does not require limits for all guideline-listed pollutants under certain circumstances. Existing paragraph (a) would be redesignated as (a)(1). A new paragraph, (a)(2), would allow permit writers on a case-by-case basis not to include limits for guideline listed pollutants where a permit applicant certifies and provides supporting information that the facility does not discharge and will not discharge certain guideline-listed pollutants. In such cases, permit writers may decide not to include a limit for those parameters in the permit. However, it should be clearly understood that in such instances, the permit would not authorize any discharges of those excluded parameters in any amounts. For the exclusion to be valid, the permit would have to contain an express condition which notes that the permit does not authorize the discharge of those excluded pollutants. This exclusion is good only for the term of the permit. To receive an exclusion under proposed paragraph (a)(2), Permittees must submit certifications (along with supporting information) each time a permit is applied for (including permit reissuances). For such an exclusion to be valid, it must be included as an express condition each time a permit is issued.

EPA believes that this approach provides permittees and permit writers with needed flexibility in reducing the burdens associated with conducting unnecessary monitoring while ensuring that permits are not interpreted as an authorization to discharge excluded pollutants in unlimited amounts. This revision is not intended to allow the exclusion of any pollutants that should be limited on the basis of water quality standards.

Applicants should not pursue this approach if there is any possibility those excluded parameters might be discharged. Applicants may instead utilize the existing process of having limits placed on all guideline-listed pollutants and seek minimum monitoring for those parameters whose presence in the discharge is not expected. EPA solicits comments on this proposal and also invites public comment on other ways this process can be streamlined to remove any unnecessary burdens with respect to limiting and monitoring for pollutants.

11. Reopener Clauses (40 CFR 122.44(c))

Section 122.44(c) provides for reopener clauses in permits. Section 122.44(c)(1)(i) requires that any permit issued to a discharger in a primary industry category (listed in Appendix A of part 122) on or before June 30, 1981, must contain an reopener clause to allow for permit modification, revocation, or reissuance if an applicable standard or limitation is promulgated under sections 301(b)(2)(C) and (D), 304(b)(2), and 307(a)(2) of the CWA after such a permit was issued and the standard or limitation is more stringent than what is found in the

permit or controls a pollutant not limited in the permit. Where applicable standards and limitations have already been promulgated, § 122.44(c)(1)(ii) requires that subsequent permits include those limitations. Section 122.44(c)(3) imposes a duty on permitting authorities to promptly modify, revoke, and reissue permits to which § 122.44(c)(1)(i) applies.

These provisions were established to implement the requirements of a settlement agreement approved by the United States District Court for the District of Columbia issued on June 8, 1976 in *Natural Resources Defense Council et al.* v. *Train,* 8 E.R.C. 2120 (D.D.C. 1976). See 43 FR 22161 (May 23, 1978). This settlement agreement resulted in a new program for the establishment of effluent limitations guidelines, new source performance standards, and pretreatment standards for 21 major categories of industries as well as the incorporation of those limits in permits issued to dischargers from those categories. To meet that goal, the agreement resulted in the imposition of a number of deadlines. On May 19, 1980 (45 FR 33449), those deadlines were replaced with a single deadline, June 30, 1981, which is found at § 122.44(c)(1).

In today's notice, EPA proposes to remove paragraphs (c)(1), (c)(2), and (c)(3) of § 122.44. Paragraphs (c)(1) and (c)(3) apply only to permits issued on or before June 30, 1981. These provisions are obsolete as more than 14 years have passed since that deadline and any permits issued on or before that date are either no longer in existence or in administrative continuance. EPA also proposes to remove paragraph (c)(2) and consolidate its requirements with those found at § 122.44(a). Paragraph (c)(2) provides that any permit issued after the deadline provided by section 301(b)(2)(A), (C), and (E) (established as March 31 1989 by the 1987 amendments to the Clean Water Act), must meet BAT and BCT standards whether or not applicable effluent limits have been promulgated or approved. Paragraph (c)(2) further states that such permits need not incorporate the reopener clause found in section paragraph (c)(1). Paragraph (c)(2) largely reiterates requirements found at Section 122.44(a) because paragraph (a) already requires that permits must meet all technology-based effluent limitations and standards promulgated under section 301, all new source performance standards under section 306 of the CWA, and case-by-case effluent limitations determined under section 402(a)(1) of the CWA. EPA proposes in today's notice to consolidate the requirements of 40 CFR 122.44(a) and (c)(2) into a new paragraph, (a)(1). (As noted in greater detail above, EPA is also creating a new paragraph, (a)(2), which contains language concerning guideline listed pollutants.) Proposed paragraph (a)(1) requires that permits shall include technology-based effluent limitations and standards based on: Effluent limitations and standards promulgated under section 301(b)(1) or 301(b)(2), as appropriate, new source performance standards promulgated under section 306 of CWA, case-by-case effluent limitations determined under section 402(a)(1) of CWA, or on a combination of the three, in accordance with § 125.3. For new sources or new dischargers, paragraph (a)(2) also notes that these technology based limitations and standards are subject to the provisions of § 122.29(d) (protection period).

Paragraph (c)(4) covers reopeners of sludge conditions in NPDES permits. EPA is proposing to retain that provision and redesignate it as paragraph (c).

By removing these provisions, EPA does not intend to limit the ability of permitting authorities to place reopener clauses in permits on a case-by-case basis particularly where reopeners may result in more environmentally protective permit limits, standards, or conditions.

12. Best Management Practices (40 CFR 122.44(k))

As described in more detail below, EPA is proposing in today's notice a non-substantive revision to § 122.44(k) which would provide a reference to available agency guidance on best management practices. The addition of this language is merely intended to assist readers in developing and implementing best management practices. It is not intended in anyway to change the requirements of § 122.44(k).

13. Termination of Permits (40 CFR 122.64)

Section 122.64 lists the causes for EPA termination of an NPDES permit during its term, or for denial of an application for permit renewal. If the Director decides to terminate a permit, he or she currently must follow the procedures at § 124.5, or approved State procedures, which require preparation of a notice of intent to terminate (a type of draft permit) and public notice and comment. (As discussed in more detail in Section II.B below, EPA is proposing to substitute part 22 procedures for termination of permits other than at the request of the permittee, also known as ''termination for cause''.) These procedures are intended primarily to assure that the rights of the permittee are adequately considered. This is because permit termination has been considered as essentially an enforcement mechanism. See 45 FR 33316 (May 19, 1980); 44 FR 34249 (June 14, 1979). However, there may be situations outside of enforcement where termination is desirable because the permittee has discontinued operation or connected the discharge to a POTW. In those situations, EPA sees little benefit in requiring the procedures of § 124.5 as currently written (or part 22 as proposed).

EPA is proposing to revise § 122.64 to allow the Director to terminate a permit by giving notice to the permittee and without following part 22 or 124 procedures where the permittee has permanently terminated its entire discharge (by elimination of its process flow or other discharge components) or has redirected that discharge into a POTW. However, where a permittee objects to the termination, this revision would require the Director to follow the existing part 124 procedures to terminate the permit. (But as noted in more detail below at Section II.B, formal hearings under part 22 would not be necessary since the termination would not be one for cause and today's proposal would remove formal hearing requirements for permit terminations that are not for cause. EPA notes that these expedited permit termination procedures would not be allowed where a permittee is subject to pending State and/or Federal enforcement actions including citizen suits brought under State or Federal law. In such situations, the public has a strong interest in participating in any permit termination proceedings and permittees should not use expedited permit termination procedures as a way to avoid enforcement liability. Therefore, EPA is adding language in proposed § 122.64 to state that expedited permit termination procedures are not available to permittees that are subject to pending State and/or Federal enforcement actions including citizen suits brought under State or Federal law. EPA will also require that permittees who request expedited permit termination procedures must certify that they are not subject to any pending State and/or Federal enforcement actions including citizen suits brought under State or Federal law. EPA specifically invites comment on how EPA and permitees may determine if there are pending State and/or Federal enforcement actions. One possible approach may be to deny the availability of expedited permit terminations where EPA, the

State, or any person has commenced an action against a permittee under State and/or Federal Law, or where a permittee, the Administrator, or the State has received notice of an intent to sue pursuant to 40 CFR § 135 or State law. EPA invites comment on that approach.

Also, EPA is not proposing to eliminate the requirement to follow part 124 termination procedures if the pollutants will be disposed of either in wells or by land application of effluent, even if the permittee requests termination. In such cases, it is important that the public be notified and able to pursue any concerns about such disposal methods under other appropriate Federal, State or local regulatory programs. EPA also notes that there are situations where permits are appropriate for no discharge facilities, particularly where there is the possibility of an inadvertent discharge into waters of the United States.

This proposal would enable the Director to terminate permits when the discharger has eliminated its discharge without waiting for permit expiration. EPA notes that a permittee terminating its discharge due to connection to a POTW would be subject to applicable pretreatment requirements, including those in parts 403 and 405–471, along with any local requirements. An existing categorical industrial user initiating a discharge to a POTW must notify the POTW in accord with § 403.12. EPA also notes that permittees should be very sure that they have, in fact, eliminated their discharge when requesting expedited permit termination procedures. This is because any pollutants discharged by the facility subsequent to permit termination could violate section 301 of the CWA (prohibition against unpermitted discharges).

This proposal would streamline the permit termination process without sacrificing any procedural safeguards. EPA specifically invites comment on whether members of the public, other than the permittee, would have a significant interest in such terminations such that public notice should continue to be required.

EPA is also proposing conforming changes to § 124.5 procedures to reflect abbreviated termination procedures proposed for the cases discussed in proposed § 122.64(b). One pre-notice commenter has recommended that these expedited permit termination procedures be employed where an existing discharger seeks to terminate its individual permit coverage and obtain coverage under a general permit for the same discharge. EPA invites comment on whether expedited permit termination procedures should be employed for this and other situations.

B. Proposed Revisions to Part 123

1. Requirements for Permitting (40 CFR 123.25)

EPA is today proposing revisions to 40 CFR 123.25(a) to clarify that certain provisions which detail penalty amounts in § 122.41 (a)(2), (a)(3), and (j)(5) are not required of State NPDES programs. Instead, the applicable penalty provisions for State NPDES programs are found at 40 CFR 123.27. This is consistent with EPA's long standing interpretation of the Clean Water Act and its regulations. See OGC Opinion dated May 31, 1973. However, EPA notes that while the penalty provisions of 122.41 (a)(2) and (a)(3) need not be included in State NPDES programs, § 122.41(a)'s condition, ''a duty to comply'' does. With respect to existing § 122.41(j) (proposed in today's notice as § 122.48(d)), EPA notes that it does not have to be included in NPDES State Programs. However, EPA wishes it to be clear that it interprets § 123.27(a)(3) to contain the same prohibitions as those found in paragraph § 122.41(j). That is, a person who falsifies, tampers with, or knowingly renders inaccurate, any monitoring device or method required under a permit is subject to criminal fines and penalties as determined under § 123.27. Finally, EPA notes that States are not prohibited from adopting penalty amounts that are the same as those found at § 122.41 if they wish to do so.

2. Transmission of Information to EPA (40 CFR 123.44)

EPA is today proposing revisions to 40 CFR 123.44 to remove references to the Office of Water Enforcement and Permits (OWEP) and its role in commenting on and objecting to State-issued general permits. At one time, OWEP (now known as the Office of Wastewater Management) was expected to play an active role in reviewing, commenting, and objecting to State-issued general permits. Under provisions once found at 40 CFR 123.43(b) and 124.58, authorized States were required to provide copies of draft general permits (other than those for separate storm sewers) to the Director of OWEP for review. Section 123.44(a)(2) of EPA's current regulations further provides that the Director of OWEP may comment upon, object to, or make recommendations with respect to proposed State-issued general permits (other than those for separate storm sewers) on EPA's behalf. The introductory text of § 123.43(b)(2) also expressly provides OWEP with a role in objecting to State-issued general permits. Finally, § 123.44(i) makes the role of the Director of OWEP coextensive with that of the Regional Administrator for the purposes of objecting to proposed State-issued general permits (other than those for separate storm sewers).

The Office of Wastewater Management no longer plays an active role in reviewing State-issued general permits. The number of State general permit programs have increased with a corresponding increase in the number of State-issued general permits. This has resulted in the Regions assuming the primary role in reviewing State-issued general permits. Moreover, as States have gained more experience in running general permit programs, EPA believes that an extra level of EPA review is no longer warranted. On June 29, 1995, EPA removed §§ 123.44(b) and 124.58 from the Code of Federal regulations as unnecessary in light of the Regions' primary role in reviewing State permits. See 60 FR 33931. To conform to those earlier changes and to continue EPA's effort to streamline Federal oversight of State NPDES permit programs, EPA proposes in today's notice to revise § 123.44 (a)(2) and (b)(2) to remove those references to OWEP and its role in reviewing State-issued general permits. EPA would also remove and reserve 40 CFR 123.44(i).

C. Proposed Revisions to Public Hearing Requirements for NPDES Permit Actions and RCRA Permit Terminations

EPA is today proposing substantial revisions to its existing procedural requirements for issuing NPDES permits in those States and territories (and in Indian Country) where EPA retains the authority to issue NPDES permits. EPA is proposing to eliminate as unnecessary the existing procedures for conducting formal evidentiary hearings on NPDES permit conditions contained in 40 CFR part 124, subpart E, and is further proposing to eliminate the alternative ''Non-Adversary Panel Procedures'' in part 124, subpart F. EPA is also proposing to eliminate Appendix A to part 124 (Guide to Decisionmaking under part 124) because its role in explaining subpart E and subpart F procedures would no longer be relevant in the absence of those subparts. EPA is also proposing to modify the procedures for terminating NPDES and RCRA permits. These revisions do not apply to authorized State NPDES Programs.

1. Background of the Current Rule

Section 402(a) of the CWA authorizes the Administrator to issue an NPDES permit ''after opportunity for a hearing.'' In the late 1970's, three United States Circuit Courts of Appeals concluded that section 402(a) of the CWA requires that NPDES permit adjudications be conducted according to formal adjudicatory procedures that meet the standards set forth in sections 554, 556 and 557 of the Administrative Procedure Act (''APA''). 5 U.S.C. 554, 556 & 557. These courts reasoned that the reference to a ''hearing'' in section 402(a), in light of the ''quasi-judicial'' nature of the fact finding involved in NPDES permit proceedings, indicated Congressional intent to require formal adjudicatory procedures, notwithstanding the absence of an explicit requirement in the Act that such procedures be followed. *Seacoast Anti-Pollution League* v. *Costle,* 572 F.2d 872, 877 (1st Cir. 1978); *Marathon Oil Co.* v. *EPA,* 564 F.2d 1253, 1264 (9th Cir. 1977); *United States Steel Corp.* v. *Train,* 556 F.2d 822, 833 (7th Cir. 1977).

Largely because of the holdings in these cases, EPA promulgated the current part 124 regulations in 1979, which require formal evidentiary hearings of the type contemplated by section 554 of the APA. 44 FR 32854, 32855 (June 7, 1979). These procedures apply to any NPDES permit decision (i.e., a decision to grant a permit, to deny a permit, or to terminate a permit for cause under 40 CFR 122.64), and to a decision to terminate a permit for a hazardous waste treatment, storage, or disposal facility issued under Section 3005 of RCRA. 40 CFR 124.71, 270.43.

Under part 124, when issuing, denying, or terminating an NPDES permit (or terminating a RCRA permit), EPA undergoes a complicated 3-step administrative process. Step 1 begins when a discharger submits an application for a new or revised NPDES permit. Based on the application, the appropriate EPA Regional Office prepares a draft permit (or draft decision to deny) detailing the proposed conditions on the discharger. The EPA Region provides notice and an opportunity for public comment on draft permits (40 CFR 124.10) and provides a public hearing when there is a significant degree of public interest. 40 CFR 124.12(c). Step 1 ends when the Regional Administrator (or his or her designee) issues a final permit decision, incorporating any changes in the draft permit occasioned by the public comments received.

The permit takes effect 30 days after issuance unless the permittee or any other member of the public who commented on the draft permit initiates Step 2 (or if one of the other two exceptions at 40 CFR 124.15(b) are met i.e., a later effective date is specified in the permit decision, or if no comments have requested a change in the draft permit, it becomes effective immediately upon issuance). In Step 2, a party appeals the permit decision by requesting an evidentiary hearing. 40 CFR 124.15(b). To exhaust administrative remedies, the permittee (or the public) must request an evidentiary hearing on all contested issues (legal and factual). The EPA Regional Administrator must then decide whether to grant or deny the request for a hearing. The Regional Administrator shall grant a hearing on any issue for which there is a genuine dispute of material fact, and on any legal issue which is intertwined with such material factual issues. The Regional Administrator will deny a hearing on any other legal issues, or on any factual issues for which there is no material dispute. If a hearing is granted on any issue, an Administrative Law Judge presides over a formal evidentiary hearing following the procedures of 40 CFR part 124 subpart E.

As an alternative to the full adjudicatory proceeding, EPA regulations also provide that Steps 1 and 2 may be combined in a single semi-formal hearing process before a non-adversary panel of EPA experts (called a ''Non-Adversary Panel Procedure'' or ''NAPP''). 40 CFR part 124 subpart F. These procedures apply only to NPDES permits which constitute an ''initial licensing'' proceeding under the Administrative Procedure Act, or if a party to the proceeding requests such a hearing. 40 CFR 124.74(c)(8), 124.111(a)(1).

For issues decided in an evidentiary hearing or Non-Adversary Panel Procedure (and for issues arising when a request for an evidentiary hearing is denied), a party may initiate Step 3 by appealing the Regional Administrator's decision to EPA's Environmental Appeals Board. 40 CFR 124.91, 124.127. The appeal provides an opportunity to review any factual conclusions (under a ''clear error'' standard), policy decisions, or legal conclusions. The appeal is the final prerequisite to judicial review. The entire administrative process (that is, to comment at Step 1, to appeal at Step 2, and to further appeal at Step 3) must be exhausted in order to obtain judicial review.

By contrast, permits issued or denied under RCRA Subtitle C, the UIC program of the Safe Drinking Water Act, or the PSD program of the Clean Air Act, use Steps 1 and 3 of the above-described process, but not Step 2. In other words, a party may appeal from the Regional Administrator's permit decision directly to the Environmental Appeals Board. 40 CFR 124.19(a). There is no provision for formal adjudicatory hearings, unless the RCRA, UIC, or PSD permit has been consolidated for purposes of permit issuance with an NPDES permit for which a request for evidentiary hearing has been granted. 40 CFR 124.71(a).

EPA's experience with the evidentiary hearing process suggests that it causes significant delays in NPDES permit issuance without causing noticeable improvements in the quality of the permit decisions made. As discussed in more detail below, EPA statistics suggest that at least 80% of all requests for evidentiary hearing are resolved without a hearing taking place or any changes being made to the permit. Nonetheless, it takes an average of 18–21 months to complete the 2-part appeals process for such permits. EPA has maintained the process primarily due to concerns about the legality of adopting less formal procedures. As discussed below, however, these concerns no longer hold true.

2. Proposed Elimination

In EPA's opinion, formal evidentiary hearings are not required by the CWA, nor are they necessary to protect the due process rights of permittees or other interested parties. EPA therefore proposes to eliminate the requirement for such hearings prior to EPA's issuance of NPDES permits.

a. Legal Basis. (1) The Language of Section 402(a). EPA has concluded that due to the progress of the law in the Courts of Appeals, the *Seacoast* and *Marathon* decisions are no longer good law, and that the CWA may be interpreted not to impose a formal hearing requirement. As noted earlier, Section 402(a) does not explicitly state that public hearings on NPDES permits must be conducted ''on the record,'' the phrase normally associated with a requirement that hearings be conducted under section 554 of the APA. The absence of an explicit requirement in section 402(a) that formal APA procedures be used is significant in light of certain judicial decisions that followed the promulgation of the part 124 regulations. These decisions, which address procedural requirements under statutory provisions other than section 402(a) of the CWA, have abandoned the presumption that trial-type hearings are required by the APA where a statute calls for an adjudicatory hearing

without explicitly requiring formal procedures. *Chemical Waste Management* v. *EPA*, 873 F.2d 1477 (D.C. Cir. 1989) (''*CWM*'') (RCRA section 3008(h)); *Buttrey* v. *United States*, 690 F.2d 1170 (5th Cir. 1982) (CWA section 404).

In *CWM*, the D.C. Circuit upheld RCRA regulations establishing informal procedures for adjudicating corrective action orders under RCRA section 3008(h). 873 F.2d at 1478. RCRA section 3008(h) does not specifically provide for hearings, but section 3008(b) provides that ''[a]ny order issued under this section shall become final unless * * * the person or persons named therein request a public hearing. Upon such a request the Administrator shall promptly conduct a public hearing.'' 42 U.S.C. section 6928(b). Under the RCRA corrective action hearing regulations at 40 CFR part 24, the operator of a hazardous waste facility may submit written information and arguments for inclusion in the record and may make an oral presentation at the hearing itself. Direct and cross-examination of witnesses is not permitted, but the Presiding Officer may direct questions to either party. The Presiding Officer is to be either the Regional Judicial Officer or an attorney employed by the Agency who has not had any prior connection with the case. The RCRA regulations contain detailed requirements for the establishment of the administrative record. The Presiding Officer must review the record and file a recommended decision with the Regional Administrator, who in turn renders a final decision that is judicially reviewable under the APA. These procedures closely parallel, of course, the procedures for processing a permit under part 124, subpart A.

In *Buttrey*, the Fifth Circuit upheld the hearing regulations used by the Army Corps of Engineers to issue or deny CWA section 404 permits. 690 F.2d at 1172. Section 404 provides that the Secretary may issue permits for the discharge of dredge or fill material ''after notice and opportunity for public hearings.'' 33 U.S.C. section 1344(a). The Corps' section 404 procedures authorize a ''paper hearing,'' with public notice and comment on the proposed permit action. Corps procedures do not explicitly provide an opportunity for oral presentations.

Both *Buttrey* and *CWM* seriously question the continuing validity of *Seacoast* and *Marathon*. *CWM*, in particular, notes that the cases were decided prior to the Supreme Court's decision in *Chevron, U.S.A.* v. *NRDC*, 467 U.S. 837, 843 (1984), which held that where Congress has failed to express a clear intent to the contrary, an agency charged with administering the statute may adopt any interpretation which is reasonable in light of the goals and purposes of the statute. Where a statute fails to use the term ''on the record,'' the court will evaluate whether the hearing procedures adopted by the agency are reasonable in light of the statute and also any due process considerations. *CWM*, 873 F.2d at 1482. The D.C. Circuit has also noted that even assuming formal hearings are required for issuance of NPDES permits, there is no absolute right to provide oral testimony or to cross examine witnesses in such hearings. *NRDC* v. *EPA*, 859 F.2d 156, 193 (D.C. Cir. 1988) (upholding EPA's Non-Adversary Panel Procedures and distinguishing *Seacoast*).

(2) Reasonableness of Interpretation. As with the 3008(h) rules and the procedures for issuance of RCRA or UIC permits, EPA believes that providing for informal hearings prior to issuance of NPDES permits is a reasonable interpretation of section 402(a).

First and most important, EPA believes that formal hearings are not necessary to protect the due process rights of permittees or other interested parties. The leading Supreme Court case discussing due process requirements is *Mathews* v. *Eldridge*, 424 U.S. 319 (1976). *Mathews* establishes a 3-part analysis that balances the following factors in deciding what procedures are required by the Due Process clause: (1) The private interests at stake, (2) the risk of erroneous decision-making, and (3) the nature of the government interest. Due process generally requires, at a minimum, that EPA provide independent and objective fact-finding, see *Wong Yang Sung* v. *McGrath*, 339 U.S. 33, 41 (1949), *Morrisey* v. *Brewer*, 408 U.S. 471, 489 (1972), as well as a complete administrative record containing the information upon which the Agency relies. See *Camp* v. *Pitts*, 411 U.S. 138, 139–142 (1973). Due process also requires that, prior to final agency action, EPA must provide to affected parties notice of what the Agency intends so that, should those parties disagree, they may submit contrary arguments or evidence. See *Goss* v. *Lopez*, 419 U.S. 565, 581 (1975). See generally, Kenneth C. Davis, Administrative Law Treatise, 10:3, 10:7, 13:1–2, 13:7, & 18:2 (2d ed. 1980). The procedures for processing permits under part 124 subpart A meet all of these minimum requirements.

In an NPDES permit proceeding, the private interests at stake are those of a potential discharger in obtaining a permit to conduct its economic activities in a lawful manner (and the interests of private individuals in challenging permits). Yet, no personal liberty interests are at stake, there is no ''right to pollute,'' and the granting of an NPDES permit does not convey a property right of any sort, or any exclusive privilege. See 40 CFR 122.25(b).

EPA has previously concluded that, in general, due process considerations dictate that most administrative enforcement actions should proceed under formal hearing procedures. In such a proceeding, EPA is accusing respondents of violations of ''established legal standards,'' and the decision maker is called upon to adjudicate specific factual issues relating to the violations in question. See 45 FR 24,360 (Apr. 9, 1980 (promulgating part 22)). The Agency concluded that, without full adjudicatory hearings, there was a significant risk that EPA might be vulnerable to arguments that the Agency lacked the means to properly resolve disputed factual matters upon which the alleged violator's interests were dependent.

However, EPA believes that the nature of the typical hearing on an NPDES permit will differ significantly from the type of hearing held on a compliance or penalty order. Hearings on permits are less apt to present the kind of factual issues regarding the conduct of the discharger, which case law identifies as being uniquely susceptible to resolution in a formal evidentiary hearing. Rather, the issues posed in proceedings on permits will typically relate to legal, policy, or technical matters concerning the appropriate limitations on the pollutants in the discharge, which are most appropriately addressed in informal hearings. The primary factual issues in a hearing on an NPDES permit are likely to involve what technology-based and water quality-based limitations are necessary for inclusion in the permit, and whether EPA has properly derived those limits. These kinds of issues are apt to involve wide-ranging and complex facts and are more susceptible to resolution through analysis of a full documentary record than through examination and cross-examination of witnesses. The goal should then be to compile a full and fair documentary record upon which EPA can base its decision. The procedures in subpart A allow the permittee, other interested parties, and the Agency every opportunity to develop just such a record. Where an issue is in dispute, the Regional Administrator can typically resolve the dispute through analysis of the written affidavits and arguments of

the parties' technical experts. The risk of an erroneous deprivation of the discharger's rights in deciding these issues is accordingly very low.

By contrast, there is a significant public interest in an expedited process for issuing NPDES permits. EPA's experience since 1979 has been that the opportunity to request an evidentiary hearing has led to significant delays in permit issuance. EPA does not have complete data on evidentiary hearing process all the way back to 1979. However, EPA kept comprehensive statistics on the numbers of evidentiary hearing requested, resolved, and pending between 1990 and 1994. As of July 1, 1994, the latest period for which data are available, 194 requests for evidentiary hearing were pending at EPA. That is, 194 requests were awaiting a decision by the Region on the request for evidentiary hearing, were waiting a hearing, or were awaiting action on appeal to the EAB.

Between March, 1990, and July 1, 1994, 59 requests for a hearing were finally resolved, involving 55 different permits. Of those 59, 22 requests for hearing were withdrawn, 26 were denied by the Regional Administrator (RA) or the EAB, and the remaining 11 were settled without hearing. Only four hearings were conducted during this period, and only one hearing resulted in EPA being ordered to make changes to the NPDES permit. Of the 194 pending hearing requests, 19 had been pending with the Agency for 5 years or more. For the 53 permits resolved during the period for which EPA has data, the average time between request and resolution was over 18 months; if one counts only the 33 proceedings which were resolved on the merits (i.e., other than by withdrawal of the administrative appeal), the average time increases to over 21 months. In contrast, EAB appeals for NPDES, RCRA, or UIC permits average under 9 months .

These statistics suggest that evidentiary hearings themselves rarely result in changes in permits. In only 20% of the permits for which EPA has data did the appeal process result in modifications to the permit, and only one out of 55 of those as a direct result of a decision in an actual evidentiary hearing. Rather, any changes to the permits usually resulted from informal settlement discussions between the Region and the permittee (or occasionally by unilateral decision by the Region to change the permit). For the remainder of the requests, the decision of the Regional Administrator or the EAB was sufficient to resolve all issues, and the complete evidentiary hearing and appeal process resulted in no changes to the permits.

Yet, the evidentiary hearing process clearly delays the time in which the permit becomes fully effective. Under current regulations (§ 124.60), contested permit conditions are not in effect pending the dual appeals process. The 18–21 month average appeal time means that many permit limits do not take effect until well into the 5-year permit term (the 5-year term generally begins when the RA issues the permit under § 124.15). For new sources and NPDES dischargers without a prior NPDES permit, they cannot begin to discharge until the permit appeals are resolved. For existing sources, any new or modified permit limits to protect water quality which are contested cannot take effect. Thus, the long lag time in resolving permit appeals can affect all sectors of the public. In particular, the need to pursue multiple levels of administrative appeals imposes unnecessary costs on the regulated community or other parties participating in the permit processes.

The lengthy appeals process also impacts those members of the public who have an interest in participating in the permit process. Citizen participation is a vital component of the NPDES program. Section 101(e) of the CWA explicitly requires EPA to provide for, encourage, and assist in the development of requirements under the CWA. As EPA has noted before, adequate public participation helps to ensure permits which are protective of the environment by giving permit writers the valuable insights of participants other than the permittee. 61 FR 20973–74 (May 8, 1996). The lengthy formal hearing process effectively requires all interested parties to obtain legal counsel and spend a significant amount of time to request, prepare for, and conduct a trial-type hearing before an ALJ. Citizens groups interested in the content of an NPDES permit are likely to lack the same level of resources necessary to participate in such a proceeding that either the government or an NPDES permittee will possess. Thus, the formal process may pose a barrier to citizen involvement in the NPDES permit process.

In addition to affecting the government and public interests in effective permits and effective public participation in permit proceedings, the evidentiary hearing process also represents a significant drain on Agency resources. EPA Regions utilized over 25 work years of staff time between 1990 and 1994 on processing requests for evidentiary hearings, preparing for hearings, or defending before the EAB a permittee's appeal of decisions to deny requests for hearings. Only about 5 and ¼ of those work years were spent actually preparing for or conducting the hearings; the remainder of EPA staff time was used responding to (and usually denying) requests for a hearing and defending a permittee's appeal of those denials before the EAB.

The evidentiary hearing process uses significant Agency resources with little or no apparent gain in the quality of the decision-making. Often, the key issue before the EAB involves whether the RA properly denied the request for evidentiary hearing, either because there was no genuine issue of material fact raised (see *In re Mayaguez Regional Sewage Treatment Plant, Puerto Rico Aqueduct & Sewerage Authority*, NPDES Appeal No. 92–23, at 11 (EAB, Aug. 23, 1993), *aff'd, Puerto Rico Aqueduct & Sewer Auth.* v. *Browner*, 35 F.3d 600 (1st Cir. 1994)), or because the only issues raised were legal issues for which no hearing is necessary (and which the EAB can resolve). EPA utilized 8 work years between 1990 and 1994 defending denials of evidentiary hearing requests, and very few of those decisions were reversed by the EAB. It seems particularly unnecessary for the RA to have to review a request for hearing, prepare a decision to deny the request on the grounds that the only issues are ones for which there is no genuine dispute of material fact, and then defend that decision to deny before the EAB. Rather, it would seem to make more sense to take the legal issues appropriate for EAB resolution straight to the EAB, and leave resolution of the factual issues for the informal hearing process under subpart A. In those instances where the EAB finds that the Region has made a clear error in resolving a factual issue, the EAB could, as it does for RCRA, UIC, or PSD permits, remand the permit decision for further consideration including further development of the administrative record using the informal hearing process. Furthermore, to the extent that informal settlement discussions are necessary to resolve outstanding issues, such discussions could and would take place during EAB review; the formal evidentiary hearing process is not necessary to provide an opportunity for such discussions.

Balancing the private interests at stake in an NPDES permit proceeding with the public interest in ensuring that such permits control discharges (and ensure protection of the environment) in an expeditious and effective manner and the public interest in effective citizen participation in the permit process, and given that the availability of formal hearings do not appear to reduce

significantly the already low risk of erroneous decision-making, EPA concludes that due process considerations do not mandate formal hearings.

EPA also notes that the primary goal of the Clean Water Act is to ensure that waters of the United States obtain ''fishable/swimmable'' status as early as possible. CWA section 101(a). Section 301(b)(1)(C), in particular, requires that NPDES discharges do not cause or contribute to violations of State water quality standards. The long lag time between permit issuance and when effluent limitations take effect under the current proceedings impairs achievement of these goals.

Finally, the number of States in which EPA is the permit issuing authority is small and getting smaller, and EPA anticipates that its role as a permit issuing authority will continue to diminish. Forty-two States or Territories have obtained authorization to issue NPDES permits; EPA retains permitting authority in only 15 States/Territories and in Indian Country. Many States do not provide for formal hearings prior to issuance of NPDES permits, and EPA is unaware that there have been significant problems with the content of such permits as a result.[3] EPA sees no reason to retain formal hearings for a fraction of the NPDES permits issued nationwide.

For all of these reasons, EPA believes that neither due process nor the Congressional goals for the NPDES program counsels in favor of maintaining the evidentiary hearing process, and that, consistent with the principles of *Chevron*, EPA may reasonably interpret Section 402(a) to authorize use of informal hearings when issuing NPDES permits.

b. Proposed New System. (1) Permit Issuance. The existing process for RCRA, UIC, and PSD permits has proven effective in resolving all factual, legal, and policy issues, providing for adequate public participation, and ensuring that permit issues are resolved in a relatively short time frame. EPA therefore proposes to place NPDES permits under the same system.

NPDES permits would therefore utilize Steps 1 and 3 of the existing process; Step 2 would be eliminated. The EPA Regional Office would continue to prepare a draft permit, provide notice and an opportunity for public comment on the draft permit and opportunity for a public hearing when there is a significant degree of public interest, and issue a final permit decision, incorporating any changes in the draft permit occasioned by the public comments received. After that initial decision, however, a party would appeal from the Regional Administrator's permit decision directly to the Environmental Appeals Board. As provided in § 124.19, a party could appeal any factual or legal determination in the Regional Administrator's decision (if the issue were properly raised in public comments on the draft permit, as provided in 124.13).[4] Subpart E would be eliminated in its entirety.

EPA also proposes to eliminate the NAPP procedure in subpart F. Subpart F was designed to be a less onerous alternative hearing procedure for NPDES permits, to substitute for subpart E when the parties so agreed. EPA has conducted no hearings under subpart F, and EPA is aware of only three permits where a party requested use of the proceeding. One of those involved a RCRA permit denial in EPA Region IX. The purpose of requesting the NAPP in that proceeding appears to have been solely to delay final issuance of the permit denial decision. (See the public docket for today's proposal for details.) With the elimination of subpart E, and given the fact that there has been so little interest in the use of subpart F, EPA sees no reason to retain it.

(2) Termination of NPDES and RCRA Permits. EPA's regulations also currently provide for a formal hearing prior to terminating an NPDES or RCRA permit during its term. EPA regulations treat termination of a RCRA or NPDES permit in the same manner as the issuance or denial of an NPDES permit. That is, termination of a permit begins with preparation of a draft notice of intent to terminate. The notice of intent to terminate is subject to public comment and possibly an informal hearing. After the informal process, the Regional Administrator issues an initial decision, from which a party may request an evidentiary hearing under subpart E, and subsequently an appeal to the EAB.

In developing today's proposal, EPA seriously considered proposing to eliminate all formal hearing procedures for RCRA and NPDES permit terminations and instead treat such terminations just like permit issuance or denial. EPA recognizes that due process considerations may not mandate such procedures. As noted above, issuance of an NPDES permit conveys no property right to the permittee. Thus, the only private interests at stake relate to the expectation of a permittee to continue discharging until the end of a permit term, which can be up to 5 years at most. Otherwise, the permittee cannot presume it will be able to continue discharging beyond the end of the permit term, particularly if the permittee has violated the terms of the permit or misrepresented information on its permit application (the bases for terminating a permit). Thus, the private interests at stake in a permit termination are only marginally stronger than those at stake in a permit denial proceeding (which EPA has always conducted using informal hearing procedures except for NPDES). Yet, EPA also recognizes some differences between permit terminations and other permit proceedings. In contrast to the issuance of a permit, the decision to terminate a permit, other than at the request of the permittee, is more likely to involve factual issues for which formal hearings are appropriate. Under EPA regulations (40 CFR 122.64, 270.43), EPA may terminate a permit only for reasons such as the non-compliance with the permit or failure to have disclosed relevant information in the permit application. In other words, a permit termination is akin to an enforcement action (and indeed often accompanies an administrative enforcement action), where credibility of witnesses will be a more significant concern.

On balance, EPA's preferred option is to maintain the formal hearing requirement for these type of proceedings. EPA solicits comment on whether the formal hearing requirement should be eliminated entirely for RCRA and NPDES permit terminations, and whether there is an adequate basis for doing so.

Termination of NPDES and RCRA permits is a rare occurrence; EPA is aware of only one EPA-issued permit that has been terminated using these procedures since 1980 (the NPDES permit for Marine Shale Processors in Louisiana). EPA's ''Consolidated Rules

[3] However, EPA believes that the ability to judicially challenge final permits is an essential element of public participation under the Clean Water Act. On May 1, 1996, EPA issued a final rule which will require that all States that administer or seek to administer the NPDES program 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 NPDES permitting process. This rule does not, at this time, apply to Indian Tribes. See 61 FR 20972 (May 8, 1996).

[4] The party need not, however, submit all supporting factual information during the comment period; rather the Regional Administrator may instruct the party to submit such information if desired. 40 CFR 124.13 (''Commenters shall make supporting materials not already included in the administrative record available to EPA *as directed by the Regional Administrator*'') (emphasis added); 49 FR 38,042 (Sept. 26, 1984) (''Generally supporting information would not be required to be submitted during the comment period'').

of Procedure'' at 40 CFR part 22 specify procedures for formal hearings in a variety of administrative enforcement actions, including civil compliance or penalty actions for violations of the CWA and RCRA. These regulations also cover the suspension/revocation of permits issued under the Marine Protection Research and Sanctuaries Act (Ocean Dumping Act). There is no significant difference between practice and the procedural guarantees under part 22 and under part 124 subpart E. The only difference is that a formal hearing under part 22 begins with EPA's issuance of a complaint against an alleged violator, whereas subpart E constitutes an appeal of an initial decision after a non-formal public comment and hearing process. Since there are no significant differences between the two sets of rules, EPA sees no reason to leave subpart E in the Code of Federal Regulations solely to cover the very occasional involuntary NPDES or RCRA permit termination. Instead, EPA today proposes to amend part 22 to mandate use of its procedures for such terminations. Instead of the current three-part process under part 124, such permit terminations would occur in a two-step process. Step 1 would be a hearing under part 22; the outcome of the hearing could then be appealed to the EAB under § 22.30.

For terminations at the request of the permittee, the part 124 process, as modified under today's proposal, would be used. In other words, EPA would provide for an informal public comment and hearing under subpart A, with opportunity for appeal to the EAB. This will allow other interested parties to comment on the proposed termination. Also, as noted above, EPA is proposing in today's notice revisions to § 122.64(b) which would allow Directors to terminate a permit by giving notice to the permittee and without following the part 22 or 124 procedures (or State equivalent) where the permittee has permanently terminated its entire discharge (by elimination of its process flow or other discharge components) or has redirected that discharge into a POTW. EPA notes that NPDES-authorized States are not required to use part 22 procedures for permit terminations.

EPA believes that the existing part 22 is generally adequate to cover involuntary permit terminations without substantive amendment. However, where permits are terminated for cause, existing part 124 treats the proceeding the same as for the issuance or denial of a permit. EPA is proposing to incorporate relevant provisions of part 124 into such a permit termination proceeding, i.e., consideration of the administrative record and provision for informal public comment on the proposed permit termination. EPA is also proposing one minor clarification to part 22. Part 22 refers to involuntary removal of a permit as ''revocation[s].'' Since the existing NPDES and RCRA regulations use the term ''revocation'' to refer to permits which are to be reissued (see 40 CFR 122.62, 124.5), EPA is proposing to add the term ''termination'' of permits to the appropriate references in part 22. EPA solicits comment on using the part 22 procedures to cover termination of NPDES and RCRA permits, and whether further amendments to part 22 would be necessary to make the regulations effective for this purpose.

Today's proposal is based on the current version of part 22. However, EPA will soon propose more comprehensive revisions to part 22 designed to make the regulations more readable and thus easier for the public to use. The changes proposed today will be harmonized with that proposal before final rules are issued.

(3) Stays of Contested Permit Conditions. Existing EPA regulations at § 124.15 specify that NPDES, RCRA, and UIC permits take effect 30 days after the Regional Administrator issues an initial permit decision, unless the permit is appealed (or if one of the other exceptions at 40 CFR 124.15(b) are met). Section 124.16(a) further provides that if an initial permit decision is appealed by requesting EAB review (for RCRA and UIC permits) or appealed by filing a request for evidentiary hearing (for NPDES permits) and the request is granted, the contested conditions of the permit (and any uncontested conditions which are not severable from the contested ones) are stayed (i.e., they do not take effect) pending the outcome of the appeal/evidentiary hearing. Existing regulations at § 124.60 supplement § 124.16 for purposes of NPDES permits. Section 124.60(a)(2) authorizes the Regional Administrator to issue an order to a new source or new discharger for whom an evidentiary hearing request has been granted authorizing the source to begin discharging pending the outcome of the hearing process. Section 124.60(c)(7) authorizes the Regional Administrator to impose interim permit requirements for offshore oil rigs that do not have an existing permit, but only when necessary to avoid ''irreparable environmental harm.'' The provisions of §§ 124.60(c)(1)–(c)(6) provide detailed rules for determining what constitutes ''contested conditions'' stayed pending an evidentiary hearing. Section 124.60(f) specifies that the date of compliance with permit conditions which have been stayed pending the outcome of an evidentiary hearing generally shall be extended for the period of the stay. Other provisions of § 124.60 parallel provisions contained in §§ 124.15, 124.16, or 124.19.

EPA today proposes substantial revisions to § 124.60 consistent with the proposal to eliminate evidentiary hearings. Sections 124.60(a)(2) and 124.60(f) grant certain relief to the regulated community to reflect the long lag time between when a permit is issued and when it becomes effective if an evidentiary hearing takes place. By eliminating the evidentiary hearing step, today's proposal would dramatically shorten that lag time. EPA believes that these provisions would no longer be necessary and proposes to delete them. The existing § 124.60(c)(7) also provides for temporary authorization pending the outcome of administrative review, but only for a very limited number of facilities and only as necessary to prevent environmental damage. EPA is unaware that this provision has ever been invoked, but is proposing today to retain it (recodified at § 124.60(a)) in case the need arises.

The existing §§ 124.60(a)(1), 124.60(c)(1), and 124.60(e) generally clarify that only uncontested permit conditions take effect pending appeal, and that the prior existing permit (if any) remains in effect (to the extent they match the contested conditions in the new permit). As noted above, EPA is today proposing to provide for a direct appeal of the Regional Administrator's initial permit decision to the EAB. The existing regulations at § 124.16 contain virtually the same requirements regarding contested permit conditions when a RCRA or UIC permit is appealed to the EAB. Compare § 124.60(a)(1) with § 124.16(a)(1); § 124.60(c)(1) with § 124.16(a)(2); 124.60(e) with 124.16(c)(2). EPA proposes to eliminate the redundant portions of § 124.60 in favor of the generally applicable provisions in § 124.16. However, EPA proposes to retain the NPDES-specific provisions of existing § 124.60(c) (2)–(6) concerning what constitutes a ''contested condition;'' these would be recodified at § 124.60(b)(2)–(6). EPA also proposes to retain the specific language of 124.60(e) as recodified at 124.60(c).

EPA also proposes to make a more general change to its practice surrounding effective dates, contested permit conditions, and stays. In the past, there has been significant confusion surrounding when a RCRA, UIC, or PSD permit takes effect if appealed to the EAB, and somewhat less

confusion with respect to the same issue for NPDES permits. Section 124.15(b) specifies that permits generally take effect 30 days after issuance by the Regional Administrator unless EAB review is requested under § 124.19 (for RCRA, UIC, or PSD) or an evidentiary hearing is requested (for NPDES) (or if one of the other exceptions at 40 CFR 124.15(b) are met). Existing §§ 124.16(a) (for non-NPDES) and 124.60(c)(1) clarify that, once the EAB grants review or the RA grants the evidentiary hearing request, contested conditions are stayed but uncontested conditions take effect. Both sections require that the Regional Administrator identify the uncontested provisions. Section 124.60(c)(1) explicitly requires the Regional Administrator to notify all interested parties. The regulations are not clear, however, as to whether any conditions of the permit are in effect during the period between filing of the request for review and the decision to grant or deny review. EPA has, in the past, interpreted § 124.16(a)(2) to apply during this period as well. In other words, the uncontested conditions take effect even prior to a decision to grant or deny review under 40 CFR 124.19. See Memorandum from Lisa K. Friedman, ''Stays of Contested Permit Conditions,'' Mar. 22, 1988 (in the docket for today's proposal).

EPA today proposes to amend § 124.16 to clearly reflect the Agency's interpretation. Section 124.16(a)(1) would clarify that contested permit conditions are stayed as of the date of filing a request for review with the EAB under § 124.19, and any contested conditions will remain stayed until EPA takes final action (either a decision of the EAB or a decision of the Regional Administrator on remand) under § 124.19(f). Uncontested permit conditions would also be stayed upon filing of a request for review, but only for a temporary period. Importing language from the existing § 124.60(c)(1), the new § 124.16(a)(2) would clarify that the uncontested conditions take effect 30 days after the Regional Administrator notifies the EAB, the permit applicant, and other interested parties as to which conditions are uncontested. Since EPA is proposing to use the same appeals process for NPDES permits as for other permits, the new § 124.16 would apply to NPDES permits as well.

The language of the existing § 124.60(b) specifies that the Regional Administrator may, at any time prior to the Administrative Law Judge's (ALJ) decision in an evidentiary hearing, withdraw contested conditions of an NPDES permit and reissue them in accordance with the procedures of subpart A. In practice, EPA has withdrawn and reissued permits under all statutes prior to decisions of the EAB as well as prior to ALJ decisions. EPA therefore proposes to clarify that the Regional Administrator may withdraw and reissue any NPDES, RCRA, UIC, or PSD permit (or a contested condition thereof) prior to a decision of the EAB to grant or deny review under § 124.19(c). To make this change, the existing § 124.60(b), as slightly modified, would be recodified as § 124.19(d).

This proposal, once finalized, will serve the public interest by shortening the time for appeals that may be brought by interested citizens, allowing for the more timely resolution of these appeals, with a shorter stay of conditions.

Finally, § 124.60(f) specifies that exhaustion of the evidentiary hearing process is a prerequisite to judicial review of an NPDES permit. EPA proposes to eliminate this language in favor of the general exhaustion provision at § 124.19(e).

(4) Procedures for Variances and New Source Determinations. EPA also proposes changes in various NPDES permit-related administrative procedures. Existing regulations at § 122.21(m) specify that applications for a ''fundamentally different factors'' variance must be filed within 180 days of promulgation of the applicable effluent limitations guideline. Section 125.32(a) contemplates that the application for a variance be submitted in accordance with part 124, subpart F. (However, subpart F does not appear to have ever been used.) All other effluent limitation variances under § 122.21(m) are processed as part of the underlying permit application in accordance with the procedures of part 124, subpart A. EPA sees no continuing reason to treat Fundamentally Different Factors (FDF) variances differently. EPA therefore proposes to amend § 125.32 to require an applicant for an FDF variance to submit an application under the procedures of part 124, subpart A. EPA will process the request for a variance as if it were an application for an NPDES permit.

Existing § 122.21(l)(2) requires EPA to make an initial determination of whether an applicant for an NPDES permit constitutes a ''new source'' subject to the additional requirements of § 122.29. Section 122.21(l)(4) allows for appeal of that initial determination by requesting an evidentiary hearing. Consistent with its proposal to eliminate evidentiary hearings for NPDES permits themselves, EPA proposes to modify this section to allow instead for an appeal of a new source determination to the EAB. Similar to the existing language, the proposed amendment would allow the EAB, with consent of the parties, to defer review of the determination until a decision is made on the permit for the source, and to consolidate review of the new source determination with any review of the permit decision.

(5) Transition to New Procedural Requirements. If EPA decides to issue the final rule as proposed today, there will be no further opportunity to request an evidentiary hearing and the existing procedural rules will be deleted from the CFR. The question arises, however, how today's proposal will affect ongoing NPDES permit issuance/denial or termination proceedings or RCRA permit termination proceedings. EPA proposes largely to ''grandfather'' such proceedings under the prior rules.

Under today's proposal, contained in § 124.21, ongoing proceedings would be treated as follows: For any NPDES permit for which a request for evidentiary hearing was granted or denied as of the date of the final rule, but for which a hearing had not yet been completed, the permit process would continue under the procedures of the prior part 124. Similarly, appeals pending before the EAB would be reviewed under the procedures of prior part 124. In other words, the evidentiary hearing would be conducted under the old subpart E; an appeal from the evidentiary hearing decision (or an appeal from the denial of a request for an evidentiary hearing) would proceed under the prior § 124.91; and any further proceedings conducted pursuant to a remand from the EAB would proceed under the appropriate provisions of the old part 124. Ongoing proceedings to terminate an NPDES or RCRA permit similarly would continue under the prior rules.

EPA is proposing to grandfather these proceedings in the interests of efficiency, fairness and minimizing the confusion to the regulated community. As of July 1, 1994, there were two NPDES permits for which an evidentiary hearing had been granted but the proceedings had not yet concluded, and 17 for which an appeal was pending before the EAB. Interested parties involved in an ongoing evidentiary hearing process may have invested significant resources to prepare or conduct the hearing to date, as would have EPA. It could prove to be a waste of all parties' resources to suspend such proceedings in mid-stream. Such preparation may have taken place even if the hearing itself has not begun. For ongoing proceedings before the EAB, all

parties may have invested resources in a prior evidentiary hearing or in briefing before the EAB. Rather than try to separate out on a case-by-case basis which proceedings are sufficiently advanced to justify continuing under the old rules, EPA proposes to let them all continue if the parties wish. (Today's proposal would allow an ongoing evidentiary hearing proceeding to be terminated with right of appeal to the EAB if all parties agree.) EPA solicits comment on whether it is appropriate to have these permits proceed under the prior rules or whether EPA should suspend all current proceedings and provide instead for an appeal to the EAB.

For any NPDES permit decision for which a request for evidentiary hearing remains pending, considerations of efficiency and fairness are less significant. Neither the parties nor EPA are likely to have invested any significant resources yet. Therefore, EPA is proposing not to grandfather these permits. Rather, EPA proposes to let interested parties refile an appeal directly to the EAB. For such permits, the EPA Region would, within 30 days after the final rule takes effect, notify the requester that the request for evidentiary hearing is being returned without prejudice. Notwithstanding the time limit in § 124.19(a), the requester would be allowed to file an appeal with the Board, in accordance with the other requirements of § 124.19(a), within 30 days.

(6) Miscellaneous Changes. EPA proposes a conforming change to part 117, which establishes regulations concerning the reporting of releases of hazardous substances under section 311 of the CWA. The reporting obligation does not cover discharges of hazardous substances ''resulting from circumstances identified, reviewed, and made a part of the public record with respect to a[n NPDES] permit.'' 40 CFR 117.12(a)(2). Section 117.1 defines the ''public record'' to include the permit itself and the record prepared during a NAPP proceeding under (now) subpart F. Since EPA is today proposing to eliminate subpart F, EPA proposes to modify this definition to refer instead to the administrative record required for all permits under § 124.18.

Finally, today's proposal would amend various sections of parts 122, 124, 144, 270, and 271 to eliminate obsolete references to subparts E or F of part 124. Many of these references authorize RCRA, UIC, or PSD permits to be processed under subparts E or F if consolidated with an NPDES permit undergoing an evidentiary hearing or NAPP. As reflected by the proposed language in § 124.1(d), today's proposal would continue to authorize permits to be processed in consolidated fashion under subpart A.

(7) Effect on State Programs. Under EPA's current regulations (40 CFR 123.25), EPA does not require States and Indian Tribes wishing to obtain authorization to issue NPDES permits to provide for formal evidentiary hearings, either under part 124 or part 22. Instead, EPA requires States and Tribes to provide for the informal process outlined in subpart A of part 124 and requires States to 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 NPDES permitting process. EPA also does not require States nor Tribes to provide for formal hearings prior to termination of NPDES or RCRA permits. This proposed revision concerning permit appeal and termination procedures does not change the requirements of State programs. However, as described in more detail above, another revision proposed in today's package for 40 CFR 122.64(b) would allow States to terminate NPDES permits without following part 124 procedures (or their State equivalent) under certain circumstances. Of course, States and Tribes may continue to provide for formal evidentiary hearings on such permit decisions if they wish, under section 510 of the CWA and section 3009 of RCRA.

D. Proposed Removal and Reservation of Part 125, Subpart K

1. 40 CFR Part 125, Subpart K

In today's notice, EPA proposes to remove and reserve part 125, subpart K (40 CFR 125.100–104) titled ''Criteria and Standards for Best Management Practices Authorized Under Section 304(e) of the Act''. This provision was originally promulgated on June 7, 1979 (44 FR 32954) and would have established criteria and standards for imposing best management practices (BMPs) in NPDES permits under the authority provided in sections 304(e) and 402(a)(1) of the CWA. However, for reasons set forth in more detail below, subpart K has never been activated and its original purpose is now better served by EPA's existing BMP provisions at 40 CFR 122.44(k) and accompanying guidance for developing and implementing BMPS.

BMPs are schedules of activities, prohibitions of practices, maintenance procedures, and other management practices to prevent or reduce the pollution of ''waters of the United States.'' BMPs include treatment requirements, operating procedures, and practices to control plant site runoff, spillage or leaks, sludge or waste disposal, or drainage from raw material storage. BMPs are authorized under two provisions of the CWA, sections 304(e) and 402(a)(1). Section 304(e) of the Act authorizes the Administrator to publish regulations which are supplemental to effluent limitation guidelines, for a class or category of point sources, for any toxic or hazardous pollutant regulated under sections 307(a)(1) or 311 of the CWA, in order to control plant site runoff, spillage or leaks, sludge or waste disposal, and drainage from raw material storage, which the Administrator determines are associated with or ancillary to the industrial manufacturing or treatment process within such class or category of point sources and which may contribute significant amounts of toxic or hazardous pollutants to the waters of the United States. In addition, section 402(a)(1) of the Act authorizes permitting authorities to include BMPs in permits using Best Professional Judgment (BPJ). EPA's authority to impose BMPS under section 402(a)(1) was recognized by the D.C. Circuit in *NRDC* v. *Costle,* 568 F.2d 1369 (D.C. Cir. 1977).

In addition to these statutory authorities for BMPs, EPA's regulations at 40 CFR 122.44(k) specifically authorize EPA to require BMPs in NPDES permits to control or abate the discharge of pollutants where: (1) Authorized under section 304(e) of the CWA for the control of toxic pollutants and hazardous substances, (2) numeric effluent limitations are infeasible, or (3) the practices are reasonably necessary to achieve effluent limitations and standards or to carry out the purposes and intent of the CWA. EPA has used § 122.44(k) to require specific BMPs in permits and has required, as a permit condition, that permittees develop and implement BMP plans. These are also known as storm water pollution prevention plans (SWPPPs) in certain storm water general permits). See EPA's ''Storm Water Multisector General Permit for Industrial Activities finalized on September 29, 1995 (50 FR 50804) as well as EPA's baseline storm water general permits finalized on September 9, 1992 (57 FR 41175) and September 25, 1992 (57 FR 44412).

The regulatory history covering the development of part 125, subpart K is lengthy. On August 21, 1978, EPA proposed regulations (43 FR 37089) that provided a definition of ''Best Management Practices'' (''BMPs''). In addition, subpart L—''Criteria and

Standards for Best Management Practices Authorized Under Section 304(e) of the Act'', was created under part 125 and was reserved for later rulemaking.

On September 1, 1978, EPA proposed a rule to revise the existing regulations governing the NPDES program in order to reflect new controls on toxic and hazardous pollutants under the 1977 amendments to the CWA. The proposed rule indicated how BMPs for on-site industrial activities (such as materials storage and waste disposal) may be required in NPDES permits to prevent the release of toxic and hazardous pollutants to surface waters. This regulation was proposed under part 125, subpart L—Criteria and Standards for Imposing Best Management Practices Under Section 304(e) of the Act (43 FR 39282).

After evaluating the comments received on the proposed regulation, EPA promulgated the BMP regulation in part 125, subpart K on June 7, 1979 (44 FR 32954). The revised regulation described how BMPs for control of toxic or hazardous pollutants that are ancillary to industrial activities under section 304(e) of the Act shall be reflected in permits, including BMPs promulgated in effluent limitations guidelines under section 304, and BMPs established on a case-by-case basis in permits under sections 301(b) and 402(a) of the Act.

In addition to the regulation, EPA had intended to publish technical information supporting the development of BMP programs in a guidance document. However, on August 10, 1979, three days before the regulations were to become effective, the Agency announced that the guidance document had been unavoidably delayed and that the Agency was deferring the effective date of the BMP regulation until 60 days after EPA published a Federal Register notice of the availability of the BMP program guidance document (44 FR 47063).

On March 20, 1980, EPA announced the availability of the draft guidance document and provided a 45-day comment period (45 FR 17997). EPA noted that after reviewing the comments on the guidance document, the document would be finalized and a notice would be published in the Federal Register announcing the effective date of the BMP regulations. In response to public comment on the guidance document, the comment period was extended twice, resulting in a 120-day comment period. After evaluating the comments on the guidance document, the Agency made revisions and in June 1981 published ''NPDES Best Management Practices Guidance Document.'' (The BMP Guidance Document has since been revised. The revised guidance was published in October 1993.) However, the effective date of the regulation was never announced and subpart K never became effective.

The continued inactive status of the subpart K has not hindered EPA's ability to require BMPs in permits because § 122.44(k) remained effective. Moreover, a number of guidance documents have since become available to assist permit issuing authorities and permittees in developing and implementing BMPs and BMP plans. While part 125, subpart K has remained in the Code of Federal Regulations as an inactive regulation, it has nonetheless been valuable as a model for imposing BMPS under 40 CFR 122.44(k). This was particularly true when there was less guidance available on how to develop and implement BMPs.

At present, requirements for the preparation and implementation of BMPs (and BMP plans) are commonly found in NPDES permits as permit conditions under 40 CFR 122.44(k). EPA has continued to work with industry to identify the generic BMPs that most well-operated facilities use for pollution control, fire prevention, occupational safety and health, or product loss prevention. Experience has shown that BMPs can be appropriately used and that permits containing BMP programs can effectively reduce pollutant discharges in a cost-effective manner. BMPs are also an effective mechanism for promoting the goals of pollution prevention. There are now a number of EPA guidance documents available to assist permit issuing authorities and the regulated community in developing and implementing BMPs and BMP plans. Moreover, the BMP provisions of EPA's baseline and multisector storm water general permits also provide guidance on how to implement BMPs.

Given these events and the continued successful use of BMPs for NPDES permits under existing § 122.44(k) and its associated guidance, EPA now believes that there is no longer a reason to activate part 125, subpart K. Because BMPs are often best tailored for specific industries, EPA believes that the use of existing § 122.44(k) in combination with guidance provides a more flexible and effective approach in developing and implementing BMPs than that found under part 125, subpart K. Finally, the provisions of subpart K are now over 16 years old and are antiquated on a number of fronts particularly with respect storm water discharges which form the bulk of BMP applications. For those reasons, EPA is proposing to remove the provisions of part 125, subpart K.

2. 40 CFR 122.44(k)

In today's notice, EPA proposes to add a note to 40 CFR § 122.44(k) which lists the various EPA BMP guidance documents. This will assist readers in developing and implementing BMPs and BMP plans.

E. Miscellaneous Corrections

EPA also proposes in today's notice a number of minor non-substantive revisions to its regulations that would correct typographical or drafting errors, and misplaced or obsolete references. EPA wishes to be clear that these corrections and not intended in anyway to result in substantive changes to its programs. In proposing these corrections, EPA does not solicit, and will not respond to, comments on the existing regulatory provisions which underlie those corrections. Furthermore, by including these corrections in the proposed rule, EPA is not conceding that any or all such changes require notice and comment. However, these errors were discovered while developing this proposed rule and EPA believes it is more cost effective to correct them in this rulemaking than in a separate Federal Register notice. EPA proposes the following corrections:

1. Section 122.1(b)(4) contains an erroneous cite to § 122.1. EPA proposes to amend § 122.1(b)(4) to add the correct cite which is § 122.2.

2. In § 122.21(l)(1), EPA proposes to replace the term ''paragaraph'' with its correct spelling, ''paragraph''.

3. The current heading for § 122.24(b) is written incorrectly as ''Defintion''. EPA proposes to correct that error by inserting the correct term ''Definition''.

4. Section 40 CFR 122.21(l)(2)(ii) incorrectly refers to paragraph ''(k)(2)(i)''. EPA proposes to insert the correct reference, paragraph ''(l)(2)''.

5. Section 40 CFR 122.21(l)(3) incorrectly refers to paragraph ''(k)(2)''. EPA proposes to insert the correct reference ''paragraph (l)(2)''.

6. In § 122.26(b)(15), EPA proposes to replace the term ''landill'' with its correct spelling, ''landfill''.

7. In § 122.26(d)(1)(iii)(D)(1), EPA proposes to replace the term ''overlayed'' with its correct spelling, ''overlaid''.

8. EPA proposes to remove an obsolete reference to § 124.58 found in the last sentence of § 122.28(b)(1). Section 124.58 was removed from the EPA's regulations on June 29, 1995. See 60 FR 33927.

9. Section 122.29(c)(1)(i) incorrectly refers to ''§ 122.21(k)''. EPA proposes to provide the correct reference, ''§ 122.21(l)''.

10. In § 122.41(l)(6)(i), EPA proposes to replace the term ''becames'' with the correct term, ''becomes''.

11. In § 122.43(b)(1), EPA proposes to replace the term ''additonal'' with its correct spelling, ''additional''.

12. EPA proposes to correct two inaccurate cites currently found at § 122.44(i)(1)(iii). Paragraph (iii) incorrectly refers to internal waste stream provisions as occurring at § 122.45(i). The correct cite is § 122.45(h). Paragraph (iii) also incorrectly refers to intake credit as being located at § 122.45(f). The correct cite is § 122.45(g).

13. The language in paragraph § 122.44(e)(1) contains a reference to § 122.21(g)(10). That cite is no longer current because § 122.21(g)(10) is reserved. EPA proposes to remove that reference.

14. In section 122.44(k), EPA proposes to amend paragraph (k)(2) to replace the comma after with word ''infeasible'' with a semicolon. This provision was originally promulgated with a semicolon on June 7, 1979 (44 FR 32907). However, when these provisions were combined with other EPA permit regulations as part of the June 14, 1979 permit consolidation proposed rulemaking (44 FR 38244), a comma was wrongly inserted in place of the semicolon. EPA proposes to correct that typographical error in today's notice.

15. Section 122.44(q) incorrectly refers to § 124.58 in support of the requirement that NPDES permits must include, where applicable, conditions that the Secretary of the Army considers necessary to ensure that navigation and anchorage will not be substantially impaired. The correct cite is § 124.59. EPA proposes to revise this paragraph to include the correct cite.

16. In the introductory text of § 122.47(b), EPA proposes to replace the term ''requriements'' with the correct spelling, ''requirements''.

17. Section 122.62(a)(8) contains two references that are incorrect. Paragraph (a)(8)(i) allows a permit to be modified upon request of a permittee who qualifies for a net basis under § 122.45(h). Net basis and net limitations pertain to pollutants in intake waters which are found at § 122.45(g) and not at § 122.45(h). Paragraph (a)(ii) would allow permit modification when a discharger is no longer eligible for net limitations, as provided in § 122.45(h)(1)(ii)(B). Net limitations are actually found at § 122.45(g)(1)(ii). EPA proposes insert the correct references in today's notice.

18. 40 CFR 123.25(a)(36) requires that authorized States must have legal authority to implement the provisions of part 125, subparts A, B, C, D, H, I, J, K, L. However, subparts C, I, J, and L are currently reserved and subpart K is proposed to be reserved in today's notice. EPA proposes to revise 40 CFR 123.25(a)(36) to remove the references to subparts C, I, J, K, and L.

19. In 40 CFR 123.25(b), EPA proposes to replace the citation, 40 CFR 35.1500, with the correct citation, 40 CFR 130.5. This error occurred in 1985, when part 130 was created from former subparts of part 35.

20. Language which is the same as that found in the definition of ''State Director'' is incorrectly inserted into the definition of ''State'' at § 124.2. EPA proposes to remove that language.

21. EPA proposes to remove the term ''consultation with the Regional Administrator'' from § 124.2 because it is obsolete. This term applies specifically to 301(k) compliance extensions which have not been available since March 31, 1991. On June 29, 1995, EPA removed regulatory provisions which implement § 301(k). See 60 FR 33926, June 29, 1995.

22. EPA proposes to correct two references in § 124.55. Each refers to ''certification conditions'' specified in § 124.53(d); the correct citation is to 124.53(e).

III. Administrative Requirements

A. 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 result in a rule that may:

(1) Have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, 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.''

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.

B. The Regulatory Flexibility Act

Under the Regulatory Flexibility Act (RFA), 5 U.S.C. 601 *et seq.*, EPA must prepare a Regulatory Flexibility Analysis for all regulations that have a significant impact on a substantial number of small entities. The RFA recognizes three kinds of small entities and defines them as follows:

—Small governmental jurisdictions—any government of a district with a population of less than 50,000.

—Small business—any business which is independently owned and operated and not dominant in its field as defined by Small Business Administration regulations under section 3 of the Small Business Act.

—Small organization—any not-for-profit enterprise that is independently owned and operated and not dominant in its field (e.g., private hospitals and educational institutions).

Under section 605(b) of the Act, an agency may, in lieu of preparing an initial regulatory flexibility analysis, certify that a rule will not have a ''significant impact on a substantial number of small entities.'' Then no further analysis is required.

Most of the changes in today's proposal are purely technical and will have no effect on compliance costs for NPDES permittees. Also, to the extent these technical changes clarify and simplify the regulations, they will make them easier to understand and comply with, reducing the burden on small entities. The other changes will reduce the costs of obtaining and complying with NPDES permits. For instance, the proposal would make it easier for facilities to obtain coverage under general permits, rather than go through the more complicated and expensive individual permit procedure. EPA also proposes to minimize monitoring and recordkeeping for permittees subject to effluent limitation guidelines, and streamline permit application requirements for storm water dischargers and new sources/new dischargers. EPA is also proposing to streamline the permit appeals and permit termination processes, which should further reduce the costs of obtaining (or modifying) or terminating an individual permit. None of these proposed changes are expected to

increase, and most of the changes will actually decrease, the costs of compliance for NPDES dischargers, including small entities (if any). Therefore, I certify that the proposed rule will not have a significant impact on a substantial number of small entities.

C. Paperwork Reduction Act

The proposed regulations are designed specifically to streamline the regulatory process and will not impose any additional information collection requirements on either the regulated community or permit issuing authorities. Therefore, EPA did not prepare an Information Request document for approval by the Office of Management and Budget.

Should any reviewer feel that the proposed rulemaking will require additional information collection activities, they should send their comments regarding the burden estimate or any other aspect pertaining to collection of information, including suggestions for reducing this burden to Chief, Information Policy Branch; EPA; 401 M St., S.W. (Mail Code 2136); Washington, DC 20460; and to the Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, DC 20503, marked ''Attention: Desk Officer for EPA.'' The final rule will respond to any OMB or public comments on any information collection requirements generated by this proposal.

D. Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Public Law 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 the UMRA, EPA generally must prepare a written statement, including a cost-benefit analysis, for 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, section 205 of the 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. The provisions of section 205 do not apply when they are inconsistent with applicable law. Moreover, section 205 allows EPA to adopt an alternative other than the least costly, most cost-effective or least burdensome alternative if the Administrator publishes with the final rule an explanation why that alternative was not adopted.

Under section 204 of the UMRA, EPA generally must develop a process to permit elected officials of State, local and Tribal governments (or their designated employees with authority to act on their behalf) to provide meaningful and timely input in the development of regulatory proposals containing significant Federal intergovernmental mandates. These consultation requirements build on those of Executive Order 12875 (''Enhancing the Intergovernmental Partnership'').

Before EPA establishes any regulatory requirements that may significantly or uniquely affect small governments, including Tribal governments, it must have developed under section 203 of the UMRA a small government agency plan. The plan must provide for notifying potentially affected small governments, enabling officials of affected small governments to have meaningful and 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.

Today's rule contains no Federal mandates (under the regulatory provisions of Title II of the UMRA) for State, local, or Tribal governments or the private sector. The proposed rulemaking is basically ''deregulatory'' in nature and does not impose any enforceable duties on any of these governmental entities or the private sector.

In any event, EPA has determined that this rule does not contain a Federal mandate that may result in expenditures of $100 million or more for State, local, and Tribal governments, in the aggregate, or the private sector in anyone year. This rule is intended to streamline NPDES permitting requirements and should result in resource savings to Federal and State permitting authorities as well as to the regulated community. Thus, today's rule is not subject to the requirements of sections 202, 204 and 205 of UMRA.

With respect to section 203 of UMRA, EPA has determined that this rule contains no regulatory requirements that might significantly or uniquely affect small governments. As previously stated, EPA believes that the rule will reduce the regulatory burden on Federal and State NPDES Permitting authorities as well as on the regulated community. This overall reduction will be applied across the board to all permitting authorities and the regulated community. While, EPA cannot document the effects of these streamlining measures on each affected entity, those smaller governments that are NPDES permittees are expected to benefit from the proposed modifications.

List of Subjects

40 CFR Part 22

Environmental protection, Administrative practice and procedure, Air pollution control, Hazardous substances, Hazardous waste, Penalties, Pesticides and pests, Poison prevention, Water pollution control.

40 CFR Part 117

Environmental Protection Agency, Hazardous substances, Penalties, Reporting and recordkeeping requirements, Water pollution control.

40 CFR Part 122

Administrative practice and procedure, Confidential business information, Hazardous substances, Reporting and recordkeeping requirements, Water pollution control.

40 CFR Part 123

Administrative practice and procedure, Confidential business information, Hazardous substances, Indians-lands, Intergovernmental relations, Penalties, Reporting and recordkeeping requirements, Water pollution control.

40 CFR Part 124

Environmental protection, Administrative practice and procedure, Air pollution control, Hazardous waste, Indians—lands, Reporting and recordkeeping requirements, Water pollution control, Water supply.

40 CFR Part 125

Environmental protection, Reporting and recordkeeping requirements, Waste treatment and disposal, Water pollution control.

40 CFR Part 144

Environmental protection, Administrative practice and procedure, Confidential business information, Hazardous waste, Indians—lands, Reporting and recordkeeping requirements, Surety bonds, Water supply.

40 CFR Part 270

Environmental protection, Administrative practice and procedure, Confidential business information, Hazardous materials transportation,

Hazardous waste, Reporting and recordkeeping requirements, Water pollution control, Water supply.

40 CFR Part 271

Environmental protection, Administrative practice and procedure, Confidential business information, Hazardous materials transportation, Hazardous waste, Indians-lands, Intergovernmental relations, Penalties, Reporting and recordkeeping requirements, Water pollution control, Water supply.

Dated: November 21, 1996.

Carol M. Browner,

Administrator.

For the reasons set forth in the preamble, EPA proposes to amend 40 CFR parts 22, 117, 122, 123, 124, and 125, 144, 270, and 271 as follows:

PART 22—[AMENDED]

1. The title of part 22 is revised to read as follows:

PART 22—CONSOLIDATED RULES OF PRACTICE GOVERNING THE ADMINISTRATIVE ASSESSMENT OF CIVIL PENALTIES AND THE REVOCATION/TERMINATION OR SUSPENSION OF PERMITS

2. The authority citation for part 22 is revised to read as follows:

Authority: 7 U.S.C. 136(l); 15 U.S.C. 2615; 33 U.S.C. 1319, 1342, 1361, 1415 and 1418; 42 U.S.C. 300g–3(g), 6912, 6925, 6928, 6991e and 6992d; 42 U.S.C. 7413(d), 7524(c), 7545(d), 7547, 7601 and 7607(a), 9609, and 11045.

3. Section 22.01 is amended by revising paragraphs (a)(4) and (a)(6) to read as follows:

§ 22.01 Scope of these rules.

(a) * * *

(4) The issuance of a compliance order or the issuance of a corrective action order, the termination of a permit pursuant to section 3005(d), the suspension or revocation of authority to operate pursuant to section 3005(e), or the assessment of any civil penalty under sections 3008, 9006, and 11005 of the Solid Waste Disposal Act, as amended (42 U.S.C. 6925(d), 6925(e), 6928, 6991e, and 6992d)), except as provided in 40 CFR part 24;

* * * * *

(6) The assessment of any Class II penalty under section 309(g), or the termination of any permit issued pursuant to section 402(a) of the Clean Water Act, as amended (33 U.S.C. 1319(g), 1342(a));

* * * * *

4. Section 22.03 is amended by revising the definition for ''Consent Agreement'' to read as follows:

§ 22.03 Definitions.

* * * * *

Consent Agreement means any written document, signed by the parties, containing stipulations or conclusions of fact or law and a proposed penalty or proposed revocation/termination or suspension acceptable to both complainant and respondent.

* * * * *

5. Section 22.13 is amended by revising paragraph (c) to read as follows:

§ 22.13 Issuance of complaint.

* * * * *

(c) Other good cause exists for such action, he may institute a proceeding for the revocation/termination or suspension of a permit by issuing a complaint under the Act and these rules of practice. A complaint may be for the suspension or revocation/termination of a permit in addition to the assessment of a civil penalty.

6. Section 22.14 is amended by revising paragraph (b) introductory text and paragraphs (b)(4), (b)(5), and (b)(6) to read as follows:

§ 22.14 Content and amendment of the complaint.

* * * * *

(b) *Complaint for the revocation/termination, or suspension of a permit.* Each complaint for the revocation/termination or suspension of a permit shall include:

* * * * *

(4) A request for an order either to revoke/terminate or suspend the permit and a statement of the terms and conditions or any proposed partial suspension or revocation/termination;

(5) A statement indicating the basis for recommending the revocation/termination, rather than the suspension, of the permit, or vice versa, as the case may be;

(6) Notice of the respondent's right to request a hearing on any material fact contained in the complaint, or on the appropriateness of the proposed revocation/termination or suspension.

* * * * *

7. Section 22.15 is amended by revising (a)(2) to read as follows:

§ 22.15 Answer to the complaint.

(a) * * *

(2) Contends that the amount of the penalty proposed in the complaint or the proposed revocation/termination or suspension, as the case may be, is inappropriate; or * * *

* * * * *

8. Section 22.17 is amended by revising the second-to-last sentence of paragraph (a) and by revising paragraph (c) to read as follows:

§ 22.17 Default order.

(a) * * * If the complaint is for the revocation or suspension of a permit, the conditions of revocation or suspension proposed in the complaint shall become effective without further proceedings on the date designated by the Administrator in his final order issued upon default. * * *

* * * * *

(c) *Contents of a default order.* A default order shall include findings of fact showing the grounds for the order, conclusions regarding all material issues of law or discretion, and the penalty which is recommended to be assessed or the terms and conditions of permit revocation/termination or suspension, as appropriate.

* * * * *

9. Section 22.18 is amended by revising paragraph (b)(3) to read as follows:

§ 22.18 Informal settlement; consent agreement and order.

* * * * *

(b) * * *

(3) consents to the assessment of a stated civil penalty or to the stated permit revocation/termination or suspension, as the case may be. * * *

* * * * *

10. Section 22.24 is amended by revising the first sentence to read as follows:

§ 22.24 Burden of presentation; burden of persuasion.

The complainant has the burden of going forward with and of proving that the violation occurred as set forth in the complaint and that the proposed civil penalty, revocation/termination, or suspension, as the case may be, is appropriate. * * *

11. Section 22.44 is added to subpart H to read as follows:

§ 22.44 Supplemental rules of practice governing the termination of permits under section 402(a) of the Clean Water Act or under section 3005(d) of the Resource Conservation and Recovery Act.

(a) *Scope of these Supplemental Rules.* These supplemental rules of practice shall govern, in conjunction with the preceding Consolidated Rules of Practice (40 CFR part 22), administrative proceedings for the termination of permits under section 402(a) of the Clean Water Act or under section 3005(d) of the Resource Conservation and Recovery Act. Where

inconsistencies exist between these supplemental rules and the Consolidated Rules, these Supplemental Rules shall apply.

(b) In any proceeding to terminate a permit for cause under 40 CFR 122.64 or 270.42 during the term of the permit:

(1) The complaint shall, in addition to the requirements of § 22.14(b), contain any additional information specified in 40 CFR 124.8;

(2) The Director (as defined in 40 CFR 124.2) shall provide public notice of the complaint in accordance with 40 CFR 124.10, and allow for public comment in accordance with 40 CFR 124.11; and

(3) The Presiding Officer shall admit into evidence the contents of the Administrative Record described in 40 CFR 124.9, and any public comments received.

PART 117—DETERMINATION OF REPORTABLE QUANTITIES FOR HAZARDOUS SUBSTANCES

1. The authority citation for part 117 continues to read as follows:

Authority: Secs. 311 and 501(a), Federal Water Pollution Control Act (33 U.S.C. 1251 *et. seq.*), (''the Act'') and Executive Order 11735, superseded by Executive Order 12177, 56 FR 54757.

2. Section 117.1(d) is revised to read as follows:

§ 117.1 Definitions.

* * * * *

(d) *Public record* means the NPDES permit application or the NPDES permit itself and the materials comprising the administrative record for the permit decision specified in 40 CFR 124.18.

* * * * *

PART 122—EPA ADMINISTERED PERMIT PROGRAMS: THE NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM

1. The authority citation for part 122 continues to read as follows:

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

2. Section 122.1 is revised to read as follows:

§ 122.1 Purpose and scope.

(a) *Coverage.* (1) The regulatory provisions contained in 40 CFR parts 122, 123, and 124 implement the National Pollutant Discharge Elimination System (NPDES) Program under sections 318, 402, and 405 of the Clean Water Act (CWA) (Pub. L. 92–500, as amended, 33 U.S.C. 1251 *et seq.*)

(2) These provisions cover basic EPA permitting requirements (part 122), what a State must do to obtain approval to operate its program in lieu of a Federal program and minimum requirements for administering the approved State program (part 123), and procedures for EPA processing of permit applications and appeals (part 124).

(3) These provisions also establish the requirements for public participation in EPA and State permit issuance and enforcement and related variance proceedings, and in the approval of State NPDES programs. These provisions carry out the purposes of the public participation requirements of 40 CFR part 25, and supersede the requirements of that part as they apply to actions covered under parts 122, 123, and 124.

(4) The NPDES permit program has separate additional provisions that are used by permit issuing authorities to determine what requirements must be placed in permits if issued. These provisions are located at 40 CFR parts 125, 129, 133, 136, 40 CFR subchapter N (parts 400 through 460), and 40 CFR part 503.

(5) Certain requirements set forth in parts 122 and 124 are made applicable to approved State programs by reference in part 123. These references are set forth in § 123.25. If a section or paragraph of part 122 or 124 is applicable to States, through reference in § 123.25, that fact is signaled by the following words at the end of the section or paragraph heading: (*Applicable to State programs, see § 123.25*). If these words are absent, the section (or paragraph) applies only to EPA administered permits. Nothing in parts 122, 123, or 124 precludes more stringent State regulation of any activity covered by these regulations, whether or not under an approved State program.

(b) *Scope of the NPDES permit requirement.* (1) The NPDES program requires permits for the discharge of ''pollutants'' from any ''point source'' into ''waters of the United States.'' The terms ''pollutant'', ''point source'' and ''waters of the United States'' are defined at § 122.2.

(2) The permit program established under this part also applies to owners or operators of any treatment works treating domestic sewage, whether or not the treatment works is otherwise required to obtain an NPDES permit, unless all requirements implementing section 405(d) of the CWA applicable to the treatment works treating domestic sewage are included in a permit issued under the appropriate provisions of subtitle C of the Solid Waste Disposal Act, Part C of the Safe Drinking Water Act, the Marine Protection, Research, and Sanctuaries Act of 1972, or the Clean Air Act, or under State permit programs approved by the Administrator as adequate to assure compliance with section 405 of the CWA.

(3) The Regional Administrator may designate any person subject to the standards for sewage sludge use and disposal as a ''treatment works treating domestic sewage'' as defined in § 122.2, where he or she finds that a permit is necessary to protect public health and the environment from the adverse effects of sewage sludge or to ensure compliance with the technical standards for sludge use and disposal developed under CWA section 405(d). Any person designated as a ''treatment works treating domestic sewage'' shall submit an application for a permit under § 122.21 within 180 days of being notified by the Regional Administrator that a permit is required. The Regional Administrator's decision to designate a person as a ''treatment works treating domestic sewage'' under this paragraph shall be stated in the fact sheet or statement of basis for the permit.

[Note: Information concerning the NPDES program and its regulations can be obtained by contacting the Permits Division (4203), Office of Wastewater Management, U.S.E.P.A., 401 M Street, SW., Washington, DC 20460 at (202) 260–9545.]

3. Section 122.2 is amended by adding new definitions in alphabetical order, and by revising the definition of ''Sludge-only facility'' to read as follows:

§ 122.2 Definitions.

* * * * *

Animal feeding operation is defined at § 122.23 of this part.

* * * * *

Aquaculture project is defined at § 122.25 of this part.

* * * * *

Bypass is defined at § 122.41(m) of this part.

* * * * *

Concentrated animal feeding operation is defined at § 122.23 of this part.

Concentrated aquatic animal feeding operation is defined at § 122.24 of this part.

* * * * *

Individual control strategy is defined at 40 CFR 123.46(c).

* * * * *

Municipal separate storm sewer system is defined at § 122.26 (b)(4) and (b)(7) of this part.

* * * * *

Silvicultural point source is defined at § 122.27 of this part.

* * * * *

Sludge-only facility means any ''treatment works treating domestic sewage'' whose methods of sewage sludge use or disposal are subject to regulations promulgated pursuant to section 405(d) of the CWA, and is required to obtain a permit under § 122.1(b)(2) of this part.

* * * * *

Storm water is defined at § 122.26(b)(13) of this part.

Storm water discharge associated with industrial activity is defined at § 122.26(b)(14) of this part.

* * * * *

Upset is defined at § 122.41(n) of this part.

4. Section 122.4 is amended by revising paragraph (i)(2) to read as follows:

§ 122.4 Prohibitions (applicable to State NPDES programs, see § 123.25).

* * * * *

(i) * * *

(2) The existing dischargers into that segment are subject to compliance schedules designed to bring the segment into compliance with applicable water quality standards. The Director may waive the submission of information by the new source or new discharger required by paragraph (i) of this section if the Director determines that the Director already has adequate information to evaluate the request. An explanation of the development of limitations to meet the criteria of this paragraph is to be included in the fact sheet to the permit under § 124.56(b)(1).

5. Section 122.21 is amended by revising paragraphs (a), (c)(2)(i), (c)(2)(ii), (g)(7), (g)(8), (l)(1), (l)(2)(ii), (l)(3), (l)(4), and notes 1, and the introductory text of notes 2, and 3; and by removing and reserving paragraph (d)(3) to read as follows:

§ 122.21 Application for a permit (applicable to State programs, see § 123.25).

(a) *Duty to apply*. (1) Any person who discharges or proposes to discharge pollutants or who owns or operates a ''sludge-only facility'' and who does not have an effective permit, except persons covered by general permits under § 122.28, excluded under § 122.3, or a user of a privately owned treatment works unless the Director requires otherwise under § 122.44(m), shall submit a complete application to the Director in accordance with this section and part 124.

(2) *Application Forms:* (i) All applicants for EPA-issued permits must submit applications on EPA permit application forms. More than one application form may be required from a facility depending on the number and types of discharges or outfalls found there. Applications for EPA-issued permits shall be submitted as follows:

(A) All applicants must submit Form 1 containing general information except as otherwise provided in another EPA application form.

(B) Applicants for new and existing POTWs must submit the information contained in § 122.21 (f) and (j).

(C) Applicants for concentrated animal feeding operations or aquatic animal production facilities must submit Form 2B.

(D) Applicants for existing industrial facilities (including manufacturing facilities, commercial facilities, mining activities, silvicultural activities, privately owned waste treatment facilities, and water treatment facilities plants whether publicly or privately owned that discharge process wastewater must submit Form 2C.

(E) Applicants for new industrial facilities that discharge process wastewater must submit Form 2D.

(F) Applicants for new and existing industrial facilities that discharge only nonprocess wastewater must submit Form 2E.

(G) Applicants for new and existing industrial facilities that whose discharge is composed entirely of storm water must submit Form 2F. If the discharge is composed of storm water and non-storm water, the applicant must also submit, Forms 2C, 2D, and/or 2E, as appropriate (in addition to Form 2F).

(H) In addition to any other applicable requirements in this part, all POTWs and other ''treatment works treating domestic sewage,'' including ''sludge-only facilities,'' must submit with their applications the information listed at 40 CFR 501.15(a)(2) within the timeframes established in paragraph (c)(2) of this section.

(ii) The application information required by § 122.21(a)(2)(i) may be electronically submitted if such method of submittal is approved by EPA or authorized NPDES State Director.

(iii) Applicants can obtain copies of these forms by contacting the Water Management Divisions (or equivalent division which contains the NPDES permitting function) of the EPA Regional Offices. The Regional Offices' addresses can be found at § 1.7 of this title.

(iv) Applicants for State-issued permits must use State forms which must require at a minimum the information required for permit applications in this paragraph(a).

* * * * *

(c) * * *

(2) * * *

(i) Any existing ''treatment works treating domestic sewage'' required to have, or requesting site-specific pollutant limits as provided in 40 CFR part 503, must submit the permit application information required by paragraph(a)(2) of this section within 180 days after publication of a standard applicable to its sewage sludge use or disposal practice(s). After this 180 day period, ''treatment works treating domestic sewage'' may only apply for site-specific pollutant limits for good cause and such requests must be made within 180 days of becoming aware that good cause exists.

(ii) Any ''treatment works treating domestic sewage'' with a currently effective NPDES permit, not addressed under paragraph (c)(2)(i) of this section, must submit the application information required by paragraph (a)(2) of this section at the time of its next NPDES permit renewal application. Such information must be submitted in accordance with paragraph (d) of this section.

* * * * *

(g) * * *

(7) *Effluent characteristics.* (i) Information on the discharge of pollutants specified in this paragraph (g)(7) of this section (except information on storm water discharges which is to be provided as specified in § 122.26). When ''quantitative data'' for a pollutant are required, the applicant must collect a sample of effluent and analyze it for the pollutant in accordance with analytical methods approved under 40 CFR part 136. When no analytical method is approved the applicant may use any suitable method but must provide a description of the method. When an applicant has two or more outfalls with substantially identical effluents, the Director may allow the applicant to test only one outfall and report that the quantitative data also apply to the substantially identical outfall. The requirements in paragraphs (g)(7) (iii) and (iv) of this section that an applicant must provide quantitative data for certain pollutants known or believed to be present do not apply to pollutants present in a discharge solely as the result of their presence in intake water; however, an applicant must report such pollutants as present. Grab samples must be used for pH, temperature, cyanide, total phenols, residual chlorine, oil and grease, fecal coliform and fecal streptococcus. For all other pollutants, 24-hour composite samples must be used. However, a minimum of one grab sample may be taken for effluents from holding ponds or other impoundments with a retention

period greater than 24 hours. In addition, for discharges other than storm water discharges, the Director may waive composite sampling for any outfall for which the applicant demonstrates that the use of an automatic sampler is infeasible and that the minimum of four (4) grab samples will be a representative sample of the effluent being discharged.

(ii) For storm water discharges, all samples shall be collected from the discharge resulting from a storm event that is greater than 0.1 inch and at least 72 hours from the previously measurable (greater than 0.1 inch rainfall) storm event. Where feasible, the variance in the duration of the event and the total rainfall of the event should not exceed 50 percent from the average or median rainfall event in that area. For all applicants, a flow-weighted composite shall be taken for either the entire discharge or for the first three hours of the discharge. The flow-weighted composite sample for a storm water discharge may be taken with a continuous sampler or as a combination of a minimum of three sample aliquots taken in each hour of discharge for the entire discharge or for the first three hours of the discharge, with each aliquot being separated by a minimum period of fifteen minutes (applicants submitting permit applications for storm water discharges under § 122.26(d) may collect flow-weighted composite samples using different protocols with respect to the time duration between the collection of sample aliquots, subject to the approval of the Director). However, a minimum of one grab sample may be taken for storm water discharges from holding ponds or other impoundments with a retention period greater than 24 hours. For a flow-weighted composite sample, only one analysis of the composite of aliquots is required. For storm water discharge samples taken from discharges associated with industrial activities, quantitative data must be reported for the grab sample taken during the first thirty minutes (or as soon thereafter as practicable) of the discharge for all pollutants specified in § 122.26(c)(1). For all storm water permit applicants taking flow-weighted composites, quantitative data must be reported for all pollutants specified in § 122.26 except pH, temperature, cyanide, total phenols, residual chlorine, oil and grease, fecal coliform, and fecal streptococcus. The Director may allow or establish appropriate site-specific sampling procedures or requirements, including sampling locations, the season in which the sampling takes place, the minimum duration between the previous measurable storm event and the storm event sampled, the minimum or maximum level of precipitation required for an appropriate storm event, the form of precipitation sampled (snow melt or rain fall), protocols for collecting samples under 40 CFR part 136, and additional time for submitting data on a case-by-case basis. An applicant is expected to ''know or have reason to believe'' that a pollutant is present in an effluent based on an evaluation of the expected use, production, or storage of the pollutant, or on any previous analyses for the pollutant. (For example, any pesticide manufactured by a facility may be expected to be present in contaminated storm water runoff from the facility.)

(iii) Every applicant must report quantitative data for every outfall for the following pollutants:

Biochemical Oxygen Demand (BOD5)
Chemical Oxygen Demand
Total Organic Carbon
Total Suspended Solids
Ammonia (as N)
Temperature (both winter and summer)
pH

(iv) The Director may waive the reporting requirements for individual point sources or for a particular industry category for one or more of the pollutants listed in paragraph (g)(7)(iii) of this section if the applicant has demonstrated that such a waiver is appropriate because information adequate to support issuance of a permit can be obtained with less stringent requirements.

(v) Each applicant with processes in one or more primary industry category (see appendix A to part 122) contributing to a discharge must report quantitative data for the following pollutants in each outfall containing process wastewater:

(A) The organic toxic pollutants in the fractions designated in table I of appendix D of this part for the applicant's industrial category or categories unless the applicant qualifies as a small business under paragraph (g)(8) of this section. Table II of appendix D of this part lists the organic toxic pollutants in each fraction. The fractions result from the sample preparation required by the analytical procedure which uses gas chromatography/mass spectrometry. A determination that an applicant falls within a particular industrial category for the purposes of selecting fractions for testing is not conclusive as to the applicant's inclusion in that category for any other purposes. [See Notes 2, 3, and 4 of this section.]

(B) The pollutants listed in table III of appendix D of this part (the toxic metals, cyanide, and total phenols).

(vi)(A) Each applicant must indicate whether it knows or has reason to believe that any of the pollutants in table IV of appendix D of this part (certain conventional and nonconventional pollutants) is discharged from each outfall. If an applicable effluent limitations guideline either directly limits the pollutant or, by its express terms, indirectly limits the pollutant through limitations on an indicator, the applicant must report quantitative data. For every pollutant discharged which is not so limited in an effluent limitations guideline, the applicant must either report quantitative data or briefly describe the reasons the pollutant is expected to be discharged.

(B) Each applicant must indicate whether it knows or has reason to believe that any of the pollutants listed in table II or table III of appendix D of this part (the toxic pollutants and total phenols) for which quantitative data are not otherwise required under paragraph (g)(7)(v) of this section, is discharged from each outfall. For every pollutant expected to be discharged in concentrations of 10 ppb or greater the applicant must report quantitative data. For acrolein, acrylonitrile, 2,4 dinitrophenol, and 2-methyl-4,6 dinitrophenol, where any of these four pollutants are expected to be discharged in concentrations of 100 ppb or greater the applicant must report quantitative data. For every pollutant expected to be discharged in concentrations less than 10 ppb, or in the case of acrolein, acrylonitrile, 2,4 dinitrophenol, and 2-methyl-4,6 dinitrophenol, in concentrations less than 100 ppb, the applicant must either submit quantitative data or briefly describe the reasons the pollutant is expected to be discharged. An applicant qualifying as a small business under paragraph (g)(8) of this section is not required to analyze for pollutants listed in table II of appendix D of this part (the organic toxic pollutants).

(vii) Each applicant must indicate whether it knows or has reason to believe that any of the pollutants in table V of appendix D of this part (certain hazardous substances and asbestos) are discharged from each outfall. For every pollutant expected to be discharged, the applicant must briefly describe the reasons the pollutant is expected to be discharged, and report any quantitative data it has for any pollutant.

(viii) Each applicant must report qualitative data, generated using a screening procedure not calibrated with

analytical standards, for 2,3,7,8-tetrachlorodibenzo-p-dioxin (TCDD) if it:

(A) Uses or manufactures 2,4,5-trichlorophenoxy acetic acid (2,4,5,-T); 2-(2,4,5-trichlorophenoxy) propanoic acid (Silvex, 2,4,5,-TP); 2-(2,4,5-trichlorophenoxy) ethyl, 2,2-dichloropropionate (Erbon); O,O-dimethyl O-(2,4,5-trichlorophenyl) phosphorothioate (Ronnel); 2,4,5-trichlorophenol (TCP); or hexachlorophene (HCP); or

(B) Knows or has reason to believe that TCDD is or may be present in an effluent.

(8) *Small business exemption.* An applicant which qualifies as a small business under one of the following criteria is exempt from the requirements in paragraph (g)(7)(v)(A) or (g)(7)(vi)(A) of this section to submit quantitative data for the pollutants listed in table II of appendix D of this part (the organic toxic pollutants):

(i) For coal mines, a probable total annual production of less than 100,000 tons per year.

(ii) For all other applicants, gross total annual sales averaging less than $100,000 per year (in second quarter 1980 dollars).

* * * * *

(l) * * *

(1) The owner or operator of any facility which may be a new sources (as defined in § 122.2) and which is located in a State without an approved NPDES program must comply with the provisions of this paragraph (l).

(2) * * *

(ii) The Regional Administrator shall make an initial determination whether the facility is a new source within 30 days of receiving all necessary information under paragraph (l)(2)(i) of this section.

(3) The Regional Administrator shall issue a public notice in accordance with 40 CFR 124.10 of the new source determination under paragraph (l)(2) of this section. If the Regional Administrator has determined that the facility is a new source, the notice shall state that the applicant must comply with the environmental review requirements of 40 CFR 6.600.

(4) Any interested party may challenge the Regional Administrator's initial new source determination by requesting review of the determination under 40 CFR 124.19 within 30 days of the public notice of the initial determination. If all interested parties agree, the Environmental Appeals Board may defer review until after a final permit decision is made, and consolidate review of the determination with any review of the permit decision.

* * * * *

[Note 1: At 46 FR 2046, Jan. 8, 1981, the Environmental Protection Agency suspended until further notice § 122.21(g)(7)(v)(A) and the corresponding portions of Item V–C of the NPDES application Form 2C as they apply to coal mines. This revision continues that suspension.] [1]

[Note 2: At 46 FR 22585, Apr. 20, 1981, the Environmental Protection Agency suspended until further notice § 122.21(g)(7)(v)(A) and the corresponding portions of Item V–C of the NPDES application Form 2C as they apply to:

* * * * *

[Note 3: At 46 FR 35090, July 1, 1981, the Environmental Protection Agency suspended until further notice § 122.21(g)(7)(v)(A) and the corresponding portions of Item V–C of the NPDES application Form 2C as they apply to:

* * * * *

6. Section 122.22 is amended by revising paragraph (a)(1)(ii) to read as follows:

§ 122.22 Signatories to permit applications and reports (applicable to State programs, see § 123.25).

(a) * * *

(1) * * *

(ii) The manager of one or more manufacturing, production, or operating facilities, provided, the manager is authorized to make management decisions which govern the operation of the regulated facility including the ability to allocate resources, make major capital investments, and initiate and direct other comprehensive measures to assure long term environmental compliance with environmental laws and regulations; can ensure that the necessary systems are established or actions taken to gather complete and accurate information for permit application requirements; and where authority to sign documents has been assigned or delegated to the manager in accordance with corporate procedures.

Note: * * *

* * * * *

§ 122.24 [Amended]

7. The paragraph heading for § 122.24(b) (known as ''Defintion'') is revised to read ''Definition''.

8. Section 122.26 is amended by revising paragraphs (b)(15), (c)(1) introductory text, (c)(1)(i)(E)(*4*), (c)(1)(i)(F), (d)(1)(iii)(D)(*1*), and (d)(2)(iv)(C)(*2*), and by removing and reserving paragraph (c)(2), to read as follows:

§ 122.26 Storm water discharges (applicable to State NPDES programs, see § 123.25).

* * * * *

(b) * * *

(15) *Uncontrolled sanitary landfill* means a landfill or open dump, whether in operation or closed, that does not meet the requirements for runon or runoff controls established pursuant to subtitle D of the Solid Waste Disposal Act.

* * * * *

(c) * * *

(1) *Individual application.* Dischargers of storm water associated with industrial activity are required to apply for an individual permit or seek coverage under a promulgated storm water general permit. Facilities that are required to obtain an individual permit, or any discharge of storm water which the Director is evaluating for designation (see 40 CFR 124.52(c)) under paragraph (a)(1)(v) of this section and is not a municipal storm sewer, shall submit an NPDES application in accordance with the requirements of § 122.21 as modified and supplemented by the provisions of this paragraph (c).

(i) * * *

(E) * * *

(*4*) Any information on the discharge required under paragraph § 122.21(g)(7)(vi) and (vii) of this part;

* * * * *

(F) Operators of a discharge which is composed entirely of storm water are exempt from the requirements of § 122.21 (g)(2), (g)(3), (g)(4), (g)(5), (g)(7)(iii), (g)(7)(iv), (g)(7)(v), and (g)(7)(viii); and * * *

* * * * *

(d) * * *

(1) * * *

(iii) * * *

(D) * * *

(*1*) A grid system consisting of perpendicular north-south and east-west lines spaced ¼ mile apart shall be overlaid on a map of the municipal storm sewer system, creating a series of cells;

* * * * *

(2) * * *

(iv) * * *

(C) * * *

(*2*) Describe a monitoring program for storm water discharges associated with the industrial facilities identified in paragraph (d)(2)(iv)(C) of this section, to be implemented during the term of the permit, including the submission of quantitative data on the following constituents: Any pollutants limited in effluent guidelines subcategories, where applicable; any pollutant listed in an existing NPDES permit for a facility; oil and grease, COD, pH, BOD5, TSS, total phosphorus, total Kjeldahl nitrogen, nitrate plus nitrite nitrogen, and any

information on discharges required under 40 CFR 122.21(g)(7) (vi) and (vii).

* * * * *

9. Section 122.28 is amended by revising paragraphs (a)(1) introductory text and (a)(2), adding paragraphs (a)(3) and (a)(4), and revising paragraph (b)(1) to read as follows:

§ 122.28 General permits (applicable to State NPDES programs, see § 123.25).

(a) * * *

(1) *Area.* The general permit shall be written to cover one or more categories or subcategories of discharges or sludge use or disposal practices or facilities described in the permit under paragraph (a)(2)(ii) of this section, except those covered by individual permits, within a geographic area. The area should correspond to existing geographic or political boundaries such as:

* * * * *

(2) *Sources.* The general permit may be written to regulate one or more categories or subcategories of discharges or sludge use or disposal practices or facilities, within the area described in paragraph (a)(1) of this section, where the sources within a covered subcategory of discharges are either:

(i) Storm water point sources; or

(ii) One or more categories or subcategories of point sources other than storm water point sources, or one or more categories or subcategories of ''treatment works treating domestic sewage'', if the sources or ''treatment works treating domestic sewage'' within each category or subcategory all:

(A) Involve the same or substantially similar types of operations;

(B) Discharge the same types of wastes or engage in the same types of sludge use or disposal practices;

(C) Require the same effluent limitations, operating conditions, or standards for sewage sludge use or disposal;

(D) Require the same or similar monitoring; and

(E) In the opinion of the Director, are more appropriately controlled under a general permit than under individual permits.

(3) *Water quality-based limits.* Where sources within a specific category or subcategory of dischargers are subject to water quality-based limits imposed pursuant to § 122.44 of this part, the sources in that specific category or subcategory shall be subject to the same water quality-based effluent limitations.

(4) *Other requirements.* (i) The general permit must clearly identify the applicable conditions for each category or subcategory of dischargers or treatment works treating domestic sewage covered by the permit.

(ii) The general permit may exclude specified sources or areas from coverage.

(b) * * *

(1) *In general.* General permits may be issued, modified, revoked and reissued, or terminated in accordance with applicable requirements of part 124 or corresponding State regulations. Special procedures for issuance are found at § 123.44 for States.

* * * * *

§ 122.29 [Amended]

10. Section 122.29(c)(1)(i) is amended by revising the reference to ''§ 122.21(k)'' to read ''§ 122.21(l)''.

11. Section 122.41 is amended by revising paragraphs (j), (l)(4), and the second sentence in paragraph (l)(6)(i) to read as follows:

§ 122.41 Conditions applicable to all permits (applicable to State programs, see § 123.25).

* * * * *

(j) *Monitoring and records.* All permits must monitor and maintain records in accordance with § 122.48 of this part.

* * * * *

(l) * * *

(4) *Monitoring reports.* Monitoring results shall be reported in accordance with § 122.48 of this part.

* * * * *

(6) *Twenty-four hour reporting.*

(i) * * * Any information shall be provided orally within 24 hours from the time the permittee becomes aware of the circumstances. * * *

* * * * *

§ 122.43 [Amended]

12. Section 122.43(b)(1) is amended by removing from the second sentence the words ''(except as provided in § 124.86(c) for NPDES permits being processed under subpart E or F of part 124)'' and by replacing the term ''additonal'' in the third sentence with its correct spelling, ''additional''.

13. Section 122.44 is amended by revising paragraphs (a), (c), and (e)(1), by removing and reserving paragraph (i), by revising paragraph (k), and revising paragraph (q) to read as follows:

§ 122.44 Establishing limitations, standards, and other permit conditions (applicable to State NPDES programs, see § 123.25).

* * * * *

(a)(1) Any permit issued shall include technology-based effluent limitations and standards based on: Effluent limitations and standards promulgated under section 301(b)(1) or 301(b)(2), as appropriate, new source performance standards promulgated under section 306 of CWA, case-by-case effluent limitations determined under section 402(a)(1) of CWA, or on a combination of the three, in accordance with § 125.3. For new sources or new dischargers, these technology based limitations and standards are subject to the provisions of § 122.29(d) (protection period).

(2) Permits need not include technology-based effluent limitations and standards for every pollutant or parameter listed in applicable effluent guidelines and standards found at 40 CFR Subchapter N if in the judgment of the Director, a permittee adequately demonstrates and certifies when applying for the permit that it will not discharge those pollutants. In such cases, the permit will be deemed not to authorize the discharge of those excluded pollutants in any amounts, and for this exclusion of limitations to be valid, the permit must contain an express condition to that effect. This exclusion is good only for the term of the permit. Certifications along with any supporting information must be submitted each time a permit is applied for.

* * * * *

(c) *Reopener clause:* For any permit issued to a treatment works treating domestic sewage (including ''sludge-only facilities''), the Director shall include a reopener clause to incorporate any applicable standard for sewage sludge use or disposal promulgated under section 405(d) of the CWA. The Director may promptly modify or revoke and reissue any permit containing the reopener clause required by this paragraph if the standard for sewage sludge use or disposal is more stringent than any requirements for sludge use or disposal in the permit, or controls a pollutant or practice not limited in the permit.

* * * * *

(e) * * *

(1) Limitations must control all toxic pollutants which the Director determines (based on information reported in a permit application under § 122.21(g)(7) or in a notification under § 122.42(a)(1) or on other information) are or may be discharged at a level greater than the level which can be achieved by the technology-based treatment requirements appropriate to the permittee under § 125.3(c); or

* * * * *

(k) *Best management practices (BMPs)* to control or abate the discharge of pollutants when:

(1) Authorized under section 304(e) of the CWA for the control of toxic

pollutants and hazardous substances from ancillary industrial activities;

(2) Numeric effluent limitations are infeasible; or

(3) The practices are reasonably necessary to achieve effluent limitations and standards or to carry out the purposes and intent of the CWA.

[Note: Additional technical information on BMPs and the elements of BMP Plans is contained in the following documents: Guidance Manual for Developing Best Management Practices (BMPs), October 1993, EPA No. 833/B–93–004, NTIS No. PB 94–178324, ERIC No. W498); Storm Water Management for Construction Activities: Developing Pollution Prevention Plans and Best Management Practices, September 1992, EPA No. 832/R–92–005, NTIS No. PB 92–235951, ERIC No. N482); Storm Water Management for Construction Activities, Developing Pollution Prevention Plans and Best Management Practices: Summary Guidance, EPA No. 833/R–92–001, NTIS No. PB 93–223550; ERIC No. W139; Storm Water Management for Industrial Activities, Developing Pollution Prevention Plans and Best Management Practices, September 1992; EPA 832/R–92–006, NTIS No. PB 92–235969, ERIC No. N477; Storm Water Management for Industrial Activities, Developing Pollution Prevention Plans and Best Management Practices: Summary Guidance, EPA 833/R–92–002, NTIS No. PB 94–133782; ERIC No. W492. Copies of those documents (or directions on how to obtain them) can be obtained by contacting either the Office of Water Resource Center (using the EPA document number as a reference) at (202) 260–7786; the National Technical Information Service (NTIS) (using the NTIS number as a reference) at (800) 553–NTIS or (703) 487–4650, or (3) the Educational Resources Information Center (ERIC) (using the ERIC number as a reference) at (800) 276–0462. Updates of these documents or additional BMP documents may also be available.]

* * * * *

(q) *Navigation.* Any conditions that the Secretary of the Army considers necessary to ensure that navigation and anchorage will not be substantially impaired, in accordance with § 124.59.

* * * * *

14. Section 122.45 is amended by revising paragraph (h)(1) to read as follows:

§ 122.45 Calculating NPDES permit conditions (applicable to State NPDES programs, see § 123.25)

* * * * *

(h) *Internal waste streams.* (1) When permit effluent limitations or standards imposed at the point of discharge are impractical or infeasible, effluent limitations or standards for discharges of pollutants may be imposed on internal waste streams before mixing with other waste streams or cooling water streams. In those instances, the monitoring required by § 122.48 shall also be applied to the internal waste streams.

* * * * *

§ 122.47 [Amended]

15. Section 122.47(b) introductory text is amended by removing the term ''requriements'' and replacing it with the correct spelling, ''requirements''.

16. Section 122.48 is revised to read as follows:

§ 122.48 Requirements for monitoring, recording and reporting of monitoring results (applicable to State programs, see § 123.25).

(a) *Monitoring requirements.* All permits must contain monitoring requirements to assure compliance with permit terms and conditions.

(1) Permittees must monitor:

(i) The mass (or other measurement specified in the permit) for each pollutant limited in the permit;

(ii) The volume of effluent discharged from each outfall; and

(iii) Other measurements as appropriate including:

(A) Pollutants in internal waste streams under § 122.45(h);

(B) Pollutants in intake water for net limitations under § 122.45(g);

(C) Frequency, rate of discharge, etc., for noncontinuous discharges under § 122.45(e);

(D) Pollutants subject to notification requirements under § 122.42(a); and

(E) Pollutants in sewage sludge or other monitoring as specified in 40 CFR part 503; or

(F) As determined to be necessary on a case-by-case basis pursuant to section 405(d)(4) of the CWA.

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

(3) Monitoring will be conducted according to test procedures approved under 40 CFR part 136, unless an alternative test procedure has been approved under § 136.5. For sludge use or disposal, monitoring will be conducted in accordance with test procedures approved under part 136 unless otherwise specified in 40 CFR part 503. Where no test procedure has been approved under 40 CFR part 136, the Director shall specify a test method in the Permit.

(4) All permits shall specify:

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

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

(iii) Applicable reporting requirements based upon the impact of the regulated activity and as specified in § 122.44; and

(iv) Calculations for all limitations which require averaging of measurements shall utilize an arithmetic mean unless otherwise specified by the Director in the permit.

(b) *Reporting monitoring results.* (1) Monitoring results must be reported on a Discharge Monitoring Report (DMR) or forms provided or specified by the Director for reporting results of monitoring of sludge use or disposal practices.

(2) Except as provided in paragraphs (b)(5) and (b)(6) of this section, requirements to report monitoring results shall be established on a case-by-case basis with a frequency dependent on the nature and effect of the discharge, but in no case less than once a year.

(3) For sewage sludge use or disposal practices, requirements to monitor and report results shall be established on a case-by-case basis with a frequency dependent on the nature and effect of the sewage sludge use or disposal practice; minimally this shall be as specified in 40 CFR part 503 (where applicable), but in no case less than once a year.

(4) Requirements to report monitoring results for storm water discharges associated with industrial activity which are subject to an effluent limitation guideline shall be established on a case-by-case basis with a frequency dependent on the nature and effect of the discharge, but in no case less than once a year.

(5) Requirements to report monitoring results for storm water discharges associated with industrial activity (other than those addressed in paragraph (b)(4) of this section) shall be established on a case-by-case basis with a frequency dependent on the nature and effect of the discharge. At a minimum, a permit for such a discharge must require:

(i) The discharger to conduct an annual inspection of the facility site to identify areas contributing to a storm water discharge associated with industrial activity and evaluate whether measures to reduce pollutant loadings identified in a storm water pollution prevention plan are adequate and properly implemented in accordance with the terms of the permit or whether additional control measures are needed;

(ii) The discharger to maintain for a period of three years a record summarizing the results of the

inspection and a certification that the facility is in compliance with the plan and the permit, and identifying any incidents of non-compliance;

(iii) Such report and certification be signed in accordance with § 122.22; and

(iv) Permits for storm water discharges associated with industrial activity from inactive mining operations may, where annual inspections are impracticable, require certification once every three years by a Registered Professional Engineer that the facility is in compliance with the permit, or alternative requirements.

(6) Permits which do not require the submittal of monitoring result reports at least annually shall require that the permittee report all instances of noncompliance not reported under § 122.41(l) (1), (5), and (6) at least annually.

(7) If the permittee monitors any pollutant more frequently than required by the permit using test procedures approved under 40 CFR part 136 or, in the case of sludge use or disposal, approved under 40 CFR part 136 unless otherwise specified in 40 CFR part 503, or as specified in the permit, the results of this monitoring shall be included in the calculation and reporting of the data submitted in the DMR or sludge reporting form specified by the Director.

(c) *Records of monitoring information.* (1) Except for records of monitoring information required by this permit related to the permittee's sewage sludge use and disposal activities, which shall be retained for a period of at least five years (or longer as required by 40 CFR part 503), the permittee shall retain records of all monitoring information, including all calibration and maintenance records and all original strip chart recordings for continuous monitoring instrumentation, copies of all reports required by this permit, and records of all data used to complete the application for this permit, for a period of at least 3 years from the date of the sample, measurement, report or application. This period may be extended by request of the Director at any time.

(2) Records of monitoring information shall include:

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

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

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

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

(v) The analytical techniques or methods used; and

(vi) The results of such analyses.

(d) *Penalties for falsification and tampering*: (1) The Clean Water Act provides that any person who falsifies, tampers with, or knowingly renders inaccurate any monitoring device or method required to be maintained under this permit shall, upon conviction, be punished by a fine of not more than $10,000, or by imprisonment for not more than 2 years, or both.

(2) If a conviction of a person is for a violation committed after a first conviction of such person under this paragraph (d), punishment is a fine of not more than $20,000 per day of violation, or by imprisonment of not more than 4 years, or both.

17. Section 122.62 is amended by revising paragraph (a)(8) to read as follows:

§ 122.62 Modification or revocation and reissuance of permits (applicable to State programs, see § 123.25).

* * * * *

(a) * * *

(8)(i) *Net limits.* Upon request of a permittee who qualifies for effluent limitations on a net basis under § 122.45(g).

(ii) When a discharger is no longer eligible for net limitations, as provided in § 122.45(g)(1)(ii).

* * * * *

18. Section 122.64 is amended by revising paragraph (b) to read as follows:

§ 122.64 Termination of permits (applicable to State programs, see § 123.25).

* * * * *

(b) The Director shall follow the applicable procedures in part 124 or part 22, as appropriate (or State procedures equivalent to part 124) in terminating any NPDES permit under this section, except that if the entire discharge is permanently terminated by elimination of the flow or by connection to a POTW (but not by land application or disposal into a well), the Director may terminate the permit by notice to the permittee. Termination by notice shall be effective 30 days after notice is sent, unless the permittee objects within that time. If the permittee objects during that period, the Director shall follow the applicable part 124 or State procedures for termination. Expedited permit termination procedures are not available to permittees that are subject to pending State and/or Federal enforcement actions including citizen suits brought under State or Federal law. If requesting expedited permit termination procedures, a permittee must certify that it is not subject to any pending State or Federal enforcement actions including citizen suits brought under State or Federal law. State-authorized NPDES programs are not required to use part 22 procedures for NPDES permit terminations.

PART 123—STATE PROGRAM REQUIREMENTS

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 123.25 is amended by revising paragraphs (a)(12), (a)(19), (a)(36) and paragraph (b) to read as follows:

§ 123.25 Requirements for permitting.

(a) * * *

* * * * *

(12) § 122.41 (a)(1) and (b) through (n)—(Applicable permit conditions) (Indian Tribes can satisfy enforcement authority requirements under § 123.34);

* * * * *

(19) § 122.48 (a) through (c)—(Monitoring requirements);

* * * * *

(36) Subparts A, B, D, and H of part 125;

* * * * *

(b) State NPDES programs shall have an approved continuing planning process under 40 CFR 130.5 and shall assure that the approved planning process is at all times consistent with the CWA.

* * * * *

3. Section 123.44 is amended by revising paragraph (a)(2) and the introductory text of paragraph (b)(2), and by removing and reserving paragraph (i) to read as follows:

§ 123.44 EPA review of and objections to State permits.

(a) * * *

(2) In the case of general permits, EPA shall have 90 days from the date of receipt of the proposed general permit to comment upon, object to or make recommendations with respect to the proposed general permit, and is not bound by any shorter time limits set by the Memorandum of Agreement for general comments, objections or recommendations.

(b) * * *

(2) Within 90 days following receipt of a proposed permit to which he or she has objected under paragraph (b)(1) of this section, or in the case of general permits within 90 days after receipt of the proposed general permit, the Regional Administrator shall set forth in writing and transmit to the State Director:

* * * * *

PART 124—PROCEDURES FOR DECISIONMAKING

1. The authority citation for part 124 is revised to read as follows:

Authority: Resource Conservation and Recovery Act, 42 U.S.C. 6901 *et seq.*; Safe Drinking Water Act, 42 U.S.C. 300f *et seq.*; Clean Water Act, 33 U.S.C. 1251 *et seq.*; Clean Air Act, 42 U.S.C. 7401 *et seq.*

2. Section 124.1 is amended by revising the first sentence of paragraph (a) and paragraphs (b) and (c), by removing the table entitled ''Hearings Available Under This Part'' following paragraph (c), and by revising the fourth sentence of paragraph (d) to read as follows:

§ 124.1 Purpose and scope.

(a) This part contains EPA procedures for issuing, modifying, revoking and reissuing, or terminating all RCRA, UIC, PSD and NPDES ''permits'' (including ''sludge-only'' permits issued pursuant to § 122.1(b)(2). * * *

(b) Part 124 is organized into four subparts. Subpart A contains general procedural requirements applicable to all permit programs covered by these provisions. Subparts B through D supplement these general provisions with requirements that apply to only one or more of the programs. Subpart A describes the steps EPA will follow in receiving permit applications, preparing draft permits, issuing public notices, inviting public comment and holding public hearings on draft permits. Subpart A also covers assembling an administrative record, responding to comments, issuing a final permit decision, and allowing for administrative appeal of final permit decisions. Subpart B contains specific procedural requirements for RCRA permits. Subpart C contains definitions and specific procedural requirements for PSD permits. Subpart D contains specific procedural requirements for NPDES permits.

(c) Part 124 offers an opportunity for public hearings (see § 124.12).

(d) * * * This part also allows consolidated permits to be subject to a single public hearing under § 124.12. * * *

* * * * *

§ 124.2 [Amended]

3. Section 124.2 is amended by:

a. Removing the following definitions: ''Applicable standards and limitations'', ''[Consultation with the Regional Administrator'']. ''NPDES'', and ''Variance''; and

b. Removing paragraph (c).

§ 124.3 [Amended]

4. Section 124.3 is amended by adding the word ''and'' at the end of paragraph (g)(3), by removing ''; and'' and replacing it with a period in paragraph (g)(4) and by removing paragraph (g)(5).

§ 124.4 [Amended]

5. Section 124.4 is amended by removing and reserving paragraph (d) and by removing the phrase ''or process a PSD permit under subpart F as provided in paragraph (d) of this section'' in paragraph (e).

6. Section 124.5 is to be amended by revising paragraph (d) to read as follows:

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

* * * * *

(d) *(Applicable to State programs, see §§ 123.25 (NPDES), 145.11 (UIC), and 271.14 (RCRA)).* (1) If the Director tentatively decides to terminate: A permit under § 144.40 (UIC), a permit under §§ 122.64(a) (NPDES) or 270.43 (RCRA) (for EPA-issued NPDES or RCRA permits, only at the request of the permittee), or a permit under § 122.64(b) (NPDES) where the permittee objects, he or she shall issue a notice of intent to terminate. A notice of intent to terminate is a type of draft permit which follows the same procedures as any draft permit prepared under § 124.6.

(2) For EPA-issued NPDES or RCRA permits, if the Director tentatively decides to terminate a permit under § 122.64(a) (NPDES) or § 270.43 (RCRA) other than at the request of the permittee, he or she shall prepare a complaint under 40 CFR 22.13 and 22.44. Such termination of NPDES and RCRA permits shall be subject to the procedures of part 22 instead of this part.

(3) In the case of EPA-issued permits, a notice of intent to terminate or a complaint shall not be issued if the Regional Administrator and the permittee agree to termination in the course of transferring permit responsibility to an approved State under §§ 123.24(b)(1) (NPDES), 145.25(b)(1) (UIC), 271.8(b)(6) (RCRA), or 501.14(b)(1) (sludge). In addition, termination of an NPDES permit for cause pursuant to § 122.64(b) may be accomplished by providing written notice to the permittee, unless the permittee objects.

* * * * *

7. Section 124.6 is amended by revising the third sentence after the heading of paragraph (e) to read as follows:

§ 124.6 Draft permits.

* * * * *

(e) * * * For all permits issued pursuant to this part, an appeal may be taken under § 124.19. * * *

§ 124.10 [Amended]

8. Section 124.10 is amended by removing the words '', subpart E or subpart F'' in paragraphs (a)(1)(iii) and (d)(2) introductory text.

§ 124.12 [Amended]

9. Section 124.12(e) is removed.

§ 124.14 [Amended]

10. Section 124.14(d) is removed and reserved.

11. Section 124.15 is amended by revising the third sentence of paragraph (a) and by revising paragraph (b)(2) to read as follows:

§ 124.15 Issuance and effective date of permit.

(a) * * * This notice shall include reference to the procedures for appealing a decision on a RCRA, UIC, PSD, or NPDES permit under § 124.19. * * *

(b) * * *

(2) Review is requested on the permit under § 124.19; or

* * * * *

12. Section 124.16 is amended by revising paragraph (a) to read as follows:

§ 124.16 Stays of contested permit conditions.

(a) *Stays.* (1) If a request for review of a RCRA, UIC, or NPDES permit under § 124.19 is filed, the effect of the contested permit conditions shall be stayed and shall not be subject to judicial review pending final agency action. Uncontested permit conditions shall be stayed only until the date specified in paragraph (a)(2)(i) of this section. (No stay of a PSD permit is available under this section.) If the permit involves a new facility or new injection well, new source, new discharger or a recommencing discharger, the applicant shall be without a permit for the proposed new facility, injection well, source or discharger pending final agency action. See also § 124.60.

(2)(i) Uncontested conditions which are not severable from those contested shall be stayed together with the contested conditions. The Regional Administrator shall identify the stayed provisions of permits for existing facilities, injection wells, and sources. All other provisions of the permit for the existing facility, injection well, or source become fully effective and enforceable 30 days after the date of the

notification required in paragraph (a)(2)(ii) of this section.

(ii) The Regional Administrator shall, as soon as possible after receiving notification from the EAB of the filing of a petition for review, notify the EAB, the applicant, and all other interested parties of the uncontested (and severable) conditions of the final permit that will become fully effective enforceable obligations of the permit as of the date specified in paragraph (a)(2)(i). For NPDES permits only, the notice shall comply with the requirements of § 124.60(b).

* * * * *

13. Section 124.19 is amended by revising the section heading, revising the first sentence of paragraph (a) introductory text, revising the first sentence of paragraph (b), revising paragraph (d), and revising the first sentence of paragraph (f)(1) introductory text to read as follows:

§ 124.19 Appeal of RCRA, UIC, NPDES, and PSD Permits.

(a) Within 30 days after a RCRA, UIC, NPDES, or PSD final permit decision (or a decision under 40 CFR 270.29 to deny a permit for the active life of a RCRA hazardous waste management facility or unit) has been issued under § 124.15, any person who filed comments on that draft permit or participated in the public hearing may petition the Environmental Appeals Board to review any condition of the permit decision. * * *

* * * * *

(b) The Environmental Appeals Board may also decide on its own initiative to review any condition of any RCRA, UIC, NPDES, or PSD permit decision issued under this part. * * *

* * * * *

(d) The Regional Administrator, at any time prior to the rendering of a decision under paragraph (c) of this section to grant or deny review of a permit decision, may, upon notification to the Board and any interested parties, withdraw the permit and prepare a new draft permit under § 124.6 addressing the portions so withdrawn. The new draft permit shall proceed through the same process of public comment and opportunity for a public hearing as would apply to any other draft permit subject to this part. Any portions of the permit which are not withdrawn and which are not stayed under § 124.16(a) shall remain in effect.

* * * * *

(f)(1) For purposes of judicial review under the appropriate Act, final agency action occurs when a final RCRA, UIC, NPDES, or PSD permit decision is issued by EPA and agency review procedures under this section are exhausted. * * *

* * * * *

14. Section 124.21 is revised to read as follows:

§ 124.21 Effective date of part 124.

(a) Part 124 became effective for all permits except for RCRA permits on July 18, 1980. Part 124 became effective for RCRA permits on November 19, 1980.

(b) EPA eliminated the previous requirement for NPDES permits to undergo an evidentiary hearing after permit issuance, and modified the procedures for termination of NPDES and RCRA permits, on [date 30 days after publication of final rule].

(c)(1) For any NPDES permit decision for which a request for evidentiary hearing was granted on or prior to [date 29 days after publication of final rule], the hearing and any subsequent proceedings (including any appeal to the Environmental Appeals Board) shall proceed pursuant to the procedures of this part as in effect on [date 29 days after publication of final rule].

(2) For any NPDES permit decision for which a request for evidentiary hearing was denied on or prior to [date 29 days after publication of final rule], but for which the Board has not yet completed proceedings under § 124.91, the appeal, and any hearing or other proceedings on remand if the Board so orders, shall proceed pursuant to the procedures of this part as in effect on [date 29 days after publication of final rule].

(3) For any NPDES permit decision for which a request for evidentiary hearing was filed on or prior to [date 29 days after publication of final rule] but was neither granted nor denied prior to that date, the Regional Administrator shall, no later than [date 60 days after publication of the final rule], notify the requester that the request for evidentiary hearing is being returned without prejudice. Notwithstanding the time limit in § 124.19(a), the requester may file an appeal with the Board, in accordance with the other requirements of § 124.19(a), no later than [date 90 days after publication of the final rule].

(4) A party to a proceeding otherwise subject to paragraphs (c) (1) or (2) of this section may, no later than [date 30 days after publication of this rule], request that the evidentiary hearing process be suspended. The Regional Administrator shall inquire of all other parties whether they desire the evidentiary hearing to continue. If no party desires the hearing to continue, the Regional Administrator shall return the request for evidentiary hearing in the manner specified in paragraph (c)(3) of this section.

(d) For any proceeding to terminate an NPDES or RCRA permit commenced on or prior to [date 29 days after publication of the final rule], the Regional Administrator shall follow the procedures of § 124.5(d) as in effect on [date 29 days after publication of the final rule], and any formal hearing shall follow the procedures of subpart E of this part as in effect on the same date.

§ 124.52 [Amended]

15. Section 124.52 is amended by removing the words ''or § 124.118'' in paragraphs (b) and (c).

§ 124.55 [Amended]

16. Section 124.55 is amended by revising the reference ''§ 124.53(d) (1) and (2)'' in paragraph (a)(2) to read ''§ 124.53(e)'' and by revising the reference ''§ 124.53(d)'' in paragraph (d) to read ''§ 124.53(e)''.

17. Section 124.56 is amended by revising (b)(1) to read as follows:

§ 124.56 Fact sheets (applicable to State NPDES programs, see § 123.25).

* * * * *

(b)(1) When the draft permit contains any of the following conditions, an explanation of the reasons why such conditions are applicable:

(i) Limitations to control toxic pollutants under § 122.44(e);

(ii) Limitations on internal waste streams under § 122.45(i);

(iii) Limitations on indicator pollutants under § 125.3(g);

(iv) Limitations set on a case-by-case basis under § 125.3 (c)(2) or (c)(3), or pursuant to Section 405(d)(4) of the CWA; or

(v) Limitations to meet the criteria for permit issuance under § 122.4(i).

* * * * *

§ 124.57 [Amended]

18. Section 124.57 is amended by removing and reserving paragraph (b) and by removing paragraph (c).

19. Section 124.60 is revised to read as follows:

§ 124.60 Issuance and effective date and stays of NPDES permits.

In addition to the requirements of §§ 124.15, 124.16, and 124.19, the following provisions apply to NPDES permits:

(a) Notwithstanding the provisions of § 124.16(a)(1), if, for any offshore or coastal mobile exploratory drilling rig or coastal mobile developmental drilling rig which has never received a final effective permit to discharge at a ''site,'' but which is not a ''new discharger'' or a ''new source,'' the Regional

Administrator finds that compliance with certain permit conditions may be necessary to avoid irreparable environmental harm during the administrative review, he or she may specify in the statement of basis or fact sheet that those conditions, even if contested, shall remain enforceable obligations of the discharger during administrative review.

(b)(1) As provided in § 124.16(a), if an appeal of an initial permit decision is filed under § 124.19, the force and effect of the contested conditions of the final permit shall be stayed until final agency action under § 124.19(f). The Regional Administrator shall notify, in accordance with § 124.16(a)(2)(ii), the discharger and all interested parties of the uncontested conditions of the final permit that are enforceable obligations of the discharger.

(2) When effluent limitations are contested, but the underlying control technology is not, the notice shall identify the installation of the technology in accordance with the permit compliance schedules (if uncontested) as an uncontested, enforceable obligation of the permit.

(3) When a combination of technologies is contested, but a portion of the combination is not contested, that portion shall be identified as uncontested if compatible with the combination of technologies proposed by the requester.

(4) Uncontested conditions, if inseverable from a contested condition, shall be considered contested.

(5) Uncontested conditions shall become enforceable 30 days after the date of notice under paragraph (b)(1) of this section.

(6) Uncontested conditions shall include:

(i) Preliminary design and engineering studies or other requirements necessary to achieve the final permit conditions which do not entail substantial expenditures;

(ii) Permit conditions which will have to be met regardless of the outcome of the appeal under § 124.19;

(iii) When the discharger proposed a less stringent level of treatment than that contained in the final permit, any permit conditions appropriate to meet the levels proposed by the discharger, if the measures required to attain that less stringent level of treatment are consistent with the measures required to attain the limits proposed by any other party; and

(iv) Construction activities, such as segregation of waste streams or installation of equipment, which would partially meet the final permit conditions and could also be used to achieve the discharger's proposed alternative conditions.

(c) In addition to the requirements of § 124.16(c)(2), when an appeal is filed under § 124.19 on an application for a renewal of an existing permit and upon written request from the applicant, the Regional Administrator may delete requirements from the existing permit which unnecessarily duplicate uncontested provisions of the new permit.

20. Section 124.64 is amended by revising paragraph (b), paragraph (c) introductory text, and paragraph (d) to read as follows:

§ 124.64 Appeals of variances.

* * * * *

(b) Variance decisions made by EPA may be appealed under the provisions of § 124.19.

(c) *Stays for section 301(g) variances.* If an appeal is filed under § 124.19 of a variance requested under CWA section 301(g), any otherwise applicable standards and limitations under CWA section 301 shall not be stayed unless:

* * * * *

(d) Stays for variances other than section 301(g) variances are governed by §§ 124.16 and 124.60.

§ 124.66 [Amended]

21. Section 124.66(a) is amended by removing the words ''Except as provided in § 124.65,'' from the first sentence, and by revising the words ''evidentiary or panel hearing under subpart E or F.'' in the fourth sentence to read ''appeal under § 124.19.''

Subpart E to Part 124 [Removed]

22. Subpart E is removed.

Subpart F to Part 124 [Removed]

23. Subpart F is removed.

Appendix A to Part 124 [Removed]

24. Appendix A to Part 124 is removed.

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

1. The authority citation for part 125 is revised to read as follows:

Authority: The Clean Water Act, 33 U.S.C. 1251 *et seq.,* unless otherwise noted.

2. Section 125.32(a) is revised to read as follows:

§ 125.32 Method of application.

(a) A written request for a variance under this subpart D shall be submitted in duplicate to the Director in accordance with §§ 122.21(m)(1) and 124.3.

* * * * *

§ 125.72 [Amended]

3. Section 125.72(c) is amended by removing the words ''and § 124.73(c)(1)''.

Subpart K to Part 125 [Removed and Reserved]

4. Subpart K is removed and reserved.

PART 144—UNDERGROUND INJECTION CONTROL PROGRAM

1. The authority citation for part 144 continues to read as follows:

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

§ 144.52 [Amended]

2. Section 144.52(b)(2) is amended by removing from the second sentence the parenthetical phrase ''(except as provided in § 124.86(c) for UIC permits being processed under subpart E or F of part 124)''.

PART 270—EPA ADMINISTERED PERMIT PROGRAMS: THE HAZARDOUS WASTE PERMIT PROGRAM

1. The authority citation for part 270 continues to read as follows:

Authority: 42 U.S.C. 6905, 6912, 6924, 6925, 6927, 6939, and 6974.

§ 270.32 [Amended]

2. Section 270.32(c) is amended by removing from the second sentence the parenthetical phrase ''(except as provided in § 124.86(c) for RCRA permits being processed under subpart E or F of part 124)''.

§ 270.43 [Amended]

3. Section 270.43(b) is amended by revising the words ''part 124'' to read ''part 124 or part 22, as appropriate''.

PART 271—REQUIREMENTS FOR AUTHORIZATION OF STATE HAZARDOUS WASTE PROGRAMS

1. The authority citation for part 271 continues to read as follows:

Authority: 42 U.S.C. 6905, 6912, and 6926.

§ 271.19 [Amended]

2. Section 271.19(e) introductory text is amended by removing the words ''in accordance with the procedures of part 124, subpart E,''.

[FR Doc. 96–30466 Filed 12–10–96; 8:45 am]

BILLING CODE 6560–50–P