ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 122, 123, 124, and 125

[FRL 1453-5]

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

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This rule establishes consolidated permit program requirements governing the Hazardous Waste Management program under the Resource Conservation and Recovery Act (RCRA), the Underground Injection Control (UIC) program under the Safe Drinking Water Act (SDWA), the National Pollutant Discharge Elimination System (NPDES) program and State Dredge or Fill ("404") programs under the Clean Water Act (CWA), and the Prevention of Significant Deterioration (PSD) program under the Clean Air Act, for three primary purposes:

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

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

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

DATES: These regulations shall become effective as follows: All regulations shall become effective as to UIC permits and programs July 18, 1980, but shall not be implemented until the effective date of 40 CFR Part 146. All regulations shall become effective as to RCRA permits and programs November 19, 1980. Part 124 shall become effective as specified in § 124.21. All other provisions of the regulations shall become effective July 18, 1980. For purposes of judicial review under the Clean Water Act, these regulations will be considered issued at 1 p.m. eastern time on June 2, 1980; see 45 FR 26894, April 22, 1980. In order to assist EPA to correct typographical errors, incorrect cross-references, and similar technical errors, comments of a technical and nonsubstantive nature on the final regulations may be submitted on or before July 18, 1980. The effective date will not be delayed by consideration of such comments.

Comments on the scope and applicability of Executive Order 11990 and Executive Order 11988 to RCRA, UIC, and NPDES permits must be submitted on or before July 18, 1980.

Comments on requirements for Class IV wells must be received by July 15, 1980.

There will be a hearing on the requirements for Class IV wells on July 8, 1980, from 9 a.m. to 5 p.m.

ADDRESSES: Comments of a technical and nonsubstantive nature, as well as the comments concerning the scope and applicability of Executive Order 11990 and Executive Order 11988, should be addressed to: Edward A. Kramer, Office of Water Enforcement (EN-336), U.S. Environmental Protection Agency, Washington, D.C. 20460.

Comments on requirements for Class IV wells should be addressed to: Alan Levin, Director, State Program Division (WH-550), Office of Drinking Water, Environmental Protection Agency, Washington, D.C. 20460.

The Public Hearing on Class IV wells will be held at: HEW Auditorium, 330 Independence Avenue, S.W., Washington, D.C.

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

SUPPLEMENTARY INFORMATION:

Background

These final regulations consolidate requirements and procedures for five EPA permit programs. These regulations represent the major product of the Agency's permit consolidation initiative that began in the fall of 1978. They are based on the proposed consolidated permit regulations that were published in the Federal Register for comment on June 14, 1979 (44 FR 32854).

EPA program requirements and State program requirements are established for three programs:

- The Hazardous Waste Management (HWM) program under the Resource Conservation and Recovery Act (RCRA);
- The Underground Injection Control (UIC) program under the Safe Drinking Water Act (SDWA);
- The National Pollutant Discharge Elimination System (NPDES) program under the Clean Water Act (CWA); and

State program requirements only are established for:

- State section 404 "Dredge or Fill" programs under the CWA.

In addition, procedures for permit decisionmaking are established for the above four programs, and for

- The Prevention of Significant Deterioration (PSD) program under the Clean Air Act, where this program is operated by EPA or a delegated State agency under 40 CFR 52.21(v); these procedures do not apply to PSD permits issued by States to whom administration of the PSD program has been transferred. (See preamble to Part 124, Subpart C.)

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

The Agency has also developed a single set of permit application forms for the programs covered by these regulations. These consolidated application forms are published elsewhere in today's Federal Register. They consist of a single general form to collect basic information from all applicants, followed by separate program-specific forms which collect additional information needed to issue permits under each program. The application forms in today's Federal Register include the general information form and the additional forms for certain water discharges under NPDES and for hazardous waste permits under RCRA.

When the draft consolidated application forms were published for public comment, they appeared along with a set of proposed NPDES regulations which were closely related to the contents of the application forms. Those accompanying regulations have now been integrated with the final NPDES regulations which appear as part of these consolidated permit regulations, and are summarized in the proper places in the preamble discussion. For a more thorough discussion and response to comments on those portions of the NPDES regulations, see the preamble to the consolidated application forms published elsewhere in today's Federal Register. Because the draft application forms and accompanying proposed NPDES regulations were originally published together, commented upon together, and are closely related, the detailed discussion of both forms and accompanying regulations has been retained in one place.

Many of the requirements in these regulations apply both to EPA programs and to State programs that receive EPA approval to operate in lieu of a Federal program in a particular State. These common requirements are intended to ensure that State permit programs satisfy minimum statutory and

environmental objectives, while at the same time recognizing that State laws, procedures, and management philosophies differ. EPA also seeks in these regulations to help States rationalize their own regulatory programs by removing or avoiding Federal obstacles to such efforts. These regulations allow greater coordination and cooperation in permit review and issuance between EPA and States with approved RCRA, UIC, NPDES, 404, or PSD programs in instances where a single facility or activity requires permits from both EPA and one or more State agencies.

Although nothing in these regulations would require a State to reorganize its permitting procedures, EPA encourages States to begin or continue efforts toward "one-stop" permitting or other forms of permit program consolidation.

The Agency anticipates a number of benefits to the environment, the regulated community, the general public, and its own institutional efficiency from permits consolidation:

- Environmental Benefits: Consolidation of permit requirements and processing procedures should result in more comprehensive management and control of wastes.
- Regulatory Benefits: More uniform procedures and permit requirements among EPA permit programs should result in more consistency and predictability for the regulated community, and in many instances this should reduce the costs of compliance. Consistent program requirements and a single set of application forms for EPA-issued permits should reduce paperwork and increase efficiency in processing permits.
- Institutional Benefits: The Agency has already experienced greater coordination, sharing of information, and resolution of inconsistencies and overlaps among the various programs during the development of these regulations. This high level of coordination and awareness is expected to continue.
- Public Participation Benefits: Procedures and opportunities for public participation in permit decisions and in State program approvals are more uniform and predictable under these regulations.
- Resource Benefits: Consolidating these permit programs should reduce the resources EPA needs to administer them over the next few years, compared with what the expanding scope of EPA permit programs would otherwise require. Consistent program requirements and use of the consolidated application forms should be particularly helpful in starting up and administering the two new programs (RCRA hazardous waste and UIC) covered by these regulations. If States adopt similar approaches, resource benefits could also be realized at the State level.

Organization of Final Regulations

The final regulations replace 40 CFR Parts 122, 123, and 124, which were formerly used exclusively for NPDES program regulations. These Parts of the Code of Federal Regulations are being used because they already provide the skeleton for organizing permit regulations, namely:

- PART 122—PERMIT REQUIREMENTS.
- PART 123—STATE PROGRAM REQUIREMENTS.
- PART 124—PROCEDURES FOR DECISIONMAKING.

Parts 122, 123, and 124 have been organized into Subparts. Subpart A of each Part applies to each permit program included in that Part. Subsequent subparts set forth additional program-specific requirements for the individual programs.

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

Summary of the Regulations

- Part 122—Establishes definitions and basic permit requirements for EPA administered RCRA, UIC, and NPDES programs. Part 122 also provides certain requirements applicable to State programs, including State 404 programs, but only to the extent Part 123 explicitly refers to Part 122 requirements. Part 122 spells out in detail who must apply for a permit; contents of the applications; what conditions must be incorporated into permits; when permits may be revised, reissued, or terminated; and other requirements.
- Part 123—Establishes the requirements for State programs operated in lieu of EPA, after a program has received the approval of the Administrator. In addition to the RCRA hazardous waste, UIC, and NPDES programs, Part 123 governs State section 404 programs for discharges of dredged or fill material into certain waters of the United States. After receiving the approval of the Administrator a State may issue section 404 permits, in lieu of the United States Army Corps of Engineers, in so-called "Phase II and III" waters (sometimes referred to as traditionally non-navigable waters). In addition, Part 123 contains the procedures for EPA approval, revision, and withdrawal of a State program.
- Part 124—Establishes the procedures to be followed in making permit decisions under the RCRA hazardous waste, UIC, PSD, and NPDES programs. It includes procedures for public participation, for consolidated review and issuance of two or more permits to the same facility or activity, and for appealing permit decisions. Most requirements in Part 124 are only applicable where EPA is the permit-issuing authority. However, Part 123 requires States to comply with some of the Part 124 provisions, such as the basic public participation requirements of permit issuance.

Technical Requirements

Technical regulations containing requirements and criteria which apply to decisionmaking under the RCRA, UIC, NPDES, 404, and PSD programs have been developed separately from Parts 122–124. These regulations set the standards for the contents of permits issued under these programs and provide some of the technical bases for determining the adequacy of State programs and individual permit decisions.

The coverage and format of the consolidated permit regulations, and the location of the technical regulations which correspond to each program, are summarized in the following chart:

BILLING CODE 6560-01-M

TABLE I: COVERAGE AND FORMAT

Name	Abbrev.	Coverage	Consolidated in 122	123	124	Act	Technical Requirements
Hazardous Waste Management Program	HWM	generation, transportation, treatment, storage, disposal of hazardous waste	Yes	Yes	Yes	Resource Conservation & Recovery Act (RCRA) 42 USC §6901	40 CFR 260-266
Underground Injection Control Program	UIC	well injection/ protection of drinking water aquifers	Yes	Yes	Yes	Safe Drinking Water Act (SDWA) 42 USC §300f	40 CFR 146
National Pollutant Discharge Elimination System	NPDES	discharge of wastewater into waters of the U.S.	Yes	Yes	Yes	Clean Water Act (CWA) 33 USC §1251	40 CFR 125, 129, 133, & Subchapter N
Dredge or Fill Program	404	discharge of dredged or fill material into waters of U.S.	Partly	Yes	Partly	Clean Water Act (CWA) 33 USC §1251	40 CFR 230
Prevention of Significant Deterioration	PSD	emission of pollutants from sources in clean air areas	No	No	Yes	Clean Air Act (CAA) 42 USC §7401	40 CFR 52

BILLING CODE 6560-01-C

Part 122—Program Requirements

A. What Does This Part Do?

(1) *Coverage.* Subpart A of Part 122 deals with EPA administration of the RCRA hazardous waste, UIC, and NPDES programs. First, it provides definitions for terms used in these regulations. Second, Subpart A contains basic program requirements applicable to EPA administration of these three programs, such as application requirements, standard permit conditions, and grounds for modification and termination of permits. Subparts B through D of Part 122 describe additional program elements of these three programs. Subpart B is specific to RCRA hazardous waste, Subpart C to UIC, and Subpart D to NPDES. The reader must consult both the general Subpart A and the appropriate program-specific Subpart B, C, or D for a full description of any one program.

Certain of the Part 122 program requirements are applicable, as indicated in section headings and in Part 123, to State RCRA, UIC, NPDES, or 404 programs which obtain approval to operate in lieu of EPA programs (or, in the case of 404 programs, in lieu of the U.S. Army Corps of Engineers). In addition to the definitions for RCRA, UIC, and NPDES, Subpart A of Part 122 contains definitions used in Part 123 for State 404 programs, but no 404 Subpart appears in Part 122 because EPA does not issue Federal 404 permits.

(2) *Complexity.* A large number of commenters on proposed Part 122, and the consolidated permit regulations in general, stated that the regulations are difficult to use because of their complexity, length, and numerous cross-references both to other sections of these regulations and to the separate technical regulations.

EPA agrees that the consolidated regulations are complex. Much of this complexity is due to the fact that the regulations include provisions under five programs which regulate complex and differing types of activities under four different statutes. The consolidation of regulations under these five permit programs may not make the substantive requirements of the five programs easier to meet. However, we believe that these regulations are less complex than they would have been if issued in five sets of regulations developed in isolation from eachother. By developing the permit regulations as a set, contradictions, gaps, and overlaps among program requirements have been detected and more easily and completely dealt with. In addition, consolidation has avoided many differences in approach that are not direct conflicts, but which still are

unnecessary to carry out the objectives of the program. The consolidated regulations make the provisions more uniform, and therefore easier to learn and deal with conceptually, by favoring consistency among programs where differences are not required by statutory objectives. In addition, these regulations achieve some saving in total length because provisions which are applicable to all programs only have to be stated once.

While EPA has retained the idea of consolidation and the basic format of the proposed regulations, we have taken or will be taking a number of steps to try to make the regulations easier to use and less confusing.

First, EPA will conduct an extensive program for public awareness after the regulations are promulgated. One aspect of this proram will be preparing and distributing reprints of the regulations, which will contain only the parts of these consolidated regulations applicable to each program individually. This will make it possible for a reader interested in only one program to find out about it without reading about other programs. These individual program reprints may be combined with the separate "technical" regulations for a program, such as the Part 146 regulations for UIC, in order to provide a single package which contains the entire universe of regulatory requirements for one program and thereby ease the burden of pursuing cross-references.

In addition, EPA will be preparing a series of booklets on the regulations written to address the concerns of particular constituencies. For example, one such booklet will be specifically addressed to farmers, and another addressed to permit applicants in general.

Second, the consolidated regulations themselves have been redrafted with particular attention to their organization and their readability. Steps that EPA has taken in this effort include the following:

- The sequence of sections within each of the subparts of Part 122 has been rearranged for logic and consistency and to provide a discernible "map" for proceeding through the regulations. Each subpart of Part 122 includes three types of provisions: (1) *Orientation material* such as the purpose and scope of each program, prohibitions, and the classification of injection wells; (2) the ways in which activities covered by the programs are authorized, either through *application for a permit* or by permit substitutes such as interim authorization or authorization by rule; and (3) information on how *conditions* are incorporated into permits—first, the conditions that do vary from permit to permit, and then information on how to calculate or specify conditions which do vary from permit to permit. In addition, (4) Subpart A contains sections on the *effect of having a permit*, such as the extent of the protection a permit provides, how it is reviewed, and when it can be modified or terminated. The regulations have been organized to follow this sequence, and we have rewritten the section headings to clarify the relations between provisions in Subpart A and parallel provisions in the program subparts. The organization of the final regulations is displayed in Table II.

Table II.—*Organization of Part 122*

Subject	Subpart A (General)	Subpart B (RCRA)	Subpart C (UIC)	Subpart D (NPDES)
I. Orientation material:				
Purpose and scope	122.1 to 122.2	122.21	122.31	122.51.
Basic program provisions and coverage; prohibitions.	122.3		122.32 to 122.36	122.52.
II. Application:				
Preapplication requirements and permit substitutes.		122.23	122.37	
Who applies for a permit;	122.4	122.22	122.38	122.53
and how?	122.5, and 122.6	122.24, and 122.25		122.54 to 122.58.
Special permits		122.26 to 122.27	122.39 to 122.40	122.59.
III. Establishing permit conditions:				
Standard permit conditions	122.7	122.28	122.41	122.60 and 122.61.
Establishing variable conditions	122.8		122.42	122.62 to 122.63
	122.9 to 122.12	122.29 to 122.30	122.43 to 122.45	122.64 to 122.66.
IV. Effect of a permit	122.13 to 122.19			

A reader might wish to determine the treatment of a particular activity under Part 122 in the following manner (referring to Table II): First, if the activity is within a State with an approved program the individual is not directly covered by Part 122, but rather by State program statutes and regulations approved under Part 123, and the reader would consult those State statutes and regulations. Because some of the programs covered by these regulations are new, and others may not be approved in a particular State, the reader might wish to consult Part 123 to determine what the minimum requirements for one of these programs would be in the State. Otherwise, the reader would first go to the "Orientation Material," which summarizes each program sufficiently to give a quick idea of whether further examination of the regulations is warranted. If the activity is covered, the reader would next turn to the "Application" provisions to see what procedures to follow in obtaining a permit or other authorization. Beyond this point an individual's requirements under these programs will be spelled out in the permit document (except where the activity is authorized by a "rule" or other permit substitute). If the reader wants to know what his or her permit requirements would be, he or she could go on to the provisions on "Establishing Permit Conditions." First, "standard conditions" that will appear in all permits can be looked up. Second, the sections on establishing variable permit conditions can be consulted; these will refer to the location of the other sections of these and other regulations that set forth the requirements for variable permit conditions and how they are derived. The specific conditions of these permits for the most part will be derived through the application of technical regulations for each of the programs which do not appear with these regulations. Finally, the provisions in Subpart A on the "Effect of a Permit" will tell the reader what it means to have a permit: the protection that it offers, and how it may be reopened or changed.

- Orientation sections have been added to the beginning of each subpart of Part 122. The first of these orientation sections briefly introduces the consolidated regulation as a whole (§ 122.1). The second sets forth the purpose and scope of Part 122 (§ 122.2). Finally, each of the program subparts of Part 122 now contains an introductory section setting out the basics of that program's permit system. These introductory sections are designed both to indicate at the beginning what activities are regulated, and to make the more detailed sections which follow easier to comprehend. Much of this material is explanatory and illustrative rather than regulatory. EPA believes that inclusion of this material will help reduce the confusion created by the complexity of the regulations. Because

the introductory sections are summaries they can not substitute for the full regulations which follow.

- Those sections of Part 122 and Part 124 which are applicable to State programs (through reference in Part 123) have been highlighted in the section (or, where necessary, paragraph) headings. Indication that a section is "applicable to State programs" does not mean that exactly the same provision will be applicable to owners or operators who receive their permits from a State. Rather, "applicability" means that a State program must have a similar provision in its own statutes and regulations in order to receive approval to operate in lieu of EPA (or the Corps of Engineers for 404). For the corresponding State provision, these statutes and regulations would have to be consulted. This subject is discussed at length in the preamble to Part 123.
- Some material has been shifted from the program-specific subparts to Subpart A when it makes sense to do so. An example is noncompliance reporting (§ 122.18): moving all the requirements into Subpart A has eliminated many sections and a large number of cross-references, as well as many needless inconsistencies.
- EPA has attempted whenever possible to indicate in italics at the beginning of subparagraphs and paragraphs when the material that follows is applicable to one program only, as occurs occasionally in the general Subpart A.
- Paragraph and subparagraph headings have been added to break up long sections or to identify the material which follows. However, it is not always possible to provide a heading for every paragraph in a section.
- A large number of cross-references between these permit regulations and the technical regulations is unavoidable. However, EPA has tried to organize both sets of regulations to place the permit material in the permit regulations and technical material in the technical regulations, to make these materials consistent, to provide cross-references when needed, and to make the cross-references understandable. We have added topical headings for many cross-references to help readers determine the nature of the requirement referred to.
- Some commenters raised concerns regarding the status of "comments" in the proposal, especially when they contain regulatory material. We have attempted to eliminate as many comments as possible by moving regulatory material into the text and purely explanatory material into the preamble or the "purpose and scope" sections. However, we have retained some comments to give examples or illuminate requirements contained in the regulations. Following standard Federal Register style, these comments have been labeled as "Notes."

B. How Does This Part Relate To The June 14, 1979 Proposal?

Subpart A—General Program Requirements

The following is a discussion of the significant comments received and of the basis for revisions made to Part 122 of the proposed regulations. Minor editorial and stylistic changes (including "technical amendments" solicited in the preamble to the June 7, 1979 final NPDES regulations) have been made in all sections and are not discussed. "Includes, but is not limited to" or "includes without limitation" have been rewritten simply as "includes" in all cases and wherever that term appears, the provisions which follow are not exclusive.

§ 122.1 What are the consolidated permit regulations?

Much of this material appeared in proposed § 122.1, "Purpose and scope," but it has been reorganized and rewritten to logically set out the coverage of the entire consolidated permit regulations. Thus, there are now separate paragraphs on (a) coverage, (b) structure, (c) relation to other regulations, (d) authority, (e) public participation, and (f) State authorities. State authorities was formerly § 122.4. Because it is generally true of these regulations, and not just true of Part 122, that they do not preempt more stringent State requirements (except as provided for RCRA in § 123.33), the proposed section was moved to § 122.1 where it applies to all of the regulations. It was reworded to clarify that these regulations do not preempt more stringent requirements whether or not those requirements are part of an approved State program.

§ 122.2 Purpose and scope of Part 122.

This section is completely new. It has been added to make Part 122 easier to read and to clarify its organization.

Many commenters noted that the applicability of Part 122 to the PSD program was unclear. The PSD program was not mentioned in proposed § 122.1, "Purpose and scope," but some of the definitions in Part 122 appeared to be applicable to PSD. EPA has decided that the best way to avoid confusion is to exclude PSD from Part 122 entirely, and this is noted in the regulations. Instead, PSD definitions appear in Part 124, Subpart C.

§ 122.3 Definitions.

A number of commenters made general suggestions to cope with the difficulty of finding the correct definition in § 122.3. The proposal organized the definitions into a paragraph containing "general definitions" followed by paragraphs containing definitions applicable to each of the programs individually. EPA has followed a suggestion that all the definitions be organized into one alphabetical list. If a term applies to fewer than all of the programs, a parenthesis is inserted after the term to indicate to which programs it applies. However, because many readers of this preamble are likely to be particularly interested in the definitions for a single program, the following response to comments will continue to follow the proposed format by discussing first the "general definitions" and then the definitions that apply to individual programs.

Frequently terms are defined in reference to other terms which are also defined. When a defined term appears in a definition, the defined term appears with quotation marks when this may be helpful. Also, technical terms are frequently used in these regulations in their acronym form, such as "BMP" for "best management practices." We have expanded the definition section to include these acronyms, which are placed in their alphabetical order among all the other definitions.

(1) *General definitions.*

Administrator. Some commenters pointed out the conflicts between the proposed definition's delegation language ("his/her designee"), and those in the definition of Regional Administrator ("delegated representative"), proposed § 122.11(a) (Director or an "authorized representative"), and proposed § 123.37 (Regional Administrator or "his designee"). For consistency, the term has been made uniformly "or an autorized representative." Elsewhere in the regulations, only Administrator, Regional Administrator, or Director is used, with the understanding that authorized representatives and designees are included in these terms unless indicated otherwise. For example, the Regional Administrator may be the authorized representative of the Administrator.

Appropriate Act and regulations. For the reasons discussed under § 122.2 above, EPA has deleted the reference to the Clean Air Act.

Aquifer and *underground source of drinking water.* Some commenters objected to the fact that the proposal in effect set forth two definitions of

"underground source of drinking water" (USDW), one for use under RCRA and one with "more latitude" for use in the UIC program. (The greater flexibility for USDWs in the UIC program resulted from the procedures for eliminating certain aquifers, now called "exempted aquifers," from the coverage of the UIC program.)

Likewise, commenters noted that the proposed definition of "aquifer" ("capable of yielding useable quantities of groundwater") contradicted the definition in proposed § 250.41(5) for RCRA ("useable quantities to wells or springs"). The final definition applicable to both RCRA and UIC which appears in the consolidated regulations is "a geological formation, group of formations, or part of a formation that is capable of yielding a significant amount of water to a well or spring." This is slightly different than the definition which appears in Part 260 for RCRA, which is the same as proposed § 250.41(5).

In both instances EPA agrees that these definitions should be the same for both programs, and EPA will conform them. They have not been conformed in these regulations because the question of the proper definition of "aquifer" and "USDW" are closely related to the scope and form of the section 3004 standards under RCRA and to the manner in which Class IV wells will be dealt with. Both those issues are scheduled for final resolution by EPA next fall. The definitions of "aquifer" and "USDW" will be changed at the same time. The current definition of "USDW" applies to the RCRA program only insofar as injection wells are regulated under RCRA under § 122.26.

Best management practices. Several commenters noted that it was confusing to provide two separate definitions of "best management practices" (BMPs): one for NPDES and one for State 404 programs. The two definitions have been combined so that they appear in one place. The differing coverage under two programs is highlighted in the new combined definition.

For 404, several commenters objected to the requirement that BMPs "ensure compliance with water quality standards." EPA agrees that the proposed definition could be interpreted to place an unrealistic burden on individual BMPs, and therefore has changed the definition to require that BMPs facilitate compliance with applicable water quality standards. Some commenters argued that there should be no reference at all to water quality standards because CWA section 404(h)(1)(A)(i) does not mention them. The Agency disagrees, because that section refers to the environmental guidelines promulgated under CWA section 404(b)(1) (the "section 404(b)(1) guidelines," 40 CFR Part 230) which do require compliance with applicable water quality standards.

Some commenters wanted the BMP definition to require consideration of practicability, feasibility, or economics. The final regulation allows States to include such considerations in addition to the minimum environmental requirements. It should also be noted that the section 404 BMPs contained in § 123.92 are not absolute requirements; anyone objecting to any of them may apply for a permit and raise questions of practicability in that context.

Facility or activity. In response to a comment, EPA has clarified the applicability of this definition to section 404 programs by adding a reference to the 404 program. "Facility" and "activity" frequently appear in Part 123, Subpart E.

Hazardous waste. Two commenters stated that a full definition of "hazardous waste" rather than a cross-reference should be given. However, the definition in Part 261 is too complex to be set out in full. Several other commenters stated that no reference should be made to RCRA section 1004 because that definition is not self-implementing and the only hazardous wastes covered by Subtitle C of RCRA are those which are identified or listed under section 3001. EPA accepts this comment and has changed the definition of "hazardous waste" so that it reads entirely in terms of the substantive RCRA regulations.

Major facility. This is a new definition added to the final regulations. It is discussed in paragraph (2) of the preamble to § 122.18.

Owner-or operator. This definition remains unchanged. Some commenters sought clarification of what happens when the owner and operator are not the same, and expressed concern that requirements of the permit program might, by virtue of this definition, be imposed on landowners who have no involvement in operation of a permitted activity. To address this concern, we have amended § 122.4, application for a permit, to provide that the operator is responsible for obtaining a permit and complying with it when ownership and operation are split. However, RCRA applications must be signed both by the owner and the operator. The requirements of a RCRA permit bind both the "owner" and the "operator" of the permitted facility, while the requirements of other permits subject to this Part bind only the permit holder.

The reasons for this approach are explained in the preamble to the regulations implementing section 3004 of RCRA. Briefly, this approach has been chosen because there is at least one provision of the 3004 regulations that only the owner can comply with—the one requiring insertion of a notation in the deed to the property in question. It also may be materially more difficult to implement and enforce the closure and financial responsibility provisions of the regulations if the owner is not bound, since in at least some of those cases the site may have been abandoned and the "operator" may be difficult to determine. Joint responsibility will also provide more incentive to comply with the requirements of the RCRA program. Finally, the legislative history suggests that both owner and operator should be bound.

To ensure that both the owner and the operator understand their joint responsibility, EPA is requiring both the owner and the operator to sign the permit application. In adopting this approach, however, EPA has no intention to require both owner and operator to take all or even most compliance actions in tandem. EPA will regard compliance by *either* owner or operator with any given obligation under the permit as sufficient for both of them. EPA anticipates that in most cases the operator will take the lead role in complying with all but the few conditions that only the owner can satisfy. The owner is free to make arrangements with the operator by contract or otherwise to assure itself that the operator will take most actions necessary for compliance activities beyond that. Nonetheless, EPA considers both parties responsible for compliance with the regulations.

Permit. EPA has changed the definition in response to comments. First, commenters found obscure and confusing the statement that "in Part 124, reference to 'permit' may include permit modification, revocation or denial." EPA agrees. Part 124 has been rewritten to specify the precise kinds of permit actions to which its provisions apply.

Second, we have clarified the scope of the definition by adding references to other types of authorization or documents, such as "general permit," "draft permit," and "permit by rule." Similarly, § 122.4, application for a permit, is now written to clarify which of the several types of permits or other authorizations under these regulations is covered by the application requirement. Finally, the procedures governing issuance, administration, or termination

of interim status, authorization by rule, permits by rule, and emergency permits are segregated within their own sections. As a result, provisions of Parts 122 and 124 (and discussions in this preamble) which are generally applicable to permits, permit applications, and permittees are not applicable to those types of authorization, but are applicable to all other permits, including area permits and general permits. The following chart may be helpful in determining which provisions of the regulations apply to which kinds of authorizations.

BILLING CODE 6560-01-M

Table III: TYPES OF PERMIT AND OTHER AUTHORIZATION

Type of Authorization	Application Required?	Part 122 Applies Generally?	Part 124 Procedures Applicable?	Permittee Issued Individual Document?
"permit"	Yes, §122.4	Yes	Yes	Yes
RCRA interim status, §122.22	Part A, see §122.22	No,, only §122.22	Partly. Termination, see §122.23 (a)(3)	No
permit by rule, §122.26	No	No, only §122.26	No	No
emergency permit, §122.27	Yes	No, only §122.27	No	Sometimes
UIC authorization by rule, §122.37	No	No, only §122.37	No	No
area permit, §122.38	Yes	Yes	Yes	Yes
emergency permit, §122.39	Yes	No, only §122.39	No	Sometimes
NPDES general permit, §122.59	No	Yes	Yes	No
404 general permit, §123.95	No (Notice)	Yes	Yes	No
emergency permit, §122.59	yes	No	No	Sometimes

BILLING CODE 6560-01-C

Person. The definition has been reworded to eliminate duplication.

State. One commenter suggested that this definition be changed to include Indian tribes so that they would be able to administer programs under Part 123. EPA has not accepted this suggestion because RCRA, SDWA, and CWA all explicitly define "State" and none includes Indian tribes. Indian tribes are included within the meaning of "municipality" in these statutes.

State Director. The definition has been changed from "a State agency" to "any State agency" to reflect the fact that a State may have more than one agency administering the permit programs.

(2) *Definitions for RCRA.*

Comments were received requesting clarifications or revisions to definitions applicable to the RCRA program requirements. Many of the definitions have been clarified or revised. All RCRA definitions in these final regulations are taken from 40 CFR Part 260. Part 260 provides the definitions for terms used in 40 CFR Parts 261 through 266. Using the Part 260 definitions in these regulations will ensure uniformity in all the regulations promulgated under Subtitle C of RCRA. Comments on the RCRA definitions are addressed and responded to as part of the rulemaking on 40 CFR Part 260.

Existing HWM facility. This definition is discussed in the preamble to Part 122, Subpart B.

Major Hazardous Waste Management Facility. In the proposal EPA defined "major HWM facility" as one that handled at least 5,000 tons of waste a year. EPA received a number of comments questioning this definition. For the reasons discussed in the preamble to § 122.18, EPA has determined that major HWM facility will be defined through guidance, and consequently this definition has been deleted. EPA intends that this guidance will result in approximately 10 percent of RCRA facilities being classified as major.

(3) *Definitions for UIC.*

Well. Commenters requested that sludge drying beds and treatment lagoons which seep into groundwater should not be considered wells. EPA agrees and has added a definition of "well." Lagoons and drying beds do not meet this definition of a well. However, those facilities may be subject to regulation under RCRA.

Additional definitions. Definitions for the following UIC terms have been added to clarify their use in the consolidated permit regulations: acidizing, exempted aquifer, fluid, formation, formation fluid, and plugging. These new terms and comments on terms which appeared in the proposal are discussed in the preamble to Part 122, Subpart C, or will be discussed in the preamble to 40 CFR Part 146.

(4) *Definitions for NPDES.*

Navigable waters and waters of the United States. Commenters noted that the definitions for "navigable waters" and "waters of the United States" were circular. EPA agrees and has eliminated the use of the term "navigable waters" in favor of using "waters of the United States" throughout these regulations and providing a single definition. "Waters of the United States" was chosen for the same reason that it is used in the Clean Water Act: the Act covers much more than waters which are traditionally "navigable."

The following changes have been made in the proposed definition of "navigable waters," which now appears as the definition of "Waters of the United States:"

(1) "Wetlands" has been given its own definition because it is sometimes used independently, and included within the scope of "waters of the United States" by cross-reference.

(2) The proposal exempted "treatment ponds or lagoons designed to meet the requirements of the CWA" from the definition of navigable waters. To clarify that the scope of this exemption is not limited to treatment ponds or lagoons, it is now written to cover "waste treatment systems including treatment ponds or lagoons . . .." Because CWA was not intended to license dischargers to freely use waters of the United States as waste treatment systems, the definition makes clear that treatment systems created in those waters or from their impoundment remain waters of the United States. Manmade waste treatment systems are not waters of the United States, however, solely because they are created by industries engaged in, or affecting, interstate or foreign commerce. Finally, as in the proposal, certain cooling ponds fall outside the exemption. EPA has referred to the definition of cooling ponds in 40 CFR § 423.11(m) to indicate the type of cooling ponds intended.

New discharger. EPA has changed this definition in two ways. First, EPA has expanded the definition to include an indirect discharger which commences discharging into waters of the United States. This does not represent a change in policy but is merely a wording change to simplify the regulatory language regarding new dischargers, former indirect dischargers, and recommencing dischargers.

Second, the definition now specifically includes a mobile point source that begins discharging at a new location for which it does not have an existing permit. This clarifies our existing interpretation that a mobile source that moves to a new location, unlike an existing source at that location, creates a new environmental insult and therefore should not be allowed to begin discharging until final Agency action granting a permit and until installation of the necessary pollution control equipment. Thus, these sources are ineligible for stays of contested permit conditions on the basis of a request for an evidentiary hearing which has been granted. These sources are governed by § 124.59(a); if the request for an evidentiary hearing is granted, "the applicant shall be without a permit pending final Agency action under § 124.91."

This change also requires, under §122.66 (proposed § 122.81(d)(4)), that a mobile point source start up control equipment before beginning discharge and meet its permit conditions within the shortest feasible time. Under § 122.10, it is ineligible for schedules of compliance, and under §122.53 it is required to submit a new permit application 180 days before recommencing discharge at the new location, unless that requirement is waived. Because a new permit is required each time the source moves, the permit can be updated to incorporate the appropriate water quality standards of the area and any other appropriate permit requirements.

Privately owned treatment works. To clarify the new provisions for treatment works other than POTWs (§ 122.62(m)) we have added a definition of "privately owned treatment works." The definition includes any treatment system which is not a POTW and whose operator is not the operator of the facility whose wastes are being treated. Thus, the typical case of a single operator of an industrial facility providing its own treatment would not be a privately owned treatment works. Although termed a "privately owned" treatment works the definition does not exclude a treatment works that is owned by a State or municipality but which meets this definition.

(4) *Definitions for 404.*

The proposal contained definitions for "plowing," "seeding," "cultivating," "minor drainage," and "harvesting." Because these terms are only used once, in the § 123.92 (proposed § 123.107) list of activities not requiring permits, EPA has moved them to that section. Responses to the many comments

received on these terms appear in the corresponding preamble.

Discharge of dredged material. One commenter questioned the distinction, in the definition of dredged material, between discharges from on-board processing (included in the definition) and on-shore processing of dredged material (not included). This distinction comes from the Corps of Engineers regulations, 33 CFR § 323.2(8). Comments to the Corps suggested that there were significant differences between the two kinds of operations, justifying the distinction. However, to clarify the distinction and to maintain consistency in eliminating the "primary purpose test" (see discussion of "fill material"), EPA has changed the definition to exclude all discharges resulting from on-shore processing of dredged material, regardless of the purpose for which the material was extracted. All such on-shore processing discharges are subject to the NPDES program. Extraction and subsequent deposit of the dredged material may still be subject to regulation by the Corps or under a State section 404 program, and are unaffected by this change.

One commenter argued that dredged material returned "unaltered" to its original borrow site should not be a discharge because there is no "addition" of a pollutant to waters of the United States. EPA disagrees; the release of dredged material into the water column may add pollutants to the water column or the downstream substrate. Also, movement of material from one part of the substrate to another may have significant environmental effects before the material is ultimately returned to its original site.

Fill material. The proposal defined fill material as material discharged for the primary purpose of replacing an aquatic area with dryland or of changing the bottom elevation of a water body, reserving to the NPDES program discharges with the same effect which are primarily for the purpose of disposing of waste. Comments were solicited on this distinction, referred to as the primary purpose test. Two comments were received, one favoring retention of the test, one opposing the test. EPA has decided to change the definition of "fill material" to eliminate the primary purpose test and to include as fill material under the 404 program all pollutants which have the effect of fill (that is, which replace part of the waters of the United States with dryland or which change the bottom elevation of a waterbody).

The Agency agreed with the commenter who said that the primary purpose test was too subjective. It has been our experience that the primary purpose test is difficult to apply, particularly where a project has two purposes, or where the purpose changes over time. In addition, the purpose of the discharge is immaterial to its effect on the waters of the United States; a landfill motivated by the need to dispose of waste and a landfill intended to create a building site both result in the loss of waters of the United States and pose a risk of contaminating the surrounding area.

Moreover, the Agency disagreed with the suggestion that all solid waste (for example, garbage, trash, and sludge) be regulated under section 402. There are several reasons why EPA believes that all discharges with the effect of fill should be handled under the 404 program instead of the 402 program. The 404 program is better suited to preventing the unnecessary destruction of valuable wetland ecosystems. For example, the section 404(b)(1) guidelines require consideration of alternative sites; the NPDES program does not provide for a comparable alternatives analysis. In addition, the section 404(b)(1) guidelines look at the ecological impact of the discharge; the NPDES program uses technology-based effluent limitations. Finally, individual section 404 permits specify sites, whereas NPDES permits are issued for point sources, such as a truck delivering trash to a wetlands. Writing an NPDES permit for a truck presents practical problems apart from the difficulty of devising technology-based limitations for discharges from trucks.

For all these reasons, EPA believes that the new definition of "fill material," eliminating the primary purpose test, better carries out the goals of the Clean Water Act.

Impoundment. A few commenters objected to the definition of "impoundment" as being too expansive, too restrictive, or not necessary. We agree that the definition is not necessary, because impoundments as such are not treated differently from other waters under these regulations. Because the definition served no purpose, EPA has deleted it to avoid confusion.

§ 122.4 Application for a permit.

(1) Commenters suggested that the use of the term "any person" in proposed § 122.6(a) (now § 122.4(a)) might require more than one permit application for a facility, where several "persons" are making use of a facility. EPA intends the person with operational control over the facility to be the one required to submit a permit application. Accordingly, EPA has adopted a suggestion of the Utility Solid Waste Activities Group that a paragraph to this effect be added to the section. However, for RCRA facilities, both the owner and the operator must sign the application; see discussion under the definition of "owner and operator." The section has also been redrafted, in response to a comment, to reflect the three limited instances when a "permit" is required but an application is not (that is, permits by rule under RCRA, and NPDES and 404 general permits). In addition, no "permit" is required until notice is given by the Director when a facility is authorized by rule for UIC or regulated under interim status for RCRA. See preamble to "permit" under § 122.3.

(2) Proposed §122.7(c) required the permittee to reapply if it wished to continue regulated activities after expiration of the permit. This requirement has been merged with final § 122.4(a). One commenter suggested that a permittee should be able to refer to the application for its expired permit rather than submit a new one if none of the information has changed. EPA rejects this suggestion. It is essential to obtain an updated certification of the accuracy of the information before issuing a new permit. However, nothing in these regulations precludes resubmitting old information so long as the certification which accompanies it is current. Resubmittal is necessary to prevent any confusion and to ensure active awareness of the information that is being certified.

The requirement to submit a renewal application prior to the expiration date of the existing permit has been restated in the standard permit conditions (§ 122.7). In addition, the program subparts contain information on how early permittees must submit their renewal applications for EPA-issued permits: 180 days for RCRA (§ 122.23), a reasonable time before construction is expected to begin for UIC (§ 122.37), and 180 days for NPDES (§ 122.53). Because these timing requirements are not applicable to States, it was not possibile to place them in the standard permit conditions, which would have given permittees the advance warning of the duty to reapply which one commenter requested. However, these regulations do not preclude placing such a statement in permits or otherwise notifying permittees when renewal applications are due.

(3) One commenter read proposed § 122.7 ("Permit issuance," now § 122.4(c)) to mean that the permit issuance process necessarily cannot begin until all permit applications for a facility have been submitted. We have

rewritten the section to clarify that it is possible for one permit to be processed even if the Director has not yet received a completed application for another permit for the same facility. Similarly, when a facility is required to have several permits, the duty to submit a renewal application operates independently for each permit. The subject of consolidation of permit applications and permit processing is further addressed in the preamble to Part 124.

Some commenters objected to the vagueness of the term "completeness" or requested that a notification of completeness be required of the Director. Section 124.3 contains provisions for notifications of completeness for all EPA permits for RCRA, UIC and NPDES facilities; these provisions are discussed in the accompanying Part 124 preamble. A sentence has been added to § 122.4(c) to emphasize that the completeness of one permit application does not depend on the completeness of other permit applications.

(4) New paragraph (d) of § 122.4 lists the information which applicants for permits under RCRA, UIC, or NPDES must supply to the Director. A detailed description of the purpose of these permit information requirements, and responses to comments received on their proposal, are contained in the detailed discussion which appears in the preamble to the consolidated application forms, published elsewhere in today's Federal Register. The requirements are quite basic and generated relatively little comment. A brief description of the requirements is included here.

EPA has developed a set of consolidated application forms to be used by applicants for EPA-administered RCRA, UIC, and NPDES permits. The structure of the consolidated permit application forms is similar to that of the consolidated permit regulations: questions applicable to all programs are contained in a generally applicable Form 1, which is supplemented by additional forms containing questions for each specific program. Likewise, the information in § 122.5(d) comprises the essential information which is submitted in Form 1, while §§ 122.24 for RCRA, 122.37 for UIC, and 122.53 for NPDES list essential information which is submitted in additional forms for those specific programs.

The draft consolidated permit application forms appeared as Part III of the June 14, 1979 Federal Register along with certain proposed NPDES regulations which listed the information requirements contained in Form 1 and Form 2 (44 FR 34393, 34346). (The draft Form 1 was to be applicable to all programs even though its contents were listed only in the proposed NPDES regulations.) Proposed §§ 122.23 and 122.36(c) of the consolidated permit regulations also included RCRA Part A and UIC permit application information requirements similar but not identical to those in draft Form 1. However, it was clear in the draft consolidated application forms that Form 1 covered all applicants, and no confusion was apparent in comments received.

The informational requirements in paragraph (d) are also applicable to States. Applicants for State permits will use State application forms, which may be different from EPA's consolidated application form. However, to provide a minimum level of uniformity in the basic data, § 123.7 requires State forms to include at least the information listed here and in the program subparts (§§ 122.24 for RCRA, 122.37 for UIC and 122.53 for NPDES) for EPA permit applications. Because these sections are applicable to States, only essential information is listed as a permit application requirement; the information required by these sections does not include every detail which appears on the application forms for EPA-issued permits.

The applicability of these information requirements to States does not reflect a change from the proposal. The Form 1 requirements were to be made applicable to State NPDES programs through a proposed amendment to § 123.73 (see 44 FR 34116), and applicability to States of the permit application requirements for RCRA and UIC appeared in the proposed consolidated permit regulations at §§ 123.39 and 123.57 respectively.

(5) EPA has added a new paragraph (e) to § 122.4 which requires applicants to keep records for a period of three years of the data used to complete all applications. This requirement is also listed in §122.8 (standard permit conditions) requiring records of background data for monitoring and other reports required by the permit to be kept for three years. The recordkeeping requirements are necessary to support any subsequent EPA enforcement action for false reporting.

§ 122.5 Continuation of expiring permits.

(1) Some changes have been made in proposed § 122.8(c) (now § 122.5) in response to comments. Proposed § 122.8 (c)(3)(ii) (now § 122.5(c)(2)) created some confusion as to what grounds were to be considered by the Director in denying a permit renewal application when the permittee is out of compliance with the continued permit. In response to these comments, EPA has amended § 122.10, "termination of permits," to state that any grounds for terminating an existing permit is grounds for denying a permit renewal application. While termination of a permit or denial of an application is a harsh measure that will only be used in extreme instances, EPA believes that a provision for doing it is necessary and that, in some instances, such action will be appropriate. If the Director were required, as some commenters suggested, to base the decision of whether or not to issue the permit solely on the permit renewal application, he or she would be in the position of having authority to terminate the existing permit for the grounds listed in § 122.10 but then being required to renew the permit for the same facility because the application did not reflect the noncompliance. We have reworded § 124.6 to clarify that when the Director seeks to deny a renewal application, he or she must first issue a notice of intent to deny which is treated as a form of draft permit, subject to public notice and the other procedures of Part 124. A specific reference to § 124.6 is now provided in § 122.5(c)(2).

In addition, several readers interpreted this section to require the Director to either deny the renewal application or take enforcement action when a facility with a continued permit is out of compliance. Comments stated that under this reading the section seems onerous and that more normal options such as permit modifications and compliance schedules ought to be available. EPA has redrafted § 122.5(c) to clarify that issuance of a new permit with appropriate conditions remains an option available to the Regional Administrator in this situation.

(2) A large number of commenters noted the possibility under proposed § 122.7(6) that a Federally-issued permit might lapse after transfer of a program to a State and expressed concern that a permittee might be forced to close down or operate illegally without a permit through no fault of its own. Several suggested that States ought to be required to have some sort of automatic reissuance authority or a provision for extensions similar to the Federal Administrative Procedure Act, perhaps as a condition of program approval under Part 123. EPA has rewritten the section to emphasize that States may continue Federally-issued RCRA, UIC, or NPDES permits which expire while under State administration if adequate

legal authority exists to do so. EPA believes that it is inappropriate to require States to extend Federally issued permits.

In evaluating whether States should be required to have an automatic continuation mechanism like the one provided by the Federal Administrative Procedure Act, EPA applied criteria similar to those used in determining the other requirements for authorization of State programs; that is, whether the requirement is necessary to provide (1) equivalent environmental protection, (2) consistency with Federal regulations, (3) adequate enforceability, and (4) public participation. Using these criteria EPA determined that continuation of permits by States should not be required for program approval. In addition, it is questionable whether EPA could impose such a requirement in view of the fact that failure to continue permits could be considered a "more stringent" State program feature.

Of course, States receiving program authority are encouraged to coordinate transfers of permits with EPA and to expedite permit processing in situations where the permit has been extended under the Federal APA and the State has no similar administrative extension provision. It is anticipated that such situations will be rare. The more common situation covered by this provision—namely, when a permit which has not been Federally extended is transferred to a State and then expires—can only be remedied by timely processing of a renewal application by the State or existence of a State equivalent to the Federal Administrative Procedure Act.

(3) One commenter argued that automatic continuation under this section should not insulate an NPDES discharger from violation of a statutory deadline which intervenes prior to permit renewal. EPA believes it lacks legal authority to adopt this interpretation. Under section 402(k), the statutory deadlines in the Clean Water Act are not independently enforceable but must be embodied in the permit. However, under §§ 122.62 (establishing NPDES permit conditions) and 122.10 (compliance schedules), NPDES permits are required to be written to assure compliance within the CWA statutory deadlines. Consequently, any permittee whose permit is continued beyond the deadline is still subject to enforcement for noncompliance with its continued permit.

§ 122.6 Signatories to permit applications and reports

(1) Some commenters challenged EPA's legal authority to establish signatory and certification requirements at all. Clearly, the Resource Conservation and Recovery Act, the Safe Drinking Water Act, and the Clean Water Act each require programs for issuing permits and give the Administrator rulemaking authority to prescribe regulations to establish them. A mechanism requiring applications for permits has been chosen in most instances, although not always (for example, permits by rule, general permits), because in most cases applications are necessary to determine appropriate permit conditions. In addition, each of the above statutes establishes authority for requiring submission of information in applications or other reports. EPA believes that this duty runs both to the corporate or other business entity and to the individual who submits the application on its behalf. The certification ensures that the signer of the application will be aware of, and will meet, the legal standard which would be applicable to him or her and to the corporation in any event.

(2) The majority of the commenters who read proposed § 122.5 (now § 122.6) objected to the requirement that corporate vice presidents sign and certify permit applications. Commenters argued that a large corporation could require numerous permits, and that the position and responsibilities of a vice president of a large corporation may make it difficult and time consuming for such a person to "become familiar" with the information in permit applications and to personally make "inquiry of those persons immediately responsible for obtaining the information." The proposed certification required these acts.

These objections received a great deal of attention, and since the proposal EPA has attempted to devise a number of differing solutions through revisions to the signatories section. In the end these alternatives have all been found wanting, and the final section retains the principal features of the proposal, with only some minor changes.

One alternative which EPA examined was to adopt some commenters' suggestions that a corporate official immediately responsible for the preparation of the application (such as a plant manager), rather than a principal executive officer, be allowed to certify familiarity with the information contained in the application. However, EPA determined that a signature by a principal executive officer will always be necessary, both to ensure an adequate level of corporate liability and to ensure a high level of concern with and responsibility for the corporation's compliance with environmental laws. This necessity remains the same even if the contents of the certification could be changed somewhat to remove the requirement to certify "familiarity." Therefore, the alternative would have required a "dual signatory" scheme, one signature by the preparer and one by the principal executive officer. Because it would be necessary to ensure the same level of corporate liability, the certifications would be altered very little from the proposal. In addition, to avoid possibly making the requirements more onerous rather than less, the dual scheme would have to be optional. Finally, it would have been available to corporations only, and, as in the proposal, would have applied only to applications, because the proposed "authorized representative" mechanism for reports would still be available.

After drafting a signatories section which adopted this approach, EPA found that negligible improvements were made at the expense of a great deal of complexity which was not likely to be received favorably. Some other solutions which were attempted and which suffered from similar defects involved distinguishing corporations on the basis of their corporate structure, their geographic dispersion, or similar factors. Consequently, EPA has retained the requirement which appeared in the proposal for a signature and certification by one principal executive officer as the simplest requirement that is adequate.

(3) Some commenters questioned why it should be necessary to distinguish between applications and other submissions and suggested that if reports can be signed by an authorized representative, applications should be also. EPA feels that the distinction is a valid one. A permit application is needed to determine whether to issue a "permit" which establishes the privileges and duties of the permittee. In the case of a corporation or other business entity, the entity is the "person" with the privileges and duties. The permit application therefore needs to be signed by an individual with the capacity to speak for that corporation or other entity. This is also true because the application in many cases contains information which itself binds the corporation once the permit is issued, either through incorporation in the permit (as in the case of contingency, closure or post-closure plans for RCRA and for certain UIC facilities) or through establishing predicted levels of use or discharge of certain toxic pollutants (as in the case of certain NPDES facilities).

Reports on the other hand are usually required by the permit and involve monitoring requirements or reporting of instances of noncompliance. Having established the entity's responsibility for submitting these reports in the permit, it is no longer necessary to require an executive officer to sign them each time. Furthermore, the reports usually require familiarity with particular monitoring instrumentation at particular points, rather than an understanding and familiarity with the corporate enterprise as a whole. Finally, this information generally does not involve the complexity of many of the items required in applications or require a high level of corporate consultation and commitment as in the case, for example, of contingency plans or closure plans.

As in the proposal, however, EPA has made an exception for Class II wells applying for permits under the UIC program. Class II well permit applications may be signed by an authorized representative. The reason for this exception is that Class II wells are large in number yet, as a group, much less complex than, for example, hazardous waste facilities or most point source dischargers. While EPA has determined that Class II wells should be regulated under the UIC program, several attempts have been made to make sure that this regulation is no more burdensome than needed to protect the environment. For a further discussion of regulation of Class II wells, see the preambles to Subpart C and to Part 146. For the reasons discussed in those places, Class II wells have been distinguished from Class III wells or other wells, and for the same reasons the exception to the signatory requirement that applies to Class II wells has not been extended to other wells under the UIC program.

(4) EPA has made a number of changes from the proposal to make the authorized representative mechanism work better. First, the section has been reworded slightly to emphasize that delegation of the authority to sign information reports and Class II well permit applications may be to a position rather than to a specific individual. Some possible examples of positions which can be authorized are given, but any position authorized must be one having "responsibility for the overall operation of the facility." The wording clarification does not represent a change from present NPDES policy.

Second, several commenters objected to the need to submit new authorizations every time there was a change in the person who is the authorized representative for signing reports. Authorization of a position should solve this problem in many instances. In addition, the section has been rewritten to clarify its applicability and to allow a new authorization to be submitted concurrently with the next report which requires a certification, rather than immediately every time a chance has occurred. Finally, contrary to some commenters' reading, EPA does not intend to preclude authorization of more than one individual occupying different positions, so long as each position meets the requirement that the representative in each instance occupy a position of responsibility for the overall operation of the facility. EPA does not agree, however, that no authorization at all should be required. A written authorization submitted to the Director is necessary to ensure that the principal executive officer or other high level official maintains the same level of legal accountability for the accuracy of the information submitted as he or she would have had without exercising the authorization.

(5) Because EPA permit applications will now consist of a general form with a number of attachments, with only one certification, the certification statement has been amended to require examination of and familiarity with the information submitted "in this and all attached documents."

§ 122.7 Conditions applicable to all permits.

(1) *Organization.* Proposed § 122.11 (now § 122.7) sets forth "standard" or "boilerplate" conditions which are to appear in all permits. In order to make these conditions truly "standard" conditions which can be inserted without alteration in all permits for all the programs, program-specific elements which appeared in the proposal have been separated and placed in the individual program subparts. Accordingly, the RCRA, UIC, NPDES' and 404 Subparts now each have a section setting forth "additional conditions" applicable to all permits for each respective program; see §§ 122.26 (RCRA), 122.41 (UIC), 122.61 and 122.62 (NPDES), and 123.97(404). These program-specific "boilerplate" sections have been written to correspond to the organization of new § 122.7 so that they can be easily incorporated by the permit writer. See Table IV.

Table IV.—*Standard Permit Conditions*

Heading	Subpart A	Subpart B (RCRA)	Subpart B (UIC)	Subpart D (NPDES)	Part 123 Subpart E (404)
Duty to comply	122.7(a)	122.26(a)	122.41(a)	122.60(a)	123.97 (a), (b)
Duty to reapply	122.7(b)				
Duty to halt or reduce activity	122.7(c)			122.60(b)	
Duty to mitigate	122.7(d)				
Proper operation and maintenance	122.7(e)				
Permit actions	122.7(f)				
Property rights	122.7(g)				
Duty to provide information	122.7(h)				
Inspection and entry	122.7(i)				
Monitoring and records	122.7(j)	122.26(b)	122.41(b)	122.60(c)	
Signatory requirement	122.7(k)			122.60(d)	
Reporting requirements	122.7(l)	122.26 (c), (d)	122.41 (c), (d)	122.60 (e), (f) 122.61 (a), (b)	
Additional standard conditions		122.26(e)	122.41(e)	122.60(g) 122.61(h)	123.97 (c), (d)

New § 122.7 and the corresponding subpart sections referred to above set forth all conditions which do not vary from permit to permit. The mechanism for including permit conditions which do vary depending on the facility or activity in question is provided in § 122.8 (proposed § 122.13), "Establishing permit conditions." Section 122.8 refers to Subpart A sections on establishing variable permit terms (for example, establishing compliance schedules), and to the sections of the program subparts which indicate how variable terms are calculated for each program. The purpose of this organization is to provide a clear roadmap to the permit writer and is discussed more fully in Table I and accompanying text of this preamble. Because, as provided in final § 122.13, in most cases "compliance with a permit is compliance with the appropriate Act" it is important that all requirements binding upon permittees be adequately referenced in the permit document. The final regulations have been drafted to help ensure this result.

(2) *Incorporation by reference.* Several commenters stated that the standard permit conditions should not be "incorporated by reference" in a

permit. Under final § 122.7, permit conditions may still be incorporated by reference. However, EPA has provided protection to permittees by requiring that, if conditions are incorporated by reference, the reference must include a specific citation to these regulations or to the corresponding State regulations. EPA does not believe that it is possible to state all permit requirements in all permits without using references in some instances. For example, § 122.60(c)(1) requires as a standard permit condition for all NPDES permits that monitoring be conducted according to the test procedures approved under 40 CFR Part 136 unless alternative test procedures are specified in the permit. Part 136 procedures are in many instances quite detailed and requiring these procedures to be restated in the permit verbatim would not be justified in view of the increased paperwork burden it would impose on permit writers.

(3) *Duty to comply.* Section 122.7(a) is essentially a restatement of proposed § 122.11(a). The duty of an NPDES permittee to comply with newly promulgated toxic effluent standards or prohibitions under section 307(a) of CWA, which appeared in the proposal in § 122.69, has been moved to the corresponding "duty to comply" NPDES section, § 122.60(a), because it is addressed to permittees. Also, the corresponding RCRA (§ 122.28(a)) and UIC (§-122.41(a)) provisions reflect the fact that emergency permits issued under these programs may act as a limited modification of existing permit requirements.

(4) *Duty to reapply.* EPA has added § 122.7(b) to make sure that permittees are informed of their duty to reapply for a permit. State and EPA permits may incorporate reapplication deadlines at this point if desired.

(5) *Duty to halt or reduce activities.* Proposed § 122.11(j) (now § 122.7(c)) required the permittee to "halt or reduce its business activities whenever and to the extent necessary to maintain compliance with the terms of a permit." This requirement received many adverse comments. In general, commenters argued that in many cases noncompliance with permit conditions may not be serious enough to justify halting or reducing regulated activities, and therefore that the requirement should be: deleted, discretionary, limited to imminent and substantial endangerment of the environment, deleted in favor of assessing enforcement penalties, or should allow for exemptions. Some commenters found the requirement inconsistent with the performance-based standards which are the primary mechanism for protection of the environment used by the programs in these regulations, arguing that EPA has no authority to enforce or require anything but limits "at the end of the pipe."

EPA does not intend to enforce a duty to halt or reduce regulated activities every time any permit condition is violated. Furthermore, EPA does not rule out the possibility that in some instances halting activities could cause more damage than to continue them, that it may be necessary to continue operations to locate the problem, that less drastic means for assuring permit compliance may be appropriate in some circumstances, or that for certain instances of trivial noncompliance it might be inappropriate for a permittee to halt its operations. However, EPA wishes to clearly establish for every permittee the principle that a permittee has a duty to comply with its permit, and that this duty requires reducing or halting activities if no other means of complying is possible. A permittee can not "buy" a right to damage the environment by violating the permit and being assessed civil penalties as a result.

EPA has rewritten the provision to state that "it shall not be a defense for the permittee in an enforcement action that it would have been necessary to halt or reduce the permitted activity in order to maintain compliance with the conditions of this permit". This rewording of the duty emphasizes its relevance to enforcement actions, and eliminates the appearance of double enforcement (once for the permit violation, and again for not reducing activity or shutting down). Of course, permittees must use their judgment in determining how to respond to noncompliance. They should consider the potential seriousness of the noncompliance, and the damage it is causing. If noncompliance with the permit is serious enough to warrant enforcement action, no permittee will be allowed to argue that compliance would have been unreasonable because it would have required a halt or reduction of the regulated activity.

Several commenters noted that proposed § 122.11(j) was quite similar to proposed § 122.68(e), which applied to NPDES. The NPDES provision now appears at § 122.60(b) and is discussed in the preamble accompanying that section.

(6) *Duty to mitigate.* Section 122.7(d) restates proposed § 122.11(i). For the reasons discussed under (5) above, EPA rejects the argument that it may not require permittees to mitigate the damage caused by noncompliance with their permits. It should be noted that in some circumstances noncompliance with this permit condition may be used to establish willfulness in an enforcement action.

(7) *Proper operation and maintenance.* The first sentence of proposed § 122.11(g) (now § 122.7(e)) required the permittee to "maintain in good working order and operate efficiently all facilities and systems of treatment or control which are installed or used by the permittee to achieve compliance with the terms and conditions of the permit." The second sentence further defined "proper operation and maintenance" as including "effective performance based on designed facility removals, adequate funding, effective management, adequate operator staffing and training, and adequate laboratory and process controls including appropriate quality assurance procedures." We have revised the first sentence by substituting the phrase "proper operation and maintenance" for "maintain in good working order and operate efficiently" in order to parallel the second sentence, which gives examples of proper operation and maintenance.

Many commenters expressed doubt whether EPA is legally authorized to require proper operation and maintenance of facilities. This requirement is clearly authorized for NPDES permittees by section 402(a)(2) of CWA which requires the Administrator to prescribe permit conditions which will assure compliance with the requirements of CWA section 402(a)(1). EPA similarly believes that a proper operation and maintenance requirement is authorized by section 1421(b) of SDWA to assure compliance with requirements in UIC permits to protect underground sources of drinking water, and by section 3004(6) of RCRA which requires EPA to establish "maintenance" and "operation" standards.

One commentor argued that if a permittee can meet its permit requirements by operating its treatment or control systems at less that optimum efficiency, rather than at "designed facility removals," it should be allowed to do so. EPA agrees and has deleted that example from the second sentence.

Other commenters argued that the phrase "effective management" as an example of "proper operation and maintenance" was unnecessary, overbroad, and would result in an intrusion into internal plant management. Although EPA still believes effective management requirements are authorized by CWA,

EPA agrees, in part, that the term "effective management" may be overbroad as a generally applicable permit condition and has deleted it from the second sentence. In response to comments fearing that proposed § 122.11(g) would require operation of backup or auxiliary facilities and systems at all times, EPA has added a new sentence to final § 122.7(e) to clarify that this paragraph requires the operation of those facilities only when necessary to achieve compliance with the permit.

(8) *Permit actions.* Proposed § 122.11(d) stated that "unless and until a permit is modified or revoked and reissued, a permittee must comply with the terms and conditions of the existing permit whether or not the existing permit would allow the permittee to begin the activity described in paragraph (c) of this section." The paragraph referred to required notification of proposed activities which could constitute grounds for modification. Commenters found this provision vague and objected that it appeared to prohibit activities otherwise allowed in the permit.

EPA agrees that it can not prohibit activities which are in compliance with a permit. The intent of the provision is to inform permittees that, simply because a permit modification has been requested or because information has been reported which might require a change in the permit, the permit itself has not been changed and must be complied with. Because RCRA and UIC permits contain construction as well as operating requirements, permittees should obtain approval before physically modifying a RCRA or UIC facility; see §§ 122.28 (RCRA) and 122.41 (UIC). (Similarly, for RCRA facilities under interim status, see § 122.23.) Final § 122.7(d) clarifies the intent by stating, "The filing of a request by the permittee for a permit modification, revocation and reissuance, or termination does not stay any permit condition."

Several commenters argued that a permittee should be able to change its conduct before approval of a permit modification. So long as the change does not violate the requirements of the permit, EPA agrees. However, a permittee runs the risk of enforcement action whenever it does not comply with its permit (see § 122.7(a)); therefore, it is in the permittee's interest to notify the Director sufficiently in advance for the permit to be modified, if necessary, to allow for anticipated changes in conduct prior to their occurrence. The notification could constitute "new information" which is cause for modifying a permit under § 122.15(a)(2).

The reporting requirements summarized in paragraph (1) of the standard conditions require advance notice of (1) planned physical alterations or additions to the permitted facility, and (2) any planned changes in the permitted facility or activity which may result in permit noncompliance. These duties are narrower than in the proposal and are discussed below. EPA recognizes that plans will not always be formulated enough in advance for the permit to be modified prior to a change. When this is the case and the change does result in noncompliance, the permittee will not be excused by the fact that notice has been submitted or that a permit modification is being processed.

Some commenters noted that proposed § 122.11(d) contradicted the proposed provisions for emergency and temporary authorizations under RCRA and UIC. Sections 122.28 and 122.41 now clarify that a permittee need not comply with the conditions of its existing permit to the extent and for the duration authorized in an emergency permit. One effect of this statement is that emergency permits are processed independently of existing permits and not as modifications of them, although the end result is similar.

(9) *Property rights.* Section 122.7(g) repeats the statement in § 122.13(b) (proposed § 122.7(b)) that a permit is not a property right. For a discussion of permit transfers, see the preamble to § 122.14.

(10) *Duty to provide information.* Final paragraph (h) states the duty of the permittee to provide information necessary in determining compliance or in processing a permit modification or termination. This roughly corresponds to proposed § 122.13(f), but has been broadened to be coextensive with the Director's general authority to require information under RCRA section 3004, SDWA section 1445, and CWA section 308.

Proposed § 122.11(c), in addition to requiring notification of any activity that might give rise to cause for modification, stated that "the Director may require a submission of a new application." This language no longer appears as a standard permit condition. EPA has amended § 124.5 to require submission of a new application whenever a permit is being revoked and reissued. This is necessary because in that case the permit is being reissued for a new term. Section 124.5 also states that an updated application may be requested by the Director in the case of a permit modification. An updated application may be necessary when, for example, a permit is being extensively rewritten or when a permit is being modified to reflect a transfer in ownership. However, it is not EPA's intent to require a complete new application when not all of the information is needed to process a permit modification. Likewise, when information is needed to determine compliance, it will be requested through the general information gathering authority and not through a requirement to submit a complete new permit application, which contains questions which often are not relevant to a determination of compliance.

(11) *Inspection and entry.* Final paragraph (i) was proposed as § 122.11(e). Proposed §122.11(e) set forth requirements for allowing representatives of the Director to enter and inspect the facility, the records that are required to be kept, and regulated substances. Many commenters were concerned that confidential information is not adequately protected when a contractor rather than an officer or employee of EPA or a State government conducts an inspection. All information disclosed during an inspection is subject to the business confidentiality provision of 40 CFR Part 2. A company may assert a claim of confidentiality and if EPA proposes to disclose any information covered by such a claim, the Agency gives prior notice to the submitter. The Agency's procedures for disclosure to contractors who are authorized representatives are contained in 40 CFR § 2.301(h) which is incorporated by reference in §§ 2.302(h) (CWA), 2.304(h) (UIC) and 2.305(h) (RCRA). Readers are referred to these sections for their specific provisions. In addition, 40 CFR § 2.211 provides that a contractor may only use the information as provided by the contract. Any violation of these provisions is grounds for debarment or suspension; willful violation may result in criminal prosecution. EPA believes that these provisions fully protect confidential information obtained by a contractor.

Several commenters stated that the provision should incorporate the legal principles set forth in *Marshall* v. *Barlow's Inc.*, 436 U.S. 307 (1978), relating to the necessity for presentation of a warrant under appropriate circumstances. Some commenters feared that by including entry and inspection requirements as a permit condition, EPA might be requiring permittees to waive certain rights under the Fourth Amendment to the United States Constitution. It is not EPA's intent to deprive any permittee of its Fourth Amendment rights as interpreted by

Supreme Court decisions. However, we have retained the general wording requiring "presentation of credentials and such other document as may be required by law" because of the complexity and the changing nature of this area of the law, and the possibility that any particular formulation or citation could be inaccurate or inapplicable.

Seveal commenters argued that proposed subparagraphs (e)(3), (4), and (5)—concerning entry to inspect facilities, equipment and operations, and to sample at the monitoring point substances required to be monitored—were not authorized by RCRA. EPA disagrees. Congressional intent was to allow for monitoring of areas surrounding the waste disposal sites, and EPA inspection of such sites and the substances monitored, to ensure reasonable protection of human health and the environment. See H. Rep. 94-1491, 94th Cong., 2d Sess., page 28. EPA has followed the suggestion of two commenters and combined proposed subparagraphs (e)(4) and (e)(5).

Some commenters suggested that entry under proposed § 122.11(e)(1) should also be at reasonable times, as are access to copy, to inspect, or to sample or monitor. EPA feels that such a limitation should not be inserted because it might give rise to arguments that EPA is precluded from inspecting without notice or at unusual times when in fact doing so is "reasonably" necessary to determine compliance or noncompliance.

(12) *Monitoring and records.* The requirement for permittees to conduct monitoring and keep records, contained in §122.7(j), was proposed in § 122.11(k). This standard permit condition has been revised to include requirements which appeared in the proposed section on "Recording and reporting of monitoring results" (proposed § 122.14, now § 122.11). The generally applicable requirements that monitoring be representative of the monitored activity, that certain information be recorded, and that records be retained for at least 3 years, are appropriately addressed to permittees in the permit document.

The records retention requirements have been revised slightly in response to comment. Copies of all reports required by the permit, not just the data used in monitoring reports, must now be retained for the 3 year period. In addition, the requirement to retain records for longer than 3 years during litigation will no longer apply automatically. Commenters argued that permittees must be given notice if records are to be retained for longer than 3 years. The Director will now have to make a request before longer retention of records during the course of litigation is required. This procedure will give adequate notice to the permittee during litigation to the extent preservation of material evidence is not already a requirement under common law. Likewise, the Director can require the permittee to retain records at any other time for longer than 3 years upon request, as in the proposal. EPA believes that there are many instances when it will be important for records to be retained for longer periods of time, up to the life of a facility or the postclosure period, and additional records retention requirements are set forth in corresponding paragraphs of §§ 122.28 and 122.41 for RCRA and UIC respectively. Finally, EPA has amended §122.4, as discussed in the preamble to that section, to require retention of information used in completing permit applications, and this requirement is repeated here.

(13) *Signatories.* Paragraph (k) simply restates the requirement of § 122.6 that reports to the Director be signed and certified, to make sure that the requirements of that section are permit requirement.

(14) *Reporting requirements.* Final paragraph (l) was proposed in § 122.11 (c) and (h). Many commenters expressed concern over proposed paragraph (c), which required the permittee to report any past or predicted activity which might constitute cause for modification or revocation and reissuance. The general tenor of these comments was that the provision was vague and burdensome, would lead to trivial and duplicative reporting, and might violate the Fifth Amendment. Examples were given of instances when this requirement would apply even if there were neither permit noncompliance nor alteration to the facility, for example upon promulgation of new standards or regulations. Furthermore, the provision would have required the permittee to make a determination of "cause" and might, for example, have required reporting of trivial instances of "ineffective management." Finally, it was unclear how this reporting requirement operated in relation to several other reporting requirements which also appeared in the proposed section (reporting of noncompliance, in emergencies, of monitoring) and elsewhere in the regulations (monitoring, proposed transfers, noncompliance reporting). The same event might have had to be reported two or even three times under separate proposed provisions.

Several commenters argued that mandatory reporting of noncompliance raises questions of self-incrimination under the Fifth Amendment. The privilege against compulsory self-incrimination applies only in a criminal case. Moreover, corporations do not have the privilege. *George Campbell Painting Corporation* v. *Reid,* 392 U.S. 286 (1968). Finally, "records required to be kept" by individuals are outside the scope of the privilege. *Shapiro* v. *United States,* 335 U.S. 1 (1948). The reporting requirements of § 122.7(l) fit within this "required records" exception to the scope of the Fifth Amendment privilege and, therefore, there is no Constitutional infirmity in requiring reporting of noncompliance as a condition of receiving a permit.

EPA has extensively rewritten the permittee's reporting requirements to make it as clear as possible to the permittee what reports are required, when they are to be submitted, and how they relate to eachother and to other sections of the regulations. All duties of the permittee to submit reports to the Director as part of the permit program will now be explained in the permit, and are summarized in one place, § 122.7(l), and corresponding sections of the program subparts. These reporting requirements are summarized under eight headings in § 122.7(l) and are discussed here as follows: (a) planned changes and anticipated noncompliance; (b) transfers; (c) monitoring reports; (d) compliance schedules; (e) 24-hour reporting; (f) other noncompliance; and (g) other information. See Table III. These headings have been harmonized to prevent duplicate reporting of the same event where this would serve no purpose. As noted in the table, the corresponding program sections refer to additional permit reporting requirements that are not specifically related to monitoring or compliance. These requirements must also be incorporated into fixed-term permits to be enforceable.

(a) *Planned changes and anticipated noncompliance.* Proposed paragraphs (c) and (h) combined reporting of both past and future causes for modification or noncompliance. Commenters argued that these paragraphs were confusing and overbroad. In response, EPA has separated the reporting requirements for events contemplated in the future from reporting requirements which arise after the event, and has narrowed the scope of both.

Planned changes. First, permittees must report "planned physical alterations or additions to the permitted facility" (§ 122.7(l)(1)). Except as

provided in § 122.61(a) for NPDES (expected use or manufacture of toxic pollutants), this is the only reporting duty which arises before the event as a matter of course regardless of whether the permittee believes it might give rise to a permit modification. (New RCRA and UIC facilities are also required to submit a statement before commencing operations; see §§ 122.28(c) and 122.41(d).) In the proposal, the permittee only reported changes after making a determination of cause for modification. However, EPA believes that it is unreasonable to expect permittees to distinguish those alterations to the facility which may constitute cause for permit modification from those which do not; therefore, the Director shall make this distinction. In addition, the nature of the programs covered by this provision favors the presumption that physical changes in the facility will give rise to cause for modification of the permit. For NPDES, changes to the facility include any physical changes, such as addition of a new process line, that may affect the quality of the discharge. It also includes commencing to discharge into a well, into a POTW, or by land application, and the permit may be modified or terminated accordingly under § 122.16(a)(4), using the criteria in § 122.65. When plans are known sufficiently in advance, this notice should be given in time for the Director to modify the permit prior to the occurrence of the noted event. This is necessary so that, if modification of the permit is an appropriate response to the change, the modification can be made in time to prevent noncompliance with the permit.

Anticipated noncompliance. The "planned alterations or additions to the facility" that are to be reported under § 122.7(l)(1) are limited to physical changes to the facility and exclude changes in production or other activities (except as provided in § 122.61(a) for NPDES). In the case of all other changes to the facility or activity contemplated by the permittee, advance reporting is required only where noncompliance is anticipated (§ 122.7(l)(2)). Here EPA presumes that changes are not likely to cause noncompliance except in cases where the potential violation is clear enough to allow reliance on self policing. Consequently, EPA believes that in most cases permittees may begin new activities other than physical alterations to the facility without the fear of violating their permits if they have no reason to believe that they will result in noncompliance. However, noncompliance with a permit is always grounds for enforcement, and if there is any doubt in the permittee's mind whether a contemplated change to the regulated activity may constitute noncompliance, the permittee should contact the permitting authority for further information.

Distinguishing "planned changes" from "anticipated noncompliance" reflects a compromise between two conflicting but valid considerations: the need to give the permittee the maximum achievable certainty as to what it is necessary to report, and the need to provide the Director with information in a timely manner. The final approach is significantly narrower than in the proposal. The proposal required that notice be given in advance of anything which might constitute cause for modification or revocation and reissuance as well as notice of any anticipated noncompliance. The final notice requirements (1) eliminate notification at any time based on possible cause for modification; (2) only require notice of anticipated noncompliance without the elaborate list of noncompliance information that was required in the proposal; (3) triggers advance notice only upon changes to the facility or activity; and (4) only requires advance reporting of changes in production without accompanying process changes if the permittee has reason to believe they might result in permit noncompliance. For example, if an NPDES permittee is reducing its production and consequently its discharges, and therefore does not violate the effluent limitations in the permit, such changes normally need not be reported. This prevents the permittee from feeling it must report innumerable instances of changed production just to be on the safe side. (See, however, § 122.16(a)(4), which allows an NPDES permit to be modified in this situation even if there is no permit noncompliance. This cause for modification is statutory.) Fifth, changes in the activity which are not limited in the permit would not have to be reported under this scheme. EPA believes that for NPDES the requirement to report expected use or manufacture of toxic pollutants under § 122.61(a) takes care of parameters not limited in the permit in most instances; similarly § 123.95 ensures that any change in an activity regulated by a 404 permit is noncompliance. As for RCRA and UIC, experience with these programs may be necessary before it can be determined with more precision what activities—other than changes to the physical facility or those which may result in noncompliance—need to be reported in advance.

(b) *Transfers.* The provision on transfers appeared in the proposal in § 122.8(e). These final regulations contain a separate section on transfers, § 122.14. This standard permit condition reflects the requirements of that section; see the preamble discussion thereunder.

(c) *Monitoring reports.* The new section of the permit listing reporting requirements now refers to the duty to submit monitoring reports so as to provide one list of permit reporting requirements. The frequency and content of these reports, however, will be specified elsewhere in the permit because they are variable provisions incorporated through § 122.11 and the sections which it refers to.

(d) *Compliance schedules.* The requirement for the submission of reports on compliance or noncompliance with requirements in a compliance schedule appeared in proposed § 122.12(a)(2) (now § 122.10(a)(2)). Because this requirement is binding on all permittees with compliance schedules, it is referred to also in final § 122.7(1)(4) to make sure that it will appear in the permit.

(e) *Twenty-four hour reporting.* Proposed § 122.11(h) stated that all instances of noncompliance had to be reported, that the Director "may" require such report within 24 hours "or" five days in certain instances, and that the Director "shall" require such reports within 24 hours in the case of NPDES permittees subject to CWA section 307(a) toxic standards or prohibitions. Many commenters objected that the duty to report these instances of noncompliance was vague, unreasonalbe, and duplicative. In addition, application of the five-day or 24-hour requirement was unclear.

EPA believes that in certain instances it is important to receive prompt notice of noncompliance, and the requirement for 24-hour or five-day reporting has been retained. However, several changes have been made to make this requirement clearer.

EPA has retained the general duty to report potential endangerments to health and the environment as a 24-hour reporting requirement applicable to all programs. However, the general requirement is now triggered only by noncompliance. EPA agrees that a duty to independently report information that "may" constitute an endangerment to human health or the environment that is not coupled with noncompliance should not be imposed.

Second, each of the program subparts indicates more specific instances where health and the environment reporting is likely to be applicable. While in many cases the prompt reporting of instances

of noncompliance affecting human health and the environment must depend on the permittee's good faith estimation of its importance, it should be clear, as these regulations now provide, that in the case of a release of a hazardous waste into public drinking water supplies (RCRA), endangerment of public drinking water supplies (UIC), and noncompliance involving a CWA section 311 or 307 pollutant (NPDES), the permittee must report immediately to the Director.

Third, the program subparts also indicate additional 24-hour reporting requirements which are not necessarily linked to possible endangerment to human health and the environment or to noncompliance, but which are readily identifiable by the permittee and which EPA has determined are sufficiently important to warrant immediate reporting. Thus, for NPDES, each permit will include a list of those pollutants for which the violation of a maximum daily discharge limitation must be reported within 24 hours. Similarly, for RCRA, EPA requires notification of any fire or explosion at an HWM facility, as required in each RCRA permittee's contingency plan, even though there may be no specific permit condition directly prohibiting fires or explosions so as to render the event technically a "noncompliance."

Each event reported under § 122.7(l)(6) and the corresponding program sections must be followed by a written submission within 5 days. The list of information that must be submitted in the written report speaks in terms of "noncompliance," but where a report must be submitted for an event which is technically not noncompliance, this may be read to include the other events required to be reported.

Fourth, several inconsistencies have been eliminated. The requirement for oral reporting within 24 hours is now uniform in all instances covered by new § 122.7(l)(6). The provision for RCRA has been coordinated with the language in the section 3004 regulations; see § 122.28(d) and 40 CFR § 264.56.

Fifth, the operation of the 24-hour versus 5-day requirement has been clarified. Now, in all instances, an oral report must be supplied in 24 hours, to be followed by a written report within 5 days. There is no longer a "choice" between 24 hours or 5 days that the permittee would have to be informed of somehow, and there is no possibility that a written report could be required within 24 hours. In addition, some commenters, including EPA Regional Offices, argued against the Director's proposed authority to waive a written report when the permittee has orally reported within 24 hours. EPA agrees that a written report is needed for documentation of all instances of threats to human health and the environment. However, written reports concerning other 24-hour reporting instances remain waivable if indicated in the program subparts.

(g) *Other noncompliance.* Proposed § 122.11(h) required all instances of noncompliance to be reported to the Director, but was unclear as to how this requirement related to other reporting requirements. Final § 122.7(l)(7) states that only those instances of noncompliance not otherwise reported in monitoring reports, compliance schedules, or as 24-hour and 5-day reports, must be independently reported as noncompliance. Reports of anticipated noncompliance must still be reported under this heading if the noncompliance actually occurs. Thus, if noncompliance is revealed in routine submissions of monitoring reports, it is not necessary for the permittee to automatically submit a duplicate report on the same information. For NPDES, and perhaps the other programs, reports under this heading will be rare.

The final provision also clarifies when these noncompliance reports are to be submitted—at the same time as the monitoring reports are submitted under the conditions of the permit. The proposal referred to the section on quarterly and annual noncompliance reports. This was confusing because these reports are prepared by the Director, not the permittee. The cross-reference has been eliminated.

(h) *Other information.* This heading, which was only implied in the proposal through the duty to report causes for modification, requires permittees to update information submitted in their applications or reports. If the permittee learns that incorrect information is contained in its application or reports that have been submitted, it shall correct the information "promptly."

The permittee's reporting requirements are summarized in Table V.

§ *122.8 Establishing permit conditions.*

Final § 122.8 (proposed § 122.13) is essentially a cross-reference to other sections of these regulations and other regulations which set forth required permit conditions that vary from permit to permit and methods for setting those conditions. This section has been rewritten to provide a roadmap to all of the sections of these regulations that must be consulted by permit writers in setting these variable permit conditions (see also Table II and preamble to § 122.13). The section first refers to sections of Subpart A which set forth permit conditions required for all programs in certain instances, and then refers to corresponding sections in each of the program subparts on "establishing permit conditions" for those programs. The latter sections in turn refer to all subsequent sections of the subpart containing information on setting permit conditions, and to relevant portions of the technical regulations for the program.

Table V.—*Permittee Reporting Requirements*

Type of information	When	Additional program requirements
1. Planned changes.	In advance	§ 122.28(c) (RCRA), § 122.41(c) (UIC), § 122.60(g)(3)(i) and § 122.61(a) (NPDES).
2. Anticipated noncompliance.	In advance	
3. Planned transfers.	In advance	
4. Monitoring reports.	As specified in permit	§ 122.60(e) (NPDES).
5. Compliance schedules.	14 days of compliance date.	
6. Endangerment or other 24 hours/5 day	24 hours/5 days	§ 122.28(d) (RCRA), § 122.41(d) (UIC), § 122.60(f) (NPDES).
7. Other noncompliance.	With monitoring reports.	
8. Other information.	Promptly	
9. Additional program requirements.	As specified	§ 122.28(e) (RCRA), § 122.41(e) (UIC), § 122.60(g), § 122.60(h), § 122.61(a), and § 122.61(b) (NPDES).

The fact that this section is the guide to all permit conditions which do not always apply in the same way, or in every instance, to every permit, and that these conditions therefore must be applied on a case-by-case basis, as appropriate, should not be taken to mean that any of them are necessarily optional. In many if not most cases, the conditions referred to in this section are mandatory if the circumstances which invoke the condition are present. In addition, this section now explicitly states the general duty of the permit writer to include conditions in the permit which are necessary to ensure compliance with the appropriate Act and regulations. It also contains guidance on when a statutory or regulatory requirement becomes effective for purposes of that duty. Some of that material originally appeared in § 122.69 of the proposal for NPDES; it is now applicable to all of the programs.

§*122.9 Duration of permits.*

Proposed § 122.8 (now § 122.9) provided that RCRA and UIC permits

would be issued for terms up to the life of the facility. NPDES and 404 permits would be issued for terms of up to 5 years. When a facility or activity has permits under two or more programs, proposed § 122.9 (now § 122.14) provided that a "cross-review" of each issued permit would have been conducted every time another permit for that facility or activity was issued, modified, reissued, or terminated. This review would have been conducted to determine whether the other permits should also be modified, revoked and reissued, or terminated. Proposed § 122.9 on causes for modification (now §122.15) provided that modification or revocation and reissuance of a permit could be based upon a related change to another permit issued to the same facility or activity. Also, all UIC and RCRA permits were subject to mandatory review every 5 years.

The proposal requested comments on the permit duration and review scheme, and a signficant number were received. In general, industry favored lifetime permits for RCRA and UIC, and objected that the provisions for permit review negated the advantages of lifetime permits. Many felt that normal reporting, inspection, and monitoring already provided sufficient oversight, and that reviews ought to be triggered only when such methods themselves revealed possible cause for a modification. More fundamentally, commenters cited the permittee's need to rely on the conditions of its permit, particularly for siting and construction requirements, and argued that financing could be jeopardized without this certainty. The proposal seemed to open the prospect of an endless round of reviews or "nonstop permitting" with permit conditions continually being adjusted. This fear was aggravated by the fact that just what a "review" entailed was not spelled out. Finally, many commenters feared that reviews would cause delays in processing applications and modification requests, because action would be held up while all reviews of other permits for the same facility were conducted. They especially objected to the provision for "cross-reviews" for facilities with multiple permits both for its potential for delay and for appearing to "bootstrap" the requirements of one permit onto other, related permits.

On the other hand, a number of comments were received from environmental groups and some States favoring a fixed term approach, particulary for RCRA permits. These commenters felt that regular review and updating of permits is necessary for an effective UIC or RCRA program, and that the only way to be sure that such reviews take place is to adopt a fixed-term permit approach.

In response, and as a result of the evolution of its own thinking, EPA has extensively redrafted the permit duration, permit review (proposed § 122.9, now deleted but discussed below), permit termination (proposed § 122.10, now § 122.16), effect of a permit (proposed § 122.7, now § 122.13), and consolidation of applications (proposed § 124.4, now § 124.4) sections to provide maximum certainty to permittees consistent with adequate protection of the environment and human health. The discussion of permit durations should be read along with the above sections and accompanying preamble.

With the exception of certain UIC wells, which may receive lifetime permits, the final regulations replace the mandatory 5 year reviews for RCRA and UIC permits, and in all cases replace the "cross-reviews" for facilities with more than one permit, with a fixed-term permit scheme for all of the programs. Accordingly, permit reissuance at regular five or ten year intervals, instead of permit modification at unpredictable times, will be the primary mechanism for adjusting permit requirements. In addition, EPA has narrowed the grounds upon which a permit may be modified or teminated during each permit term in order to provide a maximum amount of security to permittees. Also, a provision has been added stating that for all permits that must be issued for a fixed term, compliance with a permit constitutes compliance, for purposes of enforcement, with the appropriate Act. Finally, because of the fixed-term approach, permits for the same facility can be set to expire and be reissued at the same time. In this way all relevant aspects of a facility's operations can be reviewed together, which should result in more comprehensive and consistent requirements.

(1) Final § 122.9 now states that all HWM facilities may be issued permits which are effective for a maximum of 10 years. Wells injecting industrial or municipal wastes beneath the lowermost formation containing an underground source of drinking water and certain wells injecting hazardous wastes (Class I wells) may be issued permits for up to 10 years. Wells for enhanced recovery, hydrocarbon storage, and special process mining (Class II and III wells) will still receive permits for up to the life of the facility. A Class V well, if it is required to obtain a permit (see preamble to § 122.37)) may receive a permit for up to 10 years.

EPA agrees with those commenters who believe that permit expiration and reissuance is an important mechanism for providing regular scrutiny of permit compliance and updating of permit conditions. When permits must be reissued periodically, there is greater assurance that the existing conditions of the permit will be scrutinized to determine whether any of them must be modified or updated. In addition, a limited-term permit provides protection against human error by the permit writer. This is particularly important for facilities which undergo construction to comply with construction or performance standards contained in the permit; such facilities could comply with those standards and yet not comply with other requirements designed to protect human health and the environment. Under the proposed scheme, the facility could be subject to having its permit modified at any time. Under a fixed-term permit scheme, this situation can normally be addressed during permit reissuance (see discussion of permit modification below).

Finally, periodic reissuance builds in a mechanism for upgrading of permit requirements to reflect changing knowledge and advances in technology for permit programs which are new or undergoing rapid evolution.

Accordingly, EPA has determined that RCRA facilities and Class I wells under the UIC program will be issued permits of a fixed duration of up to 10 years. These facilities deal with hazardous and municipal wastes which in many instances have great potential for harm to human health and the environment. In both instances the Federal regulatory program covering these facilities is new, which favors a short-term permit approach, especially during the early years while technical criteria for the regulation of hazardous and municipal waste are further developed.

A 10-year term (rather than 5 years as with NPDES) was chosen for RCRA facilities because of the especially intense scrutiny such facilities frequently receive during public hearings (which are required during permit reissuance) and the local opposition which is frequently engendered. EPA determined that for this reason the entrepreneurial risk and need for the security which is afforded by a longer permit term is correspondingly greater for RCRA facilities as a class than for NPDES point sources as a class, particularly in view of widespread shortages of capacity within approvable facilities and the consequent lack of local alternatives. In addition, a term of up to

10 years may be needed for some RCRA facilities because of their experimental nature and the need for adequate time to analyze differing approaches to hazardous waste management. Finally, 10 years was chosen because it is a multiple of five, which will make it easier to coordinate the reissuance of RCRA permits with NPDES and UIC permits for the same facility. Having chosen maximum 10-year terms for RCRA facilities, EPA determined that the maximum term for Class I wells should likewise be 10 years. To provide otherwise would not comport with EPA's attempts through consolidation to achieve consistency between programs, particularly as Class I wells include those injecting hazardous wastes.

Class II and III wells under the UIC program, on the other hand, will retain the maximum lifetime permit duration which appeared in the proposal. These wells, which are used for enhanced oil and gas recovery, certain types of hydrocarbon storage, and several kinds of special processes for mining of minerals or in situ gasification of hydrocarbon resources, present less hazard to the environment, so that the increase in permit issuing resources needed for fixed-term permits would not be justified. Instead, permits for these facilities will be reviewed every 5 years, as in the proposal.

(2) Several commenters stated that UIC permits should be for the actual life of the facility rather than the "designed" life, on the grounds that for many facilities the "designed" life is hard to determine or arbitrary, and that a permit renewal application would be required if the facility happened to last longer than originally computed. The purpose of this provision was to be sure that EPA and States would have adequate oversight of the termination of facility operations, particularly the closure and financial responsibility provisions set forth in § 122.42. However, EPA agrees that setting the permit term on the basis of an estimate of the operating life of the facility is not the way to do it, particularly as the estimate could fall on either side of the actual date of closure. Rather, EPA has amended § 122.41 to require UIC permittees to give notice 180 days prior to closure so that the financial responsibility and closure provisions of the permit can be reviewed and modified if necessary, and the permitting agency can be assured of adequate opportunity to oversee the termination of operations. This change has consequently allowed EPA to amend § 122.9 so that Class II and III wells may be permitted for up to the actual operating life of the facility.

(3) Several commenters noted that both the lifetime and fixed-term permit provisions gave the Director discretion to issue permits for less than the full allowable term. EPA believes that the option of issuing permits for less than the maximum duration is necessary in both instances. For example, Class II and III UIC wells include a wide variety of operations in various locations with differing environmental concerns. More rigorous oversight through a term permit may be appropriate because of the type of the well, its past operating history, and the risks to the environment which it may present. For the fixed term permits, permits of less than 10 year durations will be a normal occurrence, both in consideration of varying environmental risks and as permit durations will be set to allow permits for the same facility to expire and be reissued at the same time (see § 124.4 and accompanying preamble). Another example of short-term permits is the "short-term permit policy" for NPDES permits (see § 122.64), coordinating permit durations so as to incorporate BAT effluent limitations mandated by the *NRDC* v. *Train* settlement agreement.

§ 122.10 Schedules of compliance.

(1) Proposed § 122.12 (now § 122.10) solicited comments on the possible need for uniformity in two requirements for schedules of compliance: (a) the deadline for permittees to give notice of compliance or noncompliance (14 days from the compliance date for EPA programs, but 30 days for UIC programs and for all State programs); and (b) the maximum interval between compliance dates (9 months for EPA programs, 1 year for States).

In both instances, commenters heavily favored greater uniformity. Not a single State specifically commented in favor of the greater latitude for States which appeared in the proposal. As for uniformity among programs, almost all commenters stated that they favored it, and then went on to lend support to the less stringent requirements of 30 days and one year.

EPA agrees with commenters that timing requirements associated with compliance schedules is an area where one of the potential benefits of consolidation—elimination of arbitrary differences in requirements shared by several programs—can be realized.

(a) The NPDES program, which has had several years of experience in monitoring permit compliance and is the only program covered in these regulations with Federal enforcement experience, has found that the 14-day notice requirement is an important element of State and Regional oversight. In some cases delay in reporting could result in damage to the environment. Balanced against this possibility, there is little increased burden in requiring prompt notice, because notice is required in any event, and the permittee knows or should know that it is in noncompliance on the date specified for the requirement in the schedule. EPA has therefore determined that the deadline of 14 days after the compliance date for notice should be retained as a uniform requirement for all programs and, in view of comments in favor of uniformity, for States as well.

(b) Stating a maximum time between interim compliance dates limits the Director's discretion in writing permit conditions. The dates he or she sets for compliance will determine how soon information on noncompliance will be received. Timely receipt of information is particularly important for State-administered programs, where EPA will be relying on summaries of compliance schedule violations contained in quarterly or annual noncompliance reports. In the interest of uniformity, EPA has determined that a maximum one-year interval between compliance dates is practical. Because the provision sets forth the *maximum* interval between deadlines, the Director is always free to set deadlines closer together when more rigorous oversight is important. Normally "milestone" events occur at intervals shorter than one year. Under § 122.10(a)(3)(ii), Directors must require progress reports where it is impractical to specify compliance intervals of one year or less.

(2) A comment following proposed § 122.12(a) stated that NPDES new dischargers, sources which recommence discharge after terminating operations, and those sources which had been indirect dischargers which commence discharging into waters of the United States, do not qualify for compliance schedules. This comment was taken from the language of § 122.17(f) of the NPDES regulations. Final § 122.10(a) reinstates this language as part of the text of the regulation rather than as a comment to emphasize the regulatory effect of the section.

In addition, the proposed comment to § 122.12(a) failed to specify that NPDES new sources are ineligible for schedules of compliance.

The comment was thus inconsistent with § 122.17(f) of the final June 7, 1979 NPDES regulations and with section 306(e) of CWA. This omission has been corrected in the final regulations.

Some commenters questioned whether the comment to proposed § 122.12(a) (and the corresponding provision in

§ 122.81(d)(4)) could be construed to mean that dischargers subject to its provisions are never eligible for schedules of compliance, even for permits issued after the first permit. EPA did not intend this interpretation and thus has clarified the section to indicate that these dischargers will be ineligible for schedules of compliance only for the first permits issued to them.

An additional change in the text of final § 122.10(a) (and a parallel change in § 122.67(d)(4), proposed as § 122.81(d)(4)) allows new dischargers which commenced discharge before August 13, 1979 (the effective date of the June 7, 1979 NPDES regulations), to qualify for schedules of compliance. Because a number of new dischargers had begun discharge before the August date with EPA's consent pending Agency action on their permit applications, EPA believes it would be unfair to retroactively declare such dischargers ineligible for schedules of compliance.

(3) Several commenters, including the State of New Mexico, stated that they thought compliance schedules are unnecessary for the UIC program. This section will not disrupt those State-administered UIC programs which have used compliance schedules infrequently. Those States are free to continue their practice of requiring full compliance on "startup." However, the UIC program does contain requirements for which compliance schedules may be appropriate. For example, although States may, if they wish, require even existing operations to stop injection pending permit compliance, the regulations require that, if States do not choose this route, permits for existing wells are at least required to contain schedules for compliance with construction requirements; see § 122.42[a].

(4) Some commenters expressed concern about the applicability of schedules of compliance to State 404 permits. Under proposed § 122.11(a) (now § 122.10(a)), permits will specify schedules of compliance only "where appropriate." Because CWA does not establish a series of deadlines for the 404 program comparable to the "BPT" and "BAT" schedules for the NPDES program, and because 404 activities are generally not continuing ones, section 404 permits will rarely specify schedules of compliance.

(5) Several environmental groups and other commenters advocated a time limit, such as two years, for compliance with RCRA requirements. They cite the importance of bringing existing hazardous waste management facilities into full compliance with RCRA section 3004 requirements after they have obtained permits, as well as the need for an incentive for such facilities to begin upgrading during the interim period in anticipation of strict permit conditions. EPA agrees that speedy compliance by HWM facilities with § 3004 standards is important, and has amended § 122.10(a) to require compliance "as soon as possible" for all compliance schedules, not just those in NPDES permits. See also § 122.10(a)(1)(ii). However, we believe that it would be a mistake to impose a strict deadline for RCRA or other program compliance, because it would eliminate any authority to shape the duration of compliance schedules as the circumstances warrant. EPA believes that decisions as to the duration of compliance schedules should be made through the permit-issuance process, where there is full opportunity for public participation and for interaction between the Director and the applicant or permittee. A requirement for strict interim compliance deadlines coupled with the new fixed-term permit requirements of § 122.9 should help support quick upgrading of existing HWM facilities.

Likewise, a commenter suggested that it is unfair to require compliance as soon as possible, because this favors the company whose resources or wherewithal make it impossible to comply as soon as some other company with superior capabilities. It is important to write a compliance schedule with consideration for the type of requirement at issue and the seriousness to the environment of delay in meeting it. Again, the permitting process is the proper forum for consideration of these issues, rather than, for example, eliminating all distinctions by allowing all NPDES schedules to require compliance merely by the statutory deadline.

(6) Proposed § 122.12 (b) and (c) has been combined in final § 122.10(b) to provide one "alternative schedules of compliance" provision applicable to all RCRA, UIC, and NPDES situations where a facility chooses to terminate operations rather than meet permit requirements. The RCRA and UIC alternative schedules of compliance now follow the NPDES model.

A principal feature of the RCRA and UIC proposal was that permittees could switch back and forth between the schedule leading to compliance and the schedule leading to termination. That provision was subject to the very abuses which all of the alternative schedule of compliance provisions are designed to prevent: namely, when a facility chooses to terminate rather than comply with permit requirements by assuring EPA that it is going to terminate operations, but then changes its mind either in good or in bad faith, and therefore requires more time to make up what was lost while presumptively on the road to termination. To prevent this from happening, it is necessary to require the permittee to commit itself to terminating if it is to be placed on a termination schedule, as in proposed § 122.12(c) for NPDES. Similarly, the commitment has to be "a firm public commitment satisfactory to the Director." However, the requirement that a bond be posted to back up the commitment, which appeared in proposed § 122.12(c), has been eliminated. Several commenters argued that EPA lacked legal authority for such a bond under the Clean Water Act, and the need for a bond has not yet been demonstrated in the case of RCRA or UIC. An additional change from the proposal is that alternative schedules of compliance are now available to RCRA and UIC permittees in addition to applicants, as it was limited in the proposal. Alternative schedules for applicants will, as with permittees, be determined through the permit-issuance process.

The alternatives schedules of compliance provision is written to allow the final termination date in a schedule leading to termination to be somewhat later than the final compliance date in a schedule leading to compliance. However, the schedule leading to termination must still lead to "timely" cessation of activities. It is not EPA's intent for the termination route in this section to be used as a means of unduly delaying requirements that are applicable to the facility. The delay must be judged on a case-by-case basis considering the type of permit requirement and the harm or potential harm to the environment that the noncompliance or a delayed schedule will cause. In no event should the date for cessation greatly exceed what it would have been for compliance.

Nor is it EPA's intent that a schedule of compliance leading to cessation of activities relieve a permittee from applicable requirements any more than any other schedule of compliance. Obviously, if a permittee will cease activities, many permit requirements which apply only to operating facilities will not have to be complied with after cessation. Such requirements, to the extent that it would not cause harm to the environment, many also be relaxed during the period leading up to cessation when the permittee is firmly committed to the cessation course. To the extent that requirement for operating facilities

are necessary to protection of human health and the environment, compliance may not be excused. At a minimum, a RCRA (or UIC injector of hazardous waste) permittee on a closure schedule should be required to meet RCRA interim status standards, just as a facility without a permit would be.

Finally, RCRA (and certain UIC) permit requirements which pertain to closure and post-closure, including financial responsibility, are applicable to a closing facility, regardless of whether it is on a schedule leading to cessation of activities, and the schedule must ensure compliance with these requirements.

Several commenters noted that the proposal required the permittee or applicant to decide to cease conducting activities before the Director determines what the compliance schedule would be if that decision were reversed. They suggested that the Director should be required to determine the compliance schedule first to help the permittee make a decision. EPA has not accepted this comment. However, where new permits are at issue, EPA encourages permittees to contact their permitting agencies to discuss compliance schedules and work out compliance or closure alternatives. Where existing permits are concerned, the paragraph is designed to give the Director an optional mechanism for modifying permits when the permittee has made the decision to terminate. Presumably such a permittee already knows what its schedule leading to compliance looks like.

EPA has not retained the language of the proposal which coupled the cessation schedule to compliance with the closure requirements by the "predicted closure date." Instead, the final provision requires timely compliance in general, thus eliminating any implication that only the closure requirements are of concern when a facility is on a closure schedule. Also, several commenters suggested that the "predicted closure date" should be predicted by the permittee or applicant rather than the Director. As discussed above, the end date of any schedule leading to cessation is appropriately determined through the permit-issuance process.

Some comments expressed concern that the schedule leading to closure of a RCRA facility did not adequately address the requirements which pertain to closure itself and post-closure. As the provision is now written, it refers to "cessation of regulated activities." For a RCRA facility, this means ceasing to accept hazardous waste which, under 40 CFR Part 264, Subpart G, triggers the closure plan, which will contain *its* own schedule for subsequent events.

§ 122.11 Requirements for recording and reporting of monitoring results.

Several commenters noted the inaccuracy of the comment that "generally installation of monitoring equipment is not required under the UIC program" in proposed § 122.14 (now § 122.11). EPA has deleted the statement.

Several objections were received that NPDES permittees should not have to refer in their discharge monitoring reports to data on internal waste streams and data collected by third parties. The comment and the requirement have been deleted.

Several of the provisions which appeared in this section of the proposal have been relocated to follow the format of the final regulations. The requirement that monitoring data be "representative" of the monitored activity now appears in § 122.7(j); recordkeeping requirements are also in § 122.7(j). The requirement that DMRs be used for NPDES reporting now appears in § 122.60. Finally, proposed paragraph (e), which repeated requirements for compliance schedule reports, has been deleted.

One commenter expressed concern that the recordkeeping and reporting requirements for 404 permittees in proposed §§ 122.14 and 122.12 (now § 122.11) go beyond the intent of CWA, particularly section 308(c). However, under section 404(h)(1)(B) (and its NPDES counterpart, section 402(b)(2) (A) and (B)), one condition of State program approval is the State's authority to issue permits which apply, and assure compliance with, all applicable requirements of section 308. Section 308 gives the Administrator authority to require recordkeeping, monitoring, reporting, and a right of entry. These regulations comply with the statute by establishing recordkeeping and reporting requirements based on those used by the EPA and State NPDES programs. However, monitoring requirements for 404 permittees may vary in required frequency or extent as appropriate to assure compliance with 40 CFR 230. Part 230 does not contain specific monitoring requirements but will be used to determine what monitoring is appropriate.

§ 122.12 Considerations under Federal law.

Proposed § 122.83 (now deleted) directed that EPA-issued NPDES permits be consistent with the requirements of several listed Federal laws and Executive orders. Several commenters objected to this section because it was too broadly written. The section has been rewritten (as § 122.12) to eliminate reference to those Federal laws that do not require any particular action by the Regional Administrator and to explain the relevance of the remaining laws listed. The provision is no longer limited to NPDES permits because the requirements of these laws may apply to other Federally-issued permits. This section does not impose any legal requirements beyond those imposed by the terms of the laws themselves. The purpose of the section is to inform the public and permit issuers of the requirements applicable to the permit programs regulated under this Part.

EPA has under consideration inserting a provision requiring permit writers to comply with two Executive orders, Executive Order 11990 (Protection of Wetlands), and Executive Order 11988 (Preservation of Floodplains). EPA included these Executive Orders in proposed § 122.83, "Special considerations under Federal law." As proposed, the orders would only have applied to NPDES permits. A number of commenters objected to this proposal on the grounds that the Executive orders were unrelated to specific statutory requirements in the Clean Water Act.

EPA wishes to reassess the applicability of these Executive orders in the context of not only the NPDES program, but the UIC and RCRA programs as well. Consequently, EPA invites comment on the appropriate scope and applicability of the requirements of these two Executive orders as applied to NPDES permits, RCRA permits, and UIC permits. Any such comments must be submitted to the address listed below on or before July 18, 1980.

Edward A. Kramer (EN-336), Office of Water Enforcement, Environmental Protection Agency, Washington, D.C. 20460.

§ 122.13 Effect of a permit.

(1) New § 122.13(a) states, with some limitations, that "compliance with a permit during its term constitutes compliance, for purposes of enforcement, with" the appropriate Act. This "shield" provision is one of the central features of EPA's attempt to provide permittees with maximum certainty during the fixed terms of their permits. (For a discussion of permit durations, see preamble to § 122.9.) This new provision gives a permittee the security of knowing that, if it complies with its permit, it will not be enforced against for violating some requirement of the appropriate Act which was not a requirement of the permit. (Of course,

compliance with a permit is not a defense to actions brought under the emergency provisions of sections 7003 of RCRA, 504 of CWA or 1431 of SDWA.)

A similar provision already applied to NPDES permits, as explicitly required by section 402(k) of CWA, and appeared in § 122.65 of the proposal. Because the provision is now generally applicable, § 122.65 has been eliminated. For State 404 programs, new § 122.13(a) is similarly required by the explicit wording of section 404(p) of CWA. The Safe Drinking Water Act is more generally phrased, but there is nothing in it that speaks against applying the "shield" to UIC permits as well. However, the "shield" does not apply to Class II or III well UIC permits, because it is important to be able to upgrade permit requirements for permits which do not incorporate applicable requirements during periodic reissuance.

Where RCRA is concerned, authority for the "shield" is more complicated. As the preamble to the section 3004 regulations points out, RCRA requires compliance by persons subject to Subtitle C with all the requirements of that Subtitle, and authorizes enforcement of all those requirements. The requirement to obtain a permit is one of the section 3004 requirements, but nothing in the statute states that compliance with the permit is deemed compliance with other provisions of Subtitle C.

Nevertheless, EPA believes that the "shield" is beneficial to the practical working of the RCRA permit program, as it is to the other permit programs. EPA agrees that one of the most useful purposes of issuing a permit is to prescribe with specificity the requirements that a facility will have to meet, both so that the facility can plan and operate with knowledge of what rules apply, and so that the permitting authority can redirect its standard-setting efforts elsewhere. If all the section 3004 standards were fully enforceable against a permitted RCRA facility even though they were not reflected in the permit (or, perhaps, not consistent with it), facilities would be exposed to unavoidable uncertainty as to the standing of their operations under the law. In addition, such a provision would increase pressure on EPA and States to keep the permit conditions applicable to a given facility in a perpetual state of re-examination. EPA's resources will at most be barely sufficient to issue and renew RCRA permits, and review State permits, at the time of their initial issuance and periodic renewal. EPA and States are likely to make much better use of their resources if they restrict examination of permits between issuance and renewal to monitoring compliance and taking enforcement action where necessary.

Accordingly, in these regulations EPA is announcing a principle by which it will bind itself—that it will not take enforcement action against any person who has received a final RCRA permit except for noncompliance with the conditions of that permit. (For reasons set out at length in the peramble to the section 3004 regulations, this self-restriction does not apply to the interim status standards applicable to facilities which have not received a final permit.)

For all programs, the shield provision applies to enforcement actions by EPA or an approved State, as well as to enforcement through citizen suits. EPA recognizes that the RCRA "citizen suit" provision allows private enforcement actions against RCRA permittees without limitation. However, because EPA plans to specify all the regulatory requirements applicable to an individual facility in the permit for that facility, as a practical matter there will be nothing beyond the permit conditions for a citizen suit to enforce. Indeed, if a plaintiff in such a suit argued that regulatory requirements outside the conditions of the permit should be applied and enforced, that would probably amount to an improper collateral attack on the conditions of the permit.

As required by CWA, the shield does not apply to section 307 toxic effluent standards or prohibitions for NPDES permits. In addition, although a permit may specify monitoring and reporting requirements, EPA believes that the "shield" does not preclude it from invoking its reporting and information gathering authority as specified in sections 3004 of RCRA, 1445 or SDWA, and 308 of CWA, which operate independently of the permit document. Under these authorities, the Director could require a report, or certain monitoring, without modifying a permit and regardless of whether the permittee were complying with the monitoring or reporting requirements of its permit. However, if the changed monitoring or reporting duties were of a continuing nature, so as in fact to amount to a modification of the duties specified in the permit, the Director would be required to modity the permit.

EPA believes this "shield" affords RCRA and UIC permittees a significant degree of added certainty. It now places the burden on permit writers rather than permittees to search through the applicable regulations and correctly apply them to the permittee through its permit. This means that a permittee may rely on its EPA-issued permit document to know the extent of its enforceable duties under the appropriate Act, or on its State issued document to the extent the State program has not adopted a more stringent approach to enforcement.

This new "shield" provision does not alter the fact that a permit may be modified, revoked and reissued, or terminated during its term for appropriate causes (see preamble to §§ 122.15 and 122.16). Most instances of modification, revocation and reissuance, or termination will be the result of noncompliance with a requirement of the permit, although some causes do not require noncompliance. However, "failure to apply any applicable requirements" (proposed § 122.9(e)(6)) is not, as it was in the proposal, grounds for modifying or revoking and reissuing a fixed-term permit. Thus, if the permit writer makes a mistake and does not include a requirement of the appropriate Act in the permit document, the permittee will neither be enforced against nor have its permit modified or revoked and reissued as a result (unless, perhaps, an endangerment to human health or the environment can be shown; see § 122.16(a)(3)). In addition, EPA has the authority in certain circumstances to "veto" a State-issued RCRA permit. This provision is discussed in the preamble to Part 123, Subpart B.

This change has necessitated a careful rewriting and reorganization of many sections of the proposal. The proposal contained language which was addressed to permit writers as well as permittees, without a coherent attempt to distinguish one from the other. Because requirements for permittees were scattered through the regulations, a conscientious permittee might have felt obliged to read through all of the regulations in order to be sure that it was aware of all of its duties. Similarly, there was no mechanism for assuring that the permit writer would pick up all of the requirements and place them in the permit. This is no longer true. Rather than stating that "the permittee shall," the regulations now in many instances state in effect that, "the permit shall be written to require that the permittee shall." Likewise, the regulations have been structured so that generally applicable permit requirements appear in all permits, and that permit requirements which vary from permit to permit can be tracked through the regulations and applied as appropriate; see Table II and accompanying preamble.

(2) Proposed § 122.7(b) (now § 122.13(b)) provided that a permit does

not "infringe" State or local law or regulations or preempt any duty to obtain State or local assent required by law. EPA recieved several comments on these proposed provisions, particularly for RCRA facilities. First, EPA has reorganized the section so that no State program will be required to ensure non-preemption as a condition of program approval by EPA. It is quite possible for a State to determine that in establishing, for example, a hazardous waste program to satisfy the requirements of the Federal Resource Conservation and Recovery Act, it is preempting any local authority to regulate hazardous waste; see *Rollins Environmental Services* v. *Iberville,* 13 ERC 1260 (S.Ct. La., 1979). The preemptive effect of State operation of any of the programs in these regulations is a matter for Federal or State law which EPA does not address one way or the other in these regulations. Applicants and permittees must find out for themselves if there are local laws with which they must comply. Second, the statement that a permit does not infringe State or local law or regulations remains applicable to EPA permits. EPA does not intend this provision to mean that non-preemption is a precondition of issuing an EPA permit. EPA's intent is that it has not made a determination through these regulations that in issuing a permit it is preempting State or local requirements.

Review of permits (proposed § 122.9). In the proposal, the provisions for permit "reviews" were of central importance, and recieved an appropriately large volume of comment, because they were a counterpart to the proposed lifetime duration of RCRA and UIC permits. Becaue of the fixed-term approach to permit duration adopted in these final regulations (see final § 122.9 and accompanying preamble), permit reviews are no longer a central feature of Part 122. Although the mandatory five-year review for Class II and III UIC permits (proposed § 122.9 (a)) remains in § 122.9(c) (duration of UIC permits), the other provisions concerning review that appeared in proposed §§ 122.9(a), (b) and (c) either have been eliminated or are adequately covered by Part 124.

First (proposed § 122.9(a)), the other five-year reviews have been eliminated because all permits other than certain UIC permits are now for a fixed term and therefore will be reviewed automatically as a part of permit reissuance.

Second (proposed §122.9(b)), EPA has eliminated mandatory "cross-reviews" for facilities with more than one permit and the corresponding provision (proposed § 122.9(e)(5)) that would have made modification of one permit grounds in itself for modifying any other permit for the facility. The "cross-review" provision is no longer necessary because of the fixed-term permit approach, and the modification provision has been eliminated both as part of EPA's attempt to narrow the causes for modification of a permit and because of commenters' objections that it involved "bootstrapping" the programs onto eachother. Section 124.10 (public notice) provides, as it did in the proposal, that mandatory notice of any permit action will be sent to any agency administering other permits under these regulations for the same facility. These agencies would then be free to take whatever permit actions would be authorized, if any, under the statutes and regulations governing the programs they administer.

Third (first clause of proposed § 122.9(c)), the provision that the Director may review a permit at any time has been eliminated. The Director always has authority to review a permit, and the statement tended merely to create confusion as to what EPA meant by "review."

Fourth (second clause of proposed § 122.9(c)), it remains true that the Director must review a permit when presented with information which, if valid, would constitute cause for a modification. However, the concept is now taken care of in final § 124.5, which EPA has broadened to state that any interested person, and not just the permittee, may request a modification, revocation and reissuance, or termination of a permit. Section 124.5(b) requires that denial of any such request must be conveyed to the requester in writing; this ensures that the "review" "shall" take place.

Commenters expressed a great deal of confusion and anxiety over what constitutes a "review." We have not provided a definition of review because EPA believes that the Director should determine the appropriate level of review. In conducting a review, the Director may obtain information in any of the ways which are authorized under the appropriate Acts anyway, such as review of the files, inspection, or information requests. Thus, the proposed review provisions added nothing to statutory information-gathering authority. "Review" describes what the Director always could have done at any time anyway. For this reason, EPA has also eliminated the list of sources of information upon which the Director could base review (proposed § 122.9(d)) as misleading and less accurate than relying on the full range of statutory authorities. Review of a permit does not mean that the permit is automatically "reopened," but only that a search is conducted to determine whether or not it should be.

Many commenters requested that information submitted by the public be subjected to some evidentiary requirement before review would be triggered. Although, as discussed above, review upon receipt of a valid public request is mandatory, the Director is free to fashion the scope his or her review according to the merits of the information submitted. Only if cause is found are permits opened, at which time the draft permit and hearing provisions of Part 124 give permittees an opportunity to provide their views on any contemplated action.

§ 122.14 Transfer of permits.

The provision on transfers appeared in the proposal in § 122.8(e). The proposal stated that permits could be transferred only if written notice were given to the Director containing a specific date for transfer of permit responsibility and if the Director failed to object within 30 days to the transfer. Tranfer of a facility was a cause for modification or termination of the permit (proposed §§ 122.9(e)(4) and 122.10(b)(4)). Many commenters objected that the grounds for disapproving a transfer and requiring a modified permit or terminating the permit were vague, that the list of grounds for modifying or terminating a permit under all circumstances ought to be sufficient, and that if there are additional grounds that arise because of permit transfers they ought to be spelled out and included with the others.

The implicit assumption of many of these commenters is that a permit is a "vested" right which should be freely and automatically transferable along with ownership of the regulated facility. EPA disagrees with this notion. It is EPA's position as a matter of law that the privileges associated with a permit attach only to the person authorized to conduct permitted activities and are not inherently assignable. Many States preclude any permit tranfers and require the new facility owner to apply for and obtain a new permit in all instances.

As a practical matter, permits in many instances contain requirements which are personal to the permittee through the explicit conditions required to be contained in the permit. This is most significantly true for RCRA facilities and UIC wells injecting hazardous wastes. Consequently, for these facilities in every case, and for other UIC facilities and NPDES facilities as appropriate, a modification of the permit is necessary

to reflect the new ownership or operational control of the facility, although EPA has attempted to draft these requirements to achieve the least possible burden on property transactions consistent with adequate transfer of permit responsibilities.

First, EPA has retained the essential features of the proposal for NPDES facilities and UIC wells not injecting hazardous waste. Permits for these facilities may be transferred automatically, without requiring any affirmative act by the Director, but only if a written agreement for transfer of permit responsibilities is sent to the Director. The agreement no longer requires specific provisions as to liability for events occurring before and after the transfer, but only an agreement as to liability between the parties. For UIC facilities, the notice to the Director must also demonstrate that the requirements for financial responsibility will be met by the new permittee. Finally, the director must have the opportunity to require that the permit be modified to reflect the change in ownership or operation. In many cases the Director may feel that it is desirable to require the prospective new permittee to submit a permit application; see preamble to § 122.15(b).

For permits that are automatically transferred under this provision, the transfer-based cause for modification or revocation and reissuance (§ 122.15(b)(2)) survives the transfer, so that the Director can later modify the permit to reflect the new realities of the operation without holding up the transfer. However, after an automatic transfer is effective the permit will not be reopened to revoke and reissue the permit unless the permittee requests or agrees. Otherwise, the new permittee would be subject to having its entire permit rewritten at any time regardless of its relevance to the change brought about by the transfer. This is contrary to the certainty which these regulations attempt to give permittees during their fixed-term permits. Of course, the transferred permit may also always be terminated for cause, such as violation of the financial responsibility requirements.

Second, for RCRA facilities and UIC wells injecting hazardous wastes, EPA has determined that in all cases it will be necessary to modify the permits upon transfer of ownership or operational control of a permitted facility or activity. This provision is also applicable to 404 permits. This is necessary because these permits, unlike NPDES permits or certain UIC permits (other than the provisions for financial responsibility), contain conditions which are personal to the permittee and which necessarily must change when the permittee changes. These include such conditions of the permit as the closure and post-closure plans, the contingency plan, and provisions for financial responsibility. In addition, because some of these conditions are incorporated in the permit on the basis of information which is submitted as part of the permit application, in most of these transfers a new permit application will be necessary as well. A new application will always be required when the permit is revoked and reissued. However, there may be some instances, such as a corporate-subsidiary transfer, where the modification would require no substantive changes in permit conditions but merely an updating to reflect the identity of the new owner or operator. In these cases, the transfer could be processed as a minor modification under § 122.17(d) if the Director receives an agreement for transfer of permit responsibilities. EPA believes that such an agreement is necessary even in these situations in order to asure adequate continuity of permit responsibilities.

This provision does not cover transfers of facilities under RCRA interim status. Provisions for such transfers may be found in § 122.23.

Because permittees need to know what provisions apply to permit transfers, final § 122.7(l)(3) now states that "this permit is not transferable to any person except after notice to the Director." The Director shall then proceed under the provisions of § 122.14.

Under this scheme, transfer in itself will no longer be a cause for termination of a permit. Rather, the permit will either be automatically transferred; transferred after a required modification or revocation and reissuance; or the permit will not be transferred but will remain with the prior owner or operator of the facility, and the new owner or operator of the facility will be subject to enforcement for operating without a permit.

EPA believes that in some instances final § 122.14 may be less burdensome than would have been possible in the proposal. For example, in the proposal an agreement for transfer of permit responsibilities was necessary in every instance of a transfer of a RCRA permit. In the final version, this is not necessary unless the transfer is to be handled as a minor modification. Also, in the proposed provision for automatic transfers, a new application was required whenever the Director objected to the transfer. Under these final regulations, a permit may be modified without requiring a new application.

§ 122.15 Modification or revocation and reissuance of permits.

EPA has rewritten the permit modification section in two ways as part of the effort (see also §§ 122.9 and 122.13 and accompanying preamble) to provide greater certainty to permittees during the period when they hold permits and thereby make it easier to make business decisions and obtain financing. First, EPA has narrowed the circumstances under which a permit may be modified during its fixed term. Second, EPA has narrowed the scope of the changes that can be made when a permit of fixed but not lifetime duration is reopened during its term.

(1) The causes for modification have been narrowed. Normally, a permit will not be modified during its term if the facility is in compliance with the conditions of the permit. The list of causes for modifying a permit is narrow; and absent cause from this list, the permit cannot be modified. (However, State programs may always be more stringent than these requirements and an approved State program could provide additional causes.) In addition, certain "minor" modifications (§ 122.17) can be made, with the consent of the permittee, absent cause from the list in § 122.15.

First (see § 122.15(a)(1), proposed § 122.9(e)(1)), a permitted facility may change its operations in ways that were not contemplated in the original permit but which require regulation. This is one instance when compliance with a permit should not insulate the permit from modification. While in many cases a change in operations will violate the permit (giving rise to cause for modification under § 122.15(b)(1)), in other cases activities not limited in the permit will arise after the permit was issued. If permits could not be modified for such reasons then permits would have to be written to prohibit all activities not specifically limited in the permit. With such a requirement permittees would never be sure what the scope of permissible activities is under their permits. (State 404 permits, however, authorize only a specific activity for what is normally a short period of time and activities not authorized in the permit are prohibited; see § 123.97(b).) For NPDES, see the related causes for modification discussed below under § 122.15(a)(5)(viii) and (ix). Permittees have a duty to report all changes in the physical facility, and all other changes that may result in noncompliance, under §122.7(l).

Second (see § 122.15(a)(2), proposed § 122.9(e)(2)), the Director may receive new information which justifies applying conditions different from those in the permit. However, except for Class II and III UIC wells, this cause is limited by requiring that the information must not have been available at the time of permit issuance. Otherwise, this cause would allow the permit writer to modify a permit because a mistake was made at the time of issuance by failing to incorporate applicable requirements into the permit. However, except for Class II and III UIC wells, EPA has rejected the idea that mistake should be a grounds for modifying a permit (see also preamble to §122.13). In addition, the cause is limited by requiring that the information would have justified the application of different permit conditions *at the time of permit issuance.* Stating the date of issuance as the reference point is necessary to prevent using this cause to modify a permit because of changed regulations or standards against the will of the permittee (prohibited by §122.15 (a)(4), discussed below) by citing information used in setting a new standard or regulation. The new information must have justified the application of permit conditions under the regulatory requirements that were applicable at the time of permit issuance. (However, new toxic standards or prohibitions under section 307 of the CWA and new conditions provided for by a reopener clause are an exception for NPDES and 404.)

A special case of "new information" is information that cumulative effects of activities authorized by a NPDES or 404 general permit or UIC area permit are unacceptable. Thus, for example, any new information indicating that the effects of a 404 general permit are more than the "minimal adverse environmental effects" allowed by CWA section 404(e)(1) would be grounds for modifying the permit.

Third (see § 122.15(a)(3), proposed § 122.12 (a), (b) and (c)), provisions for modifications of compliance schedules which formerly appeared only in the compliance schedule section are also causes for modification of a permit during its term and consequently are listed here.

Fourth (see § 122.15(a)(4), proposed § 122.9(e)(3)), standards and regulations covering the permitted activity may have changed since issuance of the permit. As part of its attempt to provide permittees with maximum certainty and protection from regulatory change during the terms of their permits, EPA has limited this cause to instances when modification is requested by the permittee. This limitation formerly applied only to NPDES permits; it is now applicable to all fixed term permits. Because Class II and Class III wells under the UIC program may be issued lifetime permits, it is necessary to retain authority to reopen them on the basis of regulatory changes during the life of the permit; therefore, the requirement for a request does not apply to these wells.

Fifth (see § 122.15(a)(5), proposed § 122.73), several causes for modification are unique to the NPDES program and formerly appeared in the NPDES subpart. They have been moved to § 122.15(a)(5) and expanded to include other causes for modification scattered throughout the proposal, to provide the reader with a complete list of all causes for modification in one place.

Two new optional causes for modification which appear in the NPDES list (§§ 122.15(a)(5)(viii) and (ix)) concern pollutants listed on the new NPDES application form. These causes are included in the final regulations as the result of a change in the Agency's approach toward controlling pollutants not limited in permits. Under proposed § 122.68(a), which appeared in Part III of the June 14, 1979 Federal Register (44 FR 34393), a permittee was limited to five times the levels or the detection limit of all pollutants reported in the application form but not otherwise limited in the permit. Under the proposal, the Director had the authority to modify the permit when these "application-based limits" were exceeded, because violation of a permit limitation is grounds for permit modification. In response to a large number of comments, EPA had modified the proposal by using the levels of pollutants reported in the permit application as the basis for a notification requirement only; see § 122.61(a). Therefore, the Director can no longer modify (or revoke and reissue) the permit in this case for noncompliance. Rather, the first new optional cause for modification was established under § 122.15(a)(5)(viii). This cause arises whenever the level of discharge of any pollutant not limited in the permit exceeds the level attainable by the installation of Best Available Technology (BAT) for treatment of discharges. (When the level of discharge of a pollutant exceeds five times the level reported in the application form, but does not exceed BAT-level treatment, the Director may modify the permit to establish a new "notification level" under § 122.15(a)(5)(x).) The Director is not required to modify the permit unless he or she determines that modification is necessary to control the discharges of the pollutant. A more detailed discussion of the new regulations and the comments received on the proposed application-based limit appears in the preamble to the public notice of the consolidated application forms in today's Federal Register.

The second new optional cause for permit modification appears in § 122.15(a)(5)(ix). It allows the Director to modify the permit when the permittee begins or expects to begin to use or manufacture any toxic pollutant (listed under section 307(a) of CWA) which it did not report using or manufacturing in its permit application. This provision supports other new regulations requiring NPDES permits to control any toxic pollutant used or manufactured by the permittee. Dischargers are required by § 122.53(d) to report these pollutants in their permit applications and by § 122.61(a)(2) to notify the Director of any new pollutants used or manufactured thereafter. The Director is not required to modify the permit unless he or she determines that modification is necessary to control the discharges of these pollutants. A more detailed discussion appears in the preamble to the public notice of the consolidated application form.

(2) To narrow the scope of changes that can be made in the permit once cause is found, the causes for modification only (final § 122.15(a), discussed in paragraph (1) above) have been distinguished (except for Class II and III UIC wells) from causes which can give rise to either a modification or a revocation and reissuance (final § 122.15(b)). When a permit is modified, only the permit conditions to be modified may be reopened (see § 124.5). When a permit is revoked and reissued, the entire permit must be reopened and the reissued permit must incorporate all currently applicable requirements (see § 122.8). ("Revocation" is used in these regulations only as part of this "revocation and reissuance." "Revocation" of a permit under section 3008 of RCRA is a form of termination in these regulations.) If the Director could use any cause for modification as an opportunity to open the entire permit to scrutiny and modification, it would defeat the purpose of fixed-term permits coupled with security during the term for permittees. It would also defeat any narrowing of the causes for modification, because a modification not otherwise authorized could be bootstrapped onto one that is.

However, a permittee is always free to request a revocation and reissuance rather than a modification. See § 124.5.

When the permittee requests, the Director is free to revoke and reissue the permit for any cause in § 122.15(a) which is otherwise limited to modification. In many instances it may be in the permittee's interest to request revocation and reissuance. For example, when the remaining term of the permit is short, the permittee may prefer the certainty of a new 5 or 10-year permit over a limited modification to a permit which may be extensively revised again soon during the permit-reissuance process.

Only two causes appear in § 122.15(b). First, when cause for termination exists the Director may determine to modify or, alternatively, revoke and reissue a permit during its term as a less drastic alternative to termination.

Second, when ownership or operational control of a facility is transferred, the permit can also either be modified, or revoked and reissued (§ 122.15(b)(2)); see preamble discussion of permit transfers under § 122.14. In many cases a modification may be adequate to reflect the name of the new permittee; for example, a transfer of control of a facility between subsidiaries of the same corporation. In other cases revocation and reissuance will be more appropriate. For example, for RCRA facilities, permittees are required to submit a contingency plan as part of their Part B applications. This plan includes such matters as a list of names, addresses and phone numbers of all persons qualified to act as facility emergency coordinators. Once the permit application is approved, this plan becomes part of the permit. There are several similar items which are submitted as part of the RCRA permit application. This information should be provided by the new applicant. As a result, a permit application followed by issuance of a new permit with a full term may be more appropriate than a simple modification of the prior permit. Similarly, a new permit application to assure an updated plugging and abandonment plan [§ 122.42(a)] may be appropriate for any UIC facility.

Likewise, existing industrial NPDES permittees are required to predict in their applications any expected levels of pollutants in their effluents which may over the next five years (the duration of the permit) exceed the levels found through the required testing, and to list any toxic pollutants which they presently use or manufacture or expect that they will during the next five years. Because these predictions should be based on knowledge of what types of operations are expected to be conducted over the next five years, it may be appropriate for the new permittee to be required to provide this information in a new permit application, and revoke and reissue the permit.

(3) In order to further narrow the scope of permissible permit modifications, part of the preamble to the proposal has been moved to the text of the permit modification section, which now states that for RCRA and UIC, "facility siting will not be considered at the time of permit modification or revocation and reissuance unless new information or standards indicate an endangerment to human health or the environment which was unknown at the time of permit issuance." This statement emphasizes that siting conditions in a permit will not normally be modified as a result of permit review, and limits the circumstances where the permit termination cause of "endangerment to human health or the environment" can be used as a grounds for modifying siting conditions. However, an endangerment to human health or the environment is still cause for terminating a permit if that is the only way that the threat can be dealt with.

§ 122.16 Termination of permits.

In general, commenters on proposed § 122.10 [now § 122.16] sought greater specificity regarding causes for termination and less breadth in their possible application, such as limiting terminations to "willfull and persistent" violations of a permit or "intentional" failure to disclose relevant facts. Many thought abuses could result from arbitrary application of the causes as proposed.

EPA believes that causes for termination must be broadly worded so that a basis for initiating permit termination proceedings is available when the need is present. Most attempts to narrowly define the boundaries of cause are inadequate because they must be invoked in a wide variety of circumstances depending on the exercise of enforcement discretion.

The proposed section neglected to state that terminations are subject to the same Part 124 (or applicable State) provisions for notice and opportunity for a hearing applicable to other permit actions. This oversight has been corrected. EPA believes that these administrative provisions and, ultimately, the possibility of judicial review, should provide the protection which commenters are seeking against arbitrary application of broadly-worded causes for termination. Thus, permittees will have an opportunity to refute claims such as that there is an endangerment to human health or the environment, or that permit violations were significant. The objective is not to try to describe precisely the circumstances which provide grounds for termination, which is impossible, but to subject such determinations to the procedural protections of Part 124 and judicial review.

Several commenters discussed the provisions of RCRA section 3008 as they relate to terminations under this section. EPA has concluded that the procedures set forth in Part 124, Subpart E, satisfy the requirements of section 3008 for a formal evidentiary hearing in cases of permit "suspension or revocation." The precedures of 40 CFR Part 22 will no longer apply to RCRA permit terminations.

As noted in the preamble to the proposal, "termination is essentially an enforcement mechanism." The Director of a permit program must carefully exercise discretion in allocating scarce "enforcement" resources. Because of these limitations on resources, it makes no sense to enforce against trivial infractions when unremedied substantial infractions exist. This alone in most cases should prevent the Director from reading the termination causes too broadly. It should also be clear that in most cases less drastic actions, such as permit modifications, are available. Proposed § 122.9 stated that for NPDES and 404 permits, causes for termination could also be causes for modification or revocation and reissuance, thereby implying that this was not so for RCRA or UIC. The wording has been changed to include RCRA and UIC. This does not mean, however, that if termination is not chosen, modification is mandatory. In some cases neither termination nor modification may be appropriate.

Some changes in the causes for termination were necessary because they also serve as causes for modifying or revoking and reissuing permits during their terms (see §122.15(b)(1)). Permits may be terminated even though, as now provided in § 122.13, "compliance with a permit is compliance with the appropriate Act." However, if noncompliance with the appropriate Act could be grounds for termination absent a permit condition which incorporates a specific requirement of the Act, the "shield" provision of § 122.13 would have limited effect. Consequently, § 122.16(a)(1) (proposed § 122.10(b)(1)) has been narrowed to exclude violations of the appropriate Act as an independent cause for termination. It now reads "noncompliance by the permittee with any condition of the permit."

Similarly, the proposal included "other good cause" as a ground for termination. Not only was this cause vague and open-ended, but it could, in serving as a cause for modification, provide a means of circumventing the limitations on opportunities for modifying permits during their terms which the changes from the proposal are intended to provide. Consequently, this cause has been eliminated. In addition, as noted in the preamble to § 122.14, transfer of ownership has been deleted as a cause for termination. The remaining causes for termination (misrepresentation and endangerment to human health or the environment) have been retained in their proposed form both because they are sufficiently serious to warrant possible permit termination and because they may warrant modifying a permit during its term.

Several commenters noted the need to clarify the effect that termination of one permit has on other related permits. As set forth in final § 124.10, termination of one permit triggers a notification to any agency administering a related permit. The related permit can then be modified, revoked and reissued, or terminated if cause exists for such action. The reference in proposed paragraph (a) to partial termination seemed to imply the existence of one "umbrella" permit. However, permits issued under these regulations are completely severable and an action on one has no automatic effects on others. The concept of partial termination has been deleted to avoid any such implication.

Finally, as noted in the discussion of final § 122.5, any cause for termination is also cause for denial of a permit renewal application, and EPA has amended the section to reflect this determination.

§ 122.17 Minor modifications of permits.

Proposed § 122.9(g) (now § 122.17) contained several provisions for minor permit modifications which could be made without the draft permit and public notice provisions applicable to all other permit modifications. This feature has been retained, with some reorganization and revisions. In addition to § 122.9(g), the proposal contained several minor modification provisions in the subparts for RCRA, UIC and NPDES. One source of confusion noted by many commenters on the RCRA provisions was that the two sections appeared to be contradictory. All program provisions have now been moved to new § 122.17 so that readers will find a complete list of provisions for minor modifications in one place.

In the proposal, a modification could not be treated as minor if it would "render the permit less stringent." We have deleted this limitation because it was vague and contradicted by other provisions in the proposal. Rather, any minor modification on the list can be made without public notice if both the Director and the permittee agree to the minor modification. If either disagrees, the permit modification is not minor and must be for cause and with public notice as required under § 122.15.

Several commenters suggested that the list of minor modifications should be examples, rather then exclusive. EPA rejects the notion that the permit modifications which can be processed without any notice to the public should be open-ended. EPA continues to believe that scrutiny by the interested public should be available in most instances, not only to lessen the possibility of objectionable changes being made without objection, but to preserve public confidence in the permit system. Several other commenters suggested that more flexibility should be available to States in the scope of permit actions which can be processed as "minor modifications." The final minor modification provisions are not applicable to States, as they were in the proposal. Of course, as with any Part 122 requirement, a State is free to have such provisions as a part of its program. However, the essential due process requirements of Part 124 that were applicable to States in the proposal are still applicable in these final regulations. This means that a State program may provide for modifications to permits without notice (i.e., as minor modifications) in any situation where to do so would be "more stringent" (as discussed in the preamble to Part 123) than the applicable requirements of Part 124. For most of the items in § 122.17, a State program could provide for more flexible minor modification provisions (if consistent with due process) because eliminating notice and comment provisions would result in greater State control.

Some commenters suggested that minor modifications should be available to decrease permit monitoring frequency, rather than only to increase frequency, as in the proposal. EPA rejects this suggestion. Any permit modification to require less frequent monitoring should be made known to the interested public for comment.

Several comments were received on the minor modification provison for permit transfers (proposed § 122.9(g)(4)). EPA has retained a provision for minor modifications to reflect changes in operational control or ownership of facilities. Transfers are discussed in the preamble to § 122.14.

The proposed regulations included special provisions on "minor modifications" of RCRA permits which would have allowed modification of a RCRA permit without notice and comment to change the types and quantities of wastes treated or to change treatment, storage, or disposal methods (proposed §§ 122.9(g)(5) and (6) and 122.24(d)).

These RCRA provisions have been deleted from the final regulations. They were so broadly phrased that they could have been used to completely change the nature of the permitted activity without putting the permitting agency and the permittee to the discipline of informing the public and considering its views.

There may well be cases where flexibility regarding these matters is desirable. In those cases, it will be perfectly possible to write the initial permit so that it covers the various courses of action that may be contemplated for the future. Where that is not done, the permit can still be modified whenever the requirements of § 122.15 are met.

However, for the present it would not be responsible for EPA to specify certain changes to the substance of RCRA permits as "minor" ones that do not require notice and comment. Because there is no experience with the RCRA permit program yet, EPA lacks the information necessary to determine which changes in methods or hazardous wastes would really be minor and which would not be minor although they might appear to be.

§ 122.18 Noncompliance and program reporting by the Director.

(1) Proposed § 122.15 (now § 122.18) has been completely reorganized to bring all of the provisions for quarterly and annual noncompliance reports together in Subpart A. Minor changes have been made to achieve this reorganization, but it was possible only because the proposed RCRA and UIC requirements were already modeled on the NPDES scheme and were virtually identical to it. The 404 noncompliance reporting requirements, because of the unique nature of that program (a large number of permits of very short duration, in most cases issued without monitoring or compliance schedule requirements) are somewhat different and have been placed in separate paragraphs ((b) and (d)).

In the proposal there was some confusion between "program reports" and noncompliance reports. Because

both reports must be prepared by permitting authorities (i.e., State Directors or Regional Administrators) it makes sense to put the provisions governing them in one place so that Directors can easily determine what reports to prepare. The only exceptions are the "progress reports" required of States with interim authorization under RCRA and of States which have been "listed" but not approved under UIC (see § 123.11). These changes have eliminated a great number of cross-references and have served to increase uniformity among programs. The coverage and organization of the section is illustrated in Table VI.

Table VI.—*Noncompliance and Program Reports*

Program	Noncompliance Quarterly	Annual	Annual program
RCRA	122.18(a)	122.18(c)	122.18(c)(3)
UIC	122.18(a)	122.18(c)	122.18(c)(4)
NPDES	122.18(a)	122.18(c)	
404	122.18(b)	122.18(d)	

Several States commented that the NPDES noncompliance reports are burdensome to prepare or that similar reports will be burdensome for the other programs. Eliminating needlessly differing requirements and formats can alleviate this problem somewhat. Likewise, the Natural Resources Defense Council commented on the difficulty it experienced in attempting to work with information contained in noncompliance reports, resulting in part from a lack of uniformity as to the kinds of information included. To the extent that this problem can be addressed in these regulations, EPA has attempted to be responsive so that citizens' groups and others outside the permitting agencies can also find noncompliance reports useful.

(2) The most frequent comment received on this section was that EPA should provide a definition of major facility and minor facility. In some cases this concern stemmed from a misapprehension that the permittee's reporting burden would depend on the classification. We have changed the heading of this section to emphasize that the reports covered are written by the program Directors, not by permittees. Furthermore, although classification as major or minor may have some effect on a permittee in determining how much scrutiny it receives in noncompliance summaries, through "fact sheets" prepared under Part 124, or through provisions for permit administration (for example, EPA review of proposed State permits), such classification does not affect permit requirements. Permit conditions are determined by the permit writer according to the same regulatory requirements and under the same procedures regardless of whether a facility is major or minor. Likewise, preparation of fact sheets, EPA review of State permits, and preparation of quarterly summaries of noncomplying facilities are actions which EPA has the authority to take whether or not a facility is designated as major. They simply state how EPA will allocate its own efforts in processing or reviewing permits.

Consequently, EPA does not believe that there is any legal requirement to specify this term more precisely, although that would be desirable as a matter of policy. However, it is not possible for EPA to determine in advance precisely which facilities will be classified as major. Flexibility is needed so that the information gathered in noncompliance reports can reflect EPA's changing enforcement and review priorities and resources. It should be emphasized that the use of the categories "major" and "minor" does not imply that one category is composed of facilities which are bigger or have greater capacity than those in the other category, but only that one category is distinguished from the other for administrative purposes.

For these reasons, EPA has not attempted to precisely define which facilities will be classified as major. Instead, a definition of "major facility" has been added in § 122.3 which refers to the Director's discretion. Major HWM facilities also will be classified through guidance; and the definition of "major HWM facility" in proposed § 122.3, which received a great deal of criticism, has therefore been deleted.

(3) EPA rejects several suggestions from industry that quarterly reports be eliminated because noncompliance is already reported by permittees in a number of ways. While it is true that permittees are required to report noncompliance (§ 122.7), this has no bearing on the need for oversight agencies and the public to have summaries of information on how the programs are being enforced.

(4) Three basic informational items for quarterly noncompliance reports which appeared in the final NPDES regulations but which were inadvertently dropped from the proposed consolidated regulations have been restored for all programs. Reports will now include a description of actions taken to ensure compliance, status of the noncompliance, and any details which mitigate or explain the noncompliance.

(5) The opening paragraph of § 122.18 and § 122.18(a)(3) add a requirement for a quarterly report concerning noncompliance by RCRA hazardous waste generators and transporters and all RCRA facilities having interim status. While the proposed regulations dealt only with permittees, EPA realized it needs similar information on generators, transporters, and interim status facilities, and therefore has added the reporting requirement. The information to be provided in the report will address the kinds and numbers of compliance monitoring and enforcement activities the Director has undertaken during the reporting period and the results of such activities.

(6) The reporting year in final § 122.18(e)(2) has been changed from the fiscal year as it appeared in the proposal for NPDES (§ 122.72(f)) to the calendar year for all programs. EPA made this change to coincide with business recordkeeping practices and to coordinate reporting schedules with the requirements for generators and transporters under the RCRA program as set forth in 40 CFR Parts 262 and 263.

§ 122.19 *Confidentiality of information.*

Paragraph (a) of § 122.19 (proposed § 122.16) states that information claimed as confidential will be treated according to the EPA's rules contained in 40 CFR Part 2 (as amended Sept. 8, 1978; 43 FR 3999). Commenters raised several questions concerning § 2.208 of those regulations. Section 2.208 sets forth the substantive criteria for use in business confidentiality determinations.

First, commenters suggested that if under § 2.208(d) EPA determines that a statute specifically requires disclosure of information claimed as confidential, the submitter should be given notice. EPA agrees with this comment; however, no change in the regulations is necessary. Notice is already provided to the submitter under § 2.205(f).

Second, commenters argued that § 2.208(e) should be amended to specifically prohibit releasing information which would violate 18 U.S.C. § 1905. The commenters argued that 18 U.S.C. § 1905 is incorporated in the third exemption to the Freedom of Information Act (FOIA), 5 U.S.C. § 552(b)(3). EPA does not agree that 18 U.S.C. § 1905 is incorporated in the third exemption to the FOIA. Rather, EPA believes that 18 U.S.C. § 1905 limits the Agency's discretion to disclose information. EPA recognizes this in its definition of "reasons of business confidentiality" in 40 CFR § 2.201(e). As a matter of policy, EPA does not disclose information covered by 5 U.S.C. § 552(b)(4) (see 40 CFR § 2.119). EPA interprets 18 U.S.C. § 1905 to be within the scope of 5 U.S.C. § 522(b)(4).

Consequently, information within 18 U.S.C. § 1905 would not be disclosed. Therefore, as a practical matter, the existing regulations adequately address this comment.

Paragraph (b) of § 122.18 lists information specifically required by statute to be disclosed even if the information would otherwise be exempt from disclosure under the FOIA. Several commenters argued that the proposed section required disclosing categories of information not specifically required to be disclosed. The information entitled to confidential treatment varies under each of the statutes covered by these consolidated regulations. Generally, information concerning trade secrets or secret processes is not to be disclosed. However, under section 402 of the Clean Water Act, NPDES permits and permit applications must be available to the public. Section 308 of the Clean Water Act provides that effluent data related to NPDES and 404 permits also are not entitled to confidential treatment. Section 1445(d)(2) of the Safe Drinking Water Act provides that information related to UIC permits which deals with the level of contaminants in drinking water must be disclosed. Paragraph (b) of § 122.18 has been rewritten to recognize these specific statutory directives. EPA has deleted the provision which would have automatically required denying claims of confidentiality for information contained in all draft permits; statements of basis; fact sheets; comments; and, in the case of all permits other than NPDES permits, permit applications and permits.

Data which are not specifically listed in paragraph (b) will be disclosed to the public under the procedures discussed in § 122.18(a). If no claim of confidentiality is asserted at the time of submission, EPA may make the information available to the public without further notice. If a claim of confidentiality is asserted, the information will be disclosed only in accordance with the procedures in 40 CFR Part 2. These procedures require that if EPA proposes to disclose any information claimed as confidential, EPA must give prior notice to the submitter. Therefore, if information is claimed as confidential in, for example, an application for a permit under RCRA and EPA proposed to include the information in a fact sheet or draft permit, EPA will give prior notice to the submitter. Because of the importance of public participation in the permitting process, EPA will make every effort to prepare draft permits and fact sheets which contain meaningful information while still preserving a submitter's valid claims of confidentiality, if any. In the case of NPDES permits, because the permit application itself can not be claimed confidential, information contained in the application may be disclosed as part of a fact sheet or draft permit, as appropriate. Moreover much of the data in the permit application is "effluent data" within the meaning of 40 CFR § 2.302(a)(2) and therefore would have to be disclosed under section 308 of CWA.

Under each of the statutes covered by these consolidated regulations, EPA may disclose confidential information when relevant in any proceeding under the particular statute. If EPA determines that it is necessary to disclose otherwise confidential business information in a permit proceeding, EPA will follow the procedures contained in 40 CFR § 2.301(g) (Clean Air Act) as incorporated by reference in §§ 2.302(g) (CWA), 2.304(g) (SDWA), and 2.305(g) (RCRA). Questions concerning the entitlement of data to confidentiality will be addressed to the maximum extent possible before initiation of the public participation procedures under Part 124.

In the case of NPDES permit applications, paragraph (c) provides that no information on the NPDES permit application forms provided by the Director may be claimed confidential. This includes information submitted in the forms themselves and in any attachments required by the forms. Under CWA section 402(j), information contained in NPDES permit applications is not entitled to confidential treatment and EPA has made class determination that any claim of confidentially for information contained in the NPDES permit application forms will be denied. Class Determination 1-78 dated March 22, 1978. Because by statute all the information contained in the NPDES permit application forms must be disclosed to the public, there is no reason to allow persons to claim the contents of the NPDES application form as confidential. Such a provision would only cause delay in the availability to the public of the NPDES permit application form in contravention of the clear purpose of section 402(j) of the CWA. Section 122.19(c) refers to the requirement in §§ 122.3 and 122.53 that the Director provide application forms. Section 122.19(c) does not apply to any information submitted to EPA which goes beyond that required under §§ 122.4 and 122.53 on the NPDES application form; claims of confidentiality may be asserted for such information and will be handled under 40 CFR Part 2. Claims of confidentiality for "effluent data" will be denied.

In the case of RCRA permit applications, paragraph (d) provides that at the time an application is submitted, the applicant must subsantiate all claims of confidentiality. This is done by answering the six questions in the instructions to the form. If an applicant asserts a claim but fails to submit any substantiation, it will be given an opportunity to correct this mistake before the Director releases the information. EPA or the State will review claims of confidentiality and deny any claim if it finds that disclosure of the relevant materials would not reveal confidential business information. Under the RCRA section 3010 procedures for the notification of hazardous waste activity, owners and operators were also required to substantiate a claim of confidentiality at the time of submitting the information. (45 *FR* 12746, February 26, 1980.)

There are several policy and administrative reasons for requiring substantiation of a claim of confidentiality at the time of submitting the information. These include the need to provide non-confidential information on the RCRA permit application to the public, to provide the Director with information necesary to make confidentiality determinations, and to inform the submitter of the criteria that the permitting authority will use in making its determination.

Under RCRA and FOIA, EPA has an affirmative duty to make non-confidential information available to the public. Given the public interest in the RCRA program, EPA expects a great number of requests for information on permit applications under RCRA. Moreover, under the permit-issuance procedures of Part 124, EPA must prepare a draft permit and a statement of basis or fact sheet. If EPA did not require substantiation at the time a RCRA permit application is submitted, EPA would have to contact the submitter to request substantiation every time a claim of confidentiality was made. This would be a significant administrative burden. Under the final procedure, however, no additional burden will be placed on permit applications because EPA would have requested substantiation of the claim in any event. In fact, applicants will now have as much as six months to prepare their substantiation, instead of the 15 business days otherwise allowed by the Agency's business confidentiality regulations.

The final approach will provide the Agency and States with all the information they need to make

confidentiality determinations upon receipt of a RCRA permit application. Thus, if the Director wishes to make a determination of confidentiality (either on its own or, for EPA, in response to an FOIA request), there will be significant savings in time. In the case of permit applications, it is especially important to settle any confidentiality issues early because permit procedures in Part 124 applicable both to States and EPA anticipate public involvement. That process can not effectively proceed until confidentiality issues, if any, are settled.

The final scheme also has the advantage of directing the submitter's attention to the type of substantiation the Director must have to grant confidentiality claims. This should reduce uncertainty for the submitter and result in defensible rather than unwarranted claims. The requirement to submit substantiation at the time of filing the permit does not change the substantive criteria for determining whether information is entitled to confidential treatment.

Subpart B—Additional Requirements for Hazardous Waste Program

§ 122.21 Purpose and scope of Subpart B.

EPA has reorganized this section to provide an orientation to the RCRA Subpart, similar to orientation sections added to the other Subparts; to provide a clearer picture of the relationship between the consolidated regulations and the technical RCRA regulations (40 CFR Parts 260 to 266); and to provide a narrative of the basic requirements of the RCRA permit program. A chart showing the CFR number, date of Federal Register publication, and subject matter of each major portion of the technical RCRA regulations has also been included. Detailed elements of the permit program are specified in subsequent sections. Proposed § 122.22, (Authorization), has been incorporated into the new § 122.21(b). Section 122.21(c) provides a brief overview of the RCRA permit process. The application procedures for existing and new facilities are explained.

(1) *Inclusions and Exclusions.* Paragraph 122.21(d) (proposed § 122.21(c)) lists some activities and facilities which are included and excluded from the RCRA permit application requirement. The inclusions are not an exhaustive list, but focus attention on certain activities which may also have permits under other EPA programs. The exclusions list activities exempted by the other RCRA regulations.

A number of comments suggested excluding from the RCRA permit requirements treatment, storage and disposal facilities handling various types of wastes, such as petroleum wastes, domestic sewage sludge, industrial sewage sludges, other industrial sludges, and small quantities of wastes. They suggested that certain wastes had a low degree of hazard, that others were not covered by the RCRA definition of solid waste, that certain wastes were similar to other excluded wastes, and that there would be adverse economic impact if facilities for such wastes had to comply with the RCRA requirements. These are issues which pertain to the RCRA section 3001 regulation for the identification of hazardous wastes and the section 3004 regulation for standards for hazardous waste management facilities, and will be addressed in the rulemaking on those sections. The one exception concerns dissolved material in domestic sewages, which is discussed below.

(2) *Coverage of NPDES Surface Impoundments.* Proposed § 122.21 would have required a RCRA permit for any surface impoundment associated with a wastewater treatment plant other than a POTW that treats or stores hazardous waste. Virtually every aspect of this proposal proved controversial.

Many comments were received stating that such impoundments at facilities having NPDES permits should be excluded from the RCRA permit requirements. Some argued that there was no basis for requiring NPDES industrial surface impoundments but not surface impoundments at POTWs to obtain a RCRA permit. Others argued that NPDES surface impoundments should be issued a permit-by-rule like POTWs.

The proposed exclusion of surface impoundments at POTWs was based upon the RCRA definition of solid waste which excludes solid or dissolved material in domestic sewage.

As the preamble to the section 3001 regulations explains in detail, EPA has re-examined this question in the light of comments received.

That re-examination has led EPA to reaffirm its original conclusion that material which is (1) mixed with domestic sewage in a sewer and then (2) discharged from the sewer into a POTW, is exempted by the statute from treatment as solid waste. This conclusion is being promulgated in interim final form. Additional comments on it are invited and will be considered.

That conclusion leaves open two questions concerning the coverage of the RCRA permit requirements.

The first concerns what happens when hazardous wastes are discharged into a POTW without losing their hazardous character by being mixed with domestic sewage in a sewer.[1] For example, the hazardous wastes might be dumped into the POTW from a truck or tank car, or they might be discharged into it from a pipe which carried only industrial wastes and did not carry domestic sewage.

In these cases the basic logic of the argument for exempting "dissolved material in domestic sewage" still holds. The wastes will be placed in a facility that is subject to a pervasive set of Federal regulatory and subsidy provisions (including the pretreatment program) that should be sufficient to deal with any hazardous waste problems by themselves. Accordingly, in these cases the POTW receiving the waste will be granted a permit by rule (§ 122.26(c)). The permit by rule is necessary to ensure that any applicable manifest is returned and the formal requirements of RCRA are otherwise satisfied.

The second question is whether a hazardous waste which has come under the manifest system may be deposited into a sewer, become mixed with domestic sewage, and thereby lose its hazardous character.

The answer to this question is "No." Manifested wastes may only be delivered to an approved HWM facility, and sewer systems will not be approved for that purpose. Sewer systems are obviously not HWM facilities in any normal sense of the word, and there is no assurance that wastes deposited in them would be treated, stored or disposed of in a manner consistent with the purposes of RCRA. Such disposal would be significantly harder to regulate under existing authorities than disposal directly into the POTW. Congress when it created an exemption for dissolved material in domestic sewage had in mind avoiding disruption of the existing patterns of funding and operation of POTWs receiving waste from "indirect dischargers," not allowing additional unregulated discharges by those not currently making use of the treatment system.

Comments also stated that NPDES surface impoundments should not be required to obtain a RCRA permit because they pose no threat to human

[1] A facility which is not a POTW that received hazardous waste in any form, whether or not mixed with domestic sewage in a sewer, is subject to the full range of RCRA's regulatory requirements. However, if such a facility receives only domestic sewage it is of course exempt from RCRA requirements altogether because domestic sewage is not classified as a hazardous waste.

health and the environment or should not have to obtain a permit where the owner or operator can demonstrate that no harm to groundwater will occur. Others stated that requiring NPDES surface impoundments to obtain RCRA permits would be very costly and force major retrofitting or abandonment of such facilities. These comments address the need for and nature of the technical standards for surface impoundments and are in fact comments on the RCRA section 3004 standards for treatment, storage and disposal facilities, rather than comments on the applicability of the permit program.

As the preamble to those regulations explains, EPA has significantly amended these requirements to reduce to a minimum the need for burdensome retrofitting. However, as explained below, these facilities cannot be completely exempted from RCRA coverage because of their potential for causing air pollution or groundwater pollution which cannot be remedied under the NPDES permit.

Commenters also argued that NPDES surface impoundments were adequately controlled by various programs under the Clean Water Act such as the NPDES and BMP programs. Comments also stated that the requirement for a RCRA permit was inconsistent and duplicative of the goals and regulations of the Clean Water Act. EPA has considered all of these arguments but believes that a RCRA permit is necessary for these facilities. Limitations imposed in NPDES permits are directed toward the quality of discharges to surface waters. The technology to achieve the limitation may require construction of surface impoundments, although the objective of such construction is to assist in the ultimate prevention of pollution of surface waters. Improper containment of wastes in surface impoundments may result in pollution of groundwater and a series of other adverse human health and environmental impacts. These types of problems are not directly addressed through NPDES permits, but are directly regulated under RCRA. The CWA does not provide authority to set standards for construction of impoundments to prevent groundwater pollution but standards for such construction are specifically provided for in section 3004(4) of RCRA. Further, leaving resolution to BMPs under CWA will not solve the problem, as BMPs are directed toward controlling only designated pollutants under sections 307 or 311 of CWA and only so far as they may reach a navigable water. Therefore both NPDES and RCRA permits are necessary for such facilities, because each permit program is directed toward control of different types of pollution. Any potential inconsistency and duplication can be minimized if the permit programs are consolidated as provided for in these regulations.

Commenters suggested that coverage of surface impoundments (proposed § 122.21(c)(3)) should be clarified to state that RCRA permits should only be required for surface impoundments if the water is hazardous at the point of discharge, regardless of the condition at the point of entry to the system. The proposal stated that any surface impoundment that treats or stores hazardous waste must obtain a RCRA permit for that impoundment up to the point of discharge. The reason for requiring a RCRA permit up to the point of discharge is to adequately protect public health and the environment from hazardous waste placed in the facility. The discharge itself would be controlled under CWA. The regulations have been restructured for clarity and the proposed language "up to the point of discharge" is no longer contained in these regulations but the concept remains the same.

§ 122.22 *Application for a permit.*

Proposed § 122.23 described permit application requirements for existing and new HWM facilities, set forth a two part application process for existing facilities, and described the information to be included in Parts A and B of the application. The contents of Part A and Part B of the application are now described in §§ 122.24 and 122.25 respectively. The remainder of proposed § 122.23 has been moved to § 122.22 and rewritten to provide better continuity to the regulation and to provide greater information on the timing of applications and to whom they should be made, particularly in the light of the approach to interim authorization now set forth in Part 123.

The major topics covered by this section—timing and address of applications, the two part application process, the requirement for a permit prior to new facility construction, and revocation of interim status—will be addressed in turn.

(1) *Timing and Address of Applications.* For existing HWM facilities, the permit process begins with the publication of the RCRA program regulations contained elsewhere in this issue of the Federal Register. That event triggers the obligation to file 3010 notification within 90 days and to file a Part A permit application within six months.[2]

All these notifications and applications must be sent to the Regional Administrator whose Region covers the State in which the facility is located. Only States with Phase I interim authorization can receive 3010 notices and only States with Phase II interim authorization can receive and process permit applications. No State programs in these categories will have been approved by the dates set for submission of these documents. (If a State program is approved thereafter, the information in these categories will be transferred to the State.)

Starting with the promulgation of the remaining Part 264 regulations, in the fall of 1980 States with approved Phase II interim authorization or final programs, and the Regional Administrator where that approval does not exist, will be able to require submission of a Part B application and proceed to final permit action. Since the permitting authority must allow six months for preparation of the application, actual submission of the Part B application cannot be required before the spring of 1981.

For new sources, the regulations prohibit construction without a permit. For the reasons set forth later in this preamble, EPA believes such a rule is essential to carry out the purposes of RCRA. Exactly how it operates in practice, however, will be impossible to determine until Congress takes final action on the pending RCRA amendments. That issue is also discussed later in this preamble.

Finally, the regulations explain the requirements for updating permit applications. Briefly, Part A applications must be updated as needed to account for any new hazardous wastes being handled by the facility. A facility can begin to handle a new hazardous waste either because the waste was already listed as hazardous and the facility has just begun to handle it, or because the facility was already handling a waste newly listed or designated by EPA or by the State as hazardous. Both situations require revision of the Part A application or else the facility will not obtain interim status for the wastes not

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

listed. (As noted above, EPA intends to list or designate additional wastes as hazardous in June of this year.)

A more flexible rule applies for Part B of the application. EPA will apply any new requirements that become applicable before a final permit is issued, but no set procedures or filing requirements are prescribed to be followed in such a situation. The normal notice and comment procedures, and where necessary § 124.14, provide enough flexibility to cope with any particular situations that may arise. For example, if a significant number of new wastes were listed and a facility with a permit application under consideration was treating, storing, or disposing of them, EPA could require submission of an updated permit application under § 124.14.

(2) *The Two Part Application Process.* Several commenters objected to the two part application process, some claiming that there was no authority for such a process. Others felt that the Part A application should obtain much more information such as hydrogeological, geological and climatological data or information to determine compliance with the interim status standards. Commenters also stated that the information contained in Part A was not sufficient to establish permitting priorities.

Despite these comments EPA has decided to maintain the two part application process for existing facilities. EPA believes this approach is legally justified and that the policy arguments for it are conclusive.

Nothing in RCRA requires that all the information for a final decision be submitted as part of the "application" needed to trigger interim status. In many permit proceedings significant new information is likely to come in during the public comment period or at the public hearing well after filing of the application and thereby affect the final conditions of the permit.

Indeed, the statute itself recognizes that considerable supplementing of the initial "application" may be required before a final decision when it provides for revoking interim status (which, of course, can only be granted upon the filing of an "application") for failure to "furnish [further] information reasonably required or requested in order to process the application." RCRA section 3005(d).

Beyond this, RCRA contemplates that facilities will be able to qualify for "interim status" by filing within six months of issuance of the 3001 regulations, even though affirmative EPA action on those permits may not take place for an appreciable time thereafter. EPA expects that in the light of the magnitude of the regulatory program now being started, many facilities may not receive their final permit for several years.

Accordingly, EPA has designed the application requirements to fit the overall structure of the program which they serve. The Part A application is designed to enable facilities to qualify for interim status within the six months filing deadline, and to provide EPA with information that will be useful to determine in which instances to move on to the next stage by requiring submission of a Part B. The alternative suggested by some commenters—requiring both parts to be submitted as a condition of interim status—would make it much more difficult and costly to qualify for interim status. In addition, it would require all owners and operators filing for interim status to furnish a great deal of information that EPA would lack the resources to review for several years. By the time EPA did review that information, much of it would probably have become outdated.

Part A of the permit application has not been designed to determine compliance with the interim status standards as some comments suggested. Combining compliance monitoring information and permit application information on one form would result in a complicated document that would not serve either purpose very well. Monitoring of compliance with the interim status standards will be carried out through separate information collection and facility inspection activities.

The information contained in Part A should allow EPA to establish initial priorities for permitting of facilities. The Part A applications will provide the type of data needed for setting priorities which is not presently available, such as design capacities and types and quantities of wastes handled at individual facilities as well as proximity to drinking water wells. The initial priorities can be further refined using compliance monitoring reports, annual reports and information from the Part B applications.

Comments on proposed § 122.23(a)(2) objected to waiting for a notice by the Director before submitting Part B of the permit application, stating that some facility owners or operators may desire to obtain permits as soon as possible. Nothing in the regulation prevents the submittal of Part B prior to request by the Director. Six months notice for submittal of Part B was established to allow applicants adequate time to gather any necessary information for submission of an application. Earlier submittals are always possible.

(2) *Permit Prior to Construction of New Facilities.* Many commenters objected to § 122.23(b) which would require a permit prior to construction of a new HWM facility. Many commenters argued that this provision is illegal under section 3005(a) of RCRA, stating that RCRA only requires permits for the operation of facilities and only prohibits the actual handling of hazardous waste without a permit. Commenters also stated that this provision will tie-up capital and aggravate existing and future capacity problems. Some argued that industry should be allowed to proceed at their own risk during construction and apply for a permit during or after completion of construction.

Once again, EPA believes that the proposed approach should be adopted for both legal and policy reasons.

Section 3004 of RCRA requires the Agency to promulgate regulations specifying, among other things, the *location, design and construction* of HWM facilities. Those regulations will only take full effect and have full meaning for a given facility when they are applied to and incorporated into the permit for that facility. Congress when it incorporated a permit requirement into RCRA must have meant the task of permitting to have independent regulatory significance, and EPA intends in its final Part 264 regulations to allow flexibility in adapting the requirements of those regulations to specific sites. Given the variety of different situations that these facilities may present, and the newness of the program, the opposite course—applying specific national requirements automatically to any facility whatever its circumstances—would not be rational. Many industries that commented on the proposed regulations made this point.

If facilities were free to make substantial commitments to a given facility, location, design or construction before receiving their RCRA permits, the purpose of the statute could very readily be undermined for no reason.

The overriding purpose of the section 3004 standards is to "protect human health and the environment." There is a significantly greater likelihood that permit writers will be able to set "location, design, and construction" permit terms that serve that purpose for new facilities if they make the permit decision before a substantial and irretrievable financial commitment is made to the location, design, and construction which the applicant itself has chosen. Allowing such commitments to be made before assuring that they

will be in conformity with the best application of the statute would force the permitting agency to the unjustifiable choice of either requiring a lesser degree of health and environmental protection than would otherwise have applied, or forcing the abandonment or devaluation of the premature investment.

The only significant argument made in favor of allowing construction to begin before receipt of a permit was that it would avoid delay in the construction of HWM facilities. However, EPA believes this argument is flawed even on its own terms and that it lacks persuasive force when compared with the arguments for forbidding that construction. Nothing in these regulations prevents owners or operators from applying for a permit early in their planning process. If the facility is small, the application can probably be processed quite quickly. If the facility is large, then the permit processing time will probably be a small part of the total time needed for design, financing, obtaining other approvals, and the like. There is no reason in either case for the permit itself to become a critical path item. EPA has made particular provisions in these regulations for expediting consideration of permits for new facilities.

Some commenters objected to the requirement for submitting a permit application for new facilities 180 days before physical construction is expected to commence. They argued that this was too long a period and that owners and operators would not have the information necessary to complete the permit application that far in advance. EPA believes that the 180 day period is necessary in order to provide adequate time to provide for public notice and comment, hold a public hearing if necessary and complete an evaluation of the application which in some instances may be quite lengthy and complex. If on a case-by-case basis the permitting process can be completed in less than 180 days, it will be. However, a 180 day period will be necessary for many facilities and will be used as the general rule. Facility owners and operators should have all of the necessary information to submit an application 180 days prior to physical construction because they will need that information in order to ensure that the facility is located, designed and constructed in compliance with the section 3004 standards.

(3) *Revocation of Interim Status.* The proposed regulation provided (at § 122.23) that interim status could be terminated without process for failure to submit an adequate Part B application when required. Commenters felt this provision was unduly harsh, not sufficiently defined, possibly detrimental to the environment, and in violation of section 3008 of RCRA.

Although EPA believes the question is debatable, it has accepted in these final regulations the position of commenters who claimed that "interim status" cannot be terminated without providing an opportunity for an evidentiary hearing. Part 124 has been modified accordingly.

In accordance with the plain language of section 3005(d), the only grounds for termination of interim status will be the failure to furnish information reasonably required to process a permit application. This provision of course includes failure to respond on time to a request for a Part B application, or failure to furnish either Part A or Part B in an acceptable form.[3]

Because of this limited test, in many cases the facts relevant to the decision will probably not be disputed. Therefore, EPA anticipates that termination of interim status will often be a candidate for summary disposition under § 124.75(a)(1).

When questions about the conformity of the site to the substantive standards of Part 265 are at issue, interim status will not be terminated in this manner. As the preamble to those regulations explains, they are meant to be enforceable apart from any permit mechanism. Nor will separate proceedings to revoke interim status be required when a permit applying the permanent status standards of Part 264 is being issued or denied. The mechanism provided by the statute for broader-gauged decisions like that is a final decision on the permit application as a whole. The preamble to Part 124 sets forth EPA's position on the procedures required for that.

§ *122.23 Interim status.*

RCRA states that during interim status owners and operators of existing HWM facilities shall be treated as having been issued a permit until a final decision is made on the complete permit application. Many comments were received on this provision.

(1) *Definition of Existing HWM Facility.* The proposal defined an existing HWM facility as a facility which was in operation or under construction on or before the date of promulgation of the RCRA section 3001 regulations. Some commenters stated that interim status should not apply to owners and operators of facilities under construction but only to facilities in operation. Others indicated that section 3005(e) refers to facilities in existence on the date of enactment of RCRA, not the date of the section 3001 regulations.

EPA now agrees that the language of the statute is clear and that the approach proposed is not defensible. Accordingly, it has changed the definition of "existing facility" to mean a facility that was in existence on the date of enactment of RCRA, or October 21, 1976.

EPA regards it as all but certain that Congress will act to change this definition before these regulations become effective.

Amendments to RCRA are now in conference. The House bill would change the definition of "existing facility" to mean one that is in existence on the effective date of the initial RCRA promulgation; the Senate bill would change it to cover those in existence on the date of promulgation. Indications are that the conferees are considering October 30, 1980 as the date for determining when a facility is an existing facility. Both bills would therefore provide relief from the consequence of existing law.

Accordingly, EPA encourages every facility which was built or under physical construction as of the promulgation date of these regulations to file Part A of its permit application so that it can be quickly processed for interim status when the change in the law takes effect. A "Note" to this effect has been inserted into the regulations.

Depending on what final action Congress takes, other provisions of these regulations may also require amendment. EPA will issue any necessary amendments and an explanatory preamble as soon as possible after final Congressional action.

This final regulation also interprets an existing HWM facility to mean either "A facility in operation, i.e., receiving hazardous waste for treatment, storage, or disposal," or "a facility for which construction has commenced." This definition has been adopted because EPA believes that owners and operators who have commenced facility construction in good faith prior to the statutory date should be classified as existing.

This final regulation further defines the term "commence construction" to take the meaning defined in EPA's Prevention of Significant Deterioration (PSD) regulations issued under the Clean Air Act. These regulations specify that construction has commenced before the date in question if:

[3] Failure to furnish an acceptable Part A, by contrast, means that interim status never starts.

1. The owner and operator has obtained all necessary Federal, State, and local preconstruction approvals or permits; and

2a. A continuous on-site, physical construction program has begun or

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

It is intended that the continuous on-site, physical construction program include physical site preparation. Design and other non-physical and non-site specific preparatory activities alone would not constitute on-site, physical construction. Furthermore it is intended that structures or equipment constructed from a permanent part of the facility that are to be used in its own operation, and represent a substantial commitment to construction.

In general if the amount an owner or operator must pay to cancel construction agreements or stop construction exceeds 10% of the total project cost, the loss would be deemed "substantial". Options to purchase or contracts for feasibility, engineering, and design studies would not constitute contractual obligations.

EPA believes this provides an equitable and reasonable approach to facilities constructed prior to the promulgation of the RCRA regulations. A substantial commitment of resources by owners and operators in a period of uncertainty to provide for treatment, storage, and disposal of hazardous waste will not be penalized. All facility construction commenced after promulgation of the new RCRA hazardous waste regulations would be subject to the RCRA permit process.

(2) *Changes in the Facility During Interim Status.* A number of commenters raised questions as to whether a facility could be modified during interim status. Comments stated that facilities should be able to make such modifications during interim status as are: (1) needed to keep the facility in operations, (2) necessary in order to meet the section 3004 standards or (3) needed to insure full beneficial use of the facility. On the other hand is the concern that allowing such changes during interim status would provide a loophole to avoid the requirements for obtaining a permit (as would occur if the modification of an existing HWM facility was tantamount to construction of a new facility), or for submitting less major, but significant changes to a facility to the kind of review and cross-check that a fully effective permit would provide. In response to these comments the final regulation sets forth the following approach to making changes in a facility during the interim status period.

Part A of the permit application basically defines the process which will be used for treatment, storage or disposal of hazardous wastes and the hazardous wastes to be handled at a facility during interim status. In order to make any changes in such items the owner or operator of the facility must submit a revised Part A permit application and in some instances such changes must be approved by the Director.

New hazardous wastes (not previously specified on the Part A permit application) may be handled if the application is revised prior to such a change. No approval of the Director is required in this instance. Furthermore additional quantities of hazardous waste (already specified on the permit application) may be handled at any time within the design capacity of the facility without revising the application.

Increases in design capacity or changes in the processes used at the facility may only be made upon submittal of a revised application and with Director approval. The Director may approve additional processes if he or she finds that they (1) are necessary because of an emergency situation; or (2) are necessary to comply with Federal, State or local laws. The Director may approve increases in the design capacity of the facility if he or she finds that this is necessary because of lack of available capacity at other facilities. In any of these instances the Director may inspect a facility prior to or after such a change and may disapprove a change that would result in a violation of the interim status standards.

Changes in ownership and operational control of a facility may only occur during the interim status period in accordance with the requirements of 40 CFR § 265.150. A revised Part A permit application is required 90 days prior to such a change so that the Director has an opportunity to determine whether such requirements are completed.

Finally, EPA will prohibit any changes to an existing facility during interim status which are so extensive as to amount to the construction of a new facility. Failure to do this would allow avoidance of the requirement that all sources which are in fact physically new go through the full permitting process before construction begins. For this purpose EPA has adopted the practice under the Clean Air Act of designating as a new facility any change that when completed would amount to more than 50% of the capital value of the facility.

The Agency believes that this approach to changes in a facility during interim status will allow reasonable modifications in existing facilities without creating a situation in which the requirements for obtaining a permit are nullified.

EPA believes that this approach represents a legally acceptable resolution to a question which the statute does not address.

Nothing in the statute provides that applicants are bound by their Part A application, and it has never been the practice when Congress requires existing facilities to come under permits to freeze their present patterns of operations until final agency action. Any such rule could have drastic consequences which Congress presumably did not intend, particularly since Congress explicitly recognized that several years might be necessary to process all RCRA permit applications. In addition, those consequences would be predominantly suffered by facilities which, because they are small or well operated, are low on the priority list of the permitting authority. To require affirmative action before such facilities could change their operations would not only be burdensome on them, but would divert the resources of the permitting agency toward such facilities and away from more urgent tasks.

At the same time, EPA does not believe that facilities which have not yet received a RCRA permit should be completely free of specific regulatory requirements. The existence of interim status standards grounded in the statute indicate that Congress intended such facilities to be subject to at least the outlines of the general RCRA scheme. In addition, the requirement to file a permit application as the price of interim status can only mean that the permitting agency can require updating of that application if it ceases to be accurate. Where the updated application indicated that the facility might cease to conform to the general RCRA regulatory scheme, EPA would be free to take enforcement action as these regulations provide.

(3) *Commencement and Termination of Interim Status.* The proposal provided that interim status began at the time the Director advised the applicant that his or her Part A application had been received. Commenters pointed out that under section 3005(e) of RCRA interim status is not granted by the Director, but begins at the time an application is submitted (and after notification under section 3010). EPA agrees with this interpretation and did not intend a different effect under these regulations. The acknowledgment was not an

attempt to place further restriction on or delay interim status. However, a method is necessary to insure that the Director and applicant know the required information has been submitted.

EPA has revised the proposal at § 122.23(a) to require an applicant to either submit notification and Part A of the application by certified mail or to hand deliver such information to provide assurance to both the applicant and EPA that the information has been sent and received.

One commenter suggested that EPA consider adopting a definite date for termination of all interim status. When a permit application is complete EPA does not have the authority to terminate interim status short of the administrative disposition of the permit application. The time period necessary to take final action on all permits is contingent upon the availability of resources. Therefore a definite date for termination of all interim status cannot be established.

§ 122.24 Contents of Part A of the RCRA permit application.

The comments received on this section are discussed in the preamble to the consolidated application forms, published elsewhere in today's Federal Register.

§ 122.25 Contents of Part B of the RCRA permit application.

The proposed regulation identified six general informational categories for inclusion in Part B of the permit application. These included a master plan for the facility which combined all of the plans required by the section 3004 facility standards. Also included were geological and hydrogeological data, a description of the climate at the site, a list of positions and job descriptions and a listing of the performance bonds and other financial instruments.

This general approach created some confusion because the relationship between the proposed section 3004 regulation and the permit application requirements was not clear. Many commenters believed that they were required to submit all the information included in each category. They suggested that the information needs be limited to the type of facility (e.g. landfill, incinerator). EPA agreed with these comments and restructured the Part B informational requirements. The Part B application requirements now parallel the structure of the section 3004 standards promulgated in Part 264 of this chapter.

Only Subparts B through E of Part 264 have been promulgated to date. This covers requirements which generally apply to all facilities. Subsequent subparts of Part 264 including standards for specific facility types (landfills, incinerators, etc.) will be promulgated later this year. The Part B permit application requirements being promulgated today essentially pertain to information which is common to all hazardous waste facilities as well as the specific plans required of all facilities in Subparts B through E of Part 264. The Part B application requirements will be amended to reflect additional planning requirements and the technical standards (e.g. equipment design, site preparation and design) which will be promulgated in Part 264 later this year.

Section 122.23 of the proposed rules contained provisions for the Director to waive certain application requirements in Part B if the information was not applicable to the facility and was not needed to establish compliance with the section 3004 standards. The Agency received numerous comments on the use of the waiver provision. While the reorganization of the regulation may eliminate the need for this waiver provision, it is not possible to reach a final decision on its use until the full Part 264 standards are promulgated.

§ 122.26 Permits by rule.

The proposed regulation provided for a permit by rule for facilities accepting special wastes, ocean disposal barges and vessels, and certain POTWs. In these instances application for a permit was not required and an actual permit would not be issued. The owner and operator of such a facility would be deemed to have a RCRA permit if certain specific conditions in the regulation were complied with. Many comments were received on this provision.

Comments from industry generally approved of this approach, though some argued that limiting the permit by rule to POTWs was arbitrary and that privately owned treatment works and NPDES industrial surface impoundments should be treated in a similar manner. However some commenters stated that the permit by rule is illegal under RCRA, as section 3005 requires each HWM facility to have a permit. These commenters objected to the permit by rule approach as less environmentally protective than site-specific permits and argued that permit by rule eliminates public notice and public participation and that EPA and the public lose the chance to gain information about such facilities.

Although the scope of the permit by rule provisions has been cut back substantially, EPA continues to believe that such an approach is both legally justified and appropriate in certain cases. The courts have interpreted the Clean Water Act to allow the issuance of "general" or "area" permits covering point sources under that statute. *Natural Resources Defense Council v. Costle,* 568 F.2d. 1369, 1381 (D.C. Cir. 1977). The court recognized that use of such approaches might be the only way to fulfill the legislative intent in a setting of limited resources. Yet the permit provisions of the Clean Water Act against which that case was decided are stronger than those of RCRA, for not only do they affirmatively require every "point source" to have a permit, but unlike RCRA, they underline the implication that source-by-source examination is required by limiting both the time for which a permit application will be acceptable instead of a permit, and the maximum term of the permit once issued. In addition, section 1006 of RCRA directs the Administrator to integrate the administration of that statute "to the maximum extent practicable" with the provisions of other EPA statutes, including the Clean Water Act, the Ocean Dumping Act, and the Safe Drinking Water Act.

Against this background, EPA believes that there can be little question of its ability to issue a permit by rule to facilities where the activities that a RCRA permit would regulate are for the most part already regulated under another EPA permit and the only purely RCRA-related provisions are those that are not site-specific and do not need to be particularized in an individual permit. The choice here is between requiring a duplicate permit proceeding and duplicate paperwork or simply making the missing RCRA provisions applicable through a general regulatory statement. EPA has chosen the latter course.

Despite criticism the permit by rule approach has been retained for POTWs for the reasons discussed above. This provision caused considerable confusion in the proposed regulation. Permit by rule was only to be applicable to the rare situation where a POTW received hazardous waste by rail or truck or by a pipe that did not carry sewage since sewer line influent to a POTW would in most instances be exempted from the RCRA definition of solid waste which includes dissolved or suspended materials in domestic sewage. Many commenters misunderstood this point and argued for extending the permit by rule approach to a wide variety of other operations such as privately owned treatment works and NPDES surface impoundments.

As explained earlier and in the section 3001 preamble, these facilities

do not come under the special Congressional intent applicable to POTWs and there is therefore no reason to exempt them from otherwise applicable RCRA requirements.

The remaining uses of permit by rule are for 1) barges or other vessels for ocean disposal of hazardous wastes with a permit under the Marine Protection, Research and Sanctuaries Act and 2) underground injection of hazardous wastes with a permit under the UIC program of the Safe Drinking Water Act. Both of these situations meet the criteria for permit by rule described previously. In both of these cases the owner or operator is deemed to have a RCRA permit if he or she has a valid permit under the other program, is in compliance with that permit and also complies with the RCRA manifest, recordkeeping and reporting requirements. Shoreside facilities related to ocean disposal activities and surface storage and treatment prior to underground injection are not covered by permits under these other statutes and the RCRA site-specific permit requirements apply to the handling of hazardous waste at such installations.

Owners and operators of facilities with a permit by rule are not required to submit a RCRA permit application. However if an owner or operator of an existing underground injection well does not have a UIC permit he or she must comply with the RCRA notification and permit application requirements in order to qualify for interim status.

Control of UIC Wells Injecting Hazardous Wastes. The RCRA hazardous waste permit program regulates the treatment, storage, and disposal of hazardous wastes. The UIC permit program, governed by Subpart C of this Part and Part 123, governs State programs regulating injection wells, including those which dispose of hazardous wastes by underground injection. The two programs therefore potentially overlap, and could result in duplicative regulation of the same practices. In order to avoid this, in the proposed consolidated permit regulations EPA sought to set clear jurisdictional boundaries for the two programs so that each would regulate the practices it was specifically designed to control, and duplication could be eliminated. In the main, these jurisdictional boundaries are retained in these final regulations, and are discussed below.

In general, UIC permits will be required for the well itself, while RCRA permits will be required for associated above-ground facilities which require permits under this Subpart—for example, those which store hazardous wastes prior to injection. A number of commenters objected to this scheme, and recommended that the UIC program control all facilities associated with a UIC well, even if such facilities might meet RCRA permitting requirements. EPA rejected this approach for two reasons. First, there is no doubt that EPA has authority to regulate surface storage facilities under RCRA; it is less clear that such authority exists under the SDWA. Even if authority is present under the SDWA, the UIC provisions of that statute are ill-suited to control risks associated with surface facilities, including possible explosions, leakage of hazardous waste into the atmosphere, or spills.

The final regulations depart from the proposal in that all UIC wells injecting hazardous waste will for an interim period be subject to regulation under RCRA. RCRA interim status standards have been revised so that they can be applied to wells. Thus, existing UIC hazardous waste wells must notify under RCRA section 3010 and file a Part A application form. Such wells will qualify for interim status, and will be subject to interim status standards like any other HWM facility. Except as noted below (in the discussion of new § 122.30, "Interim RCRA Permits for Class I Wells"), RCRA permits will not be issued for UIC wells injecting hazardous wastes. When UIC programs become effective, all such wells will either be issued UIC permits (in which case they will qualify for the RCRA permit by rule, § 122.26), or they will be required to shut down (see, for example, § 122.36).

There are several reasons why it is necessary to require UIC wells to obtain interim status and comply with RCRA interim status standards during this period. Perhaps most important is that, under section 3005 of RCRA, these facilities will not be allowed to receive hazardous wastes unless they have interim status, a RCRA permit, or a UIC permit which in turn would qualify them for a RCRA permit by rule. Mechanisms for issuing the UIC permits will not be in place for some time. Thus, the only practical alternative is for UIC wells to qualify for interim status.

Moreover, under the SDWA, substantive regulations do not become enforceable until they are incorporated into a UIC program adopted by a State or promulgated by EPA. States are allowed 270 days after the promulgation of UIC regulations to submit a program, and the Administrator may extend this period by as much as another 270 days. If the program submitted is unacceptable, EPA must promulgate one. This could take considerable additional time, resulting in delays of perhaps as much as two years after issuance of UIC program regulations before effective regulation of injection wells begins. EPA sees no reason why wells cannot be regulated during this period under interim status standards. These standards are simple, basic, and will provide some measure of control. The requirement that an application be submitted will also enable EPA to develop early a complete inventory of injection wells disposing of hazardous wastes, forming a basis for prompt and effective regulation of the facilities when UIC programs are in place.

Among other requirements UIC wells with interim status will be required to comply with the manifest system under 40 CFR Part 265, Subpart E when they receive hazardous wastes. Failure to impose manifest requirements on these facilities would create major obstacles to carrying out one of the primary functions of the manifest system: to track the movement of hazardous wastes from generation to disposal.

When a final UIC permit is issued to a UIC hazardous waste injection well, the well will become subject to the general RCRA permit by rule. Thus, they will not be required to obtain individual HWM facility permits. Sections 122.36 and 122.45 identify the requirements for UIC permits for these facilities. Many of the requirements of analogous RCRA regulations are incorporated in their entirety. Others are modified so as to fit wells, or are not applicable to wells. The resulting regulatory scheme provides, in EPA's view, a degree of control which is equivalent to that which would be obtained if the facilities were required to obtain individual permits under RCRA. A more detailed discussion of this issue may be found elsewhere in the preamble to § 122.36 and in the preamble to § 122.45. Thus, nothing would be gained by dual permitting, and a permit by rule carries out the purposes of § 1006(b) of RCRA, which obligates EPA to "avoid duplication, to the maximum extent practical, with the appropriate provisions of * * * the Safe Drinking Water Act" * * *.

§ *122.27 Emergency permits.*

Several comments were received on the proposed emergency authorization provision. In general, commenters supported EPA's proposal. Some commenters stated that the 90-day limit for such authorization was too short while another commenter stated this action should not be limited to permitted facilities. Another commenter stated that this provision was unnecessary as

EPA had available to it immediate relief through court action.

EPA continues to believe this provision is fully justified under the statute. Though section 7003 does authorize a court to grant emergency relief, that requirement is independent of permitting authority under section 3005 and is probably better adapted to forbidding certain acts than to permitting disposal. The right of the government to take summary administrative action in response to an emergency is well recognized in other regulatory fields and in the law generally. As the preamble to Part 124 explains, RCRA specifies no explicit requirements for issuing a permit. EPA believes that reading the general RCRA language to allow summary action in a limited and urgent category of cases is the interpretation that best carries out the overall intent of the legislation to protect public health and the environment.

This provision has been extended to include facilities that do not have a permit; however EPA continues to be conservative in defining the scope of this exemption to prevent the possibility of abuse, particularly while the program is still so new, and to restrict the number of cases in which regulatory action will be taken without an opportunity for public comment.

§ 122.28 Additional conditions applicable to all RCRA permits.

Numerous comments were received on the proposed RCRA permit conditions (proposed § 122.24). Many of the comments were in fact comments on the cross-references to the RCRA section 3004 regulations. These comments were received after the close of the comment period for that particular regulation and are not germane to Part 122 Subpart B. To the extent those comments were made during the comment period for the section 3004 regulation, they were considered as part of the rulemaking for that regulation.

Commenters interpreted the proposed permit conditions, § 122.24(e), to mean that an entire facility must be constructed or modified before any given part of that facility could be operated, or that an entire facility must be closed while part of the facility is being modified. EPA's intent was that only those portions of a facility affected by modifications would be covered by this requirement. The regulations have been revised so that this intent is explicit (final § 122.28(c)). The provision also allows for phased construction and operation of a facility over time, if the existing parts can operate alone and in compliance with the permit requirements.

Several commenters objected to the requirement that an engineer registered in the State in which the facility is located certify that the facility has been constructed or modified in compliance with the permit. Some commenters argued that this requirement is too restrictive for Federal facilities. Other commenters argued this requirement is not necessary as most States have reciprocity agreements for registered engineers. EPA agrees that requiring an engineer to be registered in the State in which the facility is located is overly restrictive and the regulation has been changed. Certification by a "registered professional engineer" is still required because a certain level of expertise is required to certify compliance with permits.

Numerous commenters stated that a time limit should be placed on the Director to inspect a completed facility. Suggestions of 10 days and 30 days were offered. Most commenters expressed concern that the Director could unduly delay start-up of a facility by not acting promptly in this regard. EPA has restructured the regulation to help alleviate this problem. If the Director does not notify the applicant of his or her intent to inspect within 15 days of the receipt of certification, he or she waives the right to prior inspection, and authorization to commence operations is automatically granted.

Another commenter stated that EPA had not provided a standard to be applied by the Director to determine whether operation should begin. The regulation now provides that the Director shall authorize commencement of operation if he or she finds the facility is in compliance with the conditions of the permit.

Several commenters also objected to the proposed requirement (§ 122.24(b)) which allowed the Director to establish permit requirements as necessary to protect human health and the environment. Commenters thought this provision allowed the Director too much discretion and would lead to imposition of conditions unrelated to RCRA. EPA agrees that this provision is unnecessary and has deleted it. However, as the preamble to the section 3004 regulations explains, in many cases the permit writer will have to exercise considerable discretion to adapt the requirements of general regulatory provisions to a specific permit. See also § 122.8 and accompanying preamble.

Several State agencies commented that in order to reduce paperwork permits should incorporate specific permit conditions by referencing appropriate sections of Federal regulations rather than list each condition in its entirety. The regulations accommodate this (see § 122.7).

§ 122.30 Interim RCRA permits for UIC wells.

There is an additional respect in which these regulations must be harmonized with those for UIC permits. RCRA prohibits the disposal of hazardous wastes except in a RCRA-permitted facility. This prohibition will take effect this fall, when the second phase of RCRA regulations, including technical standards for HWM facilities, is published. UIC Class I and Class IV wells with interim status may continue to operate. New UIC Class I wells and Class IV wells will be prohibited by RCRA from accepting hazardous waste for disposal because only existing facilities qualify for interim status (under section 3005(e) of RCRA). (See § 122.32 for a discussion of how injection wells are classified under UIC.) If these wells are permitted under UIC, they will be covered by a RCRA permit by rule (§ 122.26). However, many States may require as much as a year after the RCRA prohibition takes effect to develop and submit a UIC program. Until then, there will be no UIC program and therefore no authority to permit new Class I wells (or Class IV wells, if EPA decides to allow them to be permitted). Thus, EPA could inadvertently create a moratorium on the construction of new Class I wells which could last two or more years. Because these wells are, in some cases, the preferred method of disposal of hazardous waste, EPA believes this result is undesirable.

Accordingly, EPA intends to issue standards under RCRA § 3004 which would allow EPA or approved States to issue RCRA permits to new hazardous waste injection wells. Such standards would be patterned closely on 40 CFR Part 146, so that wells would not be subject to possible new or inconsistent construction and operation requirements as their RCRA permits expire and they come under regulation under the UIC program.

The actual issuance of the permits involved can be done either by EPA Regional Administrators or by the States. At their option, States may assume, under section 3006 of RCRA and 40 CFR Part 123, permitting authority for Class I wells during the period after the RCRA permit requirement goes into effect, but prior to approval or promulgation of a UIC program in the State. Accordingly, States may apply to EPA for approval to issue permits under RCRA to Class I wells, as part of their applications either

for interim or final authorization. The technical standards for such permits will be issued this fall at the same time as the other RCRA technical standards, and will be closely modeled upon 40 CFR Part 146, the technical standards for UIC permits. Because EPA continues to view the UIC program as the most effective vehicle for regulation of underground injection, the permits will be limited in duration to not more than two years. At the end of the two year period, either the State will have an approved UIC program or EPA will have promulgated one under the SDWA.

The Regional Administrator will have authority to issue RCRA permits to UIC facilities under the same conditions in the event that the State Director does not seek authority to issue them. EPA does not anticipate that it will be asked to issue such permits except in a very few cases. The total number of Class I UIC wells is small—about 400—and has grown at a slow rate.

Class IV wells are continuing to be studied in connection with the request for comments on Class IV UIC wells (see preamble discussion of §§ 122.36 and 122.45). EPA will announce treatment of these wells this fall at the completion of consideration of comments.

Proposed § 122.25(a), Health Care Facility Permits. The provisions for special permits for health care facilities have been deleted. The section 3001 regulations do not include infectious waste at present and the section 3004 regulation does not have specific standards for the treatment, storage or disposal of infectious waste. If future versions of these regulations cover infectious waste the permit requirements can be revised if necessary.

Proposed § 122.25(b), Experimental Permits. As proposed, RCRA permits were normally to be issued for the designed life of the facility and experimental special permits were to be issued for up to one year with a one year maximum extension. Because EPA will now issue RCRA permits only for up to ten years, and permits can be limited to one year if necessary, the experimental permits section has been deleted.

Proposed § 122.27, Reporting requirements. Comments suggested that the reporting requirements under this section be reviewed to determine if less stringent requirements would suffice. EPA has done this and has reduced the requirements to the minimum it now estimates are necessary to carry out the RCRA program in an adequate and responsible way. Since the program has not started yet, any estimate of the reporting needs is likely to require revision in the light of experience, and EPA will re-examine these requirements once the program has a sufficient degree of operating history behind it. All RCRA reporting requirements for permitting agencies are now contained in § 122.18.

Subpart C—Additional Requirements for UIC Program

These regulations in part establish program requirements for State Underground Injection Control programs under the Safe Drinking Water Act. However, not all the regulations called for under section 1421 of that Act appear in these consolidated permit regulations. The technical requirements for State UIC programs will appear separately as Part 146. The Agency expects to publish Part 146 regulations within a month.

The SDWA requires any State listed under section 1422 of that Act to submit a UIC program for approval within 270 days after "promulgation of any regulation under section 1421 . . . ." The Administrator may grant a 270 day extension. EPA believes, however, that it would be inappropriate for States to be subject to a statutory deadline for preparing and submitting programs when many of the necessary requirements for the programs have not yet been issued. The statute does not specify when "promulgation" takes place. Accordingly, to avoid confusion, EPA is fixing the date of "promulgation" of Part 122, 123, and 124, to the extent that they establish UIC program requirements, to the effective date of the 40 CFR Part 146 regulations. This effective date will be 30 days after the publication in the Federal Register of regulations under Part 146.

§ 122.31 Purpose and scope of Subpart C.

This is intended to be an introductory or "roadmap" section corresponding to sections which have been added to Subparts A, B, and D. One goal of this section is to clarify the connection between the proposed process for "identification" and the regulatory requirements designed to protect underground sources of drinking water (USDWs). The section now emphasizes the fact that USDWs are to be protected regardless of whether they have been accurately mapped or otherwise identified. Mapping or otherwise identifying USDWs will aid the Director in fulfilling this requirement.

The Director may also identify "exempted aquifers" using criteria in Part 146. Such aquifers are those which would otherwise qualify as "underground sources of drinking water" to be protected, but which have no real potential to be used as drinking water sources. Exempted aquifers are treated as exempt only if they have been affirmatively identified as "exempted aquifers" by the Director in the UIC program for the State.

This section also contains a list of "specific inclusions" and "specific exclusions" parallel to similar lists in the other Subparts of Part 122. These lists are designed to give readers a quick indication of whether their facilities come within the scope of the UIC program. These inclusions and exclusions are not exhaustive, but illustrative. The language of the regulations must be applied to determine whether the program applies to a particular activity.

Septic tanks or cesspools used to dispose of hazardous wastes have been specifically included within the definition of an injection well. In House Report No. 93-1185 (page 31) Congress specifically expressed its intentions that EPA include underground injection systems "other than individual residential waste disposal systems" when they are used to inject contaminants, including hazardous waste.

Several commenters questioned whether EPA should impose the same monitoring, reporting, construction and operating requirements for injection wells sited in areas without any USDW to be protected as it does in areas with one or more USDW. One commenter questioned EPA's legal authority to control wells located outside State territorial waters. Several additional commenters asked EPA to clarify the scope of coverage. EPA agrees that the UIC program is a State program and is not applicable to injection wells located outside State territorial waters (i.e., to injection wells at platforms located on the outer continental shelf). A specific provision to this effect has been added to § 122.31(d).

Section 122.43 has been added to allow the Director discretion in reducing regulatory requirements under certain circumstances.

In the proposal, EPA exempted drilling muds and cement from the program, because the Agency did not impose requirements prior to operation. Since preconstruction permits are now required, this exemption has been deleted. When UIC permits are issued, they should routinely authorize emplacement of these materials.

§ 122.32 Classification of injection wells.

In response to several comments the definition of Class I wells (other than hazardous waste wells) has been limited

to include only those wells injecting beneath formations which contain USDWs within one quarter mile of the well site. Individual formations are often identifiable for hundreds of miles and a formation may be suitable in one area as a source of drinking water yet not in another. The limitation prevents a well from being subjected to Class I requirements simply because it injects under an aquifer which, miles away, contains drinking water. Such a well would now be treated as Class V. Class I will also now include all wells injecting hazardous wastes other than Class IV wells.

EPA proposed to classify wells disposing of "nuclear" wastes in either Class I or Class IV, but did not define the term in the proposal. Few commenters addressed this aspect of the proposal, although some objected to granting States authority over these sources. The President on February 12, 1980, issued an Executive Order outlining a program to arrive at a comprehensive radioactive waste management program. Until this program is complete, and EPA has had an opportunity for full consultations with the Nuclear Regulatory Commission, the Department of Energy, and other agencies with responsibilities potentially affecting radioactive wastes, it would be premature for EPA to issue regulations concerning the disposal of radioactive wastes into Class I wells. Moreover, EPA wishes to coordinate any regulations governing sand backfill wells with regulatory measures it may undertake under the Uranium Mill Tailings Act. Accordingly, EPA has modified the classification of wells so that wells disposing of radioactive wastes below strata containing a USDW will be Class V wells.

However, the disposal of radioactive wastes into or above USDWs is an environmentally undesirable practice. Therefore, EPA has added a definition of "radioactive waste" in § 122.3 which clarifies that the term "nuclear" waste used in the proposal was intended to cover not only the radioactive wastes which are hazardous wastes under RCRA but also fission by-products and similar wastes covered under the Atomic Energy Act of 1954. The disposal of all such wastes into or above USDWs is included in Class IV and will be regulated according to the scheme promulgated here for Class IV wells: those Class IV wells injecting into a USDW are prohibited; requirements for other Class IV wells will be promulgated in the fall of this year. (See the discussion of Class IV requirements below.)

A large number of commenters questioned the need for regulations governing Class II oil and gas wells. Many felt that existing State programs are adequate and many questioned the legality of Federal requirements citing the SDWA's prohibition against interfering with or impeding oil or natural gas production.

Class II wells still include all those covered by the proposal except those injecting natural or synthetic gas. However, there are many features of these regulations which are designed to prevent inclusion in the UIC program from being unduly burdensome. These include permitting by rule for existing Class II wells for the life of the well; additional time (three years) for compliance with construction requirements; area permitting for entire well fields and allowing for new enhanced recovery wells covered by existing area permits to be installed prior to notice to the Director; and elimination of the area of review and corrective action requirements for existing Class II wells. Those Part 146 requirements for Class II wells which are potentially burdensome are written with flexibility. Others, for example monitoring and reporting, are not burdensome enough to cause interference with oil and gas production.

The hydrocarbon storage industry argued that: (1) the underground storage of natural gas does not meet the statutory requirement for underground injection because it is stored and not disposed of; (2) Congress did not intend for EPA to regulate the storage of natural gas; and (3) natural gas is not a "contaminant." In both the SDWA and the 1977 Amendment to the Act the term "underground injection" means the "subsurface emplacement of fluids by well injection." Natural gas is a fluid which is emplaced into an underground formation or reservoir for the purpose of storage by well injection.

The House Committee Report (H.R. Report 93-1185, page 31) indicates that the Committee decided to include natural gas under the definition of a fluid. The term "fluid" is defined in both this document and in the April 20, 1979 proposed Part 146 regulations (44 FR 34270) as a "material or substance which flows or moves whether semisolid, liquid, sludge or any other form or state."

The SDWA defines "contaminant" broadly as "any physical, chemical, biological, or radiological substance or matter in water." (Section 1401(6).)

Even though EPA believes natural gas is clearly subject to the Act's regulatory scope, EPA believes that the commenters are correct insofar as they make a technical argument that underground storage of natural gas poses no threat to USDWs in the vast majority of cases and that inherent economic reasons compel operators on their own initiative to employ stringent technical controls to prevent loss of an extremely valuable resource. However, the Agency does have some concern that natural gas storage could displace formation fluids into a USDW. Accordingly, this section has been modified so as to classify the underground storage of natural gas and other gaseous hydrocarbons within Class V. As such they will be authorized by rule and subject to assessment by the Director and any further regulatory requirements that may be fashioned in the future. In the interim, the Director will have authority to take action against such wells, including requiring them to get a permit, in those cases where it is necessary, see § 122.37(c). Underground storage of liquid hydrocarbons (gasoline, crude petroleum, and others) will remain in Class II. These hydrocarbons have a greater potential for contaminating water than do gases, which would be normally driven into the atmosphere as soon as the contaminated water was drawn from the tap.

The definition of Class III injection wells has remained unchanged.

The definition of Class IV wells has been limited with regard to its proximity to a USDW, in the same way, and for the same reason, as the definition for Class I wells. In addition, the proposed definition covered any well injection by a HWM facility, which was overly broad. Several commenters suggested that Class IV wells should be limited to those wells which inject hazardous waste and not include any and all injection wells owned by a hazardous waste generator or disposer. EPA concurs and has redefined Class IV wells as those, including non-residential septic system wells, used by hazardous waste management facilities to inject hazardous material into or above formations that contain an underground source of drinking water. Disposal wells not associated with HWM facilities, such as those on farms injecting water containing pesticide residues, will be classified as Class V.

Any injection well which is not otherwise classified will be a Class V well. Such wells are not free from regulation (see § 122.34), but need not comply with the technical design and operation requirements prescribed for other classes of wells in Part 146.

Commenters said that sand backfill operations using uranium mill tailings which meet the hazardous waste criteria

of RCRA might be injecting materials termed hazardous. They pointed out that the proposed regulations consider sand backfill operations to be Class V wells but, if they do inject hazardous waste, the operations might be considered Class IV wells.

In sand backfill operations waste materials remaining from the milling process are returned to abandoned portions of the mine from which they were originally removed. While some of these materials may be defined as hazardous they are waste from processing operations that must be disposed of in some manner. Even though there are environmental risks connected with the placement of certain materials in sand backfill operations, in some instances, it is the most environmentally safe method of disposal. EPA believes further study is needed before technical criteria can be prescribed for these wells. They will therefore be classified in Class V, whether or not the tailings are hazardous wastes. Keeping these operations in Class V allows an inventory and assessment procedure to determine the actual risk individual sand backfill operations present. Provisions are already contained in the regulations for removal (including immediate closure) of any Class V wells which present a significant risk.

§ 122.33 Prohibition of unauthorized injection

This new section has been added to clarify the basic legal authority which any State must have in order to carry out a UIC program. A requirement that the State prohibit construction of an unauthorized well, as well as injection, has been added. EPA believes that permits must be issued and control requirements applied before a well is constructed, not simply when it goes into operation. Among the technical requirements of Part 146 are construction requirements. It may not be possible to assure compliance with these requirements if a permit is not issued until after construction of the well.

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

We have moved proposed § 122.38, the general prohibition against movement of fluids into USDWs, up front as new § 122.34. The technical rationale for the prohibition, and responses to comments, appear in the preamble to Part 146. The provision has been augmented to include the basic provisions designed to achieve protection of USDWs for all classes of wells, not just Class I, II, and III.

EPA believes that this reorganization will serve to place the basic requirements of the UIC program up front, and dispel confusion about their operation. For Classes I, II, and III, no injection may be authorized by permit or rule if it causes or allows the movement of fluid into a USDW. If monitoring indicates movement, the Director may impose additional requirements as necessary. This standard for Classes I, II, and III was selected because it is operationally meaningful (i.e., it can be measured or otherwise determined) and because it can be achieved through the use of available, good engineering practices.

Because of the design of Class IV wells, the use of good engineering practices will not reliably insure that movement of fluids into USDWs will not occur. Consequently, Class IV wells injecting directly into a USDW are to be closed. The regulation of other Class IV wells is reserved.

Similarly, Class V embraces wells of differing construction and design, many of which inject non-hazardous fluids into and above USDWs. A "no movement" standard would not make sense for these wells. Therefore, the prohibition relies on the language of the SDWA. Class V wells are not to cause a violation of primary drinking water standards and they are not to affect the health of persons adversely. While the Class V wells are being assessed, the Director is to take action with regard to any well that violates either of these prohibitions. Such action may be accomplished through an order or by requiring the injector to apply for a permit.

The permit mechanism may be a more efficient one under some State laws to prescribe controls. The regulation leaves to the Director's discretion what technical requirements would be imposed through such a permit. However, all the conditions in §§ 122.7, 122.41, and 122.42 must be included in such permits except for the plugging and abandonment requirements and mechanical integrity requirements of § 122.42, which the Director may include as a discretionary matter. By an amendment to § 122.9 (duration of permits), a Class V well may be permitted for up to ten years.

A new provision has been included to authorize the Director to take emergency actions whenever EPA would be authorized to do so under section 1431 of the SDWA, to prevent imminent and substantial endangerment to the health of persons.

122.35 Identification of underground sources of drinking water and exempted aquifers

Numerous commenters noted the apparent contradiction between Part 146 and Part 122 on aquifer designation and noted that EPA used different definitions for a USDW in the RCRA and UIC programs. EPA has clarified its intent and resolved the differences between RCRA and UIC by identifying USDWs by definition. The Director may designate aquifers as USDWs to facilitate program administration and put potential injectors on notice of regulatory requirements.

EPA encourages State Directors to designate aquifers as USDWs, and to make the designation as thorough and complete as possible. Even if an aquifer is not designated, it is a USDW if it meets the technical criteria of § 122.3 and has not been exempted. For this reason, the burden will be on any owner and operator planning to construct an injection well to ascertain if the well is likely to pass close enough to a USDW to require a permit, or to determine if a permit is otherwise required (if, for example, the injector is injecting hazardous wastes). Thus, for example, an injector might commence drilling a well believing it was not going to inject hazardous wastes and that the well would not intersect or pass close to a USDW. Such a well might be authorized by rule as a Class V well. If the drilling operation intersects an aquifer, however, the driller must sample the water and test it to determine if it is a USDW, and if so, must cease all further drilling and construction until it has obtained a permit as required by the State program.

Some aquifers may not, as commenters noted, be amenable to description by geographic methods. The Director may identify USDWs or exempted aquifers in narrative terms or a combination of narrative and geographic terms.

The State Director may also identify "exempted aquifers." A definition of "exempted aquifer" has been added to § 122.3(c). This term takes the place of the exceptions to USDW's formerly listed in proposed § 146.04, which also appeared in the definition of USDW in proposed § 122.3(a). The term and its definition have been adopted by EPA from several suggestions by commenters. An exempted aquifer is an aquifer or portion which would normally qualify as a USDW but which for any of several specified reasons has no actual potential for providing drinking water and which has been affirmatively identified as an exempted aquifer by the

State Director as part of the program description required by § 123.4(g). If a State Director exempts an aquifer or portion of an aquifer, it is not treated as a USDW subject to the protections of these regulations.

§§ 122.36 and 122.45 Requirements for Class IV and other hazardous waste wells.

In the final regulations, all wells which are used to inject "hazardous waste," as defined under RCRA, are grouped into Classes I or IV. Class IV also covers the injection of radioactive wastes. Standards for Class I wells have already been discussed above. Section 122.36 establishes, on an interim basis, a prohibition, also required for approvable State administered programs, against the injection of hazardous waste directly into underground sources of drinking water (USDWs). The prohibition is effective six months after the effective date of a State program. Requirements applicable to other Class IV wells—those which inject above, but not into, USDWs—are reserved. Also reserved are additional requirements (for example, monitoring and retention of records) for Class IV wells injecting into USDWs.

Section 122.45 establishes additional requirements for operators of wells through which manifested hazardous wastes are injected. They apply to Class I wells and will apply to Class IV wells as final standards are established. This section essentially requires that the operators of these wells comply with selected requirements established for hazardous waste management facilities under 40 CFR Part 122 Subpart C and 40 CFR Part 264.

The proposed standards for wells used to inject hazardous waste (§ 122.45, 44 FR 34285, June 14, 1979) provided for a ban on the construction and operation of new Class IV wells, and a three-year phase-out of existing ones. The proposal would also have required that wells used to inject hazardous waste comply with the manifest and record-keeping requirements of the hazardous waste management regulations.

The definition of Class IV has been narrowed. The proposal required only that the well be owned or operated by: (1) a generator of hazardous waste; (2) the owner or operator of a hazardous waste management facility, and (3) that the injection be into or above a USDW in order to be included in Class IV. Commenters correctly pointed out that this definition could embrace wells that were not in fact used to inject hazardous waste. A requirement that hazardous wastes be injected has now been added to the definition of Class IV. The definition also clarifies that the injection has to be "into or above a formation which, within one-quarter mile of the well, contains a USDW" (§ 122.32).

A *second* major change has been made with regard to the coordination of regulatory authorities under RCRA and SDWA. Both Acts mandate regulatory controls on these wells: RCRA because hazardous wastes are disposed of, the SDWA because fluid is emplaced beneath the surface. The draft regulations proposed that all surface facilities involved in managing hazardous waste be regulated under RCRA. The well itself, from the cut-off valve at the wellhead was to be regulated under SDWA. The rationale for the proposal was that the different technologies (surface management v. injection) could be grouped and regulated by technical requirements appropriate to each.

One commenter in particular objected, arguing that the injection of hazardous waste be regulated under RCRA because the regulations under RCRA could afford a higher level of protection. The Agency does not agree that the SDWA is inherently weaker in preventing the potential impacts of injection. Indeed, the SDWA provides broader authority to regulate the injection of materials (e.g., oil and gas related brines and fission by-products) than RCRA.

However, because the SDWA allows States up to 18 months to develop UIC programs, there could be instances in which no effective UIC program will exist in a State for two years after the effective date of these regulations. In order to provide some level of environmental protection during this period, § 122.45 now requires all injectors of hazardous waste to obtain "interim status" under the hazardous waste management program. When the applicable State UIC program becomes effective, such injectors will be regulated under the UIC program. However, § 122.26 provides for a permit by rule under RCRA which will be satisfied if the injector is in compliance with the applicable UIC standards. In order to make control under SWDA substantially equivalent to control under RCRA, § 122.45 has been expanded to include appropriate standards from 40 CFR Part 264 in addition to the manifest system.

The *third* major change from the proposal is that the requirements for Class IV wells, other than those injecting hazardous wastes into a USDW, are reserved. There are several reasons for this decision. While few commenters questioned the basic premise underlying the proposal, some questioned whether, at least in some cases, the migration of fluid into a USDW would in fact cause any adverse effects either on drinking water supplies or human health. Other commenters suggested that a well should not be banned if it overlies a deep or remote USDW which it is not likely to contaminate. As noted above, commenters also indicated their belief that the definition of Class IV was too broadly drawn, and that, therefore, the proposed standard was unnecessarily protective. The Agency has reviewed these comments and is mindful of its obligation to proceed with extraordinary care before imposing an absolute ban on any practice. The Agency's concern in fashioning the proposal was to afford protection to drinking water sources. Nor is the Agency contemplating any changes which would sacrifice or endanger drinking water sources people rely on. Furthermore, wells injecting hazardous wastes are also subject to RCRA which mandates a broader set of environmental concerns than drinking water. Nevertheless, there may well be portions of aquifers so deep or remote that they may never serve as drinking water sources, or conditions under which a particular injection may not have an impact on the quality of the drinking water source.

A further reason for the proposed approach is that regulations under RCRA and SDWA touch at several points. Facilities under Class I and Class IV overlap the class of facilities designated under RCRA as hazardous waste management facilities. It is, therefore, appropriate that technical standards under RCRA and UIC be consistent, to the extent allowable under the governing statutes, for facilities capable of causing a similar degree of environmental risk.

EPA has decided to defer issuance of permitting standards for HWM facilities until fall 1980. Adoption of UIC standards now for Class IV wells could prove misleading to the States and the public, because EPA might decide this fall to revise the standards to reflect policy decisions made in connection with RCRA standards. The best course is to defer the technical standards for Class IV wells which inject above USDWs until fall 1980. Accordingly, we now solicit further comment on requirements for Class IV wells.

EPA has under consideration several options which would allow Class IV wells to inject, in certain circumstances. In order to assist commenters, these options are described below. In addition to the SDWA, EPA is considering invoking RCRA authority to deal with

Class IV wells. Accordingly, after consideration of comments, EPA will publish regulations this fall amending 40 CFR Part 122, Subpart C, or Parts 146, 264, or 265. At that time, EPA may decide to prohibit all Class IV wells as proposed under SDWA or RCRA or both, adopt any of the options discussed below, or adopt any combination or modification of the options which appears justified based upon the record, including comments received.

The language of the Act (section 1421(d)(2)) states that:

> Underground injection endangers drinking water sources if such injection may result in the presence of underground water which supplies or can reasonably be expected to supply any public water system of any contaminant, and if the presence of such contaminant may result in such system's not complying with any national primary drinking water regulations or may otherwise adversely affect the health of persons.

For the proposed regulations, EPA adopted a conservative approach to the designation of USDWs. This approach was based upon that suggested in the House Committee Report on SDWA (H.R. Rept. No. 93–1185, 92d Cong., 2d Sess. at p. 32). Thus, EPA proposed to protect any aquifer or aquifer portion already in use as a source of drinking water. Aquifers or portions which could potentially serve as drinking water sources would also be protected if they could yield useable quantities of water containing fewer than 10,000 mg/l of TDS.

Potential drinking water sources which met the technical definition could be designated as "exempted aquifers" if they are: (1) hydrocarbon, mineral or geothermal energy producing; (2) so contaminated as to make their use for human consumption technically or economically impractical; and (3) located in such a fashion as to make their use technically or economically impractical.

Within this regulatory approach, two alternative methods suggest themselves for expanding the range of allowable Class IV practices. The first is to attempt a more precise distinction between ground water in general and ground water that serves or can reasonably be expected to serve as a source of drinking water. Option A takes this approach.

A second possible approach is to attempt a more precise definition of the circumstances under which the presence of contaminants in a USDW may or may not cause a system to exceed national primary drinking water (NPDWR) standards or otherwise adversely affect the health of persons. Option B takes the latter approach.

Option A. This option would entail modification of the definition of a USDW to decline to protect USDWs in areas adequately served by other sources. EPA is aware of areas of the country which are underlain by aquifers containing immense quantities of usable fresh water, or where surface water supplies are so plentiful that they could reasonably be expected to supply all foreseeable needs for drinking water. In such cases, EPA is willing to consider a policy which would authorize injection through Class IV wells.

In this approach, an additional basis for exemption could be added to § 146.04 that would allow the Director to decline to protect an aquifer or its portion if it "otherwise cannot reasonably be expected to serve as a source of drinking water." To justify such an exemption, the Director could be required to consider the following factors:

- present and future availability of alternative sources of drinking water;
- future population growth and land use patterns in the area; and
- the expected growth in the demand for drinking water.

In keeping with the revised definition noted above, such wells would fall under Class I because they would inject into exempted aquifers (i.e., not into or above a USDW). Injectors would apply for permits with a duration of up to ten years as specified in 40 CFR 146 Subpart B, with one exception. The applicant would be required to make a showing that the injection would not impact aquifers or portions of aquifers protected as USDWs. Such a showing would involve a demonstration that the injection zone is not in hydraulic connection with or that the natural flow from the injection zone is away from protected USDWs.

The application would be processed as any other Class I permit application. Under § 122.43, the Director would have the discretion to require such permit conditions as he believes necessary to protect USDWs.

Option B. This option would recognize that the injection or presence of contaminants in a USDW may not necessarily lead to drinking water supplies exceeding the NPDW standards or adverse effects on the health of persons. Based on this rational, a more liberal approach could be taken to regulating Class IV wells if the applicant could demonstrate that the injection: (1) is environmentally the most acceptable method of disposal; and (2) would not contaminate the portion of the aquifer from which water is drawn for drinking.

Under such an approach, the standard that the applicant would have to demonstrate would be that:

- technology for safe disposal is not available, taking into account the costs;
- injecting fluid will be less harmful than use of other available means; and
- technology and other means will be employed to reduce volume and toxicity of waters.

The applicant would be required to:

- demonstrate that the proposed injection is the most environmentally acceptable alternative available considering technology and the cost of:

Trucking to an approved site.
Pretreatment prior to injection.
Construction of a Class I well.
Incineration.
Segregation of streams and/or reduction in flow.

- demonstrate anticipated ground water impact will not adversely affect the health of persons or violate NPDWR based on the following information:

Injection volume and pressure.
Life of operation.
Direction of ground water flow.
Proximity to use.
Monitoring up gradient and down-gradient.
Geological and hydrological data.
Closure plan.

There would be certain common elements under both options. Injectors would be required to obtain a permit to operate a Class IV well within one year of the effective date of the State program or close. Permits could be for a duration of 10 years, and new wells would be subject to the requirement in § 122.33 that a permit be obtained prior to the construction of a new well.

Similarly, there are certain common questions with regard to implementation under either option. The Agency solicits specific, detailed comments on these questions: *First,* do factual circumstances exist in which EPA should allow injection of hazardous waste into or above an underground source of drinking water? *Second,* if so, what information should be required of the applicant to show that the injection will not endanger drinking water sources, and what criteria should the Director use in granting or denying permits? *Third,* should new and existing Class IV wells be treated differently or alike? *Fourth,* should the decision to allow the use of a Class IV well be made as part of a statewide or regional plan (e.g., section 208, land use, RCRA section 4007 solid waste plan, UIC program application) or as part of the individual permit decision? *Fifth,* what factors should be considered in subdividing aquifers into relatively confined exempted areas and USDWs?

Sixth, what procedures should be imposed to ensure full public participation in decisions to allow injection through Class IV wells? *Seventh,* what kinds of post-closure care requirements (monitoring, third-party liability, use restrictions) should be imposed on Class IV well operators? *Eighth,* are the authorities under SDWA and CWA sufficient to prevent the potential impacts of such injections or should RCRA authorities be invoked to meet non-human health related environmental concerns such as aquifers discharging to streams and surface impact on vegetation?

These final regulations prohibit new Class IV wells injecting directly into USDWs as of the effective date of these regulations. Existing such Class IV facilities are allowed only six months from the effective date of the State program in which to close, which will in many cases, be more than two years after the date of these national regulations. Even though requirements for these wells are reserved under the UIC program, all Class IV wells must meet interim status standards under RCRA.

§ 122.37 Authorization of underground injection by rule.

Only minor changes have been made from the proposal. First, the section has been written to clarify when construction requirements must be complied with. Second, the rules are limited to exclude wells which have not responded to inventories generally, not merely Class IV and V inventories.

A number of commenters noted that this section as proposed did not explicitly specify what operational requirements were applicable to injectors authorized by rule, as opposed to by permit. This section has been revised to incorporate the applicable requirements of §§ 122.41 and 122.42. Most of these requirements are as necessary for rules as they are for permits. The exceptions (for example, the requirement that the injector apply for a renewal permit) are explicitly noted here.

In response to comments, this section has been revised to allow a rule to continue (even beyond its termination date) to authorize injection where the injector has applied for a permit and the Director has not yet acted on the application.

A new paragraph (c) has been added to this section to authorize the Director to require an injector authorized by rule to apply for a permit. EPA believes that this authority may be necessary in some cases to provide a means of promptly imposing cleanup measures on problem wells, or of allowing the Director to phase in the permitting of wells in an orderly way.

EPA rejects the claim by one industry that the authorization of existing Class II wells by rule will result in loss of oil reserves. Existing wells are allowed to continue current operations with the exception that they must start monitoring and reporting, at small cost. The estimated costs for this monitoring and reporting are given in the preamble to 40 CFR Part 146.

§ 122.38 Authorization of underground injection by permit.

As proposed, the section referred to a schedule for submitting permit applications which was to be part of a State Director's program submission under Part 123. However, no mention was made of what happens when EPA is the permitting authority. When EPA promulgates any UIC program for a State, it will specify the schedule for applications to be submitted. For States, the program description under § 123.4 will establish the schedule.

Proposed paragraph (d), mechanical integrity, has been relocated as a permit condition in § 122.42. A very large number of commenters objected that the prohibition against permitting wells which lacked mechanical integrity was illogical since permits are issued prior to construction and mechanical integrity cannot be shown until after construction. Relocation and rephrasing of this requirement is responsive to this concern.

A commenter objected to the proposed provision authorizing a State to allow an applicant to submit an application as much as four years after program approval. The commenter pointed out that this schedule conflicted with the three-year schedule set out in section 1421(b) of the SDWA. EPA has retained the four-year phase-in. All injectors must be authorized either by permit or rule under a State program, as required by section 1421. However, EPA believes that a reasonable phase-in period is necessary for States to issue permits in an orderly way, and finds a four-year period to be reasonable. Moreover, the States will have inventory information under § 122.37 well before the expiration of the four-year period and can take action under § 122.37(b) to require an early application if necessary.

A commenter asked EPA to specify how long in advance of operation a permit application is required. Since a permit will be needed for construction, each owner or operator should submit a complete (under § 122.5(c)) application for a permit as early as possible to allow time for the Director to process the application. Since the time needed to process a permit will vary with complexity, available State resources, controversial situations, and other factors, EPA has chosen not to require a fixed time for submission prior to starting construction. Instead, EPA has retained the requirement that the application be submitted to the Director a reasonable time before construction is expected to begin. EPA suggests that an applicant submit applications at least six months in advance of planned construction.

§ 122.39 Area permits.

This section has been extensively rewritten for logic and clarity. The only substantive change is to allow for new injection wells within the area without requiring *prior* administrative authorization. Many commenters noted that without such a requirement it would be impossible for some Class III operations, such as frasch process or solution mining operations to continue. The rewritten section should eliminate any possibility that the need for authorization will hold up the drilling of additional wells within the area. However, additional wells are carefully regulated under the terms of the area permit and the permit can be modified or revoked if its terms are violated. Additional wells will constitute grounds for minor modifications of the area permit which, if necessary, can be made without requiring public notice and opportunity for a hearing.

Commenters pointed out that many Class II well fields are cut by faults, even though the field is a distinct unit. These commenters contended it was unreasonable to limit area permits to fields injecting into the same aquifer. In response, EPA has eliminated the requirement that all wells inject into the same aquifer. They need only be within the same well field, facility site, reservoir, project, or similar unit in the same State. The final rule also adopts a commenter's suggestion that control by a single "owner or operator," rather than a single "person," be required for area permits.

Comments objected to the authorization of new wells within an area covered by an area permit where the Director has not considered the cumulative impact of the new wells, when added to those existing at the time of permit issuance. EPA agrees, and has added a requirement that the Director consider these cumulative impacts before issuing an area permit which authorizes new wells to be drilled without specific approval by the

Director. The final rules do not require that the location of every well that might be drilled under an area permit be identified in advance of permit issuance. However, there must be sufficient information on potential new wells in order for the Director to consider cumulative impact. If there is not, the Director may issue an area permit covering only existing wells if he or she wishes to, but new wells will be required to obtain individual permits.

§ 122.40 Emergency permits.

EPA proposed this section as § 122.40, "Temporary authorization." It has been renamed "Temporary permits" to correspond to its actual function, and to the scheme of the SDWA, which requires UIC programs to prohibit any injection not authorized either by a rule or a permit. EPA does not view this section as unlawful or as an attempt to depart from the statutory scheme, as contended by one commenter. A temporary permit is a permit. The procedures for its issuance, while different from those for other permits under this Part, in no way contravene the SDWA. EPA believes, moreover, that the stringent and narrow conditions under which temporary permits can be granted not only fill a real need, but will assure that the injection does not endanger drinking water sources.

The issuance of these permits is, of course, optional with the State Director. No State which does not wish to issue temporary permits is required to do so by these regulations.

Numerous commenters expressed concern that the EPA permitting procedures have the potential for creating or contributing to major delays in issuing permits. Several stated that issuance of draft permits is an unnecessary step in the UIC permitting process. Others claimed that the detailed procedures in Part 124 appear to be excessive in that they provide for unwarranted delays in the permitting process for oil and gas wells.

EPA evaluated these comments and found that the permitting time delays arising from these regulations would not cause an unwarranted delay except where new field (wildcat) wells were involved. If a wildcat operator found oil he or she might have to delay initial production in order to secure a UIC permit to drill an injection well which conforms with these regulations.

To avoid any unnecessary delay in production for new field wildcat wells, § 122.40 has been expanded to permit the Director to issue an emergency authorization for a new Class II injection well where a substantial delay in production of oil or gas resources will occur unless it is granted. Such authorization must not result in the movement of fluids into a USDW. The authorization is valid only during the time the permit application is being processed, provided the application is submitted within 90 days, a period EPA considers more than ample.

§ 122.41 Additional conditions applicable to all UIC permits.

One commenter noted that the sequence of permitting steps and construction for new wells was confusing in the proposal. EPA agrees and has moved a paragraph covering construction requirements into this section from §§ 146.12, 146.22, 146.32 and 146.42. Permits are issued prior to construction and contain requirements which govern the construction of the well. Wells must be in compliance with these requirements before injection begins. Changes in construction plans during construction may be approved by the Director as minor modifications. To avoid any unnecessary delay in production for new field wildcat wells, § 122.40 has been expanded to permit the Director to issue a temporary permit for an injection well where a substantial delay in production of oil or gas resources will occur unless temporary authorization is granted to new Class II wells. Such permit must not result in the movement of fluids into a USDW. The temporary permit is valid only during the time the permit application is being processed.

The plugging and abandonment condition has been rewritten to cover the possiblity of conversions of wells to new uses rather than abandonment. Injectors must notify the Director 180 days in advance of plans to convert or abandon a well so that the Director may review the plugging and abandonment procedures or otherwise act to prevent contamination.

A new requirement has been added that the permittee retain records on the nature and composition of injected fluids until at least five years after plugging and abandonment, at which time the Director may require the permittee to turn over the records. This provision is necessary in order to assure that if contamination of a USDW is discovered, the Director will have ready access to records of injected fluids which might be necessary to trace the origin and direction of flow of the contaminating fluids. EPA encourages the States to establish a system to retain these records for as long as possible.

§ 122.42 Establishing UIC permit conditions.

While § 122.41 itself prescribes permit conditions, this section prescribes the manner in which certain types of permit conditions must be established by the Director when issuing permits. The section is also intended to serve as a complete cross-reference to the applicable requirements of 40 CFR Part 146, as well as other requirements of Part 122, Subpart C, which must be applied through UIC permit issuance. Most of the requirements referenced in this section are actually established elsewhere, and comments on those requirements are dealt with in connection with the sections which establish them. However, several requirements established by this section do not appear elsewhere, and are discussed below.

Construction requirements and plugging and abandonment procedures are handled the same way. The permit applicant must develop and submit for the Director's approval permit conditions necessary to assure adequate plugging and abandonment, or testing, drilling, and construction. The Director may adopt the proposed conditions or prescribe other appropriate ones. The injector is presumably in the best position to know how these construction-related requirements can best be tailored to the individual well site. This provision will enable the Director to take advantage of that expertise, as well as giving the applicant an opportunity to suggest optimally efficient permit requirements.

This section also includes financial responsibility requirements. These were proposed as § 122.42(a)(7). The proposal did not specify a dollar amount for the performance bond or other instrument, but each well would have been required to be covered by a financial responsibility instrument. A number of comments were received. Many of these comments addressed the dollar amounts of financial responsibility instruments already required under some State laws, and suggested that applying these amounts to each well would shut down many marginal well operations. In consideration of these comments, EPA has revised the regulations to give the Director clear discretion to approve any form of financial responsibility which is equivalent to a performance bond to close, plug, and abandon the well in a manner prescribed by the Director.

The Director might conclude, for example, that the applicant's financial statement showing large assets sufficiently proves the applicant's financial stability and reliability. A

State Director might require an applicant to set up an escrow account where authorized by State law (because of Federal statutes, this alternative is not open to a Regional Administrator).

Similarly, if the Director requires a performance bond, he or she may authorize an owner or operator controlling a large number of wells to post a single instrument of financial responsibility covering all wells within a State. EPA considered establishing a minimum dollar amount for performance bonds covering all wells within a State. This did not appear practicable, however, for two reasons. First, such a fixed requirement seemed inconsistent with the broad discretion granted to the Director to approve alternative methods of establishing financial responsibility. Second, no dollar amount could be defined which EPA would be confident would be adequate for all wells under all circumstances, without being prohibitively high for most cases. The costs of plugging and abandonment range from $1500 for some Class II wells to as much as $30,000–$40,000 or more for some Class I wells. In most situations, EPA believes that a $60,000 bond would be sufficient for an otherwise financially stable owner or operator to post for a number of wells within a State. However, this figure is only guidance, and the Director is free to establish a higher or lower figure as circumstances dictate.

Some commenters contended that a bond requirement would shut down marginal and stripper wells. Such wells are often operated by large multi-national corporations which should have no difficulty establishing financial responsibility absent a bond. For smaller operators, the Director will be able to employ a single instrument for all wells under the operator's control. This authority is expected to reduce the economic burden to the lowest possible point consistent with effective regulation.

§ 122.43 Waiver of requirements by Director.

Some commenters suggested that some of the technical requirements of these regulations are not necessary when injection takes place far from any potential drinking water source and where the fluids are not likely to migrate into a USDW. EPA agrees and has added limited authority to allow the Director to waive the technical requirements for operation, monitoring, and reporting in cases where the radius of the zone of endangering influence is a negative number. In cases where injection does not take place into, through or above a USDW, the Director may also waive requirements for area of review, construction and mechanical integrity. The Director's fact sheet under paragraph (c) should explain not only the technical basis for the waiver under this section, but also why compliance with the requirements would not be feasible.

Proposed § 122.43 Noncompliance reporting.

This section has been moved to Subpart A; § 122.17.

§ 122.44 Corrective action.

This section has been extensively rewritten both for clarity and substance. Several commenters objected to the provision in the proposal that the Director shall prescribe steps for corrective action by noting that the improperly completed wells may be on property not owned by the permittee. EPA has determined that no exception shall be made for situations when corrective action on a third party's land is necessary. The Director may still prescribe such steps, although of course he or she can not require that a third party's property rights be violated. Rather, if an injector can not work out an agreement with a neighboring landowner, then the permit may be terminated or the injection will not be authorized. However, an additional option available to the Director in setting corrective action requirements has been emphasized. This consists of limiting injection pressure, and may avoid shutting some wells down in situations where other corrective actions are impossible because of conflicting property interests.

The burden and roles of the applicant or permittee and the Director in proposing corrective action have been clarified. The applicant must identify wells within the area of review. The applicant may, but is not required to, include a plan for corrective action in the application. If no such plan is included, or if the plan is inadequate, the Director may request one, or require further information. The Director then places corrective action requirements in the permit.

Several of the paragraphs in the proposal covered the handling of migration of fluids into USDWs generally rather than covering only corrective action. These provisions have been moved into the expanded general prohibition against movement of fluids into USDWs, new § 122.34.

Some commenters suggested that Frasch wells should be exempted from corrective action requirements because economics preclude leaks in such wells. If these commenters are correct, and no leaks are found, then corrective action would of course not be required for existing wells (See 40 CFR Part 146 Subpart D).

§ 122.45 Requirements for wells managing hazardous waste.

This section is intended to integrate the requirements of these regulations with those issued under RCRA for hazardous waste management facilities. RCRA prohibits disposal of hazardous wastes except at facilities which are permitted under RCRA. In order to avoid needless duplicative regulation of the same disposal actions under two statutes, Subpart B of this Part establishes under RCRA a permit by rule for UIC wells which hold final permits under an approved State UIC program, or a federal program. The two programs should be consistent, however. Accordingly, this section establishes requirements similar to those under RCRA, but adapts those requirements to the particular circumstances of injection wells.

The manifest system has been adopted without change. However, financial responsibility for UIC facilities differs from that for RCRA-permitted facilities. EPA believes that the circumstances are fundamentally different. A properly sited, designed and operated Class I disposal well offers little risk of leakage and contamination during the period of injection. Thus the primary purpose of financial responsibility is to ensure proper plugging and abandonment. EPA believes this can be done more simply for UIC wells than for RCRA facilities and has accordingly left the Director broad flexibility. Similarly, plugging and abandonment for a UIC well is dissimilar to closure for a RCRA facility. Plugging and abandonment is as close as can be obtained to assurance that fluids will not migrate and contaminate drinking water sources. For a UIC Class I well, observance of proper operating and pressure monitoring practices provide assurance against migration and contamination of USDWs. After the well is plugged, the plugging operation leaves an impermeable barrier between the injection zone and any USDW. Thus post-closure monitoring wells and other post-closure maintenance required under RCRA are unnecessary. For a HWM facility, closure is only the beginning of necessary extensive post-closure monitoring and protection. Thus plugging and abandonment is all that these regulations require of wells injecting hazardous waste. However, completion of required procedures must be certified by an independent registered professional engineer. RCRA

notification and training requirements apply without change to UIC wells.

Other UIC program requirements are equivalent to their RCRA counterparts. For example, owners or operators of Class I wells are required to analyze injected fluids often enough to yield representative data on its characteristics (§ 146.13(b)(1)). They must regularly monitor and report to the Director injection pressure, flow rate and volume, annular pressure, and any other information which might indicate movement of fluids out of the injection zone (§ 146.13(c)). If the well leaks or otherwise causes movement of fluids into USDWs, it must be repaired. To the extent that these wells present the hazards of explosion or other sudden incidents requiring emergency equipment or contingency plans under RCRA, these hazards will be associated with surface facilities, which continue to be subject to RCRA even though they are at the site of an injection well.

In order to assure prompt application of controls under the UIC program, owners and operators of UIC wells injecting hazardous wastes must apply for a permit within six months of program approval.

Subpart D—Additional Requirements for NPDES Program

Subpart D of Part 122 contains requirements which are for the most part identical to those in Part 122 of the final NPDES regulations, published on June 7, 1979 (44 FR 32854). Subpart D also contains the deadlines for request for variances from effluent limitations (previously in § 124.51 of the NPDES regulations). The Agency received a large volume of comments on these provisions. Many of these comments either repeated or incorporated by reference the comments previously made on the NPDES regulations which became final on June 7, 1979. EPA feels that comments that were made during the comment period for the June 7, 1979, regulation have been adequately considered and addressed in the preamble to those regulations. EPA has considered only those comments on the NPDES regulations which raised new issues. Some changes have been made as a result of comments and of consolidation, as discussed below.

Subpart D now incorporates regulations proposed separately on June 14, 1979 (44 FR 34393). The incorporated regulations accompanied the draft consolidation application forms (44 FR 34346) and are intended to improve control of toxic pollutant discharges under the NPDES program. Changes from the proposal include specification of the contents of the new NPDES application form, new duties to report certain pollutants, and accompanying requirements for establishing permit conditions. The regulations appear now in §§ 122.53, 122.62, 122.63, and Appendix D, and are discussed in detail in the preamble to the final consolidated application forms published elsewhere in today's Federal Register. The major changes from the proposal are summarized in this preamble in the appropriate sections.

§ *122.51 Purpose and scope.*

EPA has expanded § 122.51, Purpose and scope, to include proposed §§ 122.62 (Law authorizing NPDES permits) and 122.63 (Exclusions). The new section, in line with other subparts, contains a paragraph outlining the scope of the NPDES permit program. The "specific inclusions" list discharges that require NPDES permits, although the list is not exclusive.

EPA has added a new "specific exclusion," § 122.51(c)(2)(iv), which deals with the need to discharge chemicals and other materials to counter the effects of sudden hazardous discharges. The provision exempts any discharge made in compliance with the instructions of an On-Scene Coordinator. The Coordinator is a Federal official designated by EPA or the U.S. Coast Guard to direct Federal discharge removal efforts at the scene of an oil or hazardous substance discharge according to Regional Contingency Plans. The exemption is necessary because the NPDES permit process is inappropriate for discharges required by a Federal official in this context.

Another new exclusion, § 122.51(c)(vi), lists return flows from irrigated agriculture as exempt from the NPDES permit requirement. This does not represent a change in policy; irrigation return flows are also excluded from the definition of point source in these and the prior final NPDES regulations as required by section 502(14) of CWA. It is added here for clarity.

§ *122.52 Prohibitions.*

Proposed § 122.67(i) (now § 122.52(i)) included the terms "effluent limitation segment" and "water quality segment," which were defined in 40 CFR § 130.2 (a)(1) and (a)(2). Because those regulations have been superseded, we have deleted the two terms. The provision now implements section 303(d) and 303(e) of CWA by prohibiting permits for a new source or new discharger if its discharge will cause or contribute to the violation of a water quality standard. A new source or new discharger proposing to discharge into a water segment that does not now meet water quality standards or is not expected to meet those standards even after the application of the effluent limitations required by section 301(b)(1)(A) and 301(b)(1)(B) of CWA, and for which a pollutant load allocation has been performed, may receive a permit if it shows that sufficient pollutant load allocations to allow for the discharge remain and that existing dischargers into the segment are subject to compliance schedules designed to eliminate the segment's noncompliance with water quality standards.

Many commenters observed that no criteria were provided by the Agency for determining "entitlement" to pollutant load allocations. Upon reconsideration, we agree that it would be almost impossible to prove "entitlement;" thus, we have deleted the requirement that the applicant demonstrate the facility's entitlement to the remaining pollutant load allocation. In addition, the requirement that a discharger demonstrate, at the time of applying for a permit, that there are sufficient remaining pollutant load allocations to allow for the discharge has been changed to allow the demonstration to be made at any time before the close of the public comment period. This change was made in response to comments that compliance with the proposed regulation would be unduly burdensome and that the information necessary to make the required demonstration, in many cases, would not be readily available to the discharger at the time of application.

§ *122.53 Application for a permit.*

(1) *New application requirement.* Proposed § 122.64(b) required existing permittees to submit a new application automatically when certain facility changes would either result in new or substantially increased discharges or a change in the nature of the discharge, or violate the conditions of the permit. Commenters argued that this would be unduly burdensome because of the detailed testing requirements which are likely to be a part of the new consolidated application forms. EPA agrees that this subparagraph is unnecessary for three reasons: (1) the regulations now require the permittee to notify the Director of planned alterations or additions to the permitted facility as soon as possible (§ 122.7(l)(1)); (2) application-based notification requirements have been established for toxic pollutants (§ 122.61(a)); and (3) § 124.5 gives the Director authority to request an updated application from the permittee, if necessary, where cause exists to modify

or revoke and reissue a permit. Thus, this subparagraph has been deleted.

(2) Final § 122.53(c) phases in the new application requirements which have been promulgated today, (see §§ 122.4(d), 122.53(d) and 122.53(e)) for existing dischargers other than POTWs. These new requirements apply to (1) any such discharger whose existing permit expires after November 30, 1980 and (2) any such discharger whose permit expires on or before November 30, 1980 but who has not submitted an application prior to April 30, 1980, the approximate date these regulations become public. The reason for distinguishing between these two groups is discussed below:

The schedule for phasing in the new application requirements has been set after consideration of several factors. On one hand, it is desirable to make the requirements effective as early as possible so that the newly-required information on toxic discharges is made available to permit writers. On the other hand, as some commenters have noted, applicants must have ample time to sample and analyze their waste streams for toxic pollutants. A further consideration is the effect of § 122.10(b) of the final NPDES regulations (now incorporated, with changes, into § 122.53(c)). The regulation (proposed in the consolidated permit regulations as § 122.64(b)) required applicants for EPA-issued permits to reapply at least 180 days prior to permit expiration. (Many NPDES States have similar rules.) Thus permittees whose permits are due to expire before November 30, 1980 had to submit applications to EPA by June 3, 1980. It would be unfair to require dischargers in this group who have already applied to apply once again for the same permit.

Based upon the above considerations, EPA decided to phase in the new application requirements beginning with those dischargers whose permits expire after approximately six months from when these regulations are promulgated, i.e., after November 30, 1980. Applicants whose permits expire before that date will in most cases have already applied under the old requirements. They need not reapply except that those whose permits expire before November 30, 1980, but who have not yet applied by April 30, 1980 are required to apply under the new requirements.

Dischargers whose permits expire after November 30, 1980 must comply with the new application requirements, even if they have already applied for permit renewal. It would be inappropriate to exclude these applicants from the new requirements simply because they have submitted applications unusually early.

To allow applicants sufficient time to apply under the new requirements, EPA is temporarily relaxing its general requirements that applicants submit applications at least 180 days before permit expiration. The rule will initially be waived and then gradually phased back in accordance with the table in § 122.53(c).

EPA recognizes that in some situations, despite the relaxation of the 180-day rule, some applicants may not be able to sample and analyze their waste streams and submit the results by the application deadlines. Therefore, applicants whose permits expire before June 1, 1981 may apply for time extensions to submit that data. However, the extension must be limited to a maximum of six months and must not go beyond June 30, 1981. These limitations are necessary to ensure that permit issuance and compliance will meet the statutory July 1, 1984 deadline of CWA section 301(b).

(2) *Information requirements.* Section 122.53(d) lists the information which existing industrial NPDES permit applicants must supply to the Director in addition to the information listed in § 122.4(d). Dischargers applying to EPA for their permits will supply this information on Form 2c of the consolidated application forms. Dischargers applying to States for permits will use State application forms, which may be different from EPA's form; however, § 123.7(d) requires State forms to include at least the information listed in § 122.53(d).

Additions to § 122.53 were proposed along with a public notice of the draft consolidated permit application forms as Part III of the June 14, 1979 Federal Register (44 FR 34393, 34346). A detailed discussion of the significant comments received on the proposal and EPA's responses appears in the preamble to the public notice of the consolidated application forms published elsewhere in today's Federal Register. The major changes from the proposal are summarized as follows:

(i) The sections of the regulations listing information to be provided by all applicants have been moved to Subpart A of Part 122, discussed above at § 122.4(d).

(ii) A new paragraph has been added (§ 122.53(d)(1)) which requires applicants to list the latitude and longitude of each outfall and the name of the receiving water.

(iii) The requirement for submission of a line drawing with a water balance (§ 122.53(d)(2), proposed as § 122.64(d)(9)) has been modified to indicate that flows may be estimated and that multiple operations may be indicated as a single unit. Also, when a water balance cannot be determined, applicants may provide a pictorial description of the source, use, and treatment of water.

(iv) The requirement to describe flow, processes contributing wastewater, and treatment units (§ 122.53(d)(3), proposed as § 122.64(d)(10) and (14)) has been simplified by deleting the requirement for reporting maximum flows for types of wastewater, including storm runoff. The new subparagraph also states processes may be described in general terms. Two requirements have also been added: applicants must list the average flow of wastewater contributed by each process, and privately-owned treatment works must identify all users (see further discussion contained in the preamble to the consolidated application form in today's Federal Register).

(v) The requirement to list the production or other measure of operation (e.g., raw materials consumed, products manufactured) used in any applicable effluent guideline, (§ 122.53(d)(5), proposed § 122.64(d)(8)), has been modified to require listing of only a maximum measure of actual production as required by § 122.63(d)(2).

(vi) The analytical testing requirements have been modified in a number of ways (§ 122.53(d)(7), proposed § 122.64(d)(16)):

1. The list of pollutants (§ 122.53(d)(7)(i)) for which all applicants must test now includes ammonia, and no longer includes cyanide, total phenols, and total Kjeldahl nitrogen.

2. The list of organic toxic pollutants for which primary industries must test in process wastewater has been specified for each of the 34 primary categories (see Table II in Appendix D to Part 122, Subpart D). (In the case of 2,3,7,8 tetrachlorodibenzo-p-dioxin, (TCDD), the testing requirement depends on the applicant's use or production of a specific list of chemicals potentially contaminated with TCDD.) The organic toxic pollutants are specified by the four fractions tested by the Gas Chromotography/Mass Spectrometry analytical method. All primary applicants must test for cyanide, total phenols, and the metals on the toxics list. Also, all applicants must test for any toxic pollutant they expect to be present.

3. The list of pollutants for which applicants must indicate expected presence or absence now includes total organic nitrogen, and no longer includes ammonia, asbestos, or additional

pesticides (see Table IV in Appendix D to Part 122, Subpart D). Also, applicants who indicate that a pollutant on this list (which includes all of the toxic pollutants except asbestos) is present must now test for that pollutant, while the proposal allowed an estimate.

4. A list has been added of pollutants for which applicants must indicate the reasons for the presence of any expected pollutants (see Table V in Appendix D to Part 122, Subpart D). This list includes asbestos and 73 hazardous substances.

(vii) A paragraph has been added (§ 122.53(d)(8)) which exempts applicants qualifying as small businesses from submitting analyses for any organic toxic pollutants.

(viii) A paragraph has been added (§ 122.53(d)(9) and (10)) requiring applicants to: (1) list any toxic pollutants which they use or manufacture; and (2) describe any discharges of pollutants they expect to exceed the maximum values reported through testing.

(ix) The requirements concerning Best Management Practices (BMP) plans and potential discharges of toxic pollutants or hazardous substances not through outfalls has been deleted (proposed § 122.64(d)(12) and (13)).

(x) The paragraph requiring reporting of additional chemical testing results has been deleted (proposed § 122.64(d)(18)).

(xi) The paragraph allowing applicants the option of reporting information to obtain exclusions from the requirements and penalties of section 311 of CWA has been deleted (proposed § 122.64(d)(19)).

(xii) The requirement to report any previous biological toxicity tests (proposed § 122.64(d)(18), now § 122.53(d)(11)) has been modified to delete the requirement to report the results of the test.

(xiii) The requirement to report the identity of laboratories performing any reported analyses (§ 122.53(d)(12)), has been added, and modified to require identification of which pollutants were analyzed by the laboratories.

(xiv) The paragraph allowing the Director to require additional information from an applicant (proposed § 122.64(d)(20), now § 122.53(d)(13)) has been modified by adding the word "reasonably."

Section 122.53(e) deals with concentrated animal feeding operations and aquatic animal production facilities. It lists the information which permit applicants must supply to the Director in addition to the information listed in § 122.4(d). Applicants applying to EPA for their permits will supply this information on Form 2b of the consolidated application forms. Applicants applying to States for permits will use State application forms, which may be different from EPA's form; however, § 123.7(d) requires State forms to include at least the information listed in § 122.53(e).

Form 2b was published as a part of the public notice of the draft consolidated permit application forms, in Part III of the June 14, 1979 Federal Register (44 FR 34346). However, the corresponding regulations were inadvertently omitted from the proposed application regulations (44 FR 39393, June 14, 1979). The final regulations correspond to the final Form 2b, which is published elsewhere in today's Federal Register; the comments received and the changes made are discussed as a part of that preamble. The regulations require applicants to provide the following information:

(i) For concentrated animal feeding operations, a description of the size of the operation and of the waste control system.

(ii) For concentrated aquatic animal production facilities, a description of the water use and of the size of the operation.

Two paragraphs have been added to § 122.53, but are now reserved for future publication of the application requirements for POTWs and for new sources. This material will be proposed during the summer of 1980 (§ 122.53(f) and (g)).

(4) *New source applications and variance requests.* Certain requirements from Part 124 of the final NPDES regulations for applications from new sources and requests for variances were moved to the application section of Part 122, Subpart D in the proposal. Final §§ 122.53(h), (i), (j), and (k) include these requirements with some rewording, but no substantive changes. Also, the definition of variance in § 122.3 has been amended to include all modifications and variances specifically authorized by the Clean Water Act. Therefore, the term "variance" can be used for all permit conditions based on these CWA provisions, and the term "modification" reserved for permit modifications under § 124.5.

Final § 122.53(k) now specifically allows the draft or final permit to contain, along with the applicable limitation, the alternative limitations which may become effective automatically upon grant of the variance.

§ 122.54 and § 122.55 Concentrated animal feeding operations and concentrated aquatic animal production facilities.

The detailed criteria for determining whether facilities are "concentrated animal feeding operations," (§ 122.54, proposed § 122.76), or "concentrated aquatic animal production facilities," (§ 122.55, proposed § 122.77) required to obtain permits, have been moved from the text and placed in Appendices B and C, respectively, to allow smoother reading of the regulations.

§ 122.57 Separate storm sewers.

Section 122.57(b) (proposed § 122.79(b)) defines a "separate storm sewer" as a conveyance used primarily for collecting storm water runoff, which is either located in an urbanized area or designated (normally because it is a significant contributor of pollution) as a separate storm sewer. EPA does not consider storm sewers which do not fall under this definition (i.e., rural storm sewers or those not designated) to be point sources subject to NPDES permit requirements unless the storm water runoff is contaminated (see § 122.57(b)(3)). The former NPDES regulations had a comment to that effect, see 40 CFR § 125.52(a)(1). Because we did not repeat the language of the comment in the June 7, 1979 revised NPDES regulations or in the June 14, 1979 proposed consolidated regulations, commenters asked whether EPA was changing its policy. To make clear that we are not changing our policy, a sentence has been added (§ 122.57(b)(2)) stating that such storm sewers are not point sources.

§ 122.59 General permits.

EPA has rewritten and reorganized the general permits section (proposed § 122.82) for clarity and to make minor changes. First, the "General Permit Program Area (GPPA)" has been eliminated because this entity, along with its procedural trappings, served no purpose which could not be served equally well simply by the area described in the permit. Second, the proposal stated that the general permit program area could be "reviewed" if necessary to address water quality problems. The general permit can be modified for any of the causes listed in § 122.15 that apply to all permits. Information indicating unacceptable cumulative impacts now appears as an example of information which is cause for modifying a permit under § 122.15(a)(2) and applies as well to general and area permits under the State 404 programs and UIC programs.

Third, the procedure for EPA Headquarters review of EPA issued draft general permits, proposed in § 124.7(a)(2) and the comment following § 122.82(a), has been shortened to allow EPA 30 days rather than 90 to review and raise objections to the draft permit (final § 124.58).

Fourth, the proposal (§ 122.83(e)(2)) stated that the Director could revoke a general permit as it applied to an individual discharger and require that discharger to obtain an individual permit, but EPA could do this only after an on-site inspection. The requirement for an on-site inspection has been deleted because the causes for requiring an individual permit (examples are listed in § 122.59(b)(2)(i)) can be adequately determined without an inspection.

Fifth, the sources other than separate storm sewers that may be covered by a general permit are no longer limited to "minor" sources, so long as the category specified in the permit meets the requirements of § 122.59(a)(2).

Finally, § 122.59(b)(2)(iv) clarifies that the general permit automatically terminates on the effective date of an individual permit.

§ 122.60 Additional conditions applicable to all NPDES permits.

§ 122.60(a)(1) states the duty of the permittee to comply with toxic effluent standards or prohibitions regardless of whether they appear in the permit. This requirement formerly appeared as a comment to proposed § 122.68(b).

Section 122.60(b) (proposed § 122.68(e)): The proposal required a permittee to control production and all discharges upon reduction, loss, or failure of the treatment facility, until the facility is restored or an alternate method of treatment provided. Some commenters argued that this requirement to control both production and discharges was burdensome and that some flexibility should be allowed based on the degree of noncompliance. EPA agrees in part and has revised § 122.60(b) to require a permittee to control either production or all discharges rather than both. However, if the circumstances warrant the permittee may still be required to control both production and all discharges.

Portions of paragraphs (d) through (h) of proposed § 122.71 have been moved to § 122.60. These monitoring requirements are mandatory for all permittees and as such properly appear in the standard NPDES permit conditions. They are discussed under § 122.62(i) below.

Section 122.60(f) contains the 24-hour reporting requirements for NPDES. This paragraph is intended to coordinate with the reporting requirements under § 122.7(l). The proposal required 24-hour reporting of unanticipated bypasses if the permittee wished for the bypass not to be "prohibited." This requirement has been coordinated with the 24-hour reporting duties and therefore now applies in all instances regardless of whether the bypass will be "prohibited." Similarly, in the proposal upsets only had to be reported if the permittee wished to establish an affirmative defense to an enforcement action for noncompliance. This 24-hour reporting duty has now also been coordinated with the other 24-hour reporting duties and is mandatory in all instances where the upset causes any effluent limitation in the permit to be violated. Finally, the Director may now specify in the permit any other pollutant which he or she wishes to be reported within 24 hours if a maximum daily discharge limitation is violated.

Section 122.60(g) contains provisions covering bypass. The paragraph has been extensively redrafted for clarity. In general, the paragraph now clarifies that bypass which causes violation of effluent limitations is prohibited; the proposal appeared to place the presumption in favor of approval of a bypass. Consequently, ten day advance notice of any anticipated bypass which may violate effluent limitations is now a requirement in all cases, and not simply an optional mechanism for obtaining "approval" of an otherwise prohibited bypass. Similarly, EPA has deleted the statement in proposed § 122.68(c)(3) that "if there is any doubt" as to the necessity for the discharge, enforcement action may be taken. Finally, the reorganized section clarifies the applicability of the requirement that backup equipment be available to prevent bypass. In general, bypass will not be excused except in extreme situations, and the lack of adequate backup equipment for downtime periods will not be a defense unless the permittee could not have anticipated the need for such equipment at the time the facility was constructed. Similarly, although in general bypass which does not exceed effluent limitations is not prohibited, this is true only if the bypass also was necessary for essential maintenance.

§ 122.61 Additional conditions applicable to specified categories of NPDES permits.

(1) Section 122.61(a) requires existing industrial permittees to notify the Director when some activity has occurred or will occur, causing them to discharge toxic pollutants at a level exceeding five times the level reported in the permit application. Permittees must also notify the Director if they begin to use or manufacture a toxic pollutant which they did not report in the permit application. This requirement has been changed from the proposal (§ 122.68(a) in Part III of the June 14, 1979 Federal Register (44 FR 34393)) which established permit limits at five times the reported level or detection limit. In response to a large number of comments on this section, EPA has changed its approach towards controlling pollutants not limited in permits. A detailed discussion of the new section and the comments received on the proposal appears elsewhere in today's Federal Register in the preamble to the public notice of the consolidated application forms.

(2) Section 122.61(b) specifies conditions applicable to all POTWs. They were proposed as § 122.69(d)(1), in the section titled "Applicable limitations, standards, prohibitions, and conditions." Rather than leaving them as requirements for permit writers to specify on a case-by-case basis, they were moved, without substantive change, to this section because they are applicable to all POTWs.

§ 122.62 Establishing NPDES permit conditions.

(1) We have divided proposed § 122.69(a), which listed required limitations, into two paragraphs, § 122.62(a) and (b). Section 122.62(a) contains requirements for technology-based limitations, to be imposed either on the basis of guidelines or case-by-case under § 125.3. It also specifies requirements concerning new source performance standards which were proposed as § 122.69(c).

(2) Section 122.62(c) modifies the proposed § 122.69(b) by deleting the four dates in proposed Appendix A (September 30 and December 31, 1980 and March 31 and June 30, 1981) and replacing them by a single date identified in the text of § 122.62(c), which is June 30, 1981. Any permit issued on or before June 30, 1981 to any dischargers in an industrial category listed in Appendix A must contain a reopener clause as provided in this section. This will ensure incorporation of the requirements of effluent guidelines into permits issued to these dischargers. Any permit issued after June 30, 1981 to these dischargers must meet the requirements of sections 301(b)(2) (A), (C), (D), (E), and (F) of the Clean Water Act, whether or not applicable effluent limitation guidelines have been promulgated for those industries.

The effect of the revision from the proposal is to extend the time during which permit writers may wait for promulgation of guidelines before writing permits requiring BAT and BCT. This change has been made for several reasons.

First, many commenters expressed concern that in the absence of guidelines, permit writers would begin setting BAT limits on a case-by-case basis, resulting in a lack of uniformity. As a solution, two commenters supported allowing the permitting authority to extend expired permits until applicable guidelines are promulgated.

The dates in proposed Appendix A were derived by adding 18 months to the effluent guideline promulgation dates set in the original NRDC Consent Decree. Due to the enormity of the task, it became evident that EPA would not be able to meet that ambitious schedule. Therefore, the promulgation dates were delayed substantially in the modified Consent Decree on March 9, 1979. Furthermore, a moderate slippage beyond the new deadlines is likely for some industries. As a result, some guidelines will be promulgated after the applicable dates in proposed Appendix A.

To maximize the usage of effluent guidelines by permit writers, the September 30 and December 31, 1980 and March 31, 1981 dates in proposed Appendix A have all been extended to June 30, 1981 in the final regulations. Due to the statutory deadline of July 1, 1984, the June 30, 1981 date is the latest date by which it would be reasonable to wait for promulgation of guidelines. After that date, permits must require compliance with sections 301(b)(2) (A), (C), (D), (E), and (F) of CWA, whether or not guidelines have been promulgated.

In conjunction with revising the expiration dates for short-term BPT permits, EPA is revising one other aspect of its second round permits policy. On page 25 of "Policies and Guidance for Issuing the Second Round of NPDES Permits to Industrial Dischargers" (July 1978), EPA directed EPA Regional offices to issue only short-term permits to primary industries unless BAT guidelines for toxics were promulgated. (States were allowed to issue long-term permits with reopener clauses, provided that the permits required BAT and BCT, based upon best engineering judgment). EPA is now rescinding this directive.

As of today, EPA permit writers may issue long-term permits to primary industries even if guidelines have not yet been promulgated, provided that the permits require BAT and BCT and contain reopener clauses. The reason for this change is that the July 1, 1984 deadline for compliance with BAT and BCT is two years closer than it was when the Second Round Permit Policy was written. In some situations (for example, when the applicable guideline is not likely to be promulgated by July 1981) it may be appropriate to issue a long-term BAT permit, rather than to issue a short-term permit for a very short period of time and then issue a long-term permit soon afterwards.

In general, EPA continues to encourage EPA (as well as State) permit writers to issue short-term permits (or, where necessary, extend them administratively under section 558(c) of the Administrative Procedures Act or analogous State law) to primary industry dischargers until BAT guidelines are promulgated or until July 1, 1981 (see § 122.53(c)). However, EPA permit writers are now being given the same flexibility as State permit writers have had to issue long-term BAT and BCT permits, based on best engineering judgment, in appropriate circumstances.

The proposal also required the reopened permit to be modified to include "any other requirements of CWA then applicable," and stated that the reopened permit could be "modified or, alternatively, revoked and reissued." These provisions are inconsistent with the provisions of § 122.15 and, because they are not required by paragraph 10 of the *NRDC* v. *Train* settlement agreement, they have been deleted. The reopener clause now requires that "the permit shall be modified or revoked and reissued to conform to that effluent standard or limitation."

(3) Section 122.62(d) (proposed § 122.69(f)) lists water quality standards and State requirements in addition to or more stringent than technology-based standards or limitations. Proposed § 122.69(f)(10), which included technology-based limitations on pollutants not limited in guidelines, has been deleted from this paragraph, because such limitations are now covered by expanded § 122.62(a).

In response to a comment that proposed § 122.69(f)(3) was overbroad, EPA has amended § 122.62(d)(3) to provide that an NPDES permit will not include more stringent conditions of a State certification which has been stayed by a court of competent jurisdiction or by an appropriate State agency. EPA will include in the permit, however, any more stringent conditions necessary to meet EPA's obligation under § 301(b)(1)(C) of CWA.

(4) Section 122.62(e) requires permits to contain limits controlling all toxic pollutants which either are reported at levels exceeding BAT or are used or manufactured at the facility. Limits may be placed directly on these toxic pollutants, or indirectly on other pollutants if those limits will result in equivalent treatment of the toxic pollutants. This provision is included in the final regulations as a result of a change in the Agency's approach toward controlling pollutants not limited in permits. In the preamble to the regulations proposed in Part III of the June 14, 1979 Federal Register (44 FR 34393), EPA expressed the policy that permits should control all significant pollutants, and that the proposed application-based limit (proposed § 122.68(a)) was designed only to control unexpected pollutants. In response to a large number of comments, EPA now distinguishes between pollutants that should be controlled by the permit and all other pollutants, which are regulated only by the requirement that permittees notify the Director when their discharge does or will exceed five times the reported level or detection limit of toxic pollutants (§ 122.61(a)). A more detailed discussion of these regulations appears elsewhere in today's Federal Register, in the preamble to the public notice of the consolidated application forms.

(5) Section 122.62(g) is a new provision which requires permit writers to specify which pollutants will require 24-hour notice under § 122.60(f)(3) to the Director when their maximum daily discharge limitations are violated. This is a change from the proposal (§ 122.11(h)) which required 24-hour reporting for toxic pollutants and hazardous substances. Because in some cases toxic pollutants and hazardous substances will be controlled by limits on other pollutants, permit writers must be able to require 24-hour reporting for these other pollutants. In addition, the Director may specify any other pollutant as one which must be reported if a maximum daily discharge limitation is exceeded.

(6) Section 122.62(h) specifies that NPDES permit durations must comply with § 122.64. All provisions of Subpart D which contain requirements for how permits must be written are cross-referenced in section 122.62.

(7) *Monitoring.* Section 122.62(i) (proposed § 122.71) specifies the monitoring requirements that must be placed in NPDES permits. Proposed § 122.71, "NPDES requirements for recording and reporting of monitoring reports" (sic) has been deleted and its provisions placed in this section and §§ 122.7 and 122.60 to conform to the organization of the consolidated regulations. The requirement to report all monitoring and the statements of the

potential liability for falsifying monitoring results under the Clean Water Act have been moved to final § 122.60 (conditions applicable to all NPDES permits), with only minor wording changes.

Proposed § 122.71(d) is deleted from the final regulations. This provision encouraged permittees to request that additional monitoring requirements be placed in their permits when they felt that the conditions in their draft permits were not sufficient to yield representative data. It was deleted because section (g) of proposed § 122.71 (retained with minor wording changes as § 122.60(f)(2)) required that permittees use all monitoring results in calculating compliance with permit limits, including any results from monitoring more frequently than required by the permit. Therefore, permittees may undertake additional monitoring to yield more representative results without requesting permit modifications. (The general requirement that monitoring be representative now appears in § 122.7, applicable to all programs).

Other provisions of proposed § 122.71 appear in final § 122.62(i). Certain changes have been made in this paragraph to correspond to the Agency's policy concerning the use of test methods which are approved under 40 CFR Part 136 and which are used in the development of effluent standards and limitations. Specifically, the final regulations state that permits must require monitoring using test methods approved under 40 CFR Part 136, for all pollutants having approved test methods, and that permits must specify a test method to be used in monitoring for pollutants not having approved test methods. (Approved test methods include any alternate test method approved by the procedures in 40 CFR Part 136; therefore the additional language in proposed § 122.71(b)(1) is unnecessary and is deleted.) The major change from the proposal is the deletion of the requirement that the Director specify monitoring test methods to correspond to the test methods used in developing effluent limitations, proposed § 122.71(b)(3) and (4). This requirement has been deleted because it is not always appropriate to constrain the choice of monitoring methods to those used in developing effluent guidelines. Additional provisions in the proposal which required the permit to specify any test methods and sampling frequency required by standards or guidelines (proposed §§ 122.71(b)(3), (4), and 122.71(c)) have been deleted because the general requirements of § 122.62 that permits correspond to standards and guidelines will ensure that these requirements (which are unusual in standards and guidelines) will be incorporated into the permit.

The final regulations retain the proposed provision allowing the Director to specify monitoring requirements for pollutants reported in the application form but not limited in the permit. The proposal appeared in Part III of the June 14, 1979 Federal Register (44 FR 34393) as a part of the proposed consolidated application forms. Final § 122.62(i)(1)(iii) retains the provision as one example of additional monitoring requirements the Director may specify in the permit.

The requirement for specifying in permits a schedule for submitting monitoring results, alluded to in proposed § 122.14(d) but inadvertently dropped from proposed Subart D, now appears in § 122.62(i)(2) and follows the requirement that the minimum frequency be once per year, with certain discharges requiring more frequent reporting, as in the final NPDES regulations published on June 7, 1979 (§ 122.23(a), 44 FR 32910).

(8) Section 122.62(j) contains the requirement for permits to require a pretreatment program from POTWs. Minor wording changes have been made from proposed § 122.69(d). Other parts of proposed § 122.69(d) are incorporated in § 122.61(b).

(9) *Best management practices.* The comment following the requirement for permits to contain management practices (proposed § 122.69(g), now § 122.62(k)) has been deleted as unnecessary; however, the examples of management practices are still applicable. It should be noted that separate requirements for developing a Best Management Practices program are contained in Part 125, Subpart K.

(10) *"Anti-backsliding."* Proposed § 122.68(i) (now § 122.62(l)) reflects EPA's "anti-backsliding policy" as initially modified in the NPDES regulations. This policy prohibits the renewal or reissuance of NPDES permits containing interim effluent limitations less stringent than those imposed in the previous permit. The three exceptions applied only when both (1) the previous permit limitations were made on a case-by-case basis under section 402(a)(1) of CWA in the absence of promulgated effluent guidelines, and when (2) the subsequently promulgated effluent guidelines were less stringent. Numerous comments were received asserting that the provision was unduly restrictive. One commenter noted that the proposed regulation could be construed to "lock" dischargers into maintaining a fixed treatment efficiency even when maintenance of that efficiency level was not necessary to comply with applicable effluent guidelines. EPA reconsidered the "anti-backsliding" rule and has added two new exceptions. The first, § 122.62(l)(4), explicitly states what was implicit before: less stringent limitations may be appropriate when there has been a material and substantial change in the circumstances on which the previous permit was based which would constitute grounds for permit modification or revocation and reissuance. The second new exception to the rule, § 122.62(l)(5), allows reducing permit limitations to correspond to subsequently-promulgated guideline limitations when increased production significantly reduces treatment efficiency. This exception will, in effect, allow dischargers that have constructed treatment facilities which are capable of treating increased discharges resulting from a substantial increase in production to take advantage of this "banked" treatment efficiency as long as doing so will still allow them to meet permit limits based on subsequently promulgated effluent guidelines.

(11) *Privately owned treatment works.* Discharges of pollutants are within the jurisdiction of CWA whether they are made directly or indirectly into navigable waters. See *United States* v. *Granite State Packing Co.*, 343 F. Supp. 57 (D.N.H. 1972), *aff'd.* 470 F.2d 303 (1st Cir. 1972). Some dischargers, however, arrange for other private companies to treat their wastes before discharge into navigable waters. Although all these dischargers technically require NPDES permits under CWA, controls usually are most appropriately applied at the point of treatment. In recognition of this fact and in response to comments critical of a requirement that users of privately owned treatment works obtain NPDES permits, EPA has made several changes that affect these users. We have added a new subparagraph (m) to authorize the permit writer to include in the permit issued to a privately owned treatment works any conditions expressly applicable to any user, as a limited co-permittee, that may reasonably be necessary to ensure compliance with applicable requirements of the NPDES program. For example, a permit issued to a treatment works might require each user to notify the Director if it begins or expects to begin to use or manufacture a toxic pollutant not reported in the permit application. The permit writer alternatively may issue separate permits

to the treatment works and to the users, or may require any user to submit its own permit application. The Director's decision to (1) impose no conditions applicable to the users, (2) impose conditions on one or more users, (3) issue separate permits, or (4) require separate permits, and the basis for the decision, must be included in the fact sheet prepared for the draft permit. This discretionary authority should provide the Director sufficient flexibility both to ensure compliance with applicable standards and limitations and to minimize any administrative burdens. Proposed § 122.64 has been amended by adding a new provision (now § 122.53(d)(3)) that requires the privately owned treatment works to identify in its permit application all users of the treatment works. Sections 122.51(c)(2)(b)(ii) (amending proposed § 122.63(a)) and 122.53(a) (proposed § 122.64(a)) exclude users from having to apply for and obtain a permit, except as the Director otherwise may require under § 122.62. Finally, EPA has amended proposed § 124.11(b)(1) to add a new subparagraph (now § 124.10(c)(2)(v)) to require that public notice of permits be sent to users identified in the permit application submitted by the privately owned treatment works. These requirements apply prospectively, so that only after the effective date of these regulations will privately owned treatment works have to identify their users in their permit applications and permit writers be required to choose whether to impose permit conditions or application requirements on such users under § 122.63(m). (Of course, permit writers, in appropriate cases, may determine that it is unnecessary to impose any permit requirements on the users of the treatment works.) Existing permits held by privately owned treatment works, however, may contain conditions applicable to their users (whether or not the users are identified in the permit). Permitting authorities will continue to enforce those conditions. See the Decision of the General Counsel No. 43 (Friendswood Development Company).

§ 122.63 Calculating NPDES permit conditions.

(1) Section 122.63(b) sets requirements for calculating permit limits on the basis of the actual production of the facility. The regulation has been reworded with no substantive change from the proposed § 122.70(a)(2), including the comment. Additionally EPA has now specified that the time period for the production must correspond to the time period for the permit limit. For example, permit limits usually are written for a maximum daily discharge, and an average monthly discharge which is usually lower by a factor of 1.5 or 2. Therefore, a one-month production figure should be used to calculate the average monthly discharge limitation, or a one-day production to calculate the maximum daily limitation.

(2) Paragraphs (c), (d), and (e), have been reworded from the proposal with no substantive change. The definitions in proposed § 122.70(c) have been reworded somewhat and moved to the definitions section.

The definitions of "average monthly discharge limitation," "average weekly discharge limitation," and "maximum daily discharge limitation" all use the term "daily discharge," which is also defined. This has allowed the elimination of duplicate wording in the definitions and has made the terms more nearly parallel.

(2) Paragraph 122.63(f) (proposed § 122.70(c) and (d)) now provides permit issuers greater flexibility in using concentration limits. Whenever appropriate, permits may include a concentration limit in addition to a mass limit. Limitations expressed exclusively in terms other than mass may be used (1) when applicable effluent guideline limitations are expressed other than in mass; (2) when on a case-by-case basis the mass of the discharge cannot be related to production or other measures of operation, and dilution will not be used as a substitute for treatment; or (3) for pH or other pollutants which cannot appropriately be expressed as mass. For example, total suspended solids discharges from certain mining operations may be unrelated to measures of operation. Finally, a permit can always contain a non-mass limit in addition to a mass limit, and the permittee must comply with both.

(3) § 122.63(i) (proposed § 122.70(i)) concerns requirements for placing limitations on internal waste streams.

The provision now requires the permit writer to include in the fact sheet under § 124.56 the unusual circumstances which require the imposition of such limits. This requirement will ensure that the permittee and other interested persons will be able to judge the reasons why such limitations, which are to be imposed only in exceptional circumstances, are being used in each case.

§ 122.64 Duration of certain NPDES permits.

This requirements section has been modified by deleting the dates in proposed Appendix A and replacing them in the body of the regulation with the single date of June 30, 1981. The reasons for this change are discussed in the preamble to § 122.62(c).

§ 122.66 New sources and new dischargers.

(1) Paragraph 122.66(d)(2) (proposed § 122.81(d)) governing exclusions from the protection period has been modified slightly to clarify that the Director may impose any permit limit in conformance with § 125.3 on a toxic pollutant or hazardous substance not controlled by new source performance standards during the protection period, thus including limits imposed on a case-by-case basis as well as those required by effluent guidelines.

(2) Proposed § 122.81(d)(3) (now § 122.66(d)(3)) required that permittees with a 10 year "protection period" pursuant to § 122.81(d)(1) be in compliance with all applicable requirements immediately upon the expiration of the protection period. Some commenters were concerned that when new requirements were promulgated a short time before the expiration of the protection period this section could force dischargers to shut down pending construction of treatment facilities necessary to achieve immediate compliance. EPA recognizes this concern and has revised final § 122.66(d)(3) to allow additional time for compliance, but only when necessary to comply with requirements promulgated less than 3 years before the expiration of the protection period. This three-year period parallels the requirements of sections 301(b)(2)(D) and (F) of CWA, which allow dischargers up to three years to comply with certain newly-promulgated effluent limitations.

(3) An additional change to proposed § 122.81(d)(4) (now § 122.66(d)(4)) allows new dischargers which commenced discharge before August 13, 1979 (the effective date of the June 7, 1979, NPDES regulations) to qualify for schedules of compliance. (See further discussion in the preamble to § 122.10(a).)

(4) Some commenters seemed confused about the distinction in proposed § 122.81(b) (now § 122.66(b)) between construction that creates a new source at the site of an existing source and construction that only modifies the existing source. Therefore, we have clarified paragraphs (b)(1) and (b)(2) to emphasize that construction of a new source requires construction of a new building, structure, facility, or installation. Construction that alters, replaces, or adds to existing process or production equipment without creating these separate, physical entities is merely a modification subject to § 122.15. For example, the construction

of an additional digester within an existing building at a pulp mill to increase plant capacity would be a modification, whereas the construction of a separate building to produce inorganic chemicals at the site of an existing organic chemicals plant would create a new source.

(5) Section 122.66(c) (proposed § 122.81(c)) contains several minor changes to conform to the Council on Environmental Quality's regulations for implementing the procedural provisions of NEPA, 40 CFR Parts 1500–1508. Those regulations include a requirement that agencies prepare a finding of no significant impact, rather than issuing a "negative declaration" where an environmental assessment has been prepared which indicates that an environmental impact statement (EIS) is not needed. Thus the final section substitutes the phrase "finding of no significant impact" where the proposal required a "negative declaration."

Section 122.66(c)(4)(ii) (proposed § 122.81(c)(4)(ii)) barred on-site construction for new sources for which an EIS was not required until 15 days after issuance of a negative declaration. This paragraph has been changed to state that on-site construction shall not commence until 30 days after issuance of a finding of no significant impact, to allow for public comment in line with CEQ's NEPA regulations at 40 CFR § 1501.4(e), and EPA's regulations implementing CEQ's regulations at 40 CFR § 6.400(d). CEQ's regulations, 40 CFR § 1501.4(e), provide in certain circumstances that no action shall be taken until 30 days following the issuance of a finding of no significant impact to allow for public review. EPA has decided that this rule shall apply in all cases where a finding of no significant impact has been issued, in line with the public review procedures for final environmental impact statements.

Proposed § 122.72.

Proposed § 122.72, which contained NPDES noncompliance reporting requirements, has been moved to § 122.18. The substance of the proposed section has not changed. All of the noncompliance reporting requirements for each program have been consolidated in § 122.18.

Proposed § 122.83.

EPA has deleted § 122.83 of the proposal, "Special considerations under Federal law." However, EPA-issued NPDES permits must still reflect requirements of other applicable Federal laws or regulations under section 301(b)(1)(C) of CWA, as incorporated in § 122.61(g)(5). In addition, all EPA-issued permits must reflect requirements of other Federal laws or regulations, as listed in § 122.12 and as further discussed in the accompaning preamble discussion.

Appendices

New appendices have been added (and modifications have been made to Appendix A, discussed in the preamble to § 122.62(c)). Appendix B lists criteria for concentrated animal feeding operations under § 122.54 and Appendix C lists criteria for concentrated aquatic animal production facilities under § 122.55. Appendix D lists several tables of pollutants required to be tested by existing industrial dischargers under § 122.53(d), discussed in the preamble to the consolidated application forms elsewhere in today's Federal Register.

Table VII.—Relationship of June 7 Part 122 to Today's Regulations

Summary of Changes from Part 122 of the June 7 Regulations

EPA has developed the Table VII for use by readers who are familiar with Part 122 of the final NPDES regulations published on June 7, 1979 (44 FR 32854). The table shows the new numbering of each section of Part 122 of the June 7 regulations, and shows what changes, additions, and deletions have been made to the paragraphs and subparagraphs of each section. We hope that this table will provide a guide to a more detailed examination of the changed regulations themselves. The table is organized as follows:

- The *first column* lists each paragraph or subparagraph of the June 7 regulations in order.
- The *middle column*, in the first phrase, gives the subject of the June 7 paragraph or subparagraph in a few words. The second phrase gives a summary indication of changes from the June 7 regulations.
- The *last column* lists the paragraphs or subparagraphs of today's regulations corresponding to the contents of the paragraph or subparagraph of the June 7 regulations in the first column.
- Each June 7 section heading (for example, *Purpose and scope*) is listed separately and italicized. At the end of each June 7 section, any additional paragraphs in the corresponding section of today's regulations are listed. A blank in the first column indicates that the paragraph is competely new. A bracketed reference to a paragraph of the June 7 regulations in the first column indicates that the paragraph has been moved into the corresponding section of today's regulations from some other section of the June 7 regulations. In both instances no explanation appears in the second column. This is because the bracketed June 7 paragraph is also listed, and explained, in the place where it originally appeared, and because completely new material is fully addressed in this preamble. These two devices ensure that all additional changes and reorganizations pertaining to a section of the June 7 regulations are noted at the end of the section.

BILLING CODE 6560-01-M

TABLE VII

RELATIONSHIP OF JUNE 7 PART 122 TO TODAY'S REGULATIONS

June 7 Paragraph Number	Subject and Any Changes	Today's Paragraph Number(s)
§122.1	Purpose and scope	§122.1, §122.2, §122.51
§122.1(a)	Coverage of NPDES. Reworded, no substantive change	§122.1(a)(iii)
§122.1(b)	Coverage of 122, 123, 124. Reworded, no substantive change	§122.1(b)
§122.1(b)(3)	Coverage of 125 by States. Moved to Part 123	§123.7(d)
§122.1(c)	Permits implement the law. Deleted, duplicates other provisions	
§122.1(d)	Permits issued by RA or State Director. Deleted, duplicates definitions	
§122.1(d) [Comment]	RA and State Director include delegees. Deleted, duplicates definitions	
§122.2	Law authorizing NPDES permits. Minor wording changes	§122.51
§122.2(a)	301(a) of CWA. Minor wording changes	§122.51(b)(1)
§122.2(b)	402(a)(1) of CWA. Minor wording changes	§122.51(b)(2)
§122.2(c)	318(a) of CWA. Minor wording changes	§122.51(b)(3)
§122.2(d)	405 of CWA. Minor wording changes	§122.51(b)(4)
§122.2(e)	402(b), 318(b) & (c), 405(c) of CWA. Minor wording changes	§122.51(b)(5)

TABLE VII

RELATIONSHIP OF JUNE 7 PART 122 TO TODAY'S REGULATIONS
(Continued)

June 7 Paragraph Number	Subject and Any Changes	Today's Paragraph Number(s)
§122.2(f)	404 of CWA. Moved to Part 123	§123.1
§122.2(g)	304(i) of CWA. Minor wording changes	§122.51(b)(6)
§122.2(h)	501(a) of CWA. Minor wording changes	§122.51(b)(7)
§122.2(i)	101(e) of CWA. Minor wording changes	§122.51(b)(8), §122.1(e)
§122.3	Definitions	§122.3, No longer with paragraph numbers
§122.3 [Comment]	Other terms defined in CWA. Minor wording changes; comment incorporated	§122.3
§122.3(a)	"Act" Deleted, CWA used instead	CWA used instead
§122.3(b)	"Administrator" Added: "or an authorized representative"	§122.3
§122.3(c)	"Application" Minor wording changes	§122.3
§122.3(d)	"Applicable standards and limitations" Minor wording changes	§122.3
§122.3(e)	"Approved State program" Most of definition deleted	§122.3
§122.3(f)	"BMPs" Minor wording changes; combined with 404	§122.3
§122.3(h)	"Direct discharge" Minor wording changes	§122.3

TABLE VII

RELATIONSHIP OF JUNE 7 PART 122 TO TODAY'S REGULATIONS
(Continued)

June 7 Paragraph Number	Subject and Any Changes	Today's Paragraph Number(s)
§122.3(i)	"Director" Comment incorporated into text	§122.3
§122.3(j)	"Discharge" Minor wording changes	§122.3
§122.3(k)	"Discharge of a pollutant" Minor wording changes	§122.3
§122.3(l)	"DMR" Minor wording changes	§122.3
§122.3(m)	"Effluent limitation" Minor wording changes	§122.3
§122.3(n)	"Enforcement Division Director" Deleted as duplicative	
§122.3(p)	"Indirect discharger" Minor wording changes	§122.3
§122.3(q)	"Interstate agency" Minor wording changes	§122.3
§122.3(s)	"NPDES" Added: "pretreatment"	§122.3
§122.3(t)	"Navigable waters" Term is deleted: minor wording changes for definition of "waters of the United States"	
§122.3(u)	"New discharger" Includes indirect discharger switching to direct discharge, and mobile point sources which move (e.g., drilling rigs)	§122.3
§122.3(v)	"New source" Minor wording changes; comment deleted	§122.3

TABLE VII

RELATIONSHIP OF JUNE 7 PART 122 TO TODAY'S REGULATIONS
(Continued)

June 7 Paragraph Number	Subject and Any Changes	Today's Paragraph Number(s)
§122.3(w)	"Permit" Reworded; includes general permit; excludes draft and proposed permits	§122.3
§122.3(x)	"Person" Reworded, no substantive change	§122.3
§122.3(z)	"Pollutant" Minor wording changes; comment incorporated into note	§122.3
§122.3(aa)	"Process wastewater" Same	§122.3
§122.3(bb)	"POTW" Reworded, no substantive change	§122.3
§122.3(cc)	"Regional Administrator" Minor wording changes	§122.3
§122.3(dd)	"Schedule of compliance" Minor wording changes	§122.3
§122.3(hh)	"State" Minor wording changes	§122.3
§122.3(ii)	"State Director" Minor wording changes	§122.3
§122.3(jj)	"Variance" Added: now includes modifications of time deadlines	§122.3
§122.3(kk)	"Waters of the United States" Now defined; wording changes, clarifying treatment ponds exclusions	§122.3
[§122.16(c)(3)]	"Average monthly discharge limitation"	§122.3
[§122.16(c)(4)]	"Average weekly discharge limitation"	§122.3

TABLE VII

RELATIONSHIP OF JUNE 7 PART 122 TO TODAY'S REGULATIONS
(Continued)

June 7 Paragraph Number	Subject and Any Changes	Today's Paragraph Number(s)
[§122.16(c)(1)]	"Continuous discharge"	§122.3
	"Daily discharge"	§122.3
	"Draft permit"	§122.3
	"Effluent limitations guideline"	§122.3
	"Facility or activity"	§122.3
	"General permit"	§122.3
	"Hazardous substance"	§122.3
	"Major facility"	§122.3
[§122.16(c)(2)]	"Maximum daily discharge limitation"	§122.3
	"Owner or operator"	§122.3
	"Primary industry"	§122.3
	"Privately owned treatment works"	§122.3
	"Proposed permit"	§122.3
	"Recommencing discharger"	§122.3
	"Secondary industry"	§122.3
	"Site"	§122.3
	"State/EPA Agreement"	§122.3
	"Toxic pollutant"	§122.3
[§122.3(t)(6)]	"Wetlands"	§122.3
§122.4	Exclusions	§122.51(c)(2)
§122.4(a)(1)	Sewage from vessels. Added: when secured to a storage or seafood facility	§122.51(c)(2)(i)
§122.4(a)(2)	404. Same	§122.51(c)(2)(ii)

TABLE VII

RELATIONSHIP OF JUNE 7 PART 122 TO TODAY'S REGULATIONS
(Continued)

June 7 Paragraph Number	Subject and Any Changes	Today's Paragraph Number(s)
§122.4(a)(3)	Indirect dischargers. Part of comment incorporated	§122.51(c)(2)(iii)
§122.4(a)(4)	Silvicultural. Minor wording changes	§122.51(c)(2)(v)
§122.4(b)	State regulation not precluded. Minor wording changes	§122.1(f)
	Inclusions - a specific list.	§122.51(c)(1)
	Exclusions - ordered by on-scene coordinator.	§122.51(c)(iv)
	Exclusions - irrigation return flows.	§122.51(c)(vi)
§122.5	Signatories	§122.6
§122.5(a)	Permit applications. Same	§122.6(a)
§122.5(b)	Reports; authorization. Added: a position can be authorized	§122.6(b)
§122.5(c)	Changes to authorization. Reworded: submitted prior to or together with reports	§122.6(c)
§122.5(d)	Certification. Same; comment deleted	§122.6(d)
§122.5(e)	Applicable to States. Still applicable to States; may adopt equivalent language, taken care of in general provisions of Part 123	
§122.10	Application for a permit	§122.4, §122.53
§122.10(a)	Who must apply. Minor wording changes	§122.4(a), §122.53(a)

TABLE VII

RELATIONSHIP OF JUNE 7 PART 122 TO TODAY'S REGULATIONS
(Continued)

June 7 Paragraph Number	Subject and Any Changes	Today's Paragraph Number(s)
§122.10(b)(1)	Reapplication when increase discharge. Deleted - now grounds for modification, Director may require new application, see §124.5	
§122.10(b)(2)	Expiring permits - 180 day rule. Same for POTWS; reworded: phasing-in for new application forms	§122.53(c)
§122.10(c)	New discharger. Minor wording changes	§122.53(b)
	Who applies? Operators must apply	§122.4(b)
[§122.11(a)]	Completeness. Permit can't be issued until application is complete, to Director's satisfaction	§122.4(c)
	Information requirements. Lists information required in Form 1	§122.4(d)
	Recordkeeping. Requires applicants to keep data used for applications for three years	§122.4(e)
	Information requirements for existing industrials. Lists information required in Form 2c	§122.53(d)
	Information from animal feedlots & fishfarms. Lists information in Form 2b	§122.53(e)
	Information from POTWs [Reserved]. Will list information in Form 2a	§122.53(f)
	Information from new industrials [Reserved]. Will list information in Form 2d	§122.53(g)

TABLE VII

RELATIONSHIP OF JUNE 7 PART 122 TO TODAY'S REGULATIONS
(Continued)

June 7 Paragraph Number	Subject and Any Changes	Today's Paragraph Number(s)
[§124.12]	Special provisions for new sources. Minor wording changes	§122.53(h)
[§124.51(a),(b)]	Variance requests by non-POTWs. Reworded, no substantive change	§122.53(i)
[§124.51(a),(c)]	Variance requests by POTWs. Reworded, no substantive change	§122.53(j)
[§124.51(d)]	Expedited variance procedures. Reworded, time specified after notice is received (instead of "before draft permit is formulated") added: draft or final permit may contain alternative limitations; comment deleted	§122.53(k)
§122.11	Permit issuance, effect of a permit	§122.13
§122.11(a)	Application completeness. Reworded, no substantive change	§122.4(c)
§122.11(b)	Final EPA action. Incorporated into 124	§124.19
§122.11(c)	Compliance is compliance with CWA. Minor wording changes	§122.13(a)
§122.11(d)(1)	Issuance does not convey rights or privileges. Same	§122.13(b)
§122.11(d)(2)	Issuance does not authorize injury. Reworded, no substantive change	§122.13(c)
§122.11(d)(3)	Issuance does not preempt State law. Deleted as redundant	
§122.12	Duration, continuation, transfer	§122.5, §122.9, §122.14, §122.64
§122.12(a)	Duration. Reworded; "modification etc." deleted as redundant	§122.9(a)

TABLE VII

RELATIONSHIP OF JUNE 7 PART 122 TO TODAY'S REGULATIONS
(Continued)

June 7 Paragraph Number	Subject and Any Changes	Today's Paragraph Number(s)
§122.12(b)(1)	Continuation by EPA. Minor wording changes	§122.5(a)
§122.12(b)(2)	Effectiveness of continued permits. Minor wording changes	§122.5(b)
§122.12(b)(3)	Enforcement of continued permits. Reorganized, no major changes	§122.5(c)
§122.12(b)(4)	Continuation by States. Minor wording changes	§122.5(d)
§122.12(c)	Short-term permits. All dates in Appendix A are June 30, 1981; rearrangement and wording changes; parts of comments deleted or moved to §122.62(c); no BAT permits without toxics data.	§122.64
§122.12(d)	Transfer. Reworded: automatic transfers under conditions similar to §122.12(d); otherwise, permit must be modified to transfer	§122.14, §122.7(l)(3)
§122.13	Prohibitions	§122.52
§122.13(a)	Noncompliance with CWA. Minor wording changes	§122.52(a)
§122.13(b)	No State certification. Minor wording changes	§122.52(b)
§122.13(c)	Regional Administrator objects. Same	§122.52(c)
§122.13(d)	Nonattainment of water quality of States. Minor wording changes	§122.52(d)
§122.13(e)	Impairing navigation. Same	§122.52(e)

TABLE VII

RELATIONSHIP OF JUNE 7 PART 122 TO TODAY'S REGULATIONS
(Continued)

June 7 Paragraph Number	Subject and Any Changes	Today's Paragraph Number(s)
§122.13(f)	Radiological waste. Same	§122.52(f)
§122.13(g)	Inconsistent with 208 plan. Minor wording changes	§122.52(g)
§122.13(h)	Ocean discharge. Minor wording changes	§122.52(h)
§122.13(i)	Violation of water quality. Change to prohibit any discharge violating water quality standards; new source must demonstrate sufficient allocation before close of public comment period, need not prove "entitlement"	§122.52(i) and (j)
§122.14	Conditions applicable to all permits Incorporation by reference requires specific cite.	§122.7, §122.60, §122.61
§122.14(a) [Reserved]	[Application-based limits]. Existing dischargers must notify Director if they exceed five-times levels reported in the application	§122.61(a)
§122.14(b)	Duty to comply. Reworded, no substantive change	§122.7(a)
§122.14(c)	Permit may be modified. Added: filing of a modification request does not stay conditions	§122.7(a), §122.7(f)
§122.14(d)	Toxic standards or prohibitions Comment into standard permit terms, §122.60(a)(1); requirement to modify into modification §122.15 and into §122.62	§122.60(a)(1), §122.15(a)(5)(ii), §122.62(b)

TABLE VII

RELATIONSHIP OF JUNE 7 PART 122 TO TODAY'S REGULATIONS
(Continued)

June 7 Paragraph Number	Subject and Any Changes	Today's Paragraph Number(s)
§122.14(e)	Reporting requirements. No longer tied to causes for modification; causes spelled out individually; Director's right to request application in modification (§124.5)	§122.7(l)
§122.14(f)	Right of entry, copying, etc. Minor wording changes	§122.7(i)
§122.14(g)	Operate efficiently. Added: requires backup equipment only to comply with permit; minor wording changes	§122.7(e)
§122.14(h)	Noncompliance reporting. Extensively rearranged, some substantive changes. Added: permits must specify 24-hr. pollutants, others not reported; planned changes and anticipated non-compliance in advance	§122.7(l)(2), (l)(6), (l)(7), §122.60(f)(3), §122.62(g)
§122.14(i)	Duty to minimize impact of noncompliance. Minor wording changes	§122.7(d)
§122.14(j)	Duty to halt activities. In §122.7; not a defense against enforcement, §122.60; minor wording changes	§122.7(c), §122.60(b)
§122.14(k)	Bypass. Rearranged, no substantive change	§122.60(g)
§122.14(l)	Upset. Comment partially incorporated, no substantive change	§122.60(h)

TABLE VII

RELATIONSHIP OF JUNE 7 PART 122 TO TODAY'S REGULATIONS
(Continued)

June 7 Paragraph Number	Subject and Any Changes	Today's Paragraph Number(s)
[§122.10(a)]	Duty to reapply.	§122.7(b)
[§122.11(d)]	Permit does not convey property rights.	§122.7(g)
	Duty to provide information to the Director.	§122.7(h)
[§122.20(b)(2)]	Monitoring must be representative.	§122.7(j)(1)
[§122.21(b)]	Retaining records of monitoring.	§122.7(j)(2)
[§122.5(a)]	Signatory requirements.	§122.7(k)
[§122.31(e)(1)]	Reporting planned changes.	§122.7(l)(1)
[§122.12(d)(1)]	Reporting transfers.	§122.7(l)(3)
[§122.22(a)]	Reporting monitoring results.	§122.7(l)(4)
[§122.22(c)]	Reporting compliance with construction schedule.	§122.7(l)(5)
[§122.31(d)(2)]	Reporting other information previously reported falsely.	§122.7(l)(7)
	Listing of civil & criminal penalities.	§122.60(a)(2)
[§122.20(c)]	Monitor using 40 CFR 136.	§122.60(c)(1)
[§122.20(f)]	Penalties for falsifying monitoring.	§122.60(c)(2)
[§122.21(c), §122.22(d)]	Penalties for false statements.	§122.60(d)
[§122.22(a), (b); 122.16(c)]	Monitoring reports.	§122.60(e)
[§122.14(k)(2)(iii), §122.14(l)(3)(iii)]	24-hr. reporting for upset & bypass.	§122.60(f)
	Application-based notification.	§122.61(a)
[§122.15(d)(1)]	New users reporting by POTWs.	§122.61(b)

TABLE VII

RELATIONSHIP OF JUNE 7 PART 122 TO TODAY'S REGULATIONS
(Continued)

June 7 Paragraph Number	Subject and Any Changes	Today's Paragraph Number(s)
§122.15	Applicable limitations and standards	§122.8, §122.62
§122.15	"Applicable requirement." Minor wording changes	§122.8(b)
§122.15(a)	Effluent limitations and standards. Clarifications, separation of technology-based and other standards; including new sources; no substantive changes	§122.62(a),(b)
§122.15(b)	Short-term permits; reopener clause. All dates in Appendix A are June 30, 1980, conforming changes here; reopener clause now only reopens permit to include guideline, not all requirements of CWA	§122.62(c)
§122.15(c)	New source performance standards. Wording changes, incorporated into technology-based standards section, no substantive changes	§122.62(a)
§122.15(d)(1)	POTW notice of new users. Moved to standard permit conditions, comment incorporated	§122.61(b)
§122.15(d)(2)	POTW pretreatment program. Minor wording changes	§122.62(j)
§122.15(e)	POTW grant requirements. Comment deleted	§122.62(n)
§122.15(f)(1)-(9)	Additional water quality standards. Minor wording changes	§122.62(d)(1)-(9)
§122.15(f)(10)	Technology-based case-by-case limits. Incorporated into §122.62(a)	§122.62(a)
§122.15(f)(3)	State certification. Added: if certification is stayed, conditions under CWA section 301(b)(1)(c)	§122.62(d)(3)

TABLE VII

RELATIONSHIP OF JUNE 7 PART 122 TO TODAY'S REGULATIONS
(Continued)

June 7 Paragraph Number	Subject and Any Changes	Today's Paragraph Number(s)
§122.15(g)	Best management practices. Comment deleted	§122.62(k)
§122.15(h)	Sewage sludge. Same	§122.62(o)
§122.15(i)	Reissued permits with no less stringent limits. Added: changes in circumstances allows less stringent limits; increased production leading to reduced treatment efficiency	§122.62(l)
§122.15(j)	Vessels - Coast Guard regulations. Minor wording changes	§122.62(p)
§122.15(k)	Conditions for navigation. Same	§122.62(q)
	Incorporation of conditions by reference.	§122.8(c)
	Limits on toxic pollutants.	§122.62(e)
	Higher notification level.	§122.62(f)
	Indicators for 24-hr. reporting.	§122.62(g)
[§122.12(a)]	Permit durations.	§122.62(h)
[§122.20(a)]	Monitoring requirements.	§122.62(i)
	Privately owned treatment works.	§122.62(m)
§122.16	Calculation of effluent limits	§122.63
§122.16(a)(1)	Limits for each outfall. Reworded, no substantive change	§122.63(a)
§122.16(a)(2)	Actual production limits for non-POTWs. Reworded, comment incorporated; time period for production same as time period for limits	§122.63(b)(2)
§122.16(a)(3)	Design flow limits for POTWs. Same	§122.63(b)(1)

TABLE VII

RELATIONSHIP OF JUNE 7 PART 122 TO TODAY'S REGULATIONS
(Continued)

June 7 Paragraph Number	Subject and Any Changes	Today's Paragraph Number(s)
§122.16(b)	Total metals. Reworded, no substantive change	§122.63(c)
§122.16(c)	Maximum daily etc. limits. Added: "unless impracticable" Comment added to §122.60(e)(3)	§122.63(d)
§122.16(c)(1)-(4)	Definitions. Put into definitions section, some rewording, no substantive change	§122.3
§122.16(d)	Mass limits. Added: (1) mass-based limits not required when case-by-case production can't be used; (2) concentration-based limits allowed in addition to mass-based limits, and permittee must comply with both	§122.63(f)
§122.16(e)	Gross limits. Same	§122.63(g)
§122.16(f)	Net limits. Reworded, no substantive change, also added to causes for modification (§122.15)	§122.63(h); §122.15(a)(5)(iv) and (a)(5)(v)
§122.16(g)	Noncontinuous discharges. Same	§122.63(e)
§122.16(h)	Limits on internal wastestreams. Added: the fact sheet must include an explanation of why the limits are necessary; comment incorporated	§122.63(i)
[§122.41]	Disposal into wells, etc.	§122.63(j)
§122.17	Schedules of compliance	§122.10

TABLE VII

RELATIONSHIP OF JUNE 7 PART 122 TO TODAY'S REGULATIONS
(Continued)

June 7 Paragraph Number	Subject and Any Changes	Today's Paragraph Number(s)
§122.17(a)	Require compliance ASAP and no later than CWA deadline. Rearranged, no substantive change	§122.10(a)(1)
§122.17(b)	Interim requirements. Interim dates required if compliance is more than 1 year (instead of 9 months) away; examples put in Note	§122.10(a)(3), §122.10(a)(3)[Note]
§122.17(b)(1)	Time between dates. Time between interim dates may be up to 1 year (instead of 9 months)	§122.10(a)(3)(i)
§122.17(b)(2)	Divide into stages; submit reports. Again, time between interim dates may be 1 year; no other change	§122.10(a)(3)(ii)
§122.17(c)	Alternative schedules of compliance. Reworded, any termination of discharge	§122.10(b)
§122.17(c)(1)	Termination after permit is issued. Minor wording changes	§122.10(b)(1)
§122.17(c)(1)(i)	Modification to include termination. Reworded, no substantive change	§122.10(b)(1)(i)
§122.17(c)(1)(ii)	Terminate before miss any interim date. Same	§122.10(b)(1)(ii)
§122.17(c)(2)	Decision before permit is issued. Reworded, no substantive change	§122.10(b)(2)
§122.17(c)(3)	Alternative schedules. Added: Director may modify a permit to include two schedules (as well as issue a permit)	§122.10(b)(3)
§122.17(c)(3)(i)	Date for final decision. Reworded, no substantive change	§122.10(b)(3)(i)
§122.17(c)(3)(ii)	Schedule leading to termination. Reworded, no substantive change	§122.10(b)(3)(iii)

TABLE VII

RELATIONSHIP OF JUNE 7 PART 122 TO TODAY'S REGULATIONS
(Continued)

June 7 Paragraph Number	Subject and Any Changes	Today's Paragraph Number(s)
§122.17(c)(3)(iii)	Schedule leading to compliance. Reworded, compliance must be achieved as soon as possible	§122.10(b)(3)(ii)
§122.17(c)(3)(iv)	Follow appropriate schedule after decision. Reworded, no substantive change	§122.10(b)(3)(iv)
§122.17(c)(4)	Requirement to post a bond. DELETED	
§122.17(c)(5)	Firm public commitment. Reworded, comment deleted; no substantive change	§122.10(b)(4)
§122.17(d)	Director may modify compliance schedule. Reworded, moved to causes for modification, no substantive change	§122.15(a)(4)
§122.17(e)	POTW innovative technology grants. Reworded, moved to causes for modification, no substantive change	§122.15(a)(5)(xi)
§122.17(f)	No compliance schedule for new sources, etc. Reworded, moved to first paragraph, no major change	§122.10(a)(2)
§122.20	Monitoring	§122.7(j), §122.7(l)(4), §122.11, §122.60(c), §122.60(j)(1), §122.62(i)(1)
§122.20(a)	Permits must contain monitoring requirements. Reworded, no substantive change	§122.62(i)(1)
§122.20(a)(1)	Monitor for each pollutant limited. Reworded, no substantive change	§122.62(i)(1)(i)
§122.20(a)(2)	Monitor volume. Reworded, no substantive change	§122.62(i)(1)(ii)

TABLE VII

RELATIONSHIP OF JUNE 7 PART 122 TO TODAY'S REGULATIONS
(Continued)

June 7 Paragraph Number	Subject and Any Changes	Today's Paragraph Number(s)
§122.20(a)(3)	Monitor otherwise. Reworded, added example of requiring monitoring for pollutants reported in application, internal wastestreams, and net limits	§122.62(i)(1)(iii)
§122.20(b)(1)	Permits must specify monitoring equipment. Minor wording changes	§122.11(a)
§122.20(b)(2)	Monitoring frequency must be sufficiently representative. Added: may require continuous monitoring; deleted specific requirement for more frequent monitoring of variable effluents (representativeness requirement remains) other rewording; in standard permit conditions, permittees must take representative samples	§122.11(b), §122.7(j)(1)
§122.20(b)(3)	Permits must specify monitoring methods. Deleted as redundant	
§122.20(c)(1)	40 CFR Part 136 listed or alternate approved methods must be used. Permittees must use 40 CFR Part 136 methods or a method specified in the permit	§122.62(i)(iv), §122.60(c)(1)
§122.20(c)(2)	Director specifies a method in permit where no 136. Minor wording changes	§122.62(i)(1)(iv)
§122.20(c)(3)	Director may specify guideline method. DELETED	
§122.20(c)(4)	Director must specify guideline method if 40 CFR 136. DELETED	
§122.20(d)	Sampling frequency shall be consistent with guideline. DELETED	

TABLE VII

RELATIONSHIP OF JUNE 7 PART 122 TO TODAY'S REGULATIONS
(Continued)

June 7 Paragraph Number	Subject and Any Changes	Today's Paragraph Number(s)
§122.20(e)	Permittee should request more frequent monitoring. DELETED	
§122.20(f)	Penalties for falsifying monitoring. Same, moved to standard permit conditions	§122.60(c)(2)
[§122.22(a)]	Reporting frequency.	§122.11(c)
§122.21	Recording of monitoring results	§122.7(j)(2),(j)(3); §122.60(d)
§122.21(a)	Records of monitoring information. Deleted "and monitoring activities"	§122.7(j)(3)
§122.21(a)(1)	Date, place, and time of sampling. Same	§122.7(j)(3)(i)
§122.21(a)(2)	Samplers. Minor wording changes.	§122.7(j)(3)(ii)
§122.21(a)(3)	Date of analyses. Same	§122.7(j)(3)(iii)
§122.21(a)(4)	Analyzers. Minor wording changes.	§122.7(j)(3)(iv)
§122.21(a)(5)	Analytical techniques. Same	§122.7(j)(3)(v)
§122.21(a)(6)	Results. Same	§122.7(j)(3)(vi)
§122.21(b)	Records and results kept for 3 years. Added: all reports required by the permit and application data; at least 3 years from the date of the sample, measurement, or report; minor wording changes	§122.7(j)(2)

TABLE VII

RELATIONSHIP OF JUNE 7 PART 122 TO TODAY'S REGULATIONS
(Continued)

June 7 Paragraph Number	Subject and Any Changes	Today's Paragraph Number(s)
§122.21(b)(1)	Three years automatically extended during litigation. Now Director must request extension	§122.7(j)(2)
§122.21(b)(2)	Three years extended by Director's request. Minor wording changes	§122.7(j)(2)
§122.21(c)	Penalties for false statements. Minor wording changes	§122.60(d)
§122.22	Reporting of monitoring results by permittees	§122.7(l)(5), §122.60(e), §122.60(l)(5), §122.60(d), §122.62(i), §122.10(a)(4)
§122.22(a)	Permittees must use DMR. Minor wording changes	§122.60(e)(1)
§122.22(a)	Reports at least once per year. Now is duty of Director to specify in permit	§122.62(i)(2), §122.11(c)
§122.22(a)	Permittee must report other data not required by permit. DELETED	
§122.22(a) [Comment]	Examples of reporting frequency. Most of comment deleted	§122.62(i)(2)
§122.22(b)	Permittee must report more frequent monitoring. Reworded, no substantive change	§122.60(e)(2)
§122.22(c)	Permittee must report compliance with interim dates. Reworded, put in both standard permit conditions and schedules of compliance; no substantive change	§122.7(l)(5), §122.10(a)(4)
§122.22(d)	Penalities for false statement. Combined with §122.21(c) in standard permit conditions	§122.60(d)

TABLE VII

RELATIONSHIP OF JUNE 7 PART 122 TO TODAY'S REGULATIONS
(Continued)

June 7 Paragraph Number	Subject and Any Changes	Today's Paragraph Number(s)
§122.23	Noncompliance reporting by the Director	§122.18
§122.23(a)	State reports to Region; Regional reports to HQ. Changes: reports submitted to RA (instead of Enforcement Division Director), Regional reports submitted by RA to EPA Headquarters (instead of by Enforcement Division Director to EPA OWE)	§122.18, §122.18(e)
§122.23(b)	Reports of noncompliance by majors. Reworded, no substantive change	§122.18(a)
§122.23(b)(1)	Report failure to meet construction date. Reworded, no substantive change	§122.18(a)(2)
§122.23(b)(2)	Failure to submit schedule reports. Combined with failure to submit monitoring reports; minor wording changes	§122.18(a)(2)(iii)
§122.23(b)(3)(i)	Noncompliance with applicable limitations. Keyed on violation of permit (instead of applicable standards); unless returned to compliance before 45 days after reporting noncompliance was due (instead of "or date when DMR was due")	§122.18(a)(2)(v)(A)
§122.23(b)(3)(ii)	Pattern of noncompliance. Reworded, no substantive change	§122.18(a)(2)(v)(B)
§122.23(b)(3)(iii)	Significant noncompliance. Reworded, no substantive change	§122.18(a)(2)(v)(C)
§122.23(b)(4)	Failure to report DMR. Combined with failure to submit progress reports, minor wording changes	§122.18(a)(2)(iii)

TABLE VII

RELATIONSHIP OF JUNE 7 PART 122 TO TODAY'S REGULATIONS
(Continued)

June 7 Paragraph Number	Subject and Any Changes	Today's Paragraph Number(s)
§122.23(b)(4)	Failure to report noncompliance. Deleted as duplicative	
§122.23(b)(5)	Deficient reports. Reworded, no substantive change	§122.18(a)(2)(iv)
§122.23(b)(6)	Modification of compliance schedule. Reworded, reporting required when schedule is modified	§122.18(a)(2)(ii)
§122.23(b)(6) [Comment]	All noncompliance reported until resolved. Reworded, no substantive change	§122.18(a)(2)
§122.23(c)(1)	Information required in report. Rearranged, no substantive change	§122.18(a)(1)(iv)
§122.23(c)(1)(i)	Name, location, permit number. Same	§122.18(a)(1)(iv)(A)
§122.23(c)(1)(ii)	Date and description of noncompliance. Combined with requirement for a single entry per permittee (§122.23(c)(3)); minor wording changes	§122.18(a)(1)(iv)(B)
§122.23(c)(1)(iii)	Date and description of Director's actions. Same	§122.18(a)(1)(iv)(C)
§122.23(c)(1)(iv)	Status of noncompliance. Status as of date of review (instead of date of action)	§122.18(a)(1)(iv)(D)
§122.23(c)(1)(v)	Mitigating factors. Same	§122.18(a)(1)(iv)(E)
§122.23(c)(2)	Separate lists for POTW, non-POTW, Federal. Minor wording changes	§122.18(a)(1)(i)
§122.23(c)(3)	Single entry per permittee. Combined with date and description requirement; minor wording changes	§122.18(a)(1)(iv)(B)

TABLE VII

RELATIONSHIP OF JUNE 7 PART 122 TO TODAY'S REGULATIONS
(Continued)

June 7 Paragraph Number	Subject and Any Changes	Today's Paragraph Number(s)
§122.23(c)(4)	Alphabetized. Minor wording changes	§122.18(a)(1)(iii)
§122.23(d)	Statistical information. Minor wording changes	§122.18(a)(2)(vi)
§122.23(e)	Annual reports for non-majors. Reports must include number reviewed, number noncomplying, number of enforcement actions, and number of modifications extending deadlines	§122.18(c)(1)
§122.23(e)	Separate list of non-majors behind in construction. Same	§122.18(c)
§122.23(f)(1)	Reporting schedule for quarterly reports. Same	§122.18(e)(1)
§122.23(f)(2)	Reporting schedule for annual reports. Reports submitted at end of calendar year (December 31) (instead of fiscal year)	§122.18(e)(2)
§122.23(g)	Reports available to the public. No longer specified separately	§122.18(e)(2) footnote
§122.23(g) [Comment]	Designation of majors. Majors are defined in §122.3	§122.3
	Separate list for facilities with two or more permits.	§122.18(a)(1)(ii)
§122.30	General modification, revocation, termination. No longer a separate section	
§122.31	Modification, revocation and reissuance, and termination	§122.15, §122.16, §122.17
§122.31(a)	Any permit may be modified, etc. for cause. Same	§122.13(a), §122.15

TABLE VII

RELATIONSHIP OF JUNE 7 PART 122 TO TODAY'S REGULATIONS
(Continued)

June 7 Paragraph Number	Subject and Any Changes	Today's Paragraph Number(s)
§122.31(b)	Modification can't give longer than 5-year term. Put into duration section	§122.9(d)
§122.31(c)	Director may initiate. Director may revoke and reissue only for separate cause or at permittee's request; may initiate modification if cause exists	§122.15
§122.31(c)	Any interested person may request. Incorporated into 124	§124.5(a)
§122.31(d)	Causes for modification, revocation and reissuance, and termination. Separated causes for revocation and reissuance or termination, from modification; modifications only of condition giving cause	§122.15(a)
§122.31(d)(1)	Noncompliance with permit. Now cause for termination, "noncompliance" (instead of "violation")	§122.16(a)(1)
§122.31(d)(2)	Misrepresentation of facts. Now cause for termination; reworded: failure to disclose fully "at any time"	§122.16(a)(2)
§122.31(d)(3)	Reduction or elimination of discharge. Now cause for termination; last two examples deleted	§122.16(a)(4)
§122.31(d)(4)	Threat to human health. Now cause for termination; reworded: determination (instead of "information"); "human health or the environment" (instead of "human health or welfare"); added: "which can only be regulated to acceptable levels by permit modification or termination."	§122.16(a)(3)

TABLE VII

RELATIONSHIP OF JUNE 7 PART 122 TO TODAY'S REGULATIONS
(Continued)

June 7 Paragraph Number	Subject and Any Changes	Today's Paragraph Number(s)
§122.31(d)(5)	Transfer. Cause for a revocation and reissuance; continues to be cause for modification but not revocation and reissuance after automatic transfer.	§122.15(b)(2)
§122.31(e)	Cause for modification or revocation and reissuance. Modification only, unless permittee requests; modification only opens up condition giving cause	§122.15(a)
§122.31(e)(1)	Substantial alterations. Reworded: "which justify the application of permit conditions that are different or absent in the existing permit" (instead of "which were not covered in the effective permit"); examples deleted; comment partially incorporated, with less discussion of new sources	§122.15(a)(1)
§122.31(e)(2)	New information. Reworded, clarified, "information" not "factors"; other changes	§122.15(a)(2)
§122.31(e)(3)	New regulations. Combined with judical remand (§122.31(e)(4))	§122.15(a)(3)
§122.31(e)(3)(i)	Permit condition based on revised regulation. Minor wording changes	§122.15(a)(3)(i)(A)
§122.31(e)(3)(ii)	EPA action has revised. Minor wording changes	§122.15(a)(3)(i)(B)
§122.31(e)(3)(iii)	Request filed within 90 days. Reworded, no substantive change	§122.15(a)(3)(i)(C)
§122.31(e)(4)	Judicial remand or stay. Remanded by a court of competent jurisdiction; "remand or stay" (instead of "remand")	§122.15(a)(3)(ii)

TABLE VII

RELATIONSHIP OF JUNE 7 PART 122 TO TODAY'S REGULATIONS
(Continued)

June 7 Paragraph Number	Subject and Any Changes	Today's Paragraph Number(s)
§122.31(e)(5)	As authorized by CWA. Requirements listed separately in §122.15(a)(5)(ii)	§122.15(a)(5)(ii)
§122.31(e)(6)	Cross references. Separated	§122.15(a)
§122.31(e)(6)	Required by toxic standard or prohibition. Written out	§122.15(a)(5)(ii)
§122.31(e)(6)	Required by toxics reopener clause. Written out	§122.15(a)(5)(iii)
§122.31(e)(6)	To modify compliance schedule. Written out, transferred from §122.17(d)	§122.15(a)(4)
§122.31(e)(6)	Innovative waste treatment grant to POTW. Written out, transferred from §122.17(e)	§122.15(a)(5)(xi)
§122.31(e)(7)	Failure to notify affected State. Same	§122.15(a)(5)(vii)
§122.31(f)	Minor modification. Added: Consent of permittee required; deleted: unless would make permit less stringent	§122.17
§122.31(f)(1)	Minor modification, Correction of typos. Same	§122.17(a)
§122.31(f)(2)	More frequent monitoring. Minor wording changes	§122.17(b)
§122.31(f)(3)	Change in compliance schedule. Minor wording changes	§122.17(c)
§122.31(f)(4)	Transfer. Reworded, requirement for agreement included (instead of referenced), no substantive change	§122.17(d)

TABLE VII

RELATIONSHIP OF JUNE 7 PART 122 TO TODAY'S REGULATIONS
(Continued)

June 7 Paragraph Number	Subject and Any Changes	Today's Paragraph Number(s)
§122.31(f)(5)	Change in construction for new source. Same	§122.17(g)(1)
§122.31(f)(6)	Delete outfall. Minor wording changes	§122.17(g)(2)
[§122.10(b)(1) §122.14(e)]	Director may request an application.	§122.15
	Modification when State certification changes.	§122.15(a)(3)(iii)
[§122.16(f)(1)]	To incorporate net limits.	§122.15(a)(5)(iv)
[§122.16(f)(1)(ii)]	To remove net limits.	§122.15(a)(5)(v)
	When "reopener" for pretreatment is triggered.	§122.15(a)(5)(iii)
	To reopen pretreatment compliance schedule.	§122.15(a)(5)(vi)
	When discharge exceeds §125.3 levels.	§122.15(a)(5)(viii)
	When permittee begins to use or manufacture toxics.	§122.15(a)(5)(ix)
	To establish a higher "notificaton level."	§122.15(a)(5)(x)
[§122.31(d)]	Any cause for termination is cause for revocation.	§122.15(b)(1)
[§122.30]	Director follows Part 124 procedures for termination.	§122.16(b)
§122.40	General--Special NPDES programs No longer a separate section	
§122.41	Disposal into wells, etc.	§122.65
§122.41(a)	When to make adjustments. Same	§122.65(a)

TABLE VII

RELATIONSHIP OF JUNE 7 PART 122 TO TODAY'S REGULATIONS
(Continued)

June 7 Paragraph Number	Subject and Any Changes	Today's Paragraph Number(s)
§122.41(a)(1)	If no waste discharged. Same	§122.65(a)(1)
§122.41(a)(2)	Calculation for partial discharges. Minor wording changes, comment incorporated	§122.65(a)(2)
§122.41(b)	Not applicable for concentration guidelines. Minor wording changes	§122.65(b)
§122.41(c)	May be more stringent. Increased number of cross-references	§122.65(c)
§122.42	Concentrated animal feeding operations	§122.54
§122.42(a)	Permit requirements. Same	§122.54(a)
§122.42(b)(1)	Definition of animal feeding operation. Same	§122.54(b)(1)
§122.42(b)(2)	Definition of concentrated. Moved to Appendix B, no substantive change	§122.54(b)(2), Appendix B
§122.42(c)	Case-by-case designation. Minor wording changes	§122.54(c)
§122.43	Concentrated aquatic animal production facilities	§122.55
§122.43(a)	Permit required. Same	§122.55(a)
§122.43(b)	Definition of concentrated. Moved to Appendix C, no substantive changes	§122.55(b), Appendix C
§122.43(c)	Case-by-case designation. Minor wording changes	§122.55(c)
§122.44	Aquaculture projects	§122.56

TABLE VII

RELATIONSHIP OF JUNE 7 PART 122 TO TODAY'S REGULATIONS
(Continued)

June 7 Paragraph Number	Subject and Any Changes	Today's Paragraph Number(s)
§122.44(a)	Permit requirements. Same	§122.56(a)
§122.44(b)	Definitions. Same	§122.56(b)
§122.45	Separate storm sewers	§122.57
§122.45(a)	Permit required. Added: coverage of permit from comment at end of §122.45; minor wording changes	§122.57(a)
§122.45(b)	Definitions. Reworded, clarified	§122.57(b)
§122.45(c)	Case-by-case designation. Minor wording changes	§122.57(c)
§122.46	Silvicultural activities	§122.58
§122.46(a)	Permit required. Same	§122.58(a)
§122.46(b)	Definitions. Minor wording changes	§122.58(b)
§122.47	New sources and new dischargers	§122.66
§122.47(a)	Definitions. Same, "site" moved to §122.3	§122.66(a)
§122.47(b)(1)(i)	Construction on a new site. Same	§122.66(b)(1)(i)
§122.47(b)(1)(ii)	Construction on an existing site. Reworded, totally replaces or causes change in discharge; comment deleted	§122.66(b)(1)(ii)
§122.47(b)(2)	Modification of existing source. Reworded - construction must create new building	§122.66(b)(2)

TABLE VII

RELATIONSHIP OF JUNE 7 PART 122 TO TODAY'S REGULATIONS
(Continued)

June 7 Paragraph Number	Subject and Any Changes	Today's Paragraph Number(s)
§122.47(b)(3)	Commencement of construction. Same	§122.66(b)(3)
§122.47(c)(1)	Requirement for an EIS. Same	§122.66(c)(1)
§122.47(c)(2)	EIS includes recommendation. Minor wording changes	§122.66(c)(2)
§122.47(c)(3)	RA review. Added: "issue, condition, or deny"; "or a finding of no significant impact"	§122.66(c)(3)
§122.47(c)(4)(i)	No on-site construction with EIS. Added: RA must find no irreversible impact; provisions of agreement shall be put into permit	§122.66(c)(4)(i)
§122.47(c)(4)(ii)	No on-site construction with no EIS. Must wait 30 days (instead of 15), RA must make "no significant impact" determination of construction (instead of the probable need for EIS)	§122.66(c)(4)(ii)
§122.47(c)(5)	Notification of on-site construction. Same	§122.66(c)(5)
§122.47(d)	Effect of NSPS. Added: paragraph clarifying that existing sources are not covered from comment at end of §122.47	§122.66(d)
§122.47(d)(1)	Protection period. Same	§122.66(d)(1)
§122.47(d)(2)	Doesn't apply to toxics. Added: Does not apply to any §125.3 limit on toxics or hazardous substances	§122.66(d)(2)

TABLE VII

RELATIONSHIP OF JUNE 7 PART 122 TO TODAY'S REGULATIONS
(Continued)

June 7 Paragraph Number	Subject and Any Changes	Today's Paragraph Number(s)
§122.47(d)(3)	Compliance schedules. Added: compliance schedules allowed to meet conditions promulgated within 3 years of permit expiration	§122.66(d)(3)
§122.47(d)(4)	Start-up control equipment. Same	§122.66(d)(4)
§122.47(d)(5)	Effectiveness of NSPS. Same	§122.66(d)(5)
§122.48	General permits	§122.59
§122.48(a)(2)	Definition of "GPPA." No longer separately defined, no substantive change	§122.59(a)(1)
§122.48(a)(2) [Comment]	Objection by EPA. Moved to 123 and 124	§124.57, §123.76
§122.48(a)(3)	Definition of general permit. Definition shortened, regulatory requirements elsewhere; no substantive change	§122.3, §124.57, §123.76, §122.59(a)(1)
§122.48(b)(1)	Coverage of separate storm sewers. Same	§122.59(a)(2)(i)
§122.48(b)(2)	Coverage of other sources. Minor wording changes	§122.59(a)(2)(ii)
§122.48(c)	Covers a category within area. No longer a separate requirement	§122.59(a)(1)
§122.48(c)(1)	Area. Minor wording changes	§122.59(a)(1)
§122.48(c)(2)	Designation subject to review. DELETED	
§122.48(c)(3)	Procedures follow Part 124. Reworded, no substantive change	§122.59(b)(1)

TABLE VII

RELATIONSHIP OF JUNE 7 PART 122 TO TODAY'S REGULATIONS
(Continued)

June 7 Paragraph Number	Subject and Any Changes	Today's Paragraph Number(s)
§122.48(c)(3) [Comment]	Providing notice. Added to §124.57	§124.57
§122.48(d)(1)	Excluded sources. Reworded, no substantive change	§122.59(a)(1), §122.59(b)(2)
§122.48(d)(2)(i)	Permit applies to all not excluded. Reworded, no substantive change	§122.59(a)(1)
§122.48(d)(2)(ii)	Request for coverage. Minor wording changes	§122.59(b)(2)(v)
§122.48(e)(1)	Requirement for individual permit. Reworded, no substantive change	§122.59(b)(2)(i)
§122.48(e)(2)	EPA revocation. Reworded, requirement for onsite inspection deleted; allowance for additional time added	§122.59(b)(2)(ii)
§122.48(e)(3)	Request for individual permit. Reworded, no substantive change	§122.59(b)(2)(iii)
§122.48(e)(4)	Effect of individual permit. Incorporated with §122.48(e)(5)	§122.59(b)(2)(iv)
§122.48(e)(5)	Processing under Part 124. Incorporated with §122.48(e)(4)	§122.59(b)(2)(iv)
§122.49	Special considerations under Federal law.	§122.12
§122.49(a)	EO 11990 (Wetlands). Reserved in today's regulations	§122.12(f) (Reserved)
§122.49(b)	EO 11988 (Floodplains). Reserved in today's regulations	§122.12(f) (Reserved)
§122.49(c)	Wild and Scenic Rivers. Narrative added	§122.12(a)
§122.49(d)	National Historic Preservation. Narrative added	§122.12(b)
§122.49(e)	Land and Water Conservation Act. DELETED	

TABLE VII

RELATIONSHIP OF JUNE 7 PART 122 TO TODAY'S REGULATIONS
(Continued)

June 7 Paragraph Number	Subject and Any Changes	Today's Paragraph Number(s)
§122.49(f)	Endangered Species. Narrative added	§122.12(c)
§122.49(g)	Coastal Zone Management. Narrative added, comment deleted	§122.12(d)
§122.49(h)	RCRA. DELETED	
§122.49(i)	SDWA. DELETED	
§122.49(j)	Ocean Dumping. DELETED	
§122.49(k)	Surface Mining. DELETED	
§122.49(l)	Fish and Wildlife Coordination. Minor word changes	§122.12(e)
[122.47(c)]	NEPA. Coverage specified	§122.12(f)
§122.60	Delegation of Authority DELETED	
	Confidentiality of Information	§122.19

BILLING CODE 6560-01-C

PART 123—STATE PROGRAM REQUIREMENTS

A. What Does This Part Do?

This Part establishes the requirements for State RCRA, UIC, NPDES, and 404 programs and the process for approval, revision, and withdrawal of these State programs. It also establishes guidelines for EPA overview of these programs, including the requirement for a Memorandum of Agreement between EPA and the State. Although State programs are established and operated under State law, approved State RCRA, UIC, NPDES, and 404 programs also implement Federal law and operate in lieu of Federally administered programs. A permit issued by a State under State law after its program has been approved satisfies the Federal permit requirement. Under the CWA, EPA retains the right to object to ("veto") NPDES and 404 permits proposed to be issued by approved States. Part 123 contains the procedures for EPA objection to these permits.

Part 123 is divided into a general subpart (Subpart A) and five program specific subparts (Subparts B–F). Unless expressly indicated, the requirements of Subpart A are generally applicable to all of the State Programs covered by this Part, except State RCRA programs under interim authorization; their requirements are contained solely in Subpart F. Subparts B, C, D and E provide program-specific requirements additional to those of Subpart A for the RCRA final authorization, UIC, NPDES, and 404 programs, respectively.

The procedures for issuing permits, as well as the minimum technical requirements for such permits, are incorporated into the requirements for State programs by cross-references to other provisions of EPA regulations. For example, many of the permit requirements contained in Part 122, which is applicable in full to EPA-administered permit programs, are applicable to State programs through cross-references in Part 123. Because EPA does not issue Section 404 permits (these are issued by the Corps of Engineers in the absence of an approved State program), Part 122 does not contain a subpart devoted solely to 404 permitting. Instead, Part 123, Subpart E contains the additional permit processing requirements applicable to State 404 programs.

With one major exception, the requirements of Part 123 represent the *minimum* requirements which States must meet to qualify for approval. States are allowed some flexibility in how they implement these requirements and are free to impose more stringent controls. pursuant to State law. (The exception, discussed below, concerns the statutory requirement under RCRA that State hazardous waste programs be "consistent" with other approved State programs and with the Federal program.)

Many of the comments EPA received on proposed Part 123 objected to this scheme of setting minimum requirements for State programs and allowing States flexibility to implement those requirements. Some commenters felt that the requirements for State programs were too detailed and inflexible and that EPA should simply approve "effective" State programs. On the other hand, many national companies favored nationally uniform requirements and raised objections to allowing flexibility among the States. After careful consideration, EPA rejects both the suggestion that State program requirements should be totally flexible and the suggestion that they be much more rigid.

EPA believes that numerous problems would occur if it were to simply approve "effective" State programs without setting minimum requirements. First, since many States are presently working on developing programs, setting specific minimum requirements enables these States to know with certainty whether their program will be approvable. For example, State A is working on a hazardous waste statute. A controversial aspect of this legislation is the level of penalties and fines for program violations. By specifically establishing the minimum levels of fines for State programs in Part 123, EPA has given clear guidance. A requirement only of "effectiveness," which is subject to multiple interpretations, would subject the State to the risk of disapproval by EPA unless it enacted legislation identical to the Federal law.

It would be most difficult for the Agency to approve programs based on "effectiveness." To generate a record that a State program is "effective" which would withstand judicial scrutiny, EPA would have to look much beyond the State's submission for approval. Moreover, unless EPA established standards on which to judge whether the program was effective, it would be difficult to justify approving one State's program and denying another's. These regulations establish the specific criteria which are needed in order to make and justify these approval decisions.

In addition, because decisionmaking based on effectiveness relies primarily on the past performance of a program, it would be particularly difficult to judge State programs which are new or substantially modified since these programs would have no "track-record." Moreover, past performance is not as important to EPA as expected future performance. The Agency does not intend to disapprove all State programs which have had problems in the past. It views the decision whether or not to approve a State program as being forward looking; the Agency is primarily concerned that the program be effective in the future.[4]

Finally, all three of the statutes authorizing the State programs covered by this Part contemplate specific criteria for State programs (see CWA section 101(e), 402(b), 404(h), and 304(i); RCRA sections 3006(a) and 7004(b), and SDWA section 1421). There is a growing body of case law which suggests that in the absence of specific requirements EPA would not be able to deny a State's request for approval.

On the other hand, EPA rejects the suggestion that State programs be nationally uniform (i.e., that they should meet *all* the requirements of Parts 122 and 124). The Agency has carefully analyzed each of the Part 122 and Part 124 requirements to determine which are essential to State programs. In evaluating which requirements the State should adopt, EPA employed the following criteria:

(1) Is the requirement necessary to protect public health and the environment?;

(2) Is there a need for national uniformity with respect to the requirement?;

(3) Is the requirement necessary to promote a programmatic goal? (e.g., to promote public participation); and

(4) Is the requirement necessary under Federal law for State programs? (e.g., 5-year permit terms for NPDES and 404 permits).

Many of the procedures of Parts 122 and 124 do not meet these criteria, and therefore have not been made applicable to State programs. For example, while the Agency believes that fact sheets, draft permits, and 30 day public comment periods are necessary to ensure the opportunity for public participation (an explicit goal of Federal environmental programs), it does not

[4] In this regard, there was one place in the proposed regulations where the Agency suggested that past performance in enforcement would be a factor in evaluating State RCRA programs (see the *Comment* after proposed § 123.34(d)). This provision was strongly criticized by a large number of commenters who felt that past performance is not a relevant factor in evaluating a State program. While EPA believes that past performance can be considered, it agrees with the commenters that the decision whether or not to approve a State program is forward looking and that past performance should not be the only or prime decision factor.

believe that the process for administrative appeals of permits need to be uniform. Indeed, most States have their own administrative procedures acts and there were no comments suggesting that these were inadequate.

B. How Does This Part Relate to the June 14, 1979 Proposal?

The following is a discussion of the significant comments received and changes made to the June 14, 1979 proposal. Editorial and stylistic changes have been made to all sections and are not discussed.

Subpart A—General Program Requirements

A frequent complaint about the proposed consolidated permit regulations was that they were too complex and confusing. Some of the comments noted that there were a great number of cross-references in Part 123 and a general bifurcation of requirements between Subpart A and the program-specific subparts. Indeed, this bifurcation generated many of the cross-references.

To mitigate this problem EPA has further consolidated requirements by moving some of the material found in the program-specific subparts into the general subpart. For example, the criteria for withdrawal of State programs are found in § 123.14. In the proposal, one additional ground for withdrawal was included for State RCRA programs in Subpart B at § 123.41. In these regulations, EPA has moved proposed § 123.41 into the same section which contains the other grounds for withdrawal but, to avoid confusion, has clearly labeled it as being applicable only to State RCRA programs. While this approach means that some of the program-specific requirements are contained in Subpart A, it has resulted in the elimination of many cross-references and sections.

Subpart A is not applicable to State RCRA programs under interim authorization.

§ 123.1 Purpose and scope.

Some commenters questioned whether a State authorized to administer one of the programs under this Part would be required to seek authority to administer the others. The answer is no. EPA has never intended these regulations to act in such a manner. While EPA strongly encourages States to seek authority to administer all programs under this Part, and has promulgated these regulations in order to simplify the States' task in administering multiple programs, no affirmative duty to develop such programs is established by these regulations. It should by noted, however, that section 1422 of SDWA does require States listed by the Administrator to develop UIC programs. (All States have now been so listed.) In answer to a similiar comment concerning the requirement to consolidate, States are not being forced to consolidate when they administer multiple programs. These regulations, however, provide the framework for consolidation for those States that wish to do so. EPA encourages such consolidation.

Many commenters expressed concern about § 123.1(g) (proposed § 123.1(c)), regarding the transition from an EPA (or Corps of Engineers in the case of the 404 program) to a State administered program, and wanted EPA to retain permit issuance authority over permits being processed at the time of transfer. Potential permittees indicated it would be unfair to make an applicant whose application had been processed by EPA start over again with the State. While the Agency is sympathetic to these concerns, the statutes preclude retention of permit issuance authority after State program approval. For example, the Clean Water Act mandates that the Administrator (or the Secretary in the case of 404 programs) "suspend the issuance of permits" upon approval of a State program (see CWA sections 402(c) and 404(h)). Upon approval the State has the sole permit issuing authority. EPA cannot preclude States from reconsidering decisions made by EPA (or the Corps) during the processing of a permit application, as some commenters requested. EPA (or the Corps) will, however, transfer all pending permit applications and other relevant information, including the record of any proceedings, to the State at the time of program approval, and will work closely with the State to avoid unnecessary repetition. EPA (or the Corps) may maintain jurisdiction over permits issued prior to the transfer. Arrangements for the orderly administration of these permits are usually included in the Memorandum of Agreement.

Most of what was a *Comment* to proposed § 123.1(e) has now been included in the body of the regulation in § 123.1(j). The question of who has responsibility for program administration over activities on Indian lands drew many comments. Objections were raised to the requirement that States *must* administer the program over activities on Indian lands to the extent they are authorized to do so, coupled with the requirement of proposed § 123.5 that the State Attorney General analyze the State's authority over Indian lands. Because States will lack jurisdiction, in most instances, to control activities on Indian lands, and since many of the comments suggested that requiring the State to take a position on the issue could generate significant political controversies, EPA has modified the requirement of the proposal. EPA will assume that a State lacks authority unless the State affirmatively asserts authority and supports its assertion with an analysis from the State Attorney General. Thus, the State will not be forced to take a position unless it chooses to assert jurisdiction.

The provisions in § 123.1(k) (proposed § 123.1(f)) clarify that, except in regard to certain aspects of State RCRA programs, States may provide more stringent controls than do the comparable Federal programs. Provisions applicable under an EPA-administered program need not be adopted or may be modified by a State if their omission or modification would make the State program more stringent than the Federal program. For example, a State NPDES or 404 program need not provide for the issuance of general permits, but could instead require all dischargers to receive an individual permit. Likewise, NPDES States need not adopt upset or bypass provisions since more stringent control can be achieved without them.

Most of the *Comment* included in proposed § 123.1(f) regarding State programs with a greater scope of coverage then required by Federal law has been incorporated into the regulation, § 123.1(k)(2).

§ 123.2 Definitions.

Although the definitions of Part 122 apply to the terms used in Part 123, States are not required to adopt the same definitions. For example, although a State NPDES program must cover all "discharges of pollutants" into "navigable waters," it need not adopt the same language in defining the scope of coverage of the State program. For example, many NPDES States tie the permit requirement to the discharge of "waste," or use a different definition of waters. This is acceptable as long as the State does not adopt language which reduces the scope of coverage of the State program below the scope of coverage of the Federal program.

§ 123.3 Elements of a program submission.

This section establishes the documentation and information which a State must submit to EPA before program review can begin. Since the time allowed for EPA review of a State program submission is quite limited, it is

essential that all the necessary documents be submitted before the statutory review period starts. The Agency views each element of a submission as essential to review in making its approval decision. Program-specific additions have been added to the list of required elements so that all the elements are contained in one section.

Apparently, many commenters misconstrued the language of proposed paragraph (a). These commenters thought that EPA's 30-day review for completeness of the submission occurred *before* the commencement of the statutory-review period and pointed out that to do so would not be legal. EPA recognizes that the statutory-review period commences on the date of receipt of a complete submission and not on the date the Agency determines the submission is complete. § 123.3(b) has been revised to clarify this.

Proposed § 123.3(b)(5), which required that a State submit copies of the forms it intends to use in its program, has been shifted to § 123.4. Submission of these forms is more appropriate as a component of the program description than as a separate requirement.

§ 123.4 Program description.

All the program-specific additional requirements for the program description (i.e., proposed §§ 123.34 (RCRA), 123.52 (UIC), and 123.95 (404)) have been incorporated into this section and clearly identified.

The 404 requirement for a single agency has been dropped so as not to preclude States from using a "one-stop" permitting body for certain types of facilities, e.g., energy facilities. However, EPA believes that the use of a single State 404 agency is a preferable approach, offering more administrative simplicity and substantive consistency, and avoiding much potential confusion. Where more than one agency has responsibility for administering a State 404 program, the program submission must specifically address this division of authority, and discuss how the program will be administered and enforced by the State. Each responsible State agency must have full authority in the category of its jurisdiction. §§ 123.4(h)(7) and (8) have been added to establish these requirements.

Some commenters suggested that States be required to demonstrate that the staff designated to administer the program is adequate. Indeed, this is the purpose of § 123.4(b). Also, to avoid confusion, § 123.4(b) has been clarified to explicitly provide that any agency administering a program must have state-wide jurisdiction. A series of regional boards cannot administer a program unless they are sufficiently under the control of a State agency. The purpose of this requirement is to avoid inconsistent program administration within a State.

States with more than one agency responsible for administering a program are encouraged to designate a lead agency to facilitate communications between EPA and the State agencies having program responsibility. State RCRA programs must designate a lead agency. The lead agency need not be one of the agencies administering the program.

The requirement for submission by States of the forms they will use in their programs (proposed § 123.3(d)(5)) has been retained, but is now included as a part of the program description (§ 123.4(d)). Some commenters pointed out that program-specific requirements for State forms were not identified in the proposal. EPA has tried to clarify this. Other commenters suggested that States be required to use uniform national forms. EPA believes that States should have the flexibility to develop their own forms as long as they require the same basic information as EPA. Only in the case of the NPDES Discharge Monitoring Report is an identical form required.

§ 123.5 Attorney General's statement.

The Attorney General's statement is a central part of any State application for program approval. The Attorney General's statement is heavily relied upon by EPA in determining what authorities exist in a State, and thus whether these authorities can adequately operate in lieu of Federal requirements. While EPA will review a State's legal authorities, a complete evaluation is not possible without the Attorney General's interpretation of various provisions of State law. The Attorney General's certification can also be valuable where a State program is challenged for failure to conform with Federal requirements. The Agency will develop model Attorney General's statement formats for use in meeting the requirement of this section.

The proposal (§ 123.5(a)) required that the authorities cited by the Attorney General be in full force and effect at the time the statement is signed. This provision has been changed so as to prevent unnecessary delays in the approval process. The Attorney General may now sign the statement before the authorities are fully effective as long as the statutes and regulations cited by the Attorney General have been lawfully adopted prior to signing, and will be fully effective when the program is approved. For example, the provision now allows the Attorney General to sign the statement at the time of promulgation of a necessary regulations, even though its effectiveness is to be delayed.

In response to comments that States not be forced to assert jurisdiction over activities on Indian lands, § 123.5(b) has been changed to provide that the Attorney General need analyze the State's authority over activities on Indian lands only when the State asserts such jurisdiction.

One commenter suggested that the showing required under proposed § 123.94(b) for State section 404 programs regarding specification of disposal sites be deleted for lack of statutory basis. EPA concurs and has deleted this requirement.

§ 123.6 Memorandum of agreement.

The program-specific requirements for the Memorandum of Agreement (i.e., proposed §§ 123.37 (RCRA), 123.72 (NPDES), and 123.92 (404)) have been moved into this section for convenience.

One commenter suggested that MOAs be submitted to rulemaking, public notice, comment and hearing procedures before execution by the State Director. All MOAs will be subject to public scrutiny prior to program approval (when they become effective) if not prior to their signing by the State Director. In the case of RCRA and UIC programs, States are required to issue public notice of, and provide opportunity for public comment and hearings on their programs, a part of which is the MOA, prior to submittal to EPA. States are not required to provide similar procedures for NPDES and 404 programs, although some may do so. However, under all four programs, EPA will provide public notice of the receipt of State program submissions, including MOAs, provide a public comment period, and schedule a public hearing.

§ 123.6(b)—This paragraph identifies the basic requirements of the MOA. The *Note* under § 123.6(b)(2) points out that the nature and basis of EPA review of State permits varies among the programs. Under the CWA programs, EPA has a statutory duty to review State NPDES and 404 permits, and may object to permits proposed to be issued by a State. EPA is authorized to issue the NPDES permit, or the Corps of Engineers the 404 permit, if the State does not modify the permit within a specified period to satisfy EPA's objections. Under RCRA, EPA may not veto a proposed State permit to which it objects, but may terminate a permit issued by a State to the extent the permit does not reflect comments made

by EPA which it stated were necessary to implement State program requirements. Under the UIC program, EPA has neither a statutory right of review nor the ability to veto a State permit, but may make arrangements with the State through the MOA to review and comment upon State permits. Under all four programs, the MOA should be the vehicle for specifying the details of EPA's review of State programs.

Comments were received on proposed § 123.6(b)(4)(i) stating that EPA should always notify States before conducting inspections of facilities or activities within a State and that the section should be modified accordingly. EPA will, under most circumstances, provide advance notification. However, for cases of emergency and when otherwise necessary, EPA must retain the right to dispense with advance notification of inspections. § 123.6(b)(4)(i) has therefore been retained in its proposed form.

Proposed § 123.6(b)(4)(ii) concerning "fiscal arrangements for effective litigation support" has been dropped. Commenters indicated that they did not understand the nature of the requirement. The proposal included this as a means to ensure that enforcement activities are adequately funded, particularly when enforcement is conducted by an office outside the approved State agency (e.g., an Attorney General's office). Although EPA remains concerned about ensuring adequate funding for enforcement, it decided that this is appropriately handled in the context of a State/EPA agreement rather than through the MOA.

A new provision has been added to § 123.6(b)(4) requiring that the MOA include arrangements for the coordination of enforcement activities by EPA and the State.

Some commenters were concerned that § 123.6(b)(5), regarding the joint processing of permits required by EPA and a State under different programs, could lead to delays in permit issuance. They believed that approval of one permit would hinge on compliance with another. The intent of this paragraph has been misinterpreted. First, joint processing of permits is not required by the regulations, but rather is at the option of EPA and the State. It is intended to promote efficiency and avoid duplication and inconsistency. Where joint processing is chosen, the agreement could provide for separating out troublesome permits to avoid delays in issuing the others. § 124.4 provides for this separation. Further, the public would have an opportunity to comment on any provision regarding joint processing before program approval. § 123.6(b)(5) has been retained.

One commenter suggested that where more than one agency in a State administers a given program the MOA should require intra-State coordination. Such coordination has not been made an MOA requirement. While procedures for intra-State coordination may be referred to in the MOA, they are better discussed in the program description than in the MOA. § 123.4(b) requires a description of these intra-State procedures for coordination. In the case of State 404 programs a memorandum of understanding between the responsible State agencies will need to be included in the program description when more than one agency seeks to administer the program, and the responsible agencies will all need to be parties to the MOA under this section.

§ 123.6(f)—Several comments were received on this paragraph (proposed § 123.92(a)), which pertains to the scope of waivers of permit review available to the Regional Administrator under State 404 programs. These comments expressed two opposite viewpoints; some suggested that virtually no waivers be granted, while others suggested that the State be given a blanket waiver of EPA permit review upon program approval. EPA continues to take an intermediate position based on the express language of sections 404(j) and (k) of CWA, which provides EPA authority to review State permits, but allows waivers for specific classes and categories of activities.

Certain types of activities are likely to have substantial environmental effects, and EPA feels that it should always have an opportunity to review permit applications and draft permits for these activities. One such category is "major discharges." A commenter suggested that a definition for "major discharger" be formulated and applied nationwide. EPA believes that development of a nationwide definition is unrealistic given the variety of discharge and aquatic resource combinations within each State, and has therefore decided that such a definition is better placed in individual State MOA's with the Regional Administrator.

Another commenter requested an escalation procedure for resolving disagreements among Federal agencies on the scope of waivers. EPA disagrees. The waiver provision under section 404(k) does not require the concurrence of other Federal agencies. EPA has, through these regulations, provided other Federal agencies with an opportunity to comment on waivers by providing for consultation with the Corps of Engineers, Fish and Wildlife Service, and National Marine Fisheries Service on the scope of the waivers to be contained in the State/EPA MOA. Since the MOA is part of the State program submittal, these agencies will have an opportunity to comment on the waivers during the official review process required by sections 404(g)(2) and (3). Furthermore, EPA has required that procedures for MOA modification be consistent with those for MOA development. Thus, consultation with these other involved Federal agencies will also take place before any further waivers are implemented.

One commenter felt that the term "discharge which may affect the waters of another State" in § 123.6(f)(1)(i)(A) needed further definition to establish a reasonable basis for its use as a criterion. Although the term has not been further defined because it derives directly from the requirements of CWA section 404(h)(1), it is meant to apply to discharges which may cause or contribute to the likelihood of a long or short term chemical, physical, or biological change in the other State's waters, or which may violate the other State's water quality standards. In response to a number of comments, EPA has expanded the list of critical areas not subject to waiver in § 123.6(f)(1)(i)(C).

EPA agrees with one commenter who felt that if no problems are encountered with permits that are waived, the Agency should consider expanding the types of discharges for which review is waived. However, when EPA finds that individual permit review is needed to implement the goals of section 404, the Agency reserves the right to withdraw the waiver under § 123.6(g)(1). The only way the Agency has of determining this is by monitoring permit applications within waived categories when needed.

Proposed § 123.7 Requirement to obtain a permit.

This proposed section has been dropped because it was too vague and generalized. Program-specific language has been developed instead. Generally speaking, State law must provide for regulation of all activities regulated by the Federal program.

§ 123.7 Requirements for permitting.

This section was proposed as § 123.8. It lists the provisions of Parts 122 and 124 with which State programs must comply. The program-specific additional permit requirements [proposed §§ 123.39 (RCRA), 123.57 (UIC), and 123.73 (NPDES)] have been moved into this section for convenience. In addition, the cross-referenced section of Parts 122 and 124 now specify, in their headings,

that they are applicable to State programs. It should be noted that States are not precluded from adopting any of the other provisions of Parts 122 and 124. However, only the provisions listed in § 123.7 are specifically required of State programs.

Many comments suggested that the requirements applicable to States were too detailed and inflexible. In response, EPA reanalyzed the sections listed in the proposal (§ 123.8) which were applicable to all programs to determine if any sections could be eliminated as State requirements, or made applicable to States in a manner that would provide the States with greater flexibility. As a result of this analysis, certain sections and subsections of Parts 122 and 124 are no longer applicable to States (i.e., the requirement for a statement of basis and selected provisions regarding permit issuance, draft permits, and public notice).

EPA considered the idea of separating the remaining general State program requirements so as to establish two levels of applicability, one of which would allow States greater flexibility in how they could implement selected requirements. The idea was rejected, however, because of the confusion this bifurcation would cause among States seeking to determine what authorities would satisfy the requirements of provisions placed at varying levels and because of the difficulty of justifying the placement of a requirement at a given level.

The requirement that State programs have legal authority to implement and be administered in conformance with the listed provisions has been retained. This requirement does not mean that States must implement provisions identical to the listed provisions; only that they establish requirements which are at least as stringent as the corresponding listed provisions. Assistance will be made available to States by EPA on how they can satisfy this section.

Comments were also received expressing the belief that all of the provisions of Parts 122 and 124 should be made applicable to States. As discussed earlier in this Preamble, that notion was rejected. Comments were received, as well, regarding the failure of § 123.7 to apply specific provisions of Parts 122 and 124 to States. One commenter recommended that the transfer provisions of Part 122 should apply to States. This recommendation has been adopted. Transfer requirements were made applicable to NPDES States in the Agency's June 7, 1979, NPDES regulation (44 FR 32854) and are now made applicable to the other programs under this Part to assure that the State Director is given notice of a transfer of ownership and may react to it. Other commenters suggested that States be required to protect confidential information to the same extent as EPA. This suggestion has been rejected. § 123.7(a)(13) requires States to implement §§ 122.19(b)–(d). This means that States must grant public access to at least the same type of information as does EPA. EPA will not, however, dictate how a State must treat other information submitted to it. § 122.19(a) (proposed § 122.16(a)), therefore, has not been made applicable to States. Finally, a commenter requested that State notice and hearing procedures for RCRA permits be the same as EPA procedures. The provisions of Part 124 regarding notice and hearing were, in the proposal, and remain, in these final regulations, applicable to States to the extent necessary to assure adequate public participation. EPA believes that beyond these minimum requirements, States should have flexibility to establish their own administrative procedures.

The list of applicable requirements in § 123.7(a) has been adjusted to reflect the transfer of those permit application requirement provisions common to all programs from the individual program subparts of Part 122 to the general Subpart, § 122.4. It imposes no additional requirements on the States. This change appears at § 123.7(a)(1). The corresponding provision of Part 124, § 124.3(a), has also been made applicable. Also, an addition has been made to the list of applicable requirements, § 123.7(a)(15), to clarify that a draft permit must be prepared and circulated by approved States before a permit is modified or revoked and reissued as required by § 124.5. This requirement is not applicable to State 404 permits when no draft permit is prepared prior to initial permit issuance.

The language in proposed § 123.8 has been amended, in response to commenters' concern that the section limited State authority to impose requirements more stringent than Federal requirements, to make clear that the applicability of the listed sections to State programs does not infringe on a State's right to be more stringent. For example, State NPDES programs need not adopt the provisions for bypass and upset in § 122.60. However, when States include provisions on bypass and upset, these may not be less stringent than those allowed by EPA regulations.

§ 123.8 Requirements for compliance evaluation programs.

This section was proposed as § 123.9. The additional requirements for State NPDES compliance evaluation programs (proposed § 123.80) have been included in this section for convenience.

A comment was received suggesting that States not be required to make the information gathered under § 123.8(b)(1) available to EPA if it is prepared in anticipation of or is in any way associated with litigation. EPA cannot accept this suggestion. EPA does not intend to interfere with State litigation. However, the information collected by a State regarding persons subject to regulation who have failed to comply with permit application or other program requirements must be available to EPA in order for EPA to perform its statutory responsibilities to oversee approved State programs. The information which this commenter seeks withheld from EPA is information vital to EPA's oversight of State enforcement activities. § 122.8(b)(1) has been retained.

One commenter requested that § 123.8(b)(2) indicate how often periodic inspections should be made. EPA agrees that the establishment of such schedules is desirable, but feels that it is better handled on a State by State and year by year basis because of the continually changing nature of State permit activity. Schedules for periodic inspections, therefore, will continue to be established in annual State/EPA agreements.

§ 123.9 Requirements for enforcement authority.

This section was proposed as § 123.10. The requirements for State enforcement programs generated more comments than any other section of Subpart A. The proposal generalized the requirements to a degree which made them confusing and vague. Therefore, EPA has chosen to set some of the requirements on a program-specific basis closely tracking the EPA enforcement authority in each of the programs.

Most of the controversy on this section centered on the amounts of civil and criminal penalties or fines recoverable under State law and the types of violations to which they apply. EPA's proposal would have required States to have essentially the same enforcement capabilities as EPA, including the ability to collect the same maximum fines and penalties. The final regulation adopts a similar approach, but affords a greater degree of flexibility on the amounts recoverable. All State programs must have both civil penalties and criminal sanctions. Fines and penalties must be recoverable under State law; a State program cannot rely on the levying of Federal fines, as one commenter suggested, since the State,

not EPA, is to have primary enforcement responsibility upon program approval. The violations for which these fines and penalties must be recoverable, which some commenters claimed were set out too broadly in the proposal, are now clearly set out and coincide with EPA's authority under each statute.

The Agency has determined that it is necessary to set specific minimum levels of fines and penalties which States must have the authority to recover in order to ensure effective State enforcement programs. Without such minimum levels, EPA would often be forced to take its own enforcement action in approved States because the State action imposed inadequate penalties. Such EPA action, while available as a backup, is not intended to be relied upon as the prime enforcement mechanism in approved States. Accordingly, the Agency has set minimum levels of fines and penalties. However, it has reduced the levels below those available to EPA based on the large volume of comments from States requesting such relief.

In the area of State RCRA programs, the minimum levels of fines and penalties are set at $10,000 per day at the suggestion of the National Governors Association. Also, imprisonment for at least six months must be available. These are the minimums which must be present in a State program before it can be considered to "provide adequate enforcement" under section 3008(b) of RCRA. The violations for which criminal remedies must be obtainable was changed from "any program violation" because many commenters pointed out that EPA cannot obtain criminal remedies for any program violation. The situations where criminal remedies must be available now closely parallels the language of section 3008 of RCRA.

The levels of fines and penalties for State NPDES programs has been adjusted to the same level reflected in past Agency policy. All currently approved NPDES States meet the final regulation.

The levels of civil penalties and criminal fines for State UIC programs have been similarly reduced below Federal amounts. The minimum civil penalties and criminal fines have been set at $2,500 and $5,000 per day, respectively. However, in the case of Class II wells, States need only have the authority to recover a civil penalty of $1,000 per day, and may substitute the authority for pipeline (or production) severance for criminal fines. Several commenters noted that they had this authority for pipeline severance available to them, and that it proved to be more effective than monetary fines. EPA agrees that this may be preferable and has, therefore, allowed States to choose between pipeline severance and criminal fines for Class II wells.

One commenter suggested that the requirement of § 123.9(a)(1) (proposed § 123.10(a)(1))—that States have the authority to restrain immediately unauthorized activities endangering public health or the environment—was too broad for purposes of the UIC program, and that endangerment of the environment should be eliminated as a cause for immediate action. This commenter cited section 1431 of SDWA which allows immediate action only when there is an "imminent and substantial endangerment to the health of persons." Section 1431 is not applicable to State UIC programs. Further, section 1421(a)(1) is intended to assure effective programs. Reference to endangerment of (threatening) the environment has been retained in § 123.9(a)(1) because it is a necessary element of State enforcement programs.

The alternative in proposed § 123.10(a)(1) which allowed States to choose having available either the remedy of immediately notifying the Regional Administrator by telephone of unauthorized activities or the remedy of immediately and effectively restraining such activities by order or by suit has been dropped. The latter remedy is now required of all State programs. The remedy of telephone notification was dropped as an option since it is an obvious ability of all States. The more important authority of being able to immediately restrain an unauthorized activity is one which can be satisfied either with an administrative cease and desist order or with the ability to seek in court a temporary restraining order, an ability which few, if any, States lack.

States are still required to have the same array of enforcement tools as EPA, except that imprisonment is only required for State RCRA programs. State programs may not impose a greater burden of proof for establishing violations than is required of EPA under the appropriate Acts. A State could not, for example, require a showing "beyond a reasonable doubt" to establish a civil violation. If a greater burden of proof were allowed, enforcement actions would be less often successful and State programs, therefore, less effective.

The penalty policy provision in the proposal (§ 123.10(c)) has been retained unchanged despite numerous objections that it not be applied to States. EPA believes that it is entirely reasonable to expect States to assess penalties which are "appropriate to the violation." The additional criteria for assessing penalties apply only to "deadline" violations and are inherently flexible so as to provide States with a wide margin of discretion in their application.

Some commenters argued that the penalty policy could not be applied to States administering RCRA programs because under section 3008(c) of RCRA the Administrator may only consider the seriousness of the violation and good faith efforts to comply with applicable requirements in assessing a penalty. The Agency believes that the factors contained in § 123.9(c) fit within these broad statutory standards. Moreover, EPA interprets section 3008(c) of RCRA to allow adoption of a penalty policy by States which is not strictly within the standards of section 3008(c), since the listing in section 3008(c) is not exclusive. In addition, section 3008 covers only Federal enforcement and is not directly applicable to the States.

§ *123.9(d)*—This section establishes minimum guidelines to ensure that the public has an adequate opportunity to participate in the enforcement process itself. This regulation is promulgated, in part, pursuant to the provisions of section 101(e) of the CWA and section 7004(b) of RCRA which require EPA, in cooperation with States, to publish minimum guidelines which provide for such public participation. Additionally, this regulation is promulgated in response to the opinion of the Seventh Circuit in *Citizens for a Better Environment* v. *EPA* (596 F. 2d 270, Petition for rehearing denied, 13 ERC 1095, 7th Cir. 1979). It was proposed as § 123.10(d) on August 22, 1979 (44 FR 49275).

The August 22, 1979 proposal required all States wishing to receive or maintain programs covered by the consolidated permit program to provide citizen intervention as of right. Additionally, EPA suggested several other mechanisms for public participation. After reviewing the public comments on this proposal, the Agency has established requirements which ensure the benefits of public participation, while intruding less into the States' management of their judicial and administrative systems.

Many commenters objected to the proposed requirement of intervention as of right in State enforcement action. Various reasons were advanced including that the Agency lacks statutory and constitutional authority to impose such a requirement and that under section 101(b) of CWA States have the primary responsibility to control pollution. Additionally, many States pointed to the possible disruption or loss of existing programs if State legislatures were asked to enact statutory changes. Although the Agency

does not agree with all of the arguments advanced by commenters, intervention as of right is not now mandatory but is one of two options to be adopted by States.

The first option allows States to provide for intervention as of right by citizens who have an interest which is or may be adversely affected by a violation. This coverage is comparable to existing rights in Federal court. Alternatively, States may provide assurance that they will not oppose intervention by citizens when such intervention may be permissibly authorized under State law. States employing this option are also required to ensure that citizen complaints of potential violations are received and responded to, and that any proposed settlement of an enforcement action is published for public comment.

Commenters also objected to the application of these requirements to RCRA and UIC programs. Many pointed out that *CBE* v. *EPA, supra,* in which the Seventh Circuit invalidated the Administrator's approval of the Illinois NPDES program, was based only on the requirements of section 101(e) of the CWA. EPA believes that the application of these requirements to programs under RCRA and SDWA, in addition to CWA, is warranted. Section 7004(b) of RCRA is virtually identical to section 101(e) of CWA, and contains the same obligation to promulgate regulations dealing with public participation. Although SDWA contains no such specific requirements, section 1450(a)(1) authorizes the Administrator to prescribe regulations which are necessary or appropriate to carry out his functions under the Act. The Agency believes that these minimum public participation requirements are both necessary and appropriate for an adequate State UIC program. The requirements of § 123.9(d), therefore, remain applicable to all programs covered by Subpart A of these regulations.

Numerous commenters urged the Agency to adopt all the mechanisms for public participation suggested in the proposal. Some stated that the right of participation in State court should be equivalent to that available in Federal Court. Although these regulations require that States provide a meaningful opportunity for public participation in enforcement, they represent minimum guidelines and do allow States some flexibility in developing these provisions. Nothing in the Act or its legislative history indicates that Congress intended that States be required to provide identical rights to those Congress specified for citizens in Federal court.

Some commenters objected to the suggestion, adopted as part of the second alternative, that States be required to publish proposed settlements for public comment. They claimed that this could disrupt a process which requires that settlements be negotiated in private and adopted quickly. However, it is just such a situation, with its potential for abuse, which public participation is designed to avoid. Experience by the Federal government indicates that noticing proposed settlements for public comment does not make it appreciably harder to settle cases. Thus, notice of settlement must be published although the settlement itself needn't be published. Interested persons will be allowed to view the settlement if they wish. This process is similar to that now employed by the Department of Justice (28 CFR § 50.7).

Some commenters stated that the Agency should define "citizen." Many pointed to section 505(d) of CWA which defines citizens as persons who have an interest which is or may be adversely affected. The Agency has adopted a similar definition in this rule. However, it should be noted that the legislative history of section 505 indicates Congress' intention to give citizens the broadest right of participation permitted by the requirement of "standing" contained in the U.S. Constitution. Similar breadth would be required of States choosing to provide intervention as of right.

It was also suggested that the Agency require States to provide their citizens a right to compel State officials to perform non-discretionary duties. EPA does not believe that such a right need be specified in these minimum guidelines. When States are not performing necessary duties, citizens have the right to petition EPA to withdraw the State's authority to administer the program.

Some commenters objected to the length of time which States are given to comply with these requirements. However, this period is the same given for compliance with all new requirements contained in these consolidated permit regulations.

Some commenters asserted that EPA has not developed these regulations "in cooperation with the States" as required by RCRA and SDWA. Due to the time constraints imposed by the court in *CBE* v *EPA, supra,* the proposal was developed by EPA. However, States were fully informed and their views on the proposal were actively sought. Comments were received from agencies in over 30 States. These comments were carefully and fully considered in developing this regulation.

§ 123.10 Sharing of information.

This section was proposed as § 123.16. Paragraph (a) requires approved States to share information with EPA. Many States indicated that under State law they may not be able to make confidential information available to EPA upon request. However, since EPA cannot exercise its statutory oversight and enforcement responsibilities without access to all the information it needs, including confidential information, the paragraph has not been changed.

A commenter stated that if EPA receives confidential information from a State, the Agency should preserve the confidentiality of the information. When the Agency receives information from a State which is claimed as confidential by the submitter EPA will treat this information in accordance with its business confidentiality regulations at 40 CFR Part 2. These regulations treat all information claimed confidential by the submitter as confidential until an explicit determination is made that it is not entitled to confidential treatment. A submitter gets prior notice of this determination under 40 CFR § 2.205.

If a State operates a broader program than is required by Federal law, this information sharing requirement applies only to the Federally required portion.

Under § 123.10(b), EPA will provide States with information from its files when the State requires the information to administer a Federal program. If the information has been claimed confidential by its submitter, EPA will disclose the information to a State in accordance with the procedures of 40 CFR Part 2. In particular, 40 CFR § 2.301(h)(3), which is incorporated by reference in § 2.302(h)(3) (NPDES/404 permits), § 2.304(h)(3) (UIC Permits), and § 2.305(h)(3) (RCRA permits), provides that EPA will disclose information claimed confidential to a State if the State has the authority to compel that information or, if it does not have such authority, if EPA determines that the State will provide adequate protection to the interests of the affected business.

One commenter stated that a submitter should get notice before confidential information it submitted to EPA is disclosed to a State. Under the Part 2 regulations, EPA will give notice to the submitter before disclosure to the State if the State agency does not have the authority to directly compel submission of the information. If the State does have the authority to compel submission of the information, notice is not required. EPA's disclosure of

information to an approved State under § 123.10(b) is essentially the same as disclosure to EPA employees or other Federal agencies who perform a function on behalf of EPA. Notice is not required prior to disclosure in either of these instances. See 40 CFR §§ 2.209(c)(3) and (e).

Proposed § 123.11 Progress reports.

This proposed section has been dropped because it was duplicative of other provisions in this Part. The requirement that States with interim authorization under RCRA, and those listed as needing a UIC program submit progress reports is found in Subparts F and C, respectively.

§ 123.13 Procedure for revision of State programs.

This section was proposed as § 123.13. The procedures for revising State programs are designed to be flexible enough to cover both minor and major modifications. The Agency will issue public notice and provide opportunity for public comment on substantial proposed program modifications, and will indicate its approval by notice in the Federal Register. In most instances of minor modifications, EPA will not issue public notice and will indicate its approval by letter.

One commenter requested that there be no formal EPA review of nominal changes in the structure and responsibilities of State agencies administering an approved program. It was not the intent of the proposal nor is it of these final regulations to require EPA review in such cases. Only when the controlling Federal or State statutory or regulatory authority is modified or supplemented, or when the State proposes to transfer all or part of a program from an approved State agency to another agency may EPA approval be necessary. Changes solely in the internal structure of an approved State agency, with no changes in the overall authority of the agency, do not require EPA approval.

A new provision (§ 123.13(g)) has been added to reinstate the time periods for compliance with revised NPDES requirements by approved State NPDES programs. Those compliance deadlines had been suspended on March 13, 1980 (45 FR 16182) to allow NPDES States to await promulgation of these consolidated regulations before modifying their programs.

§ 123.13(g) also requires NPDES States to implement the new NPDES application requirements for existing dischargers other than POTW's contained in §§ 122.4(d) and 122.53(d) and (e), for all dischargers whose permits expire after November 30, 1980 or whose permits expire before November 30, 1980 but who have not reapplied prior to April 30, 1980. This is necessary to assure that the imminent round of BAT permit issuances are written with adequate knowledge of the toxic pollutants being discharged. (See the preamble to the consolidated application form, published elsewhere in today's Federal Register, and the preamble to §§ 122.53 and 122.62 for detailed discussion of the new application, its use in the NPDES program, and the considerations involved in phasing in the use of the new application.)

While these application requirements will have to be implemented more rapidly by States than other new NPDES requirements, EPA anticipates that States should have no difficulty implementing them in a timely manner. EPA is not requiring that States immediately develop new forms to secure the information required under §§ 122.4(d) and 122.53(d) and (e). Until such time as they develop new forms they may either receive the required information without the use of any form, or they may use EPA's new consolidated Forms 1, 2b and 2c (see separate publication in today's Federal Register of EPA consolidated application forms). EPA will provide adequate supplies of these forms to States wishing to use them. States which develop new application forms consistent with §§ 122.4(d) and 122.53(d) and (e) will receive expedited approval. EPA will consider these new forms to be nonsubstantial program modifications under § 123.13(b)(2).

§ 123.14 Criteria for withdrawal of State programs.

This section was proposed as § 123.14. One commenter thought that program withdrawal should be mandatory for any violation by a State of the requirements of this Part. Such a requirement would be draconian and has been rejected by the Agency and the Courts. See *Save the Bay* v. *Administrator*, 556 F.2d 1282 (5th Cir. 1977).

§ 123.15 Procedures for withdrawal of State programs.

This section was proposed as § 123.15. A commenter suggested that EPA give a written response to any petition for withdrawal of a State program. This suggestion has been adopted. Also, language has been added to clarify that actions taken by a State prior to withdrawal are valid and are not affected by withdrawal. Thus, a permit issued by a State prior to program withdrawal would remain valid after withdrawal. This provision appears at § 123.15(c).

Subpart B—Additional Requirements for State Hazardous Waste Programs

Subpart F—Requirements for Interim Authorization of State Hazardous Waste Programs

RCRA is unique among the statutes covered by these consolidated regulations in that it provides for two different types of EPA approval of State programs—"interim authorization," which may extend for only 24 months after the full Federal program has been established—and "final authorization," which is the same type of permanent approval authorized by the other statutes implemented by this Part.

EPA originally proposed guidelines for both interim and final authorization of State hazardous waste programs under section 3006 of RCRA on February 1, 1978 (43 FR 4365). On June 14, 1979, EPA reproposed the guidelines as part of these consolidated permit regulations. Because of the public interest in the Federal hazardous waste regulatory program and because of the particular need for States to know early in 1980 what EPA would require for interim authorization, the Agency, on January 29, 1980, published in the Federal Register (45 FR 6752) Advance Notice of what today's regulations impose as requirements for both interim and final authorization of State hazardous waste programs. The Agency did not accept comments on this Advance Notice, nor did it respond in the Advance Notice to comments made on the June 14, 1979 proposal.

In the June 14, 1979 proposal, EPA responded to comments received concerning the February 1, 1978 proposal and discussed certain program decisions. These will not be reiterated fully here. However, EPA strongly solicited comments on many aspects of the proposal pertaining to interim authorization. Comments on these aspects and the basis for this final regulation for interim authorization as it appears today are addressed below.

In the June 14, 1979 proposal of Part 123, requirements for both interim authorization and final authorization were contained in Subparts A and B. This caused confusion among many commenters as to which requirements pertained to which type of authorization. In order to make the final regulations easier to read and work with, EPA has now separated the RCRA provisions in this Part into two Subparts—one for final authorization and one for interim authorization. EPA believes that the

requirements for interim authorization are most comprehensible when set forth as a discreet, autonomous subpart of Part 123.

Thus, new Subpart F includes all of the requirements for interim authorization, having explicitly adopted the applicable portions of Subpart A. Accordingly, Subpart F can be read as a unit by those interested in interim authorization only. This system will also allow Subpart F to be dropped from the Code of Federal Regulations when the interim authorization period is over. Subpart B now includes the requirements for final authorization additional to those contained in Subpart A. Although this separation causes some duplication of requirements which pertain to both interim and final authorization, EPA believes this reorganization will remedy the unclearness of the proposal concerning requirements for interim authorization.

Because final and interim authorization are so closely related, they are discussed together in this section of the Preamble. The discussion first covers two general issues relevant to both programs. Interim authorization is discussed next, since it comes first in time and is expected to provide the foundation for final authorization. Finally, Subpart B concerning final authorization is discussed.

Equivalence and consistency. One of the most frequently discussed issues in the comments on the RCRA portions of the proposed Part 123 regulations concerned the extent to which State programs should be required to be substantive and procedural duplicates of the Federal program before they could be approved for either interim or final authorization. Many industries argued for requiring nearly identical State programs, out of an understandable and legitimate concern about the burden of adhering to many dissimilar State programs, while many States argued for a more lenient test, for equally understandable reasons. The basic legal framework of the problem is laid out here; EPA's detailed resolution of the issue is explained later in the program-specific discussion.

RCRA expresses a concern for national consistency of State programs during final authorization, but backs-off from that goal of consistency during interim authorization. The statute requires States with final authorization to have programs both "equivalent to" and "consistent with" the full Federal program. However, during the period of interim authorization States must have programs that are only "substantially equivalent" to the Federal program.

Although these provisions taken together evidence a clear concern to avoid duplicative and overlapping regulations and to make State hazardous waste control programs relatively equal to each other and to the Federal program, particularly during final authorization, they must be considered in light of section 3009 of RCRA. Section 3009 of RCRA states that after the Federal RCRA program becomes effective, no State may administer a program less stringent than the Federal program. The statutory language does not directly address the question whether more stringent State requirements are preempted, though EPA believes in certain circumstances, discussed later in the preamble, they well might be. However, the section taken as a whole does suggest by negative implication that RCRA was not intended to have sweeping preemptive effect. Thus States may impose requirements under their own laws which are more stringent than the Federal requirements, but section 3006 forbids EPA from approving these requirements as part of a State final authorization program if they are "inconsistent" with the Federal program.

Accordingly, establishing very tight standards for EPA approval of State programs would not necessarily advance some of the basic goals of the statute—to establish Federal minimum standards, but not abruptly halt the development of State programs, and to reduce the existence of overlapping or duplicative State regulatory programs. Indeed, setting a very high threshold might produce the reverse effect by removing an incentive for States to take moderate steps to make their program more similar to the Federal program, but not identical to it.

Though EPA has tightened a number of the requirements for approval of State programs, it has not accepted the comments calling for the programs to be identical. Instead, as discussed below, it has adhered to a more flexible approach, particularly where interim authorization is concerned. Final State RCRA programs though may not be less stringent than the Federal program.

Review of State permits. Section 3008(a)(3) of RCRA authorizes the Administrator, after giving notice, to revoke any RCRA permit whose holder is in violation of any of the requirements of Subtitle C, or State requirements established under that Subtitle, and to assess a civil penalty against that person. The statute explicitly allows this whether the permit concerned was issued by EPA or by a State with an approved program.

The proposed regulations did not specify any restrictions on this authority, and thus by implication allowed it to be used at any time. (This implication was reinforced by the very broad grounds for modification of RCRA permits set forth in proposed § 122.9.)

In these final regulations, EPA has made more explicit and narrowed the grounds on which it will move to revoke State-issued permits or enforce against their holders. First, EPA may take such actions at any time, after giving notice to the State, if the holder of a State-issued permit has not complied with its terms. EPA intends that States should have primary enforcement responsibility, but the Agency retains independent enforcement authority in an approved State and will use it to the extent a State fails to take necessary enforcement action. Beyond that, the regulations state that EPA will only revoke State-issued permits or enforce against their holders to the extent permittees do not comply with conditions included in comments made by EPA during the period for review of State permits required by §§ 123.6, 123.38, and 123.134 and which EPA stated were necessary to implement approved program requirements. EPA comments on the proposed State permit would only address whether the permit properly implemented the approved State requirements, not whether it implemented the Federal requirements that were not effective in the State. EPA does not intend to take enforcement action against a State permit holder who is in compliance with a condition commented upon by EPA during its review period and recommended for inclusion in the permit, even though the condition is not included in the permit. This is clearly not a result EPA intended in establishing these permit review procedures. Permit applicants will be on notice as to comments made by EPA during the review period as these comments will be sent to the permit applicant before the permit is issued.

This approach means that in cases where EPA has no comments on a State permit or where the comments are successfully accommodated, compliance with the State permit will be deemed compliance with the requirements of the State program and Subtitle C, for Federal enforcement purposes, apart form an "imminent hazard" action under section 7003. However, it also reserves to EPA the authority to prevent a State-issued permit from shielding owners and operators from Federal enforcement to the extent that EPA has timely expressed its views that the permit in question is not adequate to carry out the

purposes of RCRA. This will allow EPA a measure of control over State RCRA programs short of the drastic and often impractical step of withdrawing program approval. The language of section 3008(a)(3) indicates that Congress had such an oversight role in mind when State-issued RCRA permits were concerned.

EPA will follow this approach both in States with final authorization and in States which are issuing permits under Phase II of interim authorization. During Phase I of interim authorization, "interim status standards" or their State equivalents apply to facilities which have not received a full RCRA permit. Some States with Phase I interim authorization may elect to enforce their version of the interim status standards by granting permits containing those conditions. This approach is perfectly acceptable. However, a permit containing those standards has no status as a RCRA permit and does not relieve the facility holding it of the obligation to apply for and receive a full RCRA permit when the Director requests.

Interim Authorization

§ *123.121 Purpose and scope.*

As noted above, RCRA is unique among the programs covered by these consolidated regulations in providing not just for full and permanent authorization to States to administer a permit program instead of EPA, but also for a preliminary transitional stage called "interim authorization." Section 3006(c) of RCRA provides that

> Any State which has in existence a hazardous waste program pursuant to State law before the date 90 days after the date of promulgation of regulations under sections 3002, 3003, 3004, and 3005, may submit to the Administrator evidence of such existing program and may request a temporary authorization to carry out such program under this subtitle. The Administrator shall, if the evidence submitted shows the existing State program to be substantially equivalent to the Federal program under this subtitle, grant an interim authorization to the State to carry out such program in lieu of the Federal program pursuant to this subtitle for a 24-month period beginning on the date 6 months after the date of promulgation of regulations under sections 3002 through 3005.

Unlike final authorization programs, which must be "equivalent" to the Federal program, "consistent" with the Federal program and programs in other States, and provide adequate enforcement assurances, the State interim authorization program must only be "substantially equivalent" to the Federal program. The legislative history emphasizes Congress' intent that interim authorization be granted in a relatively liberal manner so as not to disrupt on-going State efforts and to encourage States to continue their efforts so that they will be ready to take over responsibility for the full program when interim authorization is over.

The timing and conditions for interim authorization, and the relationship between various State programs and between the Federal program and State programs under interim authorization, have been among the most difficult questions to be addressed in these consolidated regulations.

In the proposal, EPA specified a single starting date for interim authorization, namely "the date 6 months after the promulgation of regulations under section 3001 of RCRA." The proposed requirements for obtaining interim authorization were relatively loose. A State was not required to have a program for listing and designating hazardous wastes or for implementing the manifest system in order to obtain interim authorization. Instead it was only required to control by permit *either* on-site or off-site hazardous waste disposal facilities and to conduct an effective enforcement program.

The final regulations significantly change the approach taken in the proposal. First, the interim authorization program will be implemented in two "phases" corresponding to the two stages in which the underlying Federal program will itself take effect. The reasons for and mechanics of this approach are discussed immediately below. Second, the requirements for approval of interim authorization have been tightened significantly. A much greater degree of similarily to the corresponding requirements of the Federal program will now be required.

As the preamble to the RCRA section 3004 regulations sets forth, EPA will establish the regulations setting up the RCRA program in its initial form in two stages. The first set of regulations (or "Phase 1"), which will become effective 6 months from the date of their promulgation, will accomplish the initial identification of characteristics of hazardous waste and listing of hazardous wastes (Part 261), establish the standards applicable to generators and transporters of hazardous wastes, including establishing the manifest system (Parts 262 and 263), erect "interim status" standards applicable to existing HWM facilities before they receive permits (Part 265) and set out permitting procedures (Part 122).

The second set of regulations (or "Phase II"), to be promulgated in the fall of 1980, will complete the job of establishing the initial set of standards that govern the operation of HWM facilities. Full permitting of these facilities will be able to proceed on the effective date of these regulations. This two-stage approach has proved to be the only practical way, given the size of the regulatory task involved, of putting the program in motion expeditiously.

As far as the Federal program is concerned, the only concrete operational difference that will flow from this two-stage approach, as opposed to one in which the regulations were all promulgated at once, will be that a period of 6 months will be created during which existing HWM facilities will be subject to interim status standards but no permits will be issued. However, as the preamble to the section 3004 regulations explains, the statute explicitly foresees that many facilities will not be permitted for years after the program starts and provides for "interim status" for these facilities. The two-stage approach operates within that basic understanding.

It would be inconsistent and contrary to Congressional intent to establish interim authorization in one stage only when the basic Federal program is being established in two stages. As a practical matter, a one stage interim authorization program could only have been done by postponing the beginning of interim authorization until after both stages of the Federal program were promulgated. That would have meant creating a period of 6 months in which EPA would run a purely Federal program without any possibility of a State formally taking it over. This would have been contrary to the Congressional desire that States take formal responsibility for the program as soon as possible.

For these reasons, EPA has elected to allow interim authorization for the first phase of the Federal program as well as for the second. EPA believes this approach is legal under the statute.

Section 3006(c) of RCRA consists of two sentences embodying somewhat different policies. The second sentence requires EPA, upon finding that a State program is "substantially equivalent" to the Federal program, to

> grant an interim authorization to the State to carry out such program in lieu of the Federal program for a 24-month period beginning on the date 6 months after the date of promulgation of regulations under sections 3002 through 3005.

This sentence allows States 2 years from the effective date of the regulations establishing the full Federal program in its initial form to come into compliance with the Federal program and, during that grace period, allows Federal approval of State programs that do not

yet meet the equivalency test required for final authorization.

The approach EPA has adopted carries out that policy by limiting interim authorization to 2 years from the effective date of the full initial RCRA program regulations, which includes the Phase II regulations to be promulgated next fall. It would have been consistent with the literal language of this second sentence to have limited interim authorization to a two year period beginning on the effective date of the Phase I regulations, and EPA considered that approach.

However, that approach would have failed entirely to carry out the policies in the first sentence of section 3006(c). That sentence reads:

> Any State which has in existence a hazardous waste management program pursuant to State law before the date 90 days after promulgation of regulations under sections 3002, 3003, 3004, and 3005 may submit to the Administrator evidence of such existing program and may request a temporary authorization to carry out such program under this subtitle.

This sentence expresses and the legislative history underlines, an intent that States be able to apply for interim authorization and get it promptly after promulgation of regulations setting up a meaningful regulatory program under Subtitle C. To forbid application until after promulgation of next fall's regulations would not have been consistent with that purpose. Accordingly, EPA has elected to allow interim authorization for this stage (Phase I) of the program as well. Though this technically will result in interim authorization in some cases extending for more than the 24 months specified by the second sentence of section 3006(c), the purpose behind that 24-month ceiling will be preserved, and EPA feels the extension is necessary to carry out the purposes of the section as a whole.

Preconditions to applying. Section 3006(c) of RCRA provides that interim authorization may only be granted to States which have "in existence a hazardous waste program pursuant to State law" no more than 90 days after promulgation of the RCRA program regulations.

EPA interprets the word "program" as used above to mean enabling legislation only. EPA believes this interpretation is in keeping with Congress' desire to give States which have begun developing hazardous waste programs enough time to bring these programs into conformity with Federal requirements. Ninety days from the date of promulgation of the substantive Federal regulations—when their final terms become known for the first time—would be an extraordinarily short time in which to require States to react to them and bring their regulatory programs as a whole into "substantial equivalence" with them. Given the statements favoring use of interim authorization in the legislative history of RCRA, we do not believe that Congress intended such a strict reading. Although EPA will not require States to have more than legislative authority in place to meet the 90-day cutoff, it will require all aspects of the State program to be "substantially equivalent" to the Federal program by the time interim authorization is actually granted.

For these reasons EPA interprets the relevant statutory provisions as requiring States to have the necessary *legislative authority* in place 90 days after promulgation of the Federal regulations. Since there will be two phases of Federal regulations and interim authorization for each phase, the requirement for legislative authority will be applied to each phase separately. States that wish to apply for Phase I interim authorization must have legislative authority for Phase I within 90 days from today. States that wish to apply for Phase II interim authorization to administer a program in lieu of the full Federal program as it will exist after next Fall must have the legislative authority necessary for Phase II in existence 90 days after promulgation of the Phase II regulations.

§ *123.122 Schedule.*

With the issuance of these regulations, events and possibilities surrounding State assumption of the RCRA program will begin to unfold as follows:

Phase I application. A State may apply for interim authorization for Phase I of the Federal program, without an accompanying application for Phase II, during the period between the promulgation of requirements for Phase I, today, and the effective date of the Phase II regulations, which will be 6 months after their promulgation, or some time in the Spring of 1981.

This application window, approximately 1 year in length, will divide roughly into a first half, consisting of the estimated 6 months between promulgation of Phase I and promulgation of Phase II; and a second half, consisting of the 6 months between promulgation of the Phase II regulations and their effective date.

During the first half of the "window," before Phase II is promulgated, only applications for Phase I will be possible.[46] Although an argument can be made that after the Phase II requirements are known, only applications for complete interim authorization, including both Phase I and Phase II, should be permitted, EPA has not accepted that argument in these regulations. To be approved for interim authorization, a State program must show "substantial equivalence" to the Federal program. As discussed later in this preamble, EPA has significantly tightened the standards for making that showing over those set forth in the proposal, and it can be expected that in some cases States will have to make quite a few changes in their existing programs to conform them to the "substantial equivalence" requirement. Six months may often be too short a time for that, and so a year has been allowed. Letting this year overlap the promulgation date of the Phase II regulations will mean that there will not be any abrupt interruptions in filing and processing of State applications for interim authorization. By contrast, forbidding State applications that did not include Phase II as of the promulgation date of Phase II would create a period when no interim authorization applications could be filed because States would be adjusting their programs to the newly promulgated Phase II requirements. A discontinuity of this nature would be contrary to the Congressional intent that interim authorizations not be subject to avoidable obstacles.

Phase II application. A State may apply for interim authorization for Phase II of the Federal program (and Phase I, at the same time, if it has not already been approved for Phase I), any time between the time the requirements establishing Phase II are promulgated, sometime next fall, and 6 months after the effective date of those regulations, which is expected to be approximately October of 1981.

Relationship between Phase I authorization and Phase II authorization. As noted above, for 6 months after promulgation of the Phase II regulations, a State may apply for Phase I interim authorization or for both Phase I and II or for Phase II interim authorization, if it already has Phase I authorization (or for final authorization). A State may never obtain only Phase II interim authorization. Starting with the effective date of the Phase II regulations

[46] This issue of the Federal Register contains EPA's initial list of wastes under section 3001 of RCRA. In June, EPA expects to list additional wastes, and the candidates for that listing have also been published today. EPA encourages States applying for interim authorization before the June promulgation to include the wastes set forth today as candidates for listing in June in their Phase I submissions. That will avoid the need to supplement the application later and will reduce confusion and paperwork.

in approximately April of 1981, only applications for Phase II, or for Phase I and II combined, will be accepted.

All Phase I interim authorizations will expire automatically 6 months after the effective date of the Phase II regulations, or approximately October 1981 if a Phase II application has not been filed by that date. In other words, any State with Phase I interim authorization must apply for Phase II approximately by October 1981, or lose the program. EPA established this requirement to minimize the time during which States would be operating interim authorization programs that did not correspond to the then effective Federal program, and to keep States moving toward final authorization. The dates adopted allow States approximately 12 months after promulgation of the Phase II regulations to apply for Phase II interim authorization. This is the same length of time allowed to States to file Phase I applications, and was set for the same reasons. It allows a period of 6 months (approximately April 1981 to October 1981) when States could be operating Phase I programs even though the Phase II program was effective. Although such a phase-in time is inevitable if the interim authorization process is to be kept operating without avoidable interruption as Congress intended, it has obvious potential for creating confusion and inconsistency and its duration should be minimized. Finally, cutting off Phase I is desirable as a means of making sure that States are moving toward final authorization at least to the extent of adopting the requirements necessary for Phase II.

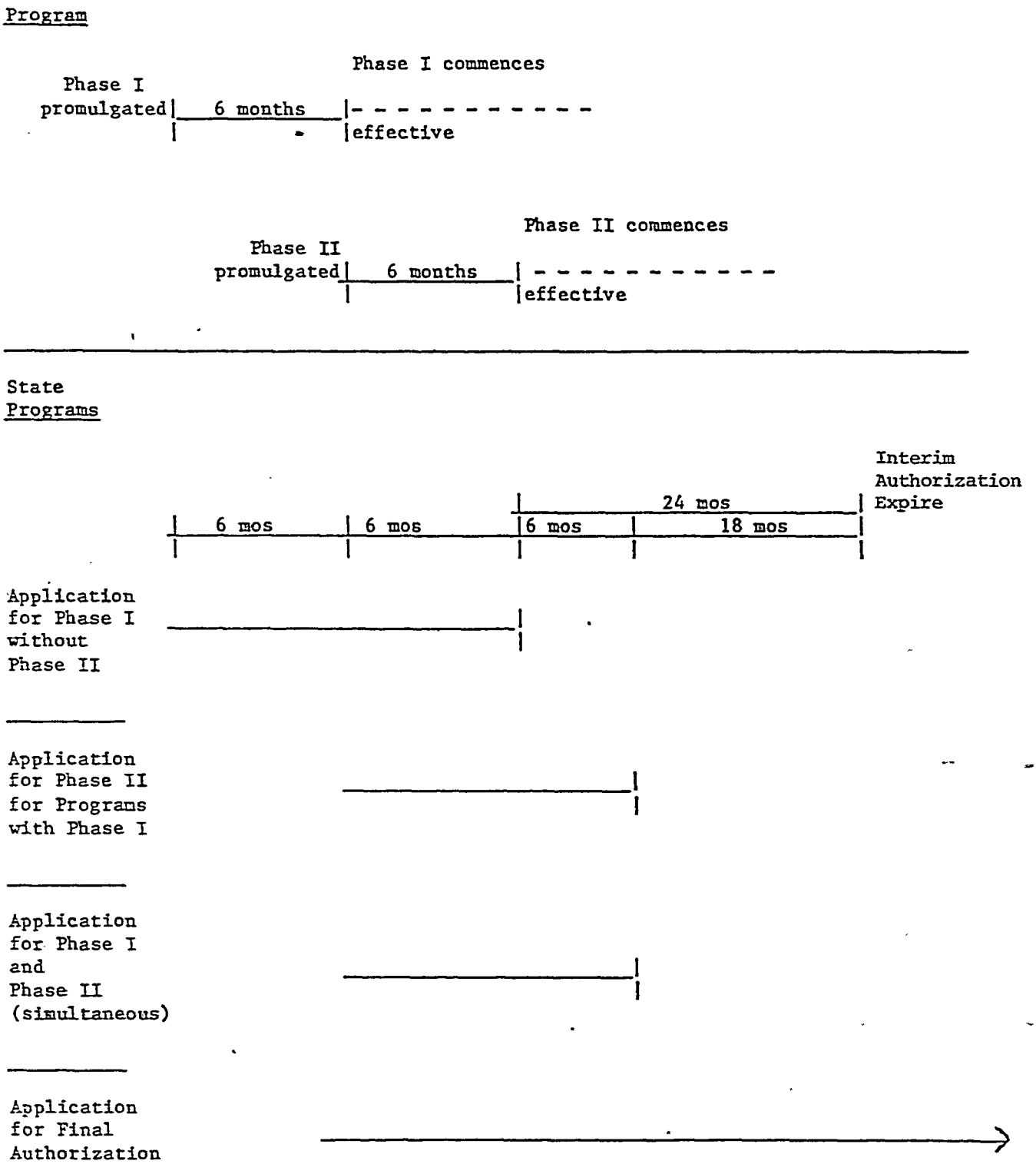
Relationship between interim authorization and final authorization. A State may apply for final authorization at any time after the Phase II regulations are promulgated. Final authorization, if granted, automatically ends interim authorization in that State and the applicability of Subpart F.

No applications for interim authorization of any sort will be accepted more than 6 months after the Phase II regulations become effective. In other words, no applications will be accepted after approximately October of 1981. EPA has established this requirement because applications made after this date, taking into account the necessary period for processing and approving a State submission, would result in conferring interim authorization that would at most, last only slightly more than a year before it would automatically terminate. This is too short a time to justify the administrative effort required to draw up and approve the application, particularly when an application for final authorization would have to be drawn up, reviewed, and approved within that same year.

Finally, as the statute requires, any State with interim authorization that has not received final authorization 2 years after the effective date of the Phase II regulations (about April 1983) will automatically lose interim authorization and the program will revert to EPA. (See Schedule of Events.)

BILLING CODE 6560-01-M

SCHEDULE OF EVENTS



BILLING CODE 6560-01-C

Manifest system. In general, as later portions of this preamble discuss, State programs approved for Phase I or Phase II must be substantially equivalent to each part of the corresponding Federal program. For reasons also discussed later, EPA has made an exception for the manifest system and associated generator and transporter requirements promulgated as part of the Phase I program. State programs that do not contain provisions corresponding to these standards may still be approved for interim authorization. More precisely, a State will have three choices in deciding how to deal with these requirements:

1. It may apply for interim authorization for these requirements along with the rest of its Phase I application. This would have been the required course if EPA had not made special provision for this part of the program, and it may still be the option chosen by a State.

2. A State may apply for interim authorization to run the manifest system as part of its Phase II application, even though the corresponding Federal requirements were promulgated in Phase I. EPA will operate the manifest in that State during Phase I. The only restriction placed on this application that will not be placed on Phase II applications for other parts of the program is that the legal authority for the manifest system must have been in place no later than 90 days after the promulgation of Phase I. Since the manifest system is part of Phase I of the Federal program, this requirement is necessary to satisfy the requirement of RCRA that States only be granted interim authorization if they have a program "in existence" 90 days after the promulgation of the Federal program.

3. Finally, a State may apply for and receive both Phase I and Phase II of interim authorization without being authorized to run the manifest system. In that case, EPA will operate the manifest system in that State throughout its interim authorization. Assumption of the manifest system will still be required in these States before final authorization.

§ *123.123 Elements of a program submission.*

This section lists the elements a State must submit to EPA in its application for interim authorization. It is largely derived from relevant portions of § 123.3, the corresponding provision governing final authorization. Due to the phased nature of interim authorization, a State will have to amend all or some of the elements in its Phase I application when it applies for Phase II.

§ *123.124 Program description.*

This section lists the required components of a complete program description, which is one element of the program submission. It is largely derived from § 123.4, the corresponding provision governing final authorization.

In the June 14, 1979 proposal, only the RCRA program mandated States to identify a lead agency for State hazardous waste program approval. EPA received several comments noting this fact. One commenter stated that by this requirement EPA was improperly dictating a State's internal organization. The intent of the requirement was only to facilitate communication between EPA and the State, due to the multimedia nature of the RCRA program. The term "lead" means only "the principal point of contact with EPA," and does not refer to overall program responsibility.

§ *123.125 Attorney General's statement.*

In accordance with the provisions described above, the Attorney General's statement must attest to the enactment of any necessary legislation within 90 days of promulgation of the phase of the Federal program for which interim authorization is sought.

As with the other program elements, Attorney Generals' statements submitted for Phase I authorization will probably have to be amended to be acceptable for Phase II.

§ *123.126 Memorandum of agreement.*

This section contains the required components of the Memorandum of Agreement (MOA). The MOA is also a part of the program submission under § 123.123. It largely derives from § 123.6, the corresponding provision governing final authorization. Those components of the MOA which concern only permitting procedures and which are not relevant until the commencement of Phase II, have been distinguished and put in a separate paragraph and need not be included in MOAs which are part of a Phase I application. Any MOA negotiated during Phase I must be amended at the time of the Phase II application to incorporate required Phase II components.

EPA's authority to inspect has been modified slightly in the final rule, in that § 123.126(b)(6) has been added to clarify that the MOA cannot limit EPA's right to inspect generators, transporters, or non-major facilities when there is cause to believe a facility is not in compliance. One commenter stated that EPA's inspections should be limited to only "problem sites." This implies that EPA should become involved only after an activity has been identified as a "problem." This would negate a significant aspect of the oversight role, which is to ensure that problem sites do not arise or are identified in the first place.

An additional comment on EPA's inspection authority was that only EPA employees can perform inspection, not Agency contractors. This is correct as the Act now stands. However, EPA believes the statute permits EPA employees to be accompanied by contract personnel who will assist them in their work. The extra personnel add little to the degree of intrusiveness which would result. A Federal employee will be in charge and will be required to obtain any necessary warrant. The assistance of contract personnel is likely to mean, however, that the substantive goals of the Act will be better served.

§ *123.127 Authorization plan.*

This is a provision of the Subpart F regulations that does not have any counterpart in Subparts A or B. It requires States which apply for interim authorization to set out in some detail how they will use the time of interim authorization to qualify for final authorization.

The statute obviously intends interim authorization to be a stepping-stone to final authorization. Beyond this, great disruption would occur if a large number of States with interim authorization did not qualify for final authorization when interim authorization was over. The program would then revert in full to EPA and would have to be redelegated over the ensuing years as States pulled the necessary authorities together. For these reasons, EPA has required States to assess and document in advance the actions needed to establish the final program.

As the regulation explicitly provides, States must submit their authorization plan with the Phase I application and update it with their Phase II application. Of course, the authorization plan with the Phase I application only needs to address the portions of the final program that are included in Phase I. The final requirements contained in Phase II—basically the detailed technical standards for treatment, storage, and disposal of hazardous wastes—can be addressed for the first time in the Phase II application.

The Attorney General's statement required under § 123.125 must certify that the authorization plan, if carried out, would meet the requirements of final authorization.

EPA does not agree with the comment that EPA should make the decision as to

what modifications are necessary for final authorization. Although EPA will provide guidance and assistance to the State in developing its authorization plan, it is the State which is in the best position to identify required revisions and modifications and to determine how best to accomplish them.

§§ 123.128 and 123.129 Program requirements for interim authorization for phase I and for phase II.

These sections set forth the substantive requirements for an approvable State interim authorization program. They have been entirely rewritten because EPA's position on program requirements for interim authorization has changed significantly since the June 14, 1979 proposal. There EPA stated that eligibility for interim authorization "would require the States to implement (i.e., regulate and enforce) controls over at least either on-site or off-site disposal of hazardous wastes." EPA agrees with the numerous commenters that argued that a State should have a fundamentally complete hazardous waste management program as compared with the Federal program in order to receive interim authorization.

In addition, this final regulation is much more specific than the proposal in describing what a State program must do to receive interim authorization. This specificity should alleviate the lack of clarity in the proposed regulations which numerous commenters pointed out.

In rewriting these provisions EPA had to deal with the question of the degree of similarity to the Federal program it should require of State programs before approving them for interim authorization, and the question of whether State programs including less than all the requirements of the corresponding phase of the Federal program should be approved.

Degree of similarity. In establishing the substantive requirements for interim authorization, EPA has had to balance two competing interests evident in RCRA, its legislative history, and the public comments on EPA's proposed guidelines for State programs. These two interests are: (1) assuring that at least a minimum level of protection of the human health and the environment is established nationwide; and (2) encouraging continued development of States' own programs without disruption, so that as many States as possible can assume responsibility for the program.

The legislative history indicates that Congress created interim authorization to reconcile these two interests. Interim authorization allows State programs time to achieve the desired level of control (complete equivalence with the Federal program), but also requires such programs to provide an adequate degree of protection to human health and the environment. Congress specified in section 3006(c) that a State could receive interim authorization if its program was "substantially equivalent" to the Federal program, leaving it up to EPA to define "substantial equivalence."

There were several public comments on the need for a working definition of this term, in order to remedy its vagueness. EPA now defines substantial equivalence as "to a large degree, or in the main, equal in effect." "Effect," of course, could mean either effect in protecting health and the environment or effect in the sense of requirements imposed on regulated industries and others. EPA has and intends to keep both these meanings in mind, as well as concerns about State autonomy, in judging the substantial equivalence of State programs. So, for example, variations in the manifest system, which calls for eventually creating a single accounting system to track wastes from State of origin to State of deposition, could be extremely burdensome to the companies that would have to cope with the inconsistencies, and to the governments that would have to regulate taking the differences in the manifest systems into account. Here, both concern for the environment and concern for avoiding regulatory burden argue for a relatively high degree of similarity. Permitting standards, by contrast, will be applied in local decisions, and the initial Federal standards will leave a good deal of discretion to permit-writers. Here the arguments for uniformity are weaker, though EPA sets minimum standards to assure protection of human health and the environment.

EPA believes this general working definition, and the specific requirements found in these sections, represent a middle ground between the approaches advocated in the public comments. The comments generally fell into two groups. Some commenters wanted EPA to require States to regulate all facilities that the Federal program would, and wanted State standards to be very similar to the Federal standards. Others thought that States should only require minimal coverage of either on-site or off-site disposal during interim authorization, and thought EPA need not examine the substance of State requirements or compare them to Federal requirements, but only examine the effectiveness of the State program.

At least one commenter suggested that the regulations should explicitly state that a State program may be less stringent than the Federal program for interim authorization. The Agency believes that while section 3009 disallows imposition by a State of "any requirements less stringent than those authorized under this subtitle respecting the same matter as governed by (EPA) regulations . . .," section 3009 was clearly not intended to mandate application of a "no less stringent" standard to State programs which seek interim authorization. Application of section 3009 to such State programs is in direct contradiction to the "substantially equivalent" standard for interim authorization mandated in section 3006(c).

Thus, EPA will not apply the mandate of section 3009 to States seeking interim authorization. This position is unchanged from the Agency's position in the June 14, 1979 proposal. EPA will, however, apply the mandate of section 3009 to State programs seeking final authorization and all State programs will be required to satisfy section 3009 to receive final authorization.

EPA also believes that States that have not received interim authorization are subject to the "no less stringent" requirement of section 3009. However, as a practical matter, it is unlikely that EPA in the early years of the program would treat this as a matter of high priority and take enforcement actions.

Partial programs. Because hazardous waste management is generally a new activity for State governments, it is inevitable that many States will not, by the effective date of the Federal program, have in place programs which control all of the same aspects as the Federal program controls, especially since many State regulations will be patterned after the Federal regulations which are just now being promulgated. This situation raised a major policy decision for EPA. The Agency had two options:

(1) To authorize immediately those parts of a State program that are substantially equivalent to the Federal program, or

(2) To postpone authorization in a State until the entire State program is substantially equivalent.

In the June 14, 1979 proposal the Agency rejected partial programs for final authorization. The Agency, however, solicited comments on the possible alternatives to EPA regulation of activities that are not regulated by the State during interim authorization. Comments ranged from endorsement of interim authorization of parts of State programs which meet Federal

requirements, to rejection of State regulation of certain activities and EPA regulation of others. Commenters strongly urged clarification of this point. With one major exception, EPA has chosen to postpone interim authorization in a State until the entire State program for the relevant Phase of the Federal program is substantially equivalent to the relevant Phase of the Federal program. The exception, covering the manifest system and other generator and transporter requirements, is discussed below.[5]

In all other areas, the State program must be substantially equivalent to the relevant phase of the Federal program. Further fragmentation of the program with a variety of program parts divided between the State and EPA would result in excessive complexity for regulated parties.[6]

§ *123.128(a)* (Identification and listing of hazardous wastes). This paragraph provides that States seeking interim authorization must demonstrate control over a "a universe of hazardous wastes generated, transported, treated, stored, and disposed of in the State which is nearly identical to that which would be controlled by the Federal program. * * *"

The definition of substantial equivalence for the identification and listing of hazardous wastes is one of the keys to control of hazardous waste by States during interim authorization. This definition will necessarily determine what wastes will become part of the hazardous waste management program required by RCRA, thus assuring their proper management. Wastes outside of the definition will not receive the attention RCRA affords. Thus, it is important that during interim authorization States be required to control as many hazardous wastes as possible without detracting from the basic concepts of substantial equivalence and interim authorization. In setting the appropriate level of control EPA had to balance arguments that States be required to control exactly the same wastes as controlled under the Federal program, that differing definitions and lists would create intolerable inconsistencies and that States only control a universe of wastes "substantially equivalent" to the Federal program.

EPA cannot accept the suggestion that interim authorization be granted only to States that define hazardous wastes in the same manner as EPA defines hazardous wastes. Present State laws and regulations define hazardous wastes in ways which make it likely that few if any States now cover exactly the same wastes as identified in the section 3001 regulation. Time will be needed to bring the State definitions into conformance with the Federal definition.

It is true, however, that allowing different States to have definitions or lists of hazardous wastes which are different from each other or from the Federal definition or list has the potential for creating considerable confusion. When a waste moves from a State in which it is defined or listed as hazardous into one where it is not, or the reverse, questions of how to deal with the waste and how to treat the manifest documents will arise and must be dealt with. EPA's answers to those questions are given below, but the problem will not arise at all to the extent the "universe" of wastes is the same from State to State.

The burdens created by these inconsistencies will vary, of course, with their extent. In an attempt to minimize them without forcing all State programs into the same mold immediately, EPA has adopted a somewhat tighter formulation of the basic test of "substantial equivalence" here than for other elements of interim authorization due to the greater potential for harm from wastes not defined or listed as hazardous and not properly managed even during interim authorization.

§ *123.128(b)–(d)* (Generator, transporter, and related manifest requirements). The one area where EPA will allow an exception to a complete, substantially equivalent State program is the manifest system and the associated generator and transporter requirements. It appears to EPA that these are the parts of the Federal program for which States would have the most difficulty in meeting the substantial equivalence test by the effective date of Phase I. In particular, many States probably will not have a manifest system in place that adequately controls interstate shipments of hazardous wastes consistent with the Federal manifest system. EPA does not believe that the lack of authority for this program part should cause States to be denied interim authorization. That approach could result in a great many States being denied interim authorization contrary to basic Congressional intent.

§ 123.128(d) therefore allows EPA to administer and enforce the Federal nationwide manifest system and generator and transporter requirements in a State without depriving the State of interim authorization for the rest of its program. This specific option is new, though in the proposal EPA did discuss the alternative of an entirely Federal manifest system. In the June 14, 1979 proposal EPA suggested that States must implement all statutory and regulatory hazardous waste management authorities they possess. EPA received comments on this point, and now believes that this consideration must yield to the concern for consistency and uniformity in the manifest system, which is the heart of the "cradle-to-grave" control system of RCRA, and has significant consequences on interstate commerce. States not authorized to run the manifest system during interim authorization should work to develop a manifest system and associated generator and transporter standards equivalent to and consistent with the Federal system as required for final authorization.

In order to obtain interim authorization, States are not required to have statutory or regulatory authority over certain aspects regulated under the Hazardous Materials Transportation Act by the Department of Transportation (DOT). However, this authority will be required for final authorization. These aspects include requirements for: accumulation of wastes in containers meeting DOT standards prior to shipment; packaging, labeling, marking and placarding of wastes; the forwarding of the manifest or shipping document for shipments solely by railroad or solely by water (bulk shipments only); and provision of the DOT proper shipping name.

This approach to interim authorization was taken in order to avoid the potential disruption of existing State programs which could occur if adoption of these DOT provisions necessitated hasty legislative and/or regulatory changes. For interstate transportation of hazardous waste these DOT requirements operate independently of the requirements that are contained in a State hazardous waste program. Thus, a degree of control of hazardous waste and protection of human health and the

[5] The phasing of interim authorization can also be seen as the authorization of part of a State program and thus as another exception to the requirement for a complete State program. EPA does not view it this way, however, for two reasons. First, the two phases of interim authorization are necessitated by the two phases of the Federal regulations, and the State program for Phase I or Phase II will be substantially equivalent to the Federal program for Phase I and Phase II; and second, EPA does not intend to authorize a State for only one phase of the program (evidenced by the automatic reversion of Phase I to EPA if a State does not apply for, or is denied, Phase II).

[6] For example, since EPA will not enforce the Federal requirements for those elements of a State program which it has authorized, further fragmentation of program approval would subject the regulated community to a patchwork of State and Federal regulations.

environment substantially equivalent to the Federal program is afforded in other States without the need for a State with interim authorization to include in its program the authority to administer (and enforce) these requirements. In other words, the aspects of DOT's program listed above must be complied with for the interstate transportation of hazardous waste in a State with interim authorization authorized to operate the manifest system. In such a case, the universe of wastes subject to these requirements is the Federal universe, as defined by 40 CFR Part 261. Any generator or transporter proposing to ship a waste interstate which is hazardous under Part 261 must comply with DOT's requirements.

Shipments of hazardous waste by intrastate motor carriers are not subject to DOT requirements during interim authorization, although the majority of States have adopted DOT requirements in their motor vehicle codes or by other means. For the reasons stated above, EPA has chosen not to set minimum requirements respecting these standards as a condition for interim authorization. However, since the transportation of hazardous waste by interstate carriers will be subject to DOT regulations, EPA encourages States to adopt transportation requirements which are consistent with DOT's regulations.

In addition, EPA will continue to require reports directly to it of international shipments of hazardous wastes. This is uniquely an issue that concerns the National Government, and requiring reports directly to EPA is the simplest procedural mechanism for ensuring that there is a central national repository of information about those shipments.

§§ *123.128(e) and 123.129* (Hazardous waste treatment, storage, and disposal facilities). During interim authorization a State must have authority to regulate all types of hazardous waste treatment, storage and disposal facilities except those that do not exist in the State on the date of interim authorization. This is a significantly stricter requirement than the one that appeared in the June 14, 1979 proposal.

When Phase II is concerned, a State must have in effect a permit program substantially equivalent to the Federal hazardous waste permit program, including substantially equivalent public participation provisions.

EPA cannot accept the suggestion that a system of permits by rule more extensive than the one in the Federal system be accepted for purposes of interim authorization. The safety and control of HWM facilities, particularly in the early years of the program, will be to a great extent a matter of site-specific judgment requiring site-specific examination.

As discussed in more detail earlier in this preamble (Part 122, Subpart B—Additional requirements for Hazardous Waste programs), the Agency has integrated the overlapping requirements of RCRA and SDWA relative to the underground injection of hazardous waste into wells. Briefly, the approach is as follows: Existing wells that receive hazardous waste will be considered to be "hazardous waste management facilities." During the "interim status" period their owners or operators will be required to comply with certain requirements of 40 CFR Parts 122 and 265, including such requirements as filing of notifications and Part A permit applications, and compliance with the manifest system and interim status standards. As discussed in the preamble to Part 122, Subpart B, EPA also will make provisions for issuing interim RCRA permits to class I wells handling hazardous waste.

Because this regulation under RCRA of wells injecting hazardous waste is somewhat different than what EPA proposed, EPA will give a State the option of whether to cover such wells under Phases I and II of its State hazardous waste program until the State has an approved UIC program (§ 123.128(e)(8)). If a State chooses not to regulate wells injecting hazardous waste under its RCRA program, EPA will enforce the interim status standards for such wells, and will, once the permitting standards for Class I wells injecting hazardous waste are in place, issue permits to owners and operators requesting them.

Relationship of State programs to each other and to the Federal program under interim authorization. As noted above, EPA has significantly revised its approach to interim authorization since the time of proposal, tightened the test for determining "substantial equivalence" and forbidden partial programs. These changes should greatly reduce the cases in which differences between State programs, and between State programs and the Federal program, lead to inconsistencies which require resolution. However, EPA has identified several types of inconsistencies which may still arise. The independent application of DOT regulations respecting interstate shipments (including requirements for the identification of waste and use of the manifest) should help mitigate the impacts of the first three potential problems discussed below.

1. Inconsistencies due to differences in the "universe" of wastes from State to State. Two types of inconsistencies can arise here. First, a waste could move from a State where it is not designated or listed as hazardous into one where it is designated or listed. Both under section 3009 of RCRA and under the general State police power, each State has the right to control the movement and disposal within its boundaries of wastes which it considers hazardous. Accordingly, under new § 123.130(b), when wastes move from a State where they are not listed or designated to one in which they are, they become subject to the treatment, storage and disposal requirements and the transporter requirements of that second State.

Also, a waste could move from a State where it is listed into one where it is not designated or listed. This is by far the most troubling of the four types of inconsistencies. EPA intends to administer the program so as to minimize the chances that this situation will in fact occur. Specifically, EPA will not approve State programs which affirmatively appear to include a smaller "universe" of wastes than the Federal program covers. However, since during interim authorization EPA will allow State programs to vary from the Federal program in their listing characteristics and test methods, it may be that a State program will turn out to be underinclusive even though that was not clear at the time of approval. By the same reasoning used above, the wastes become unregulated (except as general State law may provide) upon moving into the second State and, under § 123.130(a), may be managed as permitted by the laws of the State into which it has been transported. In addition, § 123.128(b)(6) requires State manifest systems to insure that all interstate shipments of hazardous waste be designated for delivery to facilities authorized to operate under an approved State program.

Clearly, under this approach States could become preferred "dumping grounds" for wastes which they did not regulate, but neighboring States did. However, the possibility of that occurring cannot be avoided under any approach which gives effect to the "substantial equivalence" language of RCRA.[7]

[7] EPA will also permit States to obtain interim authorization even if they lack regulatory authority over certain types of storage, treatment, or disposal facilities as long as those facilities do not exist in the State at the time interim authorization is granted. This provision raises the possibility that such a facility could be opened in the State during the time of interim authorization and operate unregulated. However, EPA believes that this will not prove to be a practical problem. It will be difficult to construct and open large or complex

Footnotes continued on next page

2. The State has interim authorization but EPA is running the manifest system. In this case, the Federal manifest system and Federal standards for generators and transporters will be enforced in the State. The universe of wastes subject to these Federal requirements, however, will be the universe of wastes covered by the State program. It will not be the Federal universe as defined in 40 CFR Part 261. However, DOT's requirements are applicable to interstate shipments of hazardous wastes in the Federal universe as defined in 40 CFR Part 261.

3. A State has Phase I authorization during Phase II. This state of affairs, as explained above, can only last for 6 months. During this period, EPA could administer and enforce the Federal permit program in the State. However, it is most unlikely that EPA would operate an active permit program that would duplicate State regulation of existing facilities. Instead, EPA would almost certainly confine itself to issuing permits to new facilities which need them to begin construction.

§§ *123.128(f) and (g)* (Enforcement and compliance evaluation). The proposal provided that States applying for interim authorization had to show, in their application, substantial compliance with proposed § 123.10, the enforcement requirements of Subpart A, and compliance with the rest of Subpart A, including the compliance evaluation requirements of proposed § 123.9. Requirements for enforcement authority and compliance evaluation programs for interim authorization are now contained in § 123.128(f) and (g).

For compliance evaluation, the requirements for interim authorization are substantively the same as those found in § 123.8, requirements for final authorization, including requirements for public participation.

For enforcement action authority, substantial equivalence has been defined with specificity. A State can qualify for interim authorization with lesser amounts of fines than required for final authorization or under the Federal program. A State must have the authority to impose civil *or* criminal sanctions, but need not have authority to imprison. Upon review of existing State legislation, EPA found that a significant number of State programs would not qualify for interim authorization if required to have the same enforcement provisions as the Federal program. In keeping with the Congressional intent that the interim authorization period provide time for States with less stringent programs to reach equivalence rather than have the program halted in its development, EPA has determined that an adequate degree of protection of human health and the environment will be provided by these requirements, while allowing as many States as possible to operate the program.

Once a State receives interim authorization, EPA retains oversight authority (section 3008) concerning the activities regulated by the State. The language in section 3006(c) that a State program with interim authorization "operates in lieu of the Federal program" does not mean, as suggested by one commenter, that EPA has no authority to enforce the State's program either in conjunction with or through the State. Section 3008(a)(2) specifically authorizes Federal enforcement of such a State program.

Section 3008(a) provides that EPA may enforce "any requirement of this subtitle" after, as one commenter noted, EPA has given notice to the authorized State. The preamble to the June 14, 1979 proposal at page 34259 stated that in an authorized State EPA might "enforce directly against any facility or activity violating the Federal standards" under the authority of section 3008(a)(2). It should be understood that in a State with interim or final authorization, the "requirements of the subtitle" which EPA will enforce under section 3008 are the State program requirements.

§ *123.132 Sharing of information.*

This section is the same as § 123.10 and is discussed in the preamble to that section.

§ *123.133 Coordination with other programs.*

This section is self-explanatory. The question of coordination is fully discussed in the preamble to Part 124.

§ *123.134 EPA review of State permits.*

The major issue raised by this section—when EPA will use its authority to revoke a State permit—has been discussed earlier.

Beyond this, quite a number of comments were received on the definition of "major" facility permit and how EPA will review State permits. As the preamble to Part 122 explains, a precise definition of a "major" facility is not possible at this stage of the program. Instead, the definition will be established year by year and State by State in guidance. However, EPA does expect that the numbers chosen will result in review of approximately ten percent of the permit applications for a State.

One commenter suggested that EPA limit its review of permits to receiving "summaries" and that it review the actual application only upon specific request. There may be cases where such an approach would be appropriate. However, a "summary" (which the regulations may require in any event in the form of a fact sheet) would not be enough for a thorough review of an important permit. Accordingly EPA believes that transmittal of more documents for certain types of permits should be provided for in the MOA.

§ *123.135 Approval process.*

In the June 14, 1979 proposal, the approval process for interim authorization was identical to the approval process for final authorization. In this final regulation EPA has shortened the approval process for interim authorization. There are two reasons for this change. First, section 3006(b) explicitly mandates, for final authorization, specific procedures which a State seeking final authorization and EPA granting authorization must follow. Section 3006(c), the provision for interim authorization, contains none of these procedural requirements.

Second, extensive procedural requirements for interim authorization approvals would be inappropriate given the short duration of interim authorization, and would contravene the Agency's desire to minimize the potential for duplicate Federal and State hazardous waste programs. Protracted approval procedures enhance the potential for duplicate State and Federal programs while an application is being processed.

The Agency is, however, committed to extensive public participation in the interim authorization process and is mindful of the need for reasoned decisionmaking in granting interim authorization. Therefore, the approval process for interim authorization will contain all the elements of the approval process for final authorization except for the requirement that the State publish its notice of intent to apply for interim authorization and the requirement that the Administrator make a tentative determination to approve the State program.

Unlike section 3006(b), section 3006(c) does not include a statutory review period (i.e., a period of time allotted to EPA for review of a complete program submission). In light of the Agency's desire to minimize the possibility of duplicate State and Federal programs,

---

Footnotes continued from last page
facilities during the 2 years allowed for interim authorization, and anyone who does build such a facility will do so in the knowledge that he or she will be subject to RCRA's full permit requirements when interim authorization expires, and may lose his or her investment if he or she does not qualify under them.

the Agency is committed to expedited review of State submissions for interim authorization. Thus, the Administrator will issue notice in the Federal Register of a hearing on the State's submission and will make a final determination whether or not to approve a State program as quickly as possible, but in no case later than 120 days after receipt of a complete program submission.

§ 123.136 Withdrawal of state programs.

This section is derived from § 123.14. It includes as an additional criterion for withdrawal of interim authorization State failure to meet the schedule for or accomplish the additions or revisions to its program set forth in its authorization plan. This criterion is required because interim authorization was specifically established to facilitate State assumption of a fully equivalent hazardous waste program.

The intent of Congress was clearly to grant interim authorization to States which would strive to achieve the requirements for final authorization in the twenty-four month period provided in section 3006(c). The authorization plan sets forth the necessary steps the State must take to achieve these requirements in this period. If it appears that a State will not achieve these requirements and clearly will not receive final authorization, it may be less disruptive to withdraw the program than to wait for it to lapse automatically. Hence, this added criterion for program withdrawal.

§ 123.137 Reversion of State programs.

This section is new. It provides that a State program shall terminate and revert to EPA if either the State fails to submit the amended application required for Phase II interim authorization as required by § 122.122(c)(4) or the Regional Administrator determines, in accordance with procedures set forth at § 123.136, that the amended State program submission does not meet the requirements for interim authorization corresponding to Phase II. There are no similar provisions in other subparts of this Part.

This automatic termination and reversion provision is necessary here because as described above, the two phases of interim authorization are integral parts of a State hazardous waste program. EPA does not intend to provide authorization for only one phase. Therefore, States with interim authorization for Phase I will be expected to seek interim authorization for Phase II; and States which received Phase I interim authorization but do not apply for interim authorization for Phase II shall not retain Phase I interim authorization beyond the 6 month period following the effective date of Phase II.

This rulemaking does not set forth detailed specifications for how the reversion of a State program to EPA will actually occur. EPA will address that subject in a future rulemaking if that appears necessary. If such a reversion takes place, it is EPA's intention to assure that facilities which had received interim status under the Federal program before a State received interim authorization, retain interim status if the program reverts to EPA and the State has not issued the facility a RCRA permit during interim authorization. Facilities which have received State-issued RCRA permits during Phase II of interim authorization will retain their permitted status until that State permit expires or is terminated. It is also EPA's intention to assure that facilities which had the equivalent of interim status under the State program will be eligible for Federal interim status.

Final Authorization.

By the time of final authorization under Subpart B of this Part, the national program for controlling hazardous wastes should be substantially more settled than it will be during interim authorization. In addition, the statutory scheme governing final authorization is more clear-cut. For both these reasons, this Subpart is significantly less intricate than Subpart F and requires less preamble discussion.

§ 123.31 Purpose and scope.

This is an introductory section. This section points out that interim authorization is *not* a precondition to final authorization. States may apply for final authorization at any time after promulgation of the Phase II regulations whether or not they have applied for or received interim authorization.

§ 123.32 Consistency.

As the discussion earlier in this Preamble states, Congress intended for State programs receiving final authorization to become fully part of an integrated national program to control hazardous wastes. Section 3006(b) of RCRA provides that State programs can only be approved if they are "equivalent to" and "consistent with" the Federal program. EPA has therefore tightened considerably the requirements for approval of final programs over those for approval of interim programs, although, as the earlier discussion also states, it has not gone as far as some commenters suggested.

This section provides that any aspect of a State program which operates as a ban on the interstate movement of hazardous waste is automatically inconsistent. A recent court decision, *City of Philadelphia* v. *New Jersey*, 437 U.S. 617 (1978), has held that such statutes are unconstitutional because they violate the interstate commerce clause, and EPA believes that decision is correct. However, since the text of RCRA speaks only to the "inconsistency" of State program submissions, not of State laws generally, this provision is restricted to the same extent.

EPA believes that State requirements which forbid the construction or operation of hazardous waste disposal facilities could be subject to attack by the same reasoning adopted by the courts that have struck down transportation bans. A State that refuses entirely to allow a necessary part of national commerce—the disposal of hazardous wastes—to take place within its boundaries is impeding the flow of interstate commerce just as much as a State that refuses to allow the transportation of those wastes. The interstate commerce concerns involved here are underlined by the establishment through RCRA of a national regulatory scheme, even though that scheme is not on its face preemptive. Accordingly, State programs which contain provisions that prohibit treatment, storage or disposal of hazardous waste within the State, will be deemed inconsistent if the prohibition has no basis in human health or environmental protection.

Finally, the section provides that if the manifest system does not meet the requirements of Part 123, the State program will be deemed inconsistent. Since the manifest is a document that may actually travel from State to State, it is important that the various States be very similar in this regard.

A number of comments raised as a "consistency" issue that State programs might be too lax in some respect so that a State would become a "waste haven" for a region. Though the terms "consistent" and "equivalent" do have a certain degree of overlapping content, in general EPA, during final authorization, will deal with problems of State programs that conflict with each other or impose unnecessary procedural burdens, as a "consistency" issue. Questions as to whether the programs are strong enough will be dealt with as a matter of "equivalence." Those matters are discussed below. To summarize, EPA has not required States to adopt EPA's precise regulations, but has required them to achieve the same effect, and has been particularly careful

to require very close similarity where problems of dissimilar State requirements might arise.

§ 123.33 Identification and listing of wastes.

This section requires States to control the same "universe" of wastes as the Federal program. This requirement will avoid the problems of differing lists pointed out earlier. Of course, a State is free to control additional wastes if it desires but, as explained earlier, this control will not extend beyond the State boundaries. In other words, unless other States have equally more inclusive programs, the extra wastes listed will not be considered hazardous in other States.

§ 123.34 Requirements for generators of hazardous waste.

As explained above, EPA places particular weight on consistency between the manifest systems in different States. The June 14, 1979, proposal provided that States must use the manifest format published by EPA and this requirement remains in the final rule. This means that a State's manifest form or format must contain the same information as required for the Federal manifest format. EPA has decided to retain a flexible approach to the manifest system and has not published a manifest form, for reasons explained in the preamble to the section 3002 regulations (45 FR 12728–29 (February 26, 1980)).

While EPA decided to minimize burdensome paperwork by only requiring exceptions reports by generators (40 CFR § 262.42), the Agency recognizes that several States view tracking of individual manifests as an integral and necessary part of their enforcement program. Indeed, several States have such a tracking system which typically requires generators and facility operators to send copies of all manifests to the State. The Agency views the continuation of such a tracking system by a State as allowable under Section 3009 of RCRA, provided the State adheres to all Federal manifest system requirements (e.g., the generator remains responsible for exception reporting).

As stated in the Preamble to § 123.128(b)–(d), certain aspects of the DOT hazardous materials program, though not required to be part of a State's interim authorization program, must be regulated as part of a State's final authorization program. These aspects include requirements for: accumulation of wastes in containers meeting DOT standards prior to shipment; packaging, labeling, marking and placarding of wastes; the forwarding of the manifest or shipping document for shipments solely by railroad or solely by water (bulk shipments only); and provision of the DOT proper shipping name. The Agency believes that, for final authorization, a State must incorporate these DOT requirements into its program, as EPA has in 40 CFR Part 262.

The overriding concern behind this requirement is the need for regulatory simplicity and elimination of confusion by split administration, i.e., generators and transporters will be able to look solely to the State hazardous waste management agency for all requirements with which they must comply.

§ 123.36 Requirements for hazardous waste management facilities.

This section contains standards for facilities that will be incorporated in permits for these facilities. Most of these requirements will be promulgated in Phase II and thus this section may well need revision at that time to fill in details.

§ 123.37 Requirements with respect to permits and permit applications.

This section requires the State Director, after a State has received final authorization, to review and change as necessary any permits issued by the State under Phase II of interim authorization. Where such permits are issued under Phase II, the Director should consider giving them a shorter term than the 10-year maximum now specified in order to make this re-examination easier.

§ 123.38 EPA review of State permits.

The significant issues raised by this section have been discussed earlier in this preamble.

§ 123.39 Approval process.

RCRA specifically provides the approval process for final authorization of State RCRA programs, which is different from that for interim authorization. The approval process has been simplified for interim, but remains virtually identical to the proposal for final authorization. One change, in response to a public comment, is that the final rule does not require the State to provide a copy of the actual transcript of the public hearing, but can instead provide a summary of the proceedings.

Subpart C—Additional Requirements for State UIC Programs

Many of the requirements of this subpart have been moved into Subpart A for the reasons explained above. Proposed §§ 123.52, 123.57, and 123.60 have been moved into §§ 123.4, 123.7, and 123.13, respectively. In addition, the requirements for State programs listed in § 123.7 are changed to the extent changes have been made in Parts 122 and 124. All States must ban certain Class IV wells as provided in § 122.36. Treatment of other Class IV wells has been reserved as discussed in the preamble to that section.

§ 123.51 Purpose and scope.

§ 123.51(d)—This paragraph (proposed § 123.51(f)(1)) generated a certain amount of confusion. EPA does not want a State to develop a detailed program covering classes of wells which do not exist in the State and which are not likely to come into being (except that the State must have a program to ban Class IV wells). However, the Agency is concerned that State programs control all types of injections and not inadvertently authorize new injections not previously found in the State. Therefore, States with no wells in a certain class (other than Class IV) have the following options:

(1) Without distinguishing between classes of wells, treat all injections as though they fall into EPA's Class I.

(2) Prohibit injections in non-existent classes explicitly.

(3) When the State can demonstrate that injections are not authorized in the absence of rules, and no rules are established over a particular class of well, EPA will accept this as an implicit prohibition. A certification to this effect from the State Attorney General is necessary, however. The State must control Class IV wells to the extent required by §§ 122.36 and 122.45 even though the State may not currently have any Class IV wells.

§ 123.52 Requirement to obtain a permit.

This section was proposed as § 123.54. State law must prohibit all well injections which are not authorized either by rule or by permit, and must provide the authority to regulate all well injections currently in place in the State, either by rule or by permit. Before any type of well injection not currently in place can be authorized, the State progam must be amended to cover that type of injection.

Proposed § 123.53 Attorney General's statement.

The specific requirement in this section has been dropped. The State's authority to prohibit or authorize well injections without a permit must be discussed, however, in the Attorney General's statement under § 123.5.

Proposed § 123.56 Annual report.

This section has been moved to § 122.18.

§ 123.54 Approval process.

Some commenters suggested that EPA was too stringent in its public notice requirements in proposed § 123.58(a), now § 123.54(a). They suggested that States should be given greater flexibility to handle public notice of their programs prior to submission. EPA strongly encourages public involvement in all of its programs and has not reduced these requirements below what was proposed. However, § 123.54(c) has been rewritten to clarify the circumstances under which the Regional Administrator may decline to hold a public hearing on a program approval.

Subpart D—Additional Requirements for State NPDES Programs

This Subpart reflects the requirements of EPA's revised NPDES regulations. (44 *FR* 32854, June 7, 1979). No substantive changes have been made. Sections 123.74 and 123.75 (proposed §§ 123.77 and 123.78) have been reorganized for greater clarity.

Proposed § 123.75 has been dropped because the requirements of that section that States have adequate authority to inspect, monitor, enter, and require reports, are duplicative of other requirements of these regulations. See §§ 122.7 (applicable permit conditions), 122.11 (monitoring requirements), and 123.8 (requirements for compliance evaluation programs).

Subpart E—Additional Requirements for State Programs Under Section 404 of the Clean Water Act

This Subpart has been reorganized to be more comprehensible.

§ 123.91 Purpose and scope.

One commenter suggested that § 123.91(c) be modified to allow EPA approval of State 404 programs lacking jurisdiction over all the waters within the State falling under the definition of "State regulated waters." EPA has thoroughly studied both the express language of CWA and the legislative history of the Act regarding the breadth of State section 404 programs. Both clearly indicate that State section 404 programs must regulate discharges of dredged or fill materials into all waters of the United States except those expressly reserved to the Corps of Engineers under section 404(g)(1) of CWA. For this reason, partial programs cannot be approved.

One commenter argued that § 123.91(d) limited the scope of State programs to regulation of only those activities permitted by the State after program approval. EPA disagrees. § 123.91(d) clearly allows approved States to assume responsibility over existing general permits issued by the Corps of Engineers. The Memorandum of Agreement between the State and the Secretary, under § 123.99, will be the vehicle for establishing which Corps issued permits the State will administer and enforce.

§ 123.92 Activities not requiring permits.

This section was proposed as § 123.107.

A number of commenters objected to the description of activities exempt from the requirement of having to obtain a permit, on the grounds that the exemptions have been drawn so narrowly that the 404 program intrudes illegally into activities reserved to the 208 program. EPA believes these objections are based on a misunderstanding of the relationship between sections 404 and 208. It is clear from the statutory scheme and legislative history that sections 402 and 404 must reach all point source discharges except those explicitly exempted in sections 404(f), 404(r), or 402(*l*). Section 208 was intended to supplement those programs by covering major non-point sources of pollution, by ensuring coordination between point and non-point source controls, by coordinating treatment facilities, and by preventing pollution as well as controlling it. Thus, it is not correct to assume that merely because an activity is identified in section 208 it is a nonpoint source; similarly, the BMPs in section 404(f)(1)(E) are not invalid merely because they reach point some problems which the 208 plans also address. Sections 404 and 208 simply do not define distinct spheres of influence.

§ 123.92(a)(1)—Several commenters objected to the restrictive language of § 123.92(a)(1). This subparagraph has been rewritten to more clearly specify the activities which are exempted from the section 404 permit requirement instead of focusing on those activities which do require permits, as the purpose of this section is to identify those activities which do not require permits.

The definitions of "plowing," "seeding," "cultivating," "minor drainage" and "harvesting" (proposed § 122.3(e)) have been moved into this paragraph for convenience. The terms appear only in this paragraph. Comments received on the definitions of cultivating, harvesting, minor drainage, and plowing are as follows:

Cultivating

EPA agrees with the commenter who recommended the deletion of the word "planted" in the definition of "cultivating," and has changed the definition accordingly to make it clear that cultivating naturally occurring crops, such as salt hay, may be exempt as long as the other requirements are met.

Harvesting

The Agency has included established ranch lands in the definition of "harvesting" to better coincide with statutory language.

Minor Drainage

A large number of commenters objected to the definition of "minor drainage." Most complained that, by limiting minor drainage to upland drains (and connections of such drains to waters of the United States), the regulation "exempted" only those activities which were already outside the scope of section 404. These commenters cited several passages in the legislative history to support their argument that some drainage within wetlands was also meant to be exempted. These commenters noted that the "recapture" provision in section 404(f)(2) would serve as assurance that the exempted drainage would have only minimal effects. The commenters also observed that the proposed definition would require a drainage proponent to determine the presence or absence of wetlands before he or she would know whether a permit is needed. A few commenters, citing the potential for abuse from wetlands drainage, recommended that the proposed definition be retained.

The definition of minor drainage is not an easy problem to solve. The legislative history contains numerous, inconsistent references to minor drainage and to other section 404(f)(1) exemptions. Some portions of the legislative history clearly support the position taken in the proposal, such as the statement that the provision for minor drainage merely recognizes that upland drainage does not involve the discharge of dredged and fill material in waters of the United States, and therefore does not ever need a permit. However, other passages in the legislative history suggest that the minor drainage provision is intended to aid farmers and foresters who are actively farming an area which may technically be waters of the United States, at least where these activities will not have a significant impact on the aquatic ecosystem.

After a careful review of the entire legislative history and consideration of the numerous comments, EPA has concluded that it would be appropriate to define "minor drainage" to include certain clearly defined drainage activities in wetlands which are part of on-going agricultural and silvicultural operations and which have minimal adverse effects, where permits are an unnecessary burden. Subparagraphs (ii), (iii), and (iv) of the new definition reflect this revision. It should be stressed that each of these provisions applies to activities that are part of an on-going farming or forestry operation; they do not exempt activities which convert wetlands to non-wetlands or which bring wetlands into farming use. The listed activities will have minimal adverse effects partly because they involve limited, reversible alterations to the hydrological regime.

Subparagraph (ii) refers to activities incidental to the planting, cultivating, protecting, or harvesting of rice, cranberries of other wetland crop species, in farm or forest areas in established use for such wetland crop production. This will allow a farmer to temporarily dewater the area for a particular step, such as planting, as long as the area is kept in *wetland* plant production (with or without rotation with other crops where such rotation is a normal practice). The phrase "wetland crop species," in the definition of minor drainage, must be read in connection with the phrase "food, fiber, and forest products" in § 123.92(a)(1)(i). Thus, it does not include peat and similar materials extracted or mined from the wetland substrate, even if such materials are derived from plants which also yield food or fiber or tree products.

Subparagraph (iii) also recognizes the particular situation of rice and cranberry (and possibly other farm or forest crop) growers, whose manipulation of water levels may involve the discharge of fill material.

Subparagraph (iv) responds to the concerns of farmers and foresters who pointed out that storms and floods occasionally deposit silt bars in pre-existing drainage channels in established crop lands; these bars block the normal drainage and often threaten crops which are not adapted to the new flooding regime. Such blockages may be due to storms, floods, beaver dams, and other such "events." We have included a requirement that such blockages be removed within one year of placement to be eligible for the exemption. This should ensure that this exemption will not be used to drain wetlands which happen to have been created by fluvial action over a period of time.

EPA considered adding a provision to exempt drainage of small, isolated, occasionally wet areas where such wet areas are surrounded by lands in established farming use. EPA concluded for a number of reasons that it would be unnecessary or unwise to include this provision in the definition of minor drainage.

First, many of these small, isolated wet areas may not be waters of the United States either because they are not wet enough to be "wetlands" under § 122.3 or because, even if wetlands, their destruction or degradation would not have any effect on interstate commerce. Including an "exemption" for such areas might create the erroneous impression that, but for the exception and subject to the recapture provisions of section 404(f)(2), each puddle and damp spot would need a permit. There is, of course, no such requirement unless there is a discharge into waters of the United States.

Second, in the case where waters of the United States are involved, such drainage would generally be covered by an existing nationwide general permit issued by the Corps of Engineers. States may arrange with the Secretary of the Army to take over the administration of such general permits, for State regulated waters, upon program approval. (See § 123.91(d)). Under one current nationwide permit (33 CFR § 323.4–2) discharges of dredged and fill material are authorized, subject to certain conditions not likely to affect farmers, in: (1) Non-tidal rivers, streams and their impoundments including adjacent wetlands that are located above the headwaters; (2) Natural lakes, including their adjacent wetlands, that are less than 10 acres in surface area and that are fed or drained by a river or stream above the headwaters. In the absence of adjacent wetlands the surface area of a lake shall be determined at the ordinary high water mark; (3) Natural lakes, including their adjacent wetlands, that are less than 10 acres in surface area and that are isolated and not a part of a surface river or stream. In the absence of adjacent wetlands, the surface area of a lake shall be determined at the ordinary high water mark; and (4) Other non-tidal waters of the United States other than isolated lakes larger than 10 acres (see (3) above) that are not part of a surface tributary system to interstate waters or navigable waters of the United States (see 33 CFR § 323.2(a)(5)). These small isolated wetlands would be covered by this nationwide permit.

There are strong policy grounds for continuing to rely on the general permit approach for regulating small, isolated, wetlands in regions where agricultural and silvicultural activities predominate. For example, the general permit approach allows a certain flexibility, in the event that the cumulative impact of such drainage should become more significant in the future. This flexibility arises in two ways. First, under the Corps' regulations and under State programs, the permitting authority has the discretion to require an individual permit in a particular case where required by concerns for the aquatic environment (as expressed in the section 404(b)(1) guidelines). For example, the permitting authority may conclude that in a particular area individual scrutiny is needed for the drainage of isolated wetlands (e.g., prairie potholes) of a certain size or type. Second, general permits are issued for fixed terms, not exceeding 5 years, and must be renewed upon expiration in order to continue in effect. The opportunity for public hearing required for such renewal will give State administrators, farmers, and other interested citizens an opportunity to assess the continued need for the general permit and its conditions, based on environmental conditions, and other relevant matters. For instance, in the previous example, the State Director may conclude that the loss of prairie potholes has had such an impact on migratory waterfowl that future discharges into any prairie pothole should have individual permits.

EPA believes that this approach complies with the direction of Congress to give the States a role in the implementation of the 404 program, recognizing that some States may choose a more protective approach than the minimum standards set by the Federal program. At the same time, this definition assures that the legitimate interests of farmers and other groups, as reflected in section 404(f), are also protected.

Plowing

Several commenters pointed out that plowing is a normal forestry as well as farming activity. We have amended the definition of plowing to reflect this. Others objected to the exclusion from plowing of redistribution of surface materials by grading, on the grounds that filling in depressions in irrigated fields may actually be a BMP.

Plowing, as defined, is not a point source and, under § 123.92, will not require a section 404 permit. However, other activities which involve the redistribution of soil or other surface materials to fill in waters of the U.S. are

not included in this definition and may require a section 404 permit.

Several commenters questioned the requirement that plowing take place on "established" farm or forest lands. This requirement has been deleted. However, it is still necessary to distinguish ongoing farming and forestry activities, which are exempt under section 404(f)(1) of CWA, from activities which convert waters of the United States to a new use, which, under section 404(f)(2), are not exempt.

EPA believes that redistribution of material should be subject to the scrutiny of the permit process when it results in the conversion of waters of the United States to dry land. In appropriate circumstances, with appropriate conditions, such redistribution may be permitted as provided in the section 404(b)(1) guidelines.

§ *123.92(a)(2)*—Some commenters felt that § 123.92(a)(2) was too vague or too inflexible for all emergency situations. EPA disagrees, and has retained this paragraph with only minor revisions.

§ *123.92(a)(3)*—A number of commenters objected to the language defining the exemption for the connection of irrigation ditches to waters of the U.S. as being too restrictive. The revised language clarifies that a permit is required only for those connections that involve construction of a water intake structure which results in significant discernable alterations to the flow or circulation of waters of the United States. It is not the intent of EPA that simple connections fall under the permit requirement. Furthermore, construction of bank protection features for ditches which do not reach into waters of the U.S. do not need a permit in any case.

§ *123.92(a)(6)*—Numerous reviewers objected to the baseline best management practices proposed in § 123.107(a)(5) on which the road construction exemption is based. Objections centered on two issues: (1) whether it is appropriate, or indeed legal, for EPA to prescribe by regulation a set of nationwide BMPs for State 404 programs; and, (2) whether the baseline BMPs in the proposal improperly control activities that do not relate to road construction involving the discharge of dredged and fill material.

As to the first of these objections, the Agency, after review of the legislative history of CWA section 404(f)(1)(E), finds no direct or implicit guidance as to the means by which Congress intended the best management practices requirement to be implemented. Our intent in specifying baseline best management practices was, and is, to identify basic measures which *are* nationally applicable and which can form a core or framework to which States may add more detailed and locally applicable BMPs which they believe are needed to assure that the environmental protection objectives of section 404(f)(1)(E) are met. We also believe that an explicit statement of minimum standards will aid States in preparing program submissions for approval. For this reason, we have retained the approach of baseline BMP's in § 123.92(a)(6).

EPA has carefully considered the second objection, relative to the scope of the specific BMPs, in light of the legislative history of section 404(f)(1)(E), and has concluded that in some cases the proposed BMPs were too broad. The Agency has, therefore, revised the list of BMPs in order to focus upon environmentally protective measures which are directly linked to the methodology and location of discharges for road construction. Proposed (i), (x), (xi), (xvi) and (xvii) have been deleted, and other proposed BMPs have been revised accordingly. Revisions have also been made to maintain consistency with the Corps of Engineers. Consistent with these other changes, we have also added several new BMPs, §§ 123.92(a)(6)(v), (xi), and (xii). New (v) emphasizes the importance of minimizing disturbance within the waters of the United States lying adjacent to road corridors. This BMP is designed to reduce the adverse impacts of road construction in waters of the United States by encouraging the widespread use of procedures which restrict road construction to the actual corridor to be occupied by the finished road. New (xi) and (xii) are both included to maintain consistency with the BMPs applied by the Corps of Engineers. New (xi) requires that the public health and welfare be protected. New (xii) requires that health and economic concerns be protected by the protection of shellfish production areas. Below is a BMP by BMP analysis of comments received and changes made in each of the proposed baseline BMPs.

Most of the comments on proposed (i) were not favorable, expressing concerns that this BMP was outside EPA's authority, that the absolute nature of the prohibition made it impracticable, and that it might even result in the need for additional road construction. Although the Agency agrees with the comments favorable to proposed (i) that logging in streams may be environmentally harmful, proposed (i) has been deleted as not being within the proper scope of this section.

Although many commenters approved of proposed (ii) (now (i)), others felt that it was already covered under section 208 or that it was too inflexible. In response to this latter comment, the Agency has included more factors to be used in determining what restrictions are feasible in any given case.

Proposed (iii) (now (ii)) has been revised to require the minimization of discharges of dredged or fill material only. This responds to those comments which stated that the BMP, as proposed, was not limited to dredged or fill material, and was impractical.

Many commenters agreed with proposed (iv) (now (iii)), and so it has been retained and only slightly revised. The Agency does not agree with those commenters who felt that allowances for certain types of discharges or for extreme flows should be included in this BMP. The phrase "high" flows has been changed to "flood" flows for clarity.

Comments on proposed (v) (now (vii)) were generally favorable, and so this BMP was retained with minor revisions. The revisions specify that the affected activities are related to road crossings. The Agency does not feel that it is impractical, as two comments stated.

Almost all commenters agreed with proposed (vi) (now (x)) and proposed (vii) (now (xiv)), and they have been retained unchanged.

Although a few commenters felt that proposed (viii) (now (ix)) needed more definition or explanation, EPA has retained this BMP unchanged in light of the predominance of favorable comments and the availability of information compiled under the Endangered Species Act for implementing this requirement.

Most commenters agree with proposed (ix) (now (iv)), and it has been retained, although limited to erosion prevention. Several commenters suggested that the word "prevent" be replaced with "minimize" or "control," but the Agency and the greater number of commenters felt that the original language is both preferable and practicable.

All comments on proposed (x) were negative, with the primary objections being that it exceeded EPA's authority, was too restrictive, was covered under section 208 and was inappropriately regulated under section 404, and was not practicable. In response to these comments, proposed (x) has been deleted.

Almost all of the comments on proposed (xi) were negative. Primary concerns were that it exceeded EPA's scope of authority, was covered under section 208 and was inappropriately regulated under section 404, was

unrelated to farm or forest road construction, was not practicable, and would not always lead to environmentally protective practices. Only one commenter favored retaining this BMP. In response to these comments, proposed (xi) has been deleted.

Many commenters agreed with proposed (xii) (now (vi)) which, in response to comments, has been slightly revised to relate specifically to road crossings. The Agency disagrees with the many commenters who felt that this BMP was not adequately specific to section 404 and that it was best regulated under section 208 only, since it is clearly concerned with potential discharges into waters of the U.S.

Proposed (xiii) (now (viii)) has been revised in response to a number of comments which criticized the zone of vegetation and thermal pollution requirements as being ineffective or not necessarily protective of the environment. The other major point of criticism in the comments was that this is not adequately related to section 404 and is properly regulated under section 208. The Agency disagrees with this point of view, and feels that this BMP may be appropriate to both sections 404 and 208. A number of commenters agreed with this position, and so proposed (xiii) has been revised and retained.

A large number of commenters agreed with proposed (xiv) (now (xiii)), which has been retained unchanged. Critical comments generally stated that this BMP was not adequately related to section 404 or that it exceeds EPA's authority. EPA feels that neither criticism is well-founded since the requirement applies to discharges regulated under section 404 and assures compliance with two related Federal laws.

Almost all of the commenters agreed with proposed (xv) (now (xv)) and it has been retained substantially as proposed. EPA feels that there is no basis for the comments that this requirement is impractical or that it might result in environmentally harmful activities.

No favorable comments were received regarding proposed (xvi). The general criticisms were that this BMP was not adequately related to section 404 and was more appropriately regulated under section 208 and/or FIFRA, that it was not practicable, that it was beyond the scope of EPA's authority, and that the language was not adequately defined or specific. In response to these comments proposed (xvi) has been deleted.

No favorable comments were received regarding proposed (xvii). Objections to this BMP were generally that it was covered under section 208 and regulation under section 404 was not appropriate, that it was not practicable or not necessary, that it exceeded EPA's authority, and that it was unrelated to farm or forest road construction. In response to these comments proposed (xvii) has been deleted.

In addition to these revisions and deletions EPA has included in these regulations three other baseline BMPs. As explained above, new BMP (v) is intended to restrict the adverse impacts of road fill construction on waters of the U.S. to the specific site of the fill. It specifically affects the manner in which dredged or fill material is discharged for road construction, and so is clearly appropriate in this section.

New (xi) and (xii) are both designed to protect the public health and welfare by protecting water supply and food production areas from contamination resulting from discharges allowed under this paragraph.

§ *123.92(d)*—One commenter expressed concern that proposed § 123.107(d), which exempts Federal projects qualifying under section 404(r) of CWA from State section 404 permit requirements, is contrary to the provisions of section 404(t) of CWA. Section 404(t) preserves for the States the right to regulate discharges of dredged or fill material in the navigable waters of the State. To clarify the distinction between section 404(r) and section 404(t), the paragraph has been changed to specify that projects qualifying under section 404(r) are exempt from regulation under the Federal or State section 404 program, but may be regulated under other State or Federal programs.

§ *123.94 Permit application.*

This section was proposed as § 123.108.

Several commenters suggested that the permit application content requirements of proposed § 123.108(c) be simplified and reduced. The Agency agrees, and in revising those requirements has attempted to clarify what is required in the application, reduce duplication, and limit application requirements to the information which is normally required for evaluation of proposed projects.

A number of commenters objected to what they considered the unreasonable economic costs of providing the application information required by the proposal. We believe the simplification and reduction of those requirements will result in commensurate reduction in costs to the applicant. The Note under § 123.94(c)(2)(v) also seeks to ensure that the level of information required will be appropriate to the necessary review, pursuant to the section 404(b)(1) guidelines, 40 CFR § 230.4(c) (as proposed in 44 FR 54222, September 18, 1979).

§ *123.96 Emergency permits.*

EPA has revised the section on emergencies (proposed § 123.111) to ensure that procedures and requirements relating to discharges of dredged and fill material will be waived only to the extent necessary to meet emergencies. The provision still allows the Director the necessary flexibility to respond to situations which would result in an unacceptable hazard to life or severe loss of property if corrective action is not undertaken during the usual processing period. At the same time, the revised language assures the public's right to participate at the earliest feasible opportunity.

§ *123.97 Additional conditions applicable to all 404 permits.*

This section contains the standard permit conditions which the State Director shall include in all State 404 permits. The permittee now must be required to maintain the authorized work area as described in the permit in order to prevent subsequent violations of CWA standards due to previously authorized activities. In addition every permit must specify that only activities specifically identified and authorized in the permit are authorized activities. This maintains consistency with Corps permits, and alerts the permittee to the fact that the permit allows him/her to perform only work specifically described by the permit. Any other activities which require a permit but are not specifically identified and authorized in the permit cannot be performed unless the permit is modified or a new permit is obtained.

§ *123.98 Establishing 404 permit conditions.*

This section also includes permit conditions which the State Director shall include in State 404 permits. These conditions may vary in their wording from permit to permit, but must be applied, to the extent appropriate, in every permit.

The permit must now include descriptions of the geographic area, specific site, type, size, and purpose of any authorized discharge, as well as the water quality standards, effluent limitations, and toxic effluent standards with which the discharge must comply. These requirements are intended to avoid any confusion as to what is authorized by the permit and what limitations are imposed on the

authorized discharge. The permit must also include a specific date by which work must commence. This will ensure that the permittee knows exactly when the discharge is authorized and when it is not.

§ 123.99 Memorandum of agreement with the Secretary.

This section was proposed as § 123.98. One commenter suggested that the requirement for the State and the Secretary to enter into an agreement was unnecessary. EPA disagrees. The MOA with the Secretary is the primary means of implementing the requirements of sections 404(g) and (h) of CWA. It is necessary to coordinate the transfer of the Federal program applicable to State-regulated waters to the State, and to clearly establish where the jurisdiction of the Corps ends and that of the State begins. The Corps will identify for the State those waters within the State over which the Corps will retain jurisdiction. The MOA with the Secretary will describe this division of jurisdiction, and confirm the State's understanding of its jurisdiction as set out in the program description under § 123.4(h)(1).

Two commenters felt that § 123.99(f), which prohibits the State from issuing a section 404 permit if in the judgement of the Secretary the discharge would substantially impair anchorage or navigation, should be struck. EPA cannot incorporate these comments since to do so would conflict with the express language of section 404(g)(1)(F) of CWA.

§ 123.100 Transmission of information to EPA and other Federal agencies.

This section was proposed as § 123.98. Several commenters objected to any application of the draft permit requirements of § 124.6 to State section 404 programs. As in the proposal, draft State section 404 permits will continue to be required in certain cases. In most cases draft permits will not be required. However, for those activities for which EPA may never waive permit review, such as major projects or projects in particularly sensitive areas, and for other activities when EPA deems it necessary, the State will be required to prepare and circulate a draft permit. (See the discussion under § 124.6 of this preamble for a general justification of the draft permit requirement.) As discussed in the preamble to § 123.6(f), the categories of discharges for which a draft State section 404 permit is required have been more clearly defined.

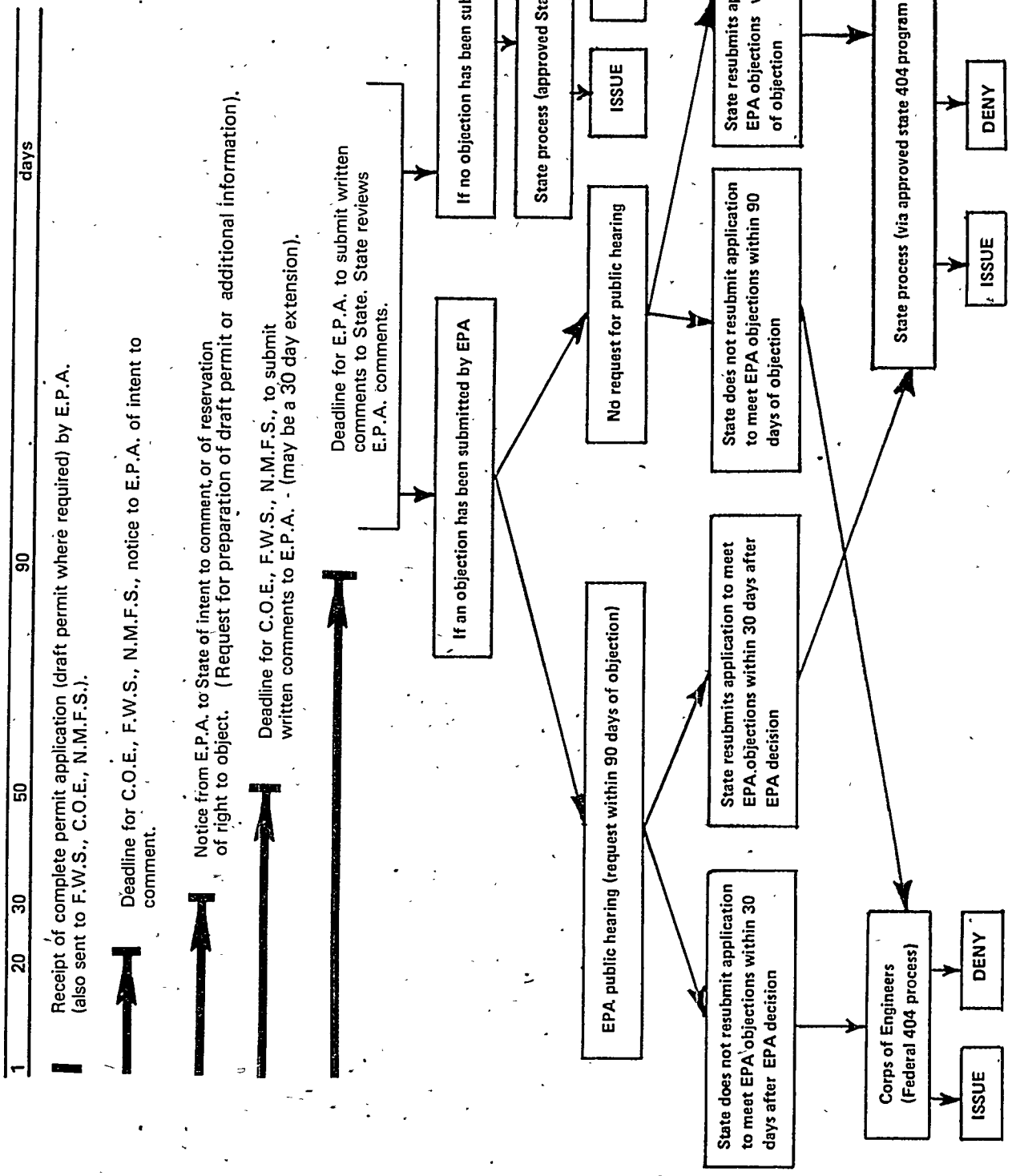
§ 123.101 EPA review of and objections to State permits.

Two industry commenters and one State agency objected to EPA review of State permits in general and the 90-day review period in particular. No changes were made because the provisions of this section follow from the express language of section 404(j) of CWA. If the Regional Administrator is going to comment upon a permit application or draft permit, he or she shall notify the State Director within 30 days of receipt. If such notification is made in time, the Regional Administrator shall have an additional 60 days to respond. Responses will normally be given in less than the full 90-day period.

The following chart should clarify the entire State section 404 permit application review process.

BILLING CODE 6560-01-M

STATE 404 PROGRAMS—PERMIT APPLICATION REVIEW PROCESS



BILLING CODE 6560-01-C