



STATE OF WEST VIRGINIA
DEPARTMENT OF NATURAL RESOURCES
CHARLESTON 25305

JOHN D. ROCKEFELLER IV
Governor

November 8, 1984

WILLIS H. HERTIG, JR.
Director

RONALD R. POTESTA
Deputy Director

The Honorable A. James Manchin
Secretary of State
Capitol Complex
Charleston, West Virginia 25305

Dear Secretary Manchin:

Enclosed please find two copies of the West Virginia Surface Mining Reclamation Regulations as approved by the Department of Natural Resources after a public hearing was held on September 26, 1984.

As you will note from the attached statement made by Dennis Treacy, Assistant Attorney General, who was appointed by the Director of the Department of Natural Resources to administer the public hearing, no one appeared to comment on the regulations nor were there any written comments received by the deadline.

Due to an oversight by the Department, one change had to be made [see errata sheet under 4C.05(f)] to correspond with changes in other MSHA approvals as directed by OSM conditions on our program.

If you have questions or need additional information, please do not hesitate to let me know.

Sincerely,

James E. Pitsenbarger
James E. Pitsenbarger, Chief
Division of Reclamation

JEP/baa

Enclosures

OFFICE OF WEST VIRGINIA
SECRETARY OF STATE

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PREAMBLE TO PROPOSED REGULATIONS
CONSOLIDATING THE ARTICLE 5A AND ARTICLE 6 PROGRAM

- I. WHAT: This is a request for comment on proposed regulations which will consolidate the water pollution control program under Article 5A with the surface mining and reclamation program under Article 6 of Chapter 20 of the Code of West Virginia. This consolidation is being undertaken under the authority in West Virginia Code Section 20-6-43. These regulations will be promulgated as Section 10 of Series VII - the West Virginia Surface Mining Regulations.
- II. WHEN: Comments will be accepted until the close of business Friday, June 8, 1984, or until the end of the public hearing scheduled for that date at 2:00 p.m. in the Conference Center, 1900 Washington Street, East, Building 7, Room C.
- III. FOR FURTHER INFORMATION: Contact Ron Shipley, Special Assistant to the Director, West Virginia Department of Natural Resources, 1800 Washington Street, East, Building 3, Room 669, Charleston, West Virginia 25305. Telephone: (304) 348-2754.
- IV. BACKGROUND: During the 1983 legislative session, legislation was enacted allowing the Director of the Department of Natural Resources to consolidate the current water pollution control program under Article 5A, Chapter 20, with the Article 6, Chapter 20 Reclamation program. It was amended during the 1984 session. This legislation, which is codified at West Virginia Code, Chapter 20, Article 6, Section 43, accomplishes consolidation by transferring all the powers, duties, and responsibilities of the Chief of the Division of Water Resources to the Director. Such legislation, however, is not effective until the Governor signs a proclamation stating that the United States Environmental Protection Agency has granted its approval to the partial transfer of the Federal National Pollutant Discharge Elimination System Program (NPDES) to the Director.

The purposes behind consolidation are three-fold:

First, by consolidating the two programs, the Department provides one-stop shopping for permits required under both the Water Pollution Control and the Surface Mining and Reclamation Acts. Currently, these permits are issued by two separate Divisions, under two separate statutes and two separate set of regulations, by two separate permitting groups, and are enforced by two separate set of inspectors. This consolidation should provide benefits to the industry in the form of less paperwork, and consistent regulatory and enforcement signals from the agency.

The second purpose is administrative efficiency. By consolidating the programs, the agency will need only one group of permit reviewers to examine the application for a facility, one set of regulations, and one enforcement group. This will make better use of the existing resources within the agency.

Finally, the third purpose is to produce better environmental results. The field inspection staff of the Division of Water Resources, for example, is spread out among many different point sources. A staff of approximately 30 inspectors must examine all the sewage discharges, all the industrial waste discharges, solid waste facilities, and discharges from coal operations. By consolidating, the agency will inspect all coal sources (except for dredging and bath houses) with the inspection forces of the Division of Reclamation which number approximately twice the Division of Water Resources' inspection forces. This means that the thirty inspectors from the Division of Water Resources will lose a substantial portion of their workload, which they can then devote to the other discharges within their jurisdiction, that is, sewage, industrial wastes, and solid waste.

V. ISSUES:

A. Scope of Consolidation

There are several important issues to be considered in consolidation. The first is the scope of the consolidation, that is, which coal facilities will be handled by the Division of Reclamation. The legislative history provides confusing and conflicting signals.

As originally proposed, the legislation, introduced as an amendment to the West Virginia Surface Coal Mining and Reclamation Act, Chapter 20, Article 6, stated that "the director shall have sole authority to issue, amend, transfer, renew or revoke permits required under Article 5A of this chapter with respect to surface mining operations." Since the phrase "surface mining operations" is the operative jurisdictional phrase in Article 6, the legislature's intent was clear. The consolidation was intended to cover only those facilities covered under Article 6.

The legislation was amended prior to passage in 1983 and the powers, duties and responsibilities transferred to the Director were those with respect to "all coal mines, preparations plants, and all refuse and waste therefrom subject to said Article 5A." This language is more akin to the language of Article 5A which among other things, keys jurisdiction to actions concerning: "any mine, quarry, preparation plant, or dispose of any refuse or industrial wastes or other wastes..." W. Va. Code §20-5A-6(b)(6). Nowhere is the phrase "coal mines, preparation plants all refuse and waste therefrom subject to said Article 5A" defined.

Although changing the language in the statute, the legislature did not change the title to Section 43, still titling it to consolidation of "surface mining operations."

The Department of Natural Resources is proposing to define the phrase "coal mines, preparations plants, and all refuse and waste therefrom" to mean:

"Any point source covered under 40 CFR Part 434 and any coal mine, coal preparation plant, coal preparation plant associated areas, refuse pile, coal waste piles, or other related activity required to have a permit under the CWA and Article 5A of Chapter 20 of the Code, excluding any sewage treatment facilities, bath houses, dredging operations or the extraction of coal incidental to the extraction of other minerals where coal does not exceed sixteen and two-thirds percent of the tonnage of minerals removed for purposes of commercial use or sale."

In defining the operative phrase, the Department has also included a definition of "coal mine" or "mine," "coal preparation plant" and "coal preparation plant associated areas." These three terms are defined to equate with the EPA terms "active mining area," "coal preparation plant," and "coal preparation plant associated areas" under 40 CFR Part 434--Coal Point Source Category--Effluent Guidelines. The Department does so to ensure EPA approval of the consolidation which is a prerequisite for the legislation becoming effective.

At the same time, the Department is mindful of the benefits which consolidation can bring in the form of administrative efficiencies and the scope of Article 5A jurisdiction being broader than just point sources. (Indeed Article 5A lists a point source discharge as only one basis for requiring permits. See W. Va. Code §20-5A-5(b)(1)).

Consequently, we are proposing a definition which includes a specific reference to activities required to have a permit under both the EPA program and Article 5A while specifically excluding facilities or activities such as sewage treatment facilities, bath houses, dredging operations, and where coal removal is incidental to other mining which are not covered under Article 6 and are more properly regulated solely under the provisions of Article 5A.

B. Consolidation Program.

Another important consolidation issue revolves around the extent and method the Department will use to consolidate the different programs. See §10C.07(b).

The statute requires that the regulations consolidate the programs "to the extent feasible." See W. Va. Code §20-6-43(b). The feasibility of consolidation is a major issue because the programs are not currently consolidated and coal facilities are in many different stages of permitting before both divisions and of varying compliance. For example, under the Article 5A/NPDES program, at least three types of permits have been issued: a State Water Pollution Control Act permit; a WW/NPDES permit, and a Federal NPDES permit which the Water Chief has "adopted" as an Article 5A permit. At the same time, there

are many Federal NPDES permits still being administered by the U.S. EPA which have not been "adopted" as an Article 5A permit.

These different permits have different expiration dates which, almost universally, have expiration dates different from the Article 6 permits. This situation prevents major problems for consolidation while also being a key reason behind the consolidation. Because there could be at least three different Article 5A permits for any one facility, which expire at different dates, the administrative workload for everyone is more than doubled. Managing this situation is the key to an effective and efficient program. The Department's program for consolidation is one which will effectuate consolidation over the next several years.

First, by providing the authority to consolidate and consider applications jointly, the program will allow the Director (through the Division of Reclamation) to consolidate current applications. Thus, a facility requiring a permit under both Article 6 and 5A, may have its applications consolidated and issued jointly, if possible.

Permissive consolidation will provide flexibility to the Department so that permits can be issued concurrently. This step is essential for consolidation because it will lead to Article 6 and 5A permits which have the same expiration dates.

Of course, there are many permits currently in effect which, somehow, must be phased in to a consolidated framework. The Department's program will accomplish this by:

1. Allowing the Director to extend expired permits for up to 18 months to the date when the Article 6 permit expires. (This 18-month period is statutorily set--See W. Va. Code §20-5A-7(c).)
2. Allowing the Director to issue Article 5A/NPDES permits for a duration of less than 5 years to reconcile its expiration date with the Article 6 permit. There is a possibility that a permit could be issued for very brief periods of time, thereby necessitating a reissuance application and its attendant costs. Consequently, we have included a safeguard by which the Director cannot issue a WV/NPDES permit whose expiration date is less than 3-1/2 years for the sole purpose of consolidation without the permittee's approval.

Secondly, it recognizes that new source applications be submitted and/or considered jointly.

Finally, the consolidation program also requires that reissuance applications be submitted with renewal applications for any water program permit which expires within eighteen (18) months after the expiration of an Article 6 permit.

C. New Source Issue

The new source issue for the coal mining point source category has been confused and confusing for a long time. There are two major affects of the new source determination. First, is that a new source must meet the new source performance standards promulgated by U.S. EPA under Section 306 of the Clean Water Act. These new source performance standards contain more stringent effluent limitations than those required for existing sources.

The second major affect is that a facility who receives effluent limitations based on the new source performance standards, has a ten-year protection period under Section 306(d) of the Clean Water Act.

Under the general NPDES regulations, a new source is defined to be

"any building, structure, facility or installation from which there is, or may be a discharge of pollutants the construction of which commenced: (a) after promulgation standards of performance under Section 306 of the Clean Water Act which are applicable to such source, or (b) after proposal of standards of performance in accordance with Section 306 of the Clean Water Act which are applicable to such source, but only if the standards are promulgated in accordance with Section 306 within 120 days of the proposal." See 40 CFR §122.2.

Since the coal mining point source category regulations have already been promulgated, the definition of the new source should be written to reference the appropriate date required by the definition. However, the new source performance standards have been promulgated by EPA several different times throughout the past nine years. This raises the issue of the "old new source"; that is, the coal mine or preparation plant which was constructed and operated after promulgation of a previous new source performance standard, but by the term of the current regulations would not be subject to new source performance standards.

EPA has apparently tried to reconcile this problem by creating a different category of point sources called a "new discharger." The Environmental Protection Agency has also extended the ten-year protection period to a new discharger.

The EPA definition of new discharger contains three criteria for designating a source as a "new discharger."

These are: the source did not commence a discharge prior to August 13, 1979; the source did not receive a finally effective NPDES permit for discharges at that site; and, the facility is not a new source. The problem with this definition is that a

court case held that the new source date for the coal mine category is September 19, 1977. (See Pennsylvania Citizens Coalition V. EPA, Third Circuit Court of Appeals, 14 ERC 1545, March 20, 1980.)

EPA's definition of new discharges, therefore, creates confusion because the dates do not coincide. In addition, EPA is planning to reduce the pollution control requirements for preparation plants by changing the new source performance standard from a zero discharge standard to allowing a treated discharge. (See Settlement Agreement, National Coal Association V. EPA, Nos. 82-1929, 4th Circuit Court of Appeals, August 1, 1983.) This means that "older" new sources must meet more stringent standards than the "newer" new sources.

The Department's proposed regulations define existing sources to be a source which commenced discharging prior to September 19, 1977--the date on which the Third Circuit Court of Appeals ruled that new source performance standards applied. A new source will be any source covered under 40 CFR Part 434 which commenced construction after September 19, 1977.

An "older" new source meeting more stringent limits than will be currently proposed, may apply for a permit modification after EPA's regulations are finalized under 40 CFR Part 434.65. The Department is incorporating into its definition of new source the ability to receive a modification.

A new discharger is defined consistent with the EPA definition.

Comments on this issue are particularly requested.

D. Abandonment Issue

EPA's regulations set effluent limitations commensurate with the five year post-mining period under SMCRA. EPA did not establish effluent limitation guidelines applicable after the SMCRA bond release period, citing insufficient data and the sufficiency of the SMCRA bond release program. While declining to establish effluent guidelines nationally, the EPA preamble stated:

"However, any point source discharge after bond release does require a permit and will be addressed on a case-by-case basis."

In a Fourth Circuit Court of Appeals case the court stated: "Moreover post-mining discharges from a point source such as these mines are illegal in the absence of an NPDES permit, the conditions of which the owner of the property must meet." (Webb V. Gorsuch, No. 82-1586, January 20, 1983, Slip. Op. at 8)

In its settlement agreement relating to NCA V. EPA, Supra, EPA agreed to re-emphasize the need for an NPDES permit after

SMCRA bond release if the mine has a discharge. By the terms of the Settlement Agreement, the following language is to be in the preamble to EPA proposed regulations:

"IV. Post-mining Discharges

EPA's coal mining effluent limitations apply until release of the bond required by SMCRA. Today's proposal will not change that. However, in response to a concern by one of the petitioners, the Agency wishes to re-emphasize that post-bond release discharges can be subject to regulation under the Clean Water Act. If a point source discharge occurs after bond release, then it must be regulated through an NPDES permit under sections 301(a) and 402 of the Clean Water Act. If the responsible party does not obtain a permit, then it is subject to enforcement action by EPA under section 309 of the Act and by citizens under section 505(a)(1) of the Act. Appropriate effluent limitations would be established in the NPDES permit for such a discharge."

NCA V. EPA, Supra, Settlement Agreement, Appendix B, page 9.

Of course, abandonment permits have been the law in West Virginia for some time. See W. Va. Code §20-5A-5(b)(6). The issue before the Department was when to require an abandonment permit, i.e., when does abandonment take place.

Several options appeared plausible. The first was to define abandonment as occurring after all bond release. This would be after the EPA established post mining period and would be equated with the EPA discussed "post-bond release discharges."

A second option was to equate abandonment with the Phase I bond release.

A third option was to equate abandonment with the termination of mineral extraction prior to reclamation. This would apply to deep mines only.

The agency opted for proposing the third option. Options one and two were not proposed because one purpose behind the State law requirement of having a permit to abandon could be requiring prior approval for all seals. Neither option one nor two would accomplish that objective.

Option three, on the other hand, would require approval of the seals before installation and is, therefore, proposed. For surface mines, an abandonment permit will be issued along with the Article 5A/NPDES permit to operate and discharge. The Department will consider the Reclamation plan as the application for a permit to abandon.

E. Public Participation

Public participation requirements under the CWA and SMCRA are very different and pose a problem for consolidation. Under the Article 6 program, the permit is publicly advertised with a public comment period of fifty-one (51) days. Informal conferences (the Article 6 version of a public hearing under the CWA) must be held within fourteen (14) days notice.

The CWA program, on the other hand, calls for public comment on permits lasting for thirty (30) days and public hearings must be advertised thirty (30) days in advance.

Today's proposal tracks the Article 6 time periods and calls for fifty-one (51) days public notice on draft permits and fourteen (14) days notice for public hearings.

F. Enforcement

During the 1984 Legislative session, W. Va. Code 20-6-43 was amended as regards the enforcement provisions. That section now provides that these proposed regulations:

"...shall be enforceable by the director under the provisions of article five-a, sections seventeen and nineteen of this chapter, as though the regulations were promulgated by the water resources board: Provided, That the director's authority to enforce such rules and regulations under article five-a shall not preclude the director or any person from invoking the remedies otherwise provided by article six of this chapter and shall not preclude the director from enforcing the provisions of this article."

The Department interprets this provision to mean that violations of the proposed Article 5A/NPDES rules are enforceable under either the provisions of Article 5A or Article 6.

This interpretation is consistent with two facts. The first is that the regulations we are proposing are promulgated by the Reclamation Commission under Article 6 as an amendment to the Article 6 regulations. Consequently, they are regulations which can be enforced as regulations pursuant to Article 6.

Secondly, for the transfer of NPDES delegation to occur, the regulations must be enforceable under the provisions of Article 5A which has the necessary enforcement provisions for NPDES delegation. Consequently, the regulations are enforceable as though they were regulations promulgated by the Water Resources Board and therefore enforceable under Article 5A.

In addition, the Department is proposing an enforcement solution for the coal operations who are operating without either a WV/NPDES, NPDES or Article 5A permit. The Department

is proposing that an "after the fact" permit will carry with it an automatic administrative assessment of \$2,000/month for every month the coal mine operated. This administrative assessment will follow the procedures of Chapter 20, Article 6, Section 17 and will apply only when a facility is operating without any of the three possible water pollution control program permits and the reason for not having a permit is due to the permittee's own negligence or willful conduct.



STATE OF WEST VIRGINIA
DEPARTMENT OF NATURAL RESOURCES
CHARLESTON 25305

JOHN D. ROCKEFELLER IV
Governor

October 18, 1984

WILLIS H. HERTIG, JR.
Director

RONALD R. POTESTA
Deputy Director

The Honorable A. James Manchin
Secretary of State
State Capitol, Suite 157-K
Charleston, West Virginia 25305

Dear Mr. Manchin:

Re: Filing of Approved Regulations -
Series VII - West Virginia Surface
Mining Regulations; Section 10 -
Article 5A/NPDES Regulations

The Commission is filing with your office approved rules and regulations relating to the consolidation of the State's surface mining program and water pollution control program as it relates to coal mines, preparation plants, and all refuse and waste therefrom under Article 5A.

Please file these proposed regulations at your earliest convenience.

Sincerely,

Willis H. Hertig, Jr.
Director

WHH/rsb

Attachments

FILED
1984 OCT 22 AM 10:02
OFFICE OF WEST VIRGINIA
SECRETARY OF STATE



STATE OF WEST VIRGINIA
OFFICE OF THE SECRETARY OF STATE
CHARLESTON 25305

JAMES R. MCCARTNEY
SECRETARY OF STATE

STATE REGISTER FILING

I, Willis H. Hertig, Jr., Chairman
Name Title or Position

Reclamation Commission hereby submit to record
Department or Division

in the State Register on 8 1/2" x 11" paper two (2) copies of

proposed rules and regulations concerning topics or
material not covered by existing rules and regulations;

proposed rules and regulations superseding rules and
regulations already on file;

a notice of hearing;

findings and determinations;

rules and regulations; or

other - specify ()

This filing pertains to

Chapter 20

Article 6

Series VII

Section 10

Page No. _____

October 19, 1984
Date Submitted

Willis H. Hertig, Jr.
Signature of Person Authorizing this
Filing

DATE: SEPTEMBER 28, 1984

TO:

FROM: LEGISLATIVE RULE-MAKING REVIEW COMMITTEE

SUBJECT: INFORMATION TO BE SUPPLIED TO THE COMMITTEE

RULES:

INFORMATION REQUIRED

1. Please give the citation of the statute which authorizes your promulgation of these rules.

W. Va. Code §20-6-43(b)

2. If the statute under which you promulgated the submitted^M rules requires certain findings and determinations to be made as a condition precedent to their promulgation:
(29A-3-5)

- a. Give the date upon which you filed in the State Register a notice of the time and place of a hearing for the taking of evidence and a general description of the issues to be decided.

NA

- b. Was the hearing held on the date scheduled and were all interested parties permitted to be heard?

NA

- c. On what date did you file in the State Register the findings and determinations required together with the reasons therefor?

NA

d. Is the transcript of all evidence received preserved and available for public inspection and copying?

NA

3. For all rules promulgated:

a. When did you file the rules in the State Register together with notice of a hearing time, date and location? (29A-3-5)

Filed May 8, 1984; hearing set for June 8, 1984

b. Did you give at least 30 days notice and no more than 60 days notice? (29A-3-7)

Yes

c. What other notice, including advertising, did you give of the hearing? (29A-3-5)

Press release to wire services--attached.

d. Was the hearing held on the scheduled date? If not, why not?

Yes

e. Was the opportunity given for all interested parties to submit data, objections, suggested amendments, views, evidence or arguments?

Yes

f. List all persons who appeared at the hearing and what type of comment they made about the proposed rules (for, against, suggested and amendments). Please attach a copy of the minutes of the hearing.

Attached

g. On what date did you file in the State Register notice of your action on the proposed rules together with the text of such rules?

October 19
~~September 28~~, 1984

h. Are your proposed rules for the purpose of implementing a federally subsidized or assisted Program? If so, give details of the program.

Yes. To regulate water discharges from point sources
into navigable waters as required by the Federal Clean Water
Act.

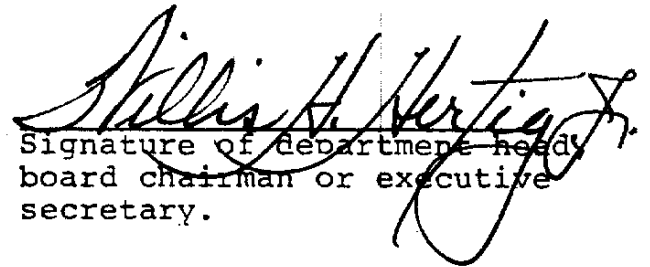
i. What will be the economic impact of these proposed rules on: (i) those persons directly affected by the operation of these rules and (ii) the general public?

Rules concern the transfer of an existing program from one DNR
Division to another. Do not expect significant difference in
economic impact except what is realized by administrative
efficiency and better implementation of the program.

j. What are the additional costs to your agency for administering these rules?

Should not be any additional costs; rather Department

expects cost savings.



Signature of department head,
board chairman or executive
secretary.

(Please attach additional sheets if necessary)

STATEMENT OF ECONOMIC IMPACT OF PROPOSED RULES OR REGULATIONS

Agency W. Va. Reclamation Commission

Rule No. 20-6; Series VII, Section 10 Subject WV/NPDES Program

1. Explanation of Overall Economic Impact of Proposed Rule.

A. Economic Impact on State Government.

Expect reduced costs on State government by consolidating two programs.

B. Economic Impact on Political Subdivisions; Specific Industries; Specific groups of citizens.

Expect reduced costs due to one-stop permitting process.

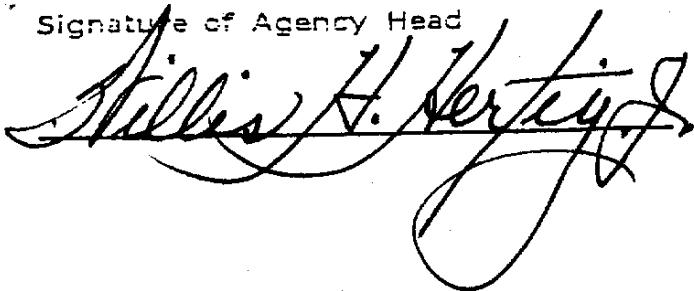
C. Economic Impact on Citizens/Public at Large.

No impact expected.

Date ~~9/29/84~~ 10/17/84 Agency W. Va. Reclamation Commission

Signature of Agency Head

Signature of Authorized Representative



NEWS

RECEIVED
DEPT OF NATURAL RESOURCES

MAY 29 1984

OFFICE OF DIRECTOR
CHARLESTON 25305

STATE OF WEST VIRGINIA • DEPARTMENT OF NATURAL RESOURCES

Willis H. Hertig, Jr., Director

FOR RELEASE: May 25, 1984

Phone: 304/348-3381

TRANSFER AND CONSOLIDATION OF WATER POLLUTION CONTROL PROGRAM

NOTICE OF PUBLIC HEARING

TRANSFER AND CONSOLIDATION OF WATER POLLUTION CONTROL PROGRAM

The West Virginia Reclamation Commission filed proposed rules and regulations with the Secretary of State in the State Register May 7, 1984, concerning the transfer and consolidation of the water pollution control program (Article 5A/NPDES) into the reclamation program.

Comments from the public will be accepted until the close of business Friday, June 8, 1984, or until the end of a public hearing scheduled to begin at 7:00 p.m. on that date.

Copies of the proposed rulemaking filing can be obtained from the Director's Office, Department of Natural Resources, by contacting Ron Shipley, 304/348-2754.

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NOTICE OF PUBLIC HEARING

The West Virginia Reclamation Board of Review will hold a site viewing and hearing on the Appeal of Elizabeth Meredith and Eleanor McGinnis v. Willis Hertig, Jr., concerning Omega Mining Company, Inc., SMA No. 1265 on Tuesday, June 12, 1984. Participants in the site viewing will meet at the Ramada Inn in Morgantown, WV at 8:30 a.m. and depart from there for the site viewing. The hearing will immediately follow the site viewing at the Northern Division Office of the West Virginia Department of Mines, 300 Scott Avenue, Morgantown, WV.

#

ATTENDANCE LIST

For Public Hearing on Proposed Reclamation Commission Regulations
relating to Article 5A/NPDES Transfer and Consolidation.

Name	Representing	Desire to give oral comment (✓)
1. STEVE MEADOW	DNR - WRD	
2. Diana Messinger	Water Res.	
3. Friedrich J. Kolb	Kolb Enterprises, Ltd.	
4. John Purbaugh	WV Highlands Conservancy / WV-CAG.	
5. Baym On	Kanawha Dredging & Minerals Co. ✓	
6. M. Ann Bradley	Robinson + McElwee	
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PUBLIC HEARING CONCERNING
PROPOSED REGULATIONS CONSOLIDATING
ARTICLE 5A AND ARTICLE 6

Good afternoon. My name is Ron Shipley. I am Special Assistant to the Director of the Department of Natural Resources, and I would like to call the public hearing to order. This public hearing is on proposed Reclamation Commission regulations relating to the Article 5A NPDES transfer consolidation regulations. There is an attendance list at the door, and I would appreciate it if you would sign this sheet. I note that beside myself there are six others sitting in the room. The comments we will receive today are part of the public notice and further comments can be given until the end of the public hearing or at the close of business today, whichever is later. At the same time, I would like to announce that in putting out a press release on this hearing, there was a clerical mistake and a press release was mailed across the State announcing a public hearing today at 7:00 p.m. So we will hold a second public hearing tonight at 7:00 and public comment will be received until the close of that public hearing. At this time, I would like to call upon anyone who would like to make an oral statement. So far, there is only one person that has indicated that they would like to make a statement. That is Mr. Gary Orr.

Mr. Orr: Basically, you have a revision to the proposed regulations to exempt dredging and bathhouses. I find no provisions in the law that allows you to make exemptions on these, on specifically dredging--I did not check with bathhouses. Basically, you need to take the proposed regulations as per the law, instead as per what you would like to do.

Ron: Is there any other statement you would like to make on that? If not, are there any other statements anyone else would like to make? I hereby declare the public hearing closed.

PREAMBLE TO APPROVED REGULATIONS
CONSOLIDATING THE ARTICLE 5A AND ARTICLE 6 PROGRAM

- I. WHAT: This constitutes the agency's response to comments and explanation for approving regulations which will consolidate the water pollution control program under Article 5A with the surface mining and reclamation program under Article 6 of Chapter 20 of the Code of West Virginia.

- II. BACKGROUND: During the 1983 legislative session, legislation was enacted allowing the Director of the Department of Natural Resources to consolidate the current water pollution control program under Article 5A, Chapter 20, with the Article 6, Chapter 20 Reclamation program. It was amended during the 1984 session. This legislation, which is codified at West Virginia Code, Chapter 20, Article 6, Section 43, accomplishes consolidation by transferring all the powers, duties, and responsibilities of the Chief of the Division of Water Resources to the Director. Such legislation, however, is not effective until the Governor signs a proclamation stating that the United States Environmental Protection Agency has granted its approval to the partial transfer of the Federal National Pollutant Discharge Elimination System Program (NPDES) to the Director.

The purposes behind consolidation include:

One-Stop Permitting and Coordinated Enforcement: By consolidating the two programs, the Department provides one-stop shopping for permits required under both the Water Pollution Control and the Surface Mining and Reclamation Acts. Currently, these permits are issued by two separate Divisions, who operate under two separate statutes and two separate set of regulations, by two separate permitting groups, and are enforced by two separate set of field inspectors. Consolidation will allow the Division of Reclamation Field Inspectors to enforce both Article 6 and Article 5A requirements. This consolidation should provide benefits to the industry in the form of less paperwork, and consistent regulatory and enforcement signals from the agency.

Administrative Efficiency: By consolidating the programs, the agency will need only one group of permit reviewers to examine the application for a facility, one set of regulations, and one enforcement group. This will make better use of the existing resources within the agency.

Less Confusion Among the Public: By consolidating the two programs, the public will only need to deal with one DNR Division, one public notice procedure, and the local inspector of only one Division.

Better Environmental Results: Consolidation will bring better environmental results, as well. The field inspection staff of the Division of Water Resources, for example, is spread out among many different point sources. A staff of approximately 30 inspectors must examine all the sewage discharges, all the industrial waste discharges, solid waste facilities, and discharges from coal

operations. By consolidating, the Division of Reclamation will inspect all coal sources (which will not include dredging) with their inspection forces which number approximately twice the Division of Water Resources' inspection forces. This means that the thirty inspectors from the Division of Water Resources will lose a substantial portion of their workload, which they can then devote to the other discharges within their jurisdiction, that is, sewage, industrial wastes, and solid waste. In addition, permit reviews will be consolidated, thereby eliminating conflicting requirements which the two programs occasionally produce. Finally, the water pollution control provisions of Article 5A will be enforceable by the provisions of Article 6, as well as Article 5A. Article 6 enforcement authority is, in some ways, more effective than the authority of Article 5A.

III. EXPLANATION: When the proposed rules were published, several issues were highlighted and explained. These included: (1) Scope of Consolidation; (2) Consolidation Program; (3) New Sources Issue; (4) Abandonment Issue; (5) Public Participation and (6) Enforcement. This preamble will explain the decision contained in the approved regulations as well as other issues which arose during the comment period.

A. Scope of Consolidation

The proposed regulations proposed a scope of consolidation which, among other things, did not include sewage facilities associated with coal mines, preparation plants, and all refuse and waste therefrom as well as dredging operations. Several commenters suggested that both associated sewage facilities and dredging operations be included in the transfer and consolidation.

The approved regulations include associated sewage facilities but do not transfer Article 5A jurisdiction for dredging operations. The reason for this decision revolves around the benefits of consolidation and the current regulatory scheme for dredging operations.

As noted in the preamble, the legislative history concerning the scope of consolidation is confusing. It appears, however, that the legislature was seeking economic, administrative, and environmental benefits from the consolidation legislation. These benefits can be further realized by including associated sewage facilities in the transfer and consolidation; no such benefits could be realized by including dredging operations.

As regards sewage facilities, it appears that a majority of the "surface coal mines" under Article 6 have sewage facilities associated with them. WV/NPDES permits for these facilities are required and, by not including associated sewage facilities, the goal of "one-stop shopping" is not as completely realized. Secondly, by transferring Article 5A authority, the Department of Natural Resources will be able to use its field inspectors

more efficiently by eliminating the need for a Division of Water Resources inspector to travel to the mine facility. Unless sewage facilities are included in the transfer, this more efficient use of Department inspectors will not be as fully realized.

Dredging operations, on the other hand, are not amenable to the same administrative efficiencies. First, two federal agencies regulate dredging operations under the Clean Water Act. The U.S. EPA must issue an NPDES permit for land based point source discharges. The U.S. Army Corps of Engineers, under Section 404, issues a Clean Water Act permit for barge based discharges. The State has assumed primacy of the NPDES program but not the Section 404 program. Consolidation of the Article 5A and Article 6 program, therefore, could not produce a one-stop permitting program.

In addition, on the State level all coal dredging operations need a license from the Public Land Corporation. Therefore, any coal dredges will need two State authorizations, in addition to the Section 404 federal permit.

Secondly, the Division of Reclamation regulatory program is devoted almost entirely to the federal SMCRA program as reflected in Article 6. Currently, they do not issue permits for dredging nor does Article 6 contemplate such permits. All of the provisions address land based mining. For example, operators must return land to "approximate original contour" and revegetate the area--both concepts which address the relatively stable terrestrial environment. Therefore, to accept such a transfer of authority, the Division of Reclamation would have to create a program and acquire the necessary expertise. Finally, because the Division of Reclamation does not regulate dredging, the Reclamation Division inspectors and Water Resources inspectors are not making separate inspections as they currently do for deep mines because of dual jurisdiction.

Consolidation and transfer of the dredging program, therefore, will not accomplish the perceived benefits of the legislation.

B. Consolidation Program

In the preamble to the proposed regulations, the consolidation program was discussed. The preamble explained that the consolidation program generally was permissive consolidation for current operations and DNR would exercise its authority to alter permit expiration dates to facilitate consolidation. Only minor changes were made to the proposed regulations consisting of clarifications and no further discussion is needed.

C. New Source Issue

In the preamble to the proposed regulations, the concept of new sources, new dischargers, and existing sources was discussed.

Several comments were received on this topic. EPA in particular said that the State had "misconceptions regarding the federal program." To correct that misconception, we hereby offer EPA's clarification as submitted to the State.

"For general purposes, EPA has defined "new source" to be essentially a facility the construction of which began after the promulgation of an applicable new source performance standard or after proposal of such standard but only if promulgated within 120 days. The "new discharger" category was created to pick up those new facilities which were in essence "new" since construction began after promulgation of a NSPS but did not meet the definition of new source because the regulation was not promulgated within 120 days. The new discharger provision, accordingly, was not created to deal with the "old" new source problem, as is the State's understanding, but to deal with the definition of new source. However, for purposes of the coal mining point source category a "new source coal mine" means a coal mine the construction of which commences after the proposal of a NSPS if subsequently promulgated whether or not promulgated within 120 days. Thus, the problem addressed by the new discharger category does not exist under EPA's new source coal mine definition. (emphasis supplied)

"When EPA issues a NSPS for the coal category, that standard defines new source coal mine, for purposes of the applicability of that standard, to be those facilities commencing construction after the date of the proposal of that standard. Thus, the current NSPS applies only to those coal mines the construction of which began after May 29, 1981. It does not apply to "old" new sources which were "new sources" under EPA's prior NSPS proposed in 1977 which the current NSPS replaced. Pennsylvania Citizens Coalition v. EPA struck down EPA's 120-day promulgation requirement only for coal and set 1977 as the new source date only for the NSPS in effect at that time. A new NSPS has been promulgated since then and the proposal date was May 29, 1981.

"In light of the preceding, there is some problem with the State's definitions of new and existing sources. The State has set September 19, 1977 as the trigger date for a new source. Since it appears as though the State intends the 1977 date to be the trigger date indefinitely and not to be changed as new NSPS are promulgated, "old" new sources after that date would be arguably be subject to each NSPS which may be

promulgated down the line, once their protection period expires. Under EPA's regulations, however, since the trigger date in the definition of new source changes with each new NSPS promulgated to reflect the proposed date of the NSPS, once the 10-year protection period ends, the source is no longer a "new source" under a subsequent NSPS and therefore is not subject to new NSPSs. Although the State's program as it stands would be more stringent than the federal program, it is doubtful the State intended this result.

"Thus, the State should insert either the date of May 29, 1981 as in EPA's current NSPS as the trigger date for a new source or insert "after the date of promulgation of a NSPS or of the proposal of a NSPS which is subsequently promulgated" in place of after "September 19, 1977." The latter change would be preferable since it would not require any changes as new NSPSs are promulgated. The definition of existing sources should then be deleted since those facilities which are not new sources would automatically be existing sources. ("New discharger" would be inapplicable because of the lack of the 120-day promulgation restriction in the State's definition of new source. Accordingly, the new discharger definition and references to new dischargers can also be deleted.)"

We have adopted EPA's suggestion and (1) deleted the phrase "new discharger" and all references thereto and (2) have substituted EPA's suggested language in place of the date September 19, 1977. We have, however, retained the definition of existing sources but modified it to mean only that an existing source is not a new source. In this way all dischargers can know which classification they fall into.

D. Abandonment Issue

The key issue discussed in the preamble concerning the abandonment issue was when to declare that abandonment was occurring and to limit a permit to abandon to only deep mines. For surface mines the regulations declared that the initial WV/NPDES permit would be a permit to abandon.

Comments were received questioning the proposed practice of treating the initial WV/NPDES permit for surface mines as a permit to abandon.

The issue is a complicated one since, under W. Va. Code §20-6-13(b)(16), surface mines have "contemporaneous" reclamation responsibility. This means that one portion of a surface mine may be backfilled before another. In analyzing this problem, the Department recommended that equating the Phase II bond release under DR Regulations Section 41 requires, among other

things, that the quality of water coming from that site be evaluated and requires the filing of an application and public notice procedures. Thus, the Phase II bond release procedure addresses two key issues of granting a permit to abandon: water issues related to abandonment and public notice procedures. The approved regulations therefore, define an application for abandonment of a surface mine as the application for Phase II bond release and the permit to abandon will be issued with the Phase II bond release using existing public notice procedure. The definition of the term "abandonment" in 10A.01 was deleted because it related only to deep mines and, based on the new abandonment program, was no longer necessary.

E. Public Participation

In the preamble to the proposed regulations the timetable of Article 6 public notice and hearings was proposed. Several comments were received objecting to the fourteen (14) day notice period for public hearings. Indeed EPA informed the State that the fourteen (14) day notice period was less stringent than the federally required thirty (30) day notice period for hearings.

The approved regulations call for 30 days public notice on WV/NPDES permits and 30 days public notice for public hearings. We expect some initial confusion over the public right to comment because the legal advertisement publicly noticing the WV/NPDES permit will contain two comment periods--30 days to comment on the WV/NPDES permit and 51 days to comment on the Article 6 permit.

At the same time, it is the Department's desire to hold any public hearings and informal conferences on the same day. Because of a thirty day (30) notice requirement for the WV/NPDES hearing, and the requirement W. Va. Code §20-6-20(b) to hold the informal conference within 21 days after the close of the 51 day public comment period, the Director will have to decide whether to hold the WV/NPDES public hearing before the Article 6 public comment is concluded. The approved regulations require the operator to provide a copy of the legal advertisement before the end of the 30-day WV/NPDES comment period to aid the Department in scheduling any potential public hearings/informal conferences.

F. Enforcement

In the preamble to the proposed regulations the enforcement procedure and mechanism was explained. Only minor changes were made to 100.01. However, the after-the-fact permitting section was deleted based upon protest by EPA, comments received, and the Division of Reclamation. The Division of Reclamation argued that sufficient authority already exists to adequately enforce for this violation.

ATTACHMENT 1

The following pages contain a summary, in tabular form, of comments received by the Commission on the proposed West Virginia Surface Mining Regulations -Section 10 -Article 5A/NPDES Regulations filed with the Secretary of State's Office on May 8, 1984, and the Commission's responses to those comments.

The comments and responses are organized into General Comments, EPA Comments on Specific Regulations, EPA Comments on Omitted Provisions, and Comments by Others. EPA's comments are further subdivided into comments by Washington, D.C. Headquarters (H) and Region III, Philadelphia (R).

On August 8 and September 26, 1984, EPA published a final rulemaking which modified several NPDES regulations (see 49 FR 31840 and 37998). The Commission received a comment urging it to adopt proposed EPA regulations into this rulemaking package. When the EPA rulemaking was finalized during our examination of comments, the Commission decided it could adopt many of the recently finalized EPA regulations. The EPA changes to the regulations, therefore, were reviewed and adopted where appropriate. The Reclamation Commission, however, did not make all the changes which will be required for EPA consistency, since EPA either did not adopt what they originally proposed or the Commission did not have enough time to study EPA's changes and finalize their regulations in time for this year's Legislative review. Some of these regulations, therefore, will need to be proposed next year in order to meet EPA's one year deadline for regulations changes. A summary of these regulation changes is provided in this attachment.

C O N T E N T S

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COMMENT	RESPONSE
<p>The State has no mechanism for the issuance of "area-wide" permits. "Area-wide" permits were developed by EPA to cover any and all point source discharges created in an area rather than just those in existence at the time a permit application is submitted. This concept would facilitate long range planning by coal companies with some certainty that new discharges in the area would be permitted.</p>	<p>"Area-wide" permits are a form of general permit and, therefore, are allowable under these regulations. The State, however, may not operate an "area-wide" permitting program in the same manner as EPA. This permitting mechanism will be considered further, but for the purposes of promulgating regulations specific mention of "area-wide" permits is unnecessary.</p>
<p>The permit application package required by these regulations should be streamlined by utilizing applications (DR-4) already on file with the Department rather than have the applicants unnecessarily duplicate material already in the Department's files</p>	<p>The Department hopes to achieve a streamlining of application procedures through the transfer and consolidation of the Article 6 and 5A programs. To this end, the Department has adopted a modular NPDES permit application form. The Department will review DR-4's which are on file and use them to the extent that they provide sufficient information and either request updating of information previously supplied or a new DR-4 where necessary.</p>
<p>Modify regulations at 10D.05(b) and 10E.02 so that permittees would not have to submit a "full-blown" applications for reissuance.</p>	<p>In regard to not requiring "full-blown" applications for reissuance, it is the Department's understanding that the material required in 10D.05(b) (which parallels EPA's requirements in 122.21) is necessary for existing sources and consequently for reissuance situations.</p>
<p>These regulations should be consistent with EPA issued NPDES permits which do not require monitoring of discharges after grade release.</p>	<p>The provisions of an adopted NPDES permit may control pursuant to 10C.06. Therefore, the NPDES permit may be controlling.</p>
<p>Many provisions of the WV/NPDES regulations are based on EPA regulations which have been withdrawn, are under litigation, or may be changed. Should adopt those which have been proposed.</p>	<p>The State has reviewed and adopted changes from the September 1, 1983, August 8, 1984, and September 26, 1984 EPA final rulemaking. Certain changes to the EPA final rulemaking have not yet been made in the State's regulations because EPA adopted provisions different than they had proposed. See Pages 14 to 18. The State has one year to propose and adopt such changes. See 40 CFR §123.62.</p>
<p>EPA HEADQUARTERS: The WV/NPDES regulations do not contain conflict of interest provisions equivalent to 40 CFR 123.25(c).</p>	<p>Such a conflict of interest provision is unnecessary because WV Code, Article 20-6-40 is a conflict of interest provision equivalent to 123.25(c) for the Reclamation Division employees. The Water Resources Board equivalent conflict of interest provision is in 20-5-3.</p>

"OMITTED" PROVISION	RESPONSE
122.21(f)(8): Information Requirement - A brief description of the nature of the business.	Requirement redundant with 100.05(a)1 and because all operations are coal mining related.
122.7(b)-(d): Confidentiality of Information (There is no (d))	WV Code, Section 20-5A-6 and the Freedom of Information Act, WV Code, §29B-1-1 et seq., are equivalent to 122.7(b) & (e) and regulations incorporate State FOIA, Section 105.06.
122.28(b)(2)(A) & (F): General Permits - (A): An individual permit is required because a discharge is a significant contributor of pollution. (F): Requirements in paragraph (a) of 122.28 are not met.	Provision incorporated. See specific comments at 10L.02(b).
122.44(d)(2): Water Quality related Effluent Limits under Section 302	Provision incorporated. See specific comments at 10F.02(c).
122.44(i)(1)(i): The mass for each pollutant limited in the permit	Provision is unnecessary because the coal mining effluent limitation guidelines - 40CFR Part 434 - are not expressed in terms of mass.
122.44(i)(1)(iv): Approved test procedures for analyses of pollutants.	See 10E.11(a).
122.44(p): Coast Guard	Provision not applicable to transferred WV/NPDES Program for coal mining operations since dredging operations are not transferred
124.8: Fact Sheet	See 10K
123.25(c): Conflict of Interest Provision	See 20-5-3 for Water Resources Board and 20-6-40 for Division of Reclamation employees
123.27(c): Enforcement Authority - Civil Penalty shall be appropriate to the violation	Provision Incorporated. See 100.01(b)
124.10(a)(1)(iii): Public Notice that a draft permit has been prepared.	See 10J.02(d)(1)(A)

"OMITTED" PROVISION	RESPONSE
124.10(c)(1)(ix): Methods - Notice to any unit of local government having jurisdiction over area where facility is located.	No regulations at 124.10(C)(1)(ix). Believe the citation should have been to 124.10(C)(1)(iv). Notice will be given to Division of Water Resources. See 10J.02(d)1.B.
124.10(c)(2)(1): Methods - Notice of general permits in Federal Register	Notice of general permit in Federal Register is for EPA issued permits only and is not applicable to State programs; General permits must be publicly noticed in accordance with 10J.02(c)
124.10(d)(2): Methods - Name and address of permittee.	See 10J.02(e)1.B.
124.10(c)(3): Legal Notice	See 10J.02(C)
124.10(d)(1)(ix): Contents: Any additional information necessary or proper	See 10J.02(e)1.G.
124.10(d)(1)(vii): Contents: General Description, etc.	See 10J.02(e)1.F.

REGULATION	COMMENT	RESPONSE
10A.03 Effective Date	H: Regulations must be effective prior to approval of program delegation	Regulations will be effective in accordance with 40 CFR 123.23(a) at the time of program approval.
10B Definitions (General)	H: Wants Director, Person, and Pollutant defined.	Comment rejected. Definition of Director is unnecessary. Statutory definition of person is lengthy and confusing. In defining pollutant, must still refer to Article 5A which defeats the purpose of definition.
10B.18 "Draft Permit"	H: Suggests that the definition be similar to 122.2 definition. 122.2 states that notices of intent to terminate or deny a permit are "types" of permits, and that denial of requests for modification, revocation and re-issuance, or termination is not a draft permit.	Comment rejected. To incorporate comment would be redundant. 10H.01(b) indicates that a denial of requests for modification, suspension, or revocation is not a draft permit. 10H.04 indicates that a notice of intent to revoke is a type of draft permit.
10B.31 "New Discharger"	R: Regulation okay, but different. 10B.31 is more stringent than Federal definition at 122.2.	Definition deleted because unnecessary. The State will recognize only two categories of sources - new and existing.
10B.32 "New Source"	H: Disagrees that 9/19/77 should be the new source determination date. Wants "after the date of promulgation of a NSPS which is subsequently promulgated" substituted. Wants State to examine definitions of facility, activity, equipment, and clarify their consistency with 122.2 and 122.29. Delete the reference to 434.65 because it is not yet promulgated.	The new discharger definition and category has been deleted from these regulations. Have incorporated the EPA proposed language for the new source determination date. Have examined the definitions of facility, activity, equipment, and find they are consistent with Federal definitions. Changed reference to 434.65 to new subsection 10L.03, Modification of NPDES permits for new sources. Incorporated new source criteria that were published in EPA's September 26, 1984 final rulemaking.
10B.38 "Proposed Permit"	R: A proposed permit must be sent to EPA for a review; not "may be" as stated in 10B.38.	Comment Incorporated.
10C.02(h) Prohibition Against Issuing a NPDES Permit	H: Reg must be deleted because the State must be able to permit an indirect discharger, even if the State permits only the treatment facility.	The State does not intend to issue permits to indirect dischargers. See 10C.02(h)

REGULATION	COMMENT	RESPONSE
10C.05(a) Duration and Transferability of permits	R: Finds 2nd line misleading. Suggests that "may vary" be changed to "shorten".	Comment Incorporated.
10C.05(c) Transfer of Permits	H: Wants clarification that permits can only be transferred to owners or operators. Also, indicated that trans- ferring permits to any person might find a permit transferred to someone not a proper signatory under Federal regulations. R: "Person" can be any one and therefore is less stringent than Federal regulations. Suggests that "operator" be substituted for "person".	Comment Incorporated. Comment Incorporated.
10C.07(a) Transition	H: Should cite Article 5A in addition to 10I concerning draft permits in public notice on effective date of regs.	Comment Incorporated.
10D.02 Responsible Party Applies	H: Must always require at least the operator to get a permit although an owner may also be bound by the permit.	Comment Incorporated.
10D.04(a) Time to Apply	R: Opinion is that 120 day time frame to reapply is less stringent than Federal 180 day requirement, but wants to defer to headquarters for final decision.	Comment rejected. 180 day time to apply period of 122.21(c) is not a state requirement for pro- gram delegation. See 123.25(a)(4) Citation to 122.62(b)(2) which EPA provides seems irrelevant.
10D.05(a)(6) Topographic Map	H: 1000 ft. beyond site should be changed to 1 mile.	Comment rejected. Current NPDES delegated program requires less than 1 mile. The 1000 ft. re- quirement provides sufficient in- formation for permit issuance in West Virginia.
10D.05(b)6(A)2 Effluent Characteristics	R: Doesn't think that an automatic waiver for sewage parameters is a good idea. Suggests that applicant must request waiver.	Comment Rejected. EPA final rulemaking on September 26, 1984 allows the Director to grant a waiver for sewage parameters for an entire industry sub-category.

REGULATION	COMMENT	RESPONSE
10D.05(e)3 Discharges into Noncomplying Waters	<p>H: Suggests that State delete (e)3 because a demonstration that a source meets variance requirements is not relevant to a determination whether or not a new source can discharge into noncomplying waters.</p> <p>R: Since Federal regulations do not contain variances in this section the State's regulations are too broad.</p>	<p>This section has been modified to eliminate the reference to variances. However, the demonstration for alternate water quality based on effluent limits has been retained</p> <p>Same response</p>
10D.07(a)1B Signatories to Applications	H: An attorney-in-fact with appropriate authorization may only sign reports under Federal regulations.	Comment Incorporated.
10D.07(d) Certification	R: Federal regulations require that a signatory personally examine permit applications and reports. Region suggests that this requirement be incorporated since the certification doesn't explicitly require a signatory to personally examine applications and reports.	Comments Rejected. 10D.07(d) is identical to Federal language as revised 9/1/83.
10E.01(c) Duty to Comply	H: Insert 307.	Inserted.
10E.04 Duty to Mitigate	R: Suggests that "steps to correct" be inserted. "Steps to correct" differs from the "duty to mitigate or prevent".	Inserted.
10E.11(h) "Rigging" Monitoring Devices	H: Wants penalties spelled out and AG opinion on State's ability to impose penalties for this type of violation.	Comment Incorporated. AG's opinion will address.
10E.13(d)2 Immediate Reporting	R: Won't decide whether "immediate" is more stringent than "within 24 hrs.". Suggests "within 24 hrs." inserted.	Comment Incorporated.
10E.13(a) Reporting Requirements	<p>H: Qualification that changes which may affect the "nature or quantity of the discharge" should be deleted; not in the Federal Regulations.</p> <p>R: Won't decide whether 30 days is more stringent than "as soon as possible" therefore wants "as soon as possible" inserted.</p>	<p>Comment Incorporated</p> <p>Comment Incorporated</p>

REGULATION	COMMENT	RESPONSE
10F.02(c) Effluent Limitations	H: Regulation doesn't specifically address water quality related effluent limits under §302. Should include.	Comment Incorporated.
10G.07 Net Limitations	R: Suggests that "discharger" be substituted for "permittee".	Comment Rejected. Although Federal regulations use discharger net limitations are only allowed for permitted discharges, therefore, permittee is more appropriate.
10H.02(c)1(J) Minor Modification	H & R: This minor modification is too broad, must conform with Federal regulations.	Regulation modified to restrict minor modification to causes which do not affect the quality quantity of discharge.
10H.02(c)2C(3) New Regs or Judicial Decision	H: Notice is not enough. Must provide a comment period and opportunity for public hearing. Any notice should reference the specific permits to be modified. R: In addition to general public notice the permittee must be notified individually.	This regulation has been deleted because there is no similar provision in Federal regulations and the state could not develop a regulation which would meet EPA objections. Same Response.
10H.02(c)2C(2) Judicial Decision	H: Interprets this reg to say that for Judicial Decisions a modification can be made only if a permittee requests it and not if the State wants to initiate a modification. Alternate language is suggested.	Suggested language incorporated
10H.02(2)M Emergency Modifications	H: Modification of a permit without prior public notice is inconsistent with Federal regulations. 122.62(a)4 even requires formal modification procedures for acts of God, strikes, and other events beyond the permittee's control. A 10 day comment period or after the fact comment period is unacceptable. Suggests that reg be deleted. R: Concurs with headquarters.	Regulation deleted.
10I.02(a)(2)B Public Notice	H: Finds 14 day notice for a public hearing inadequate.	Comment Accepted. 30 days provided.
10I.02(d)1A Public Notice	H: Insert Advisory Council on Historic Preservation.	Inserted.

REGULATION	COMMENT	RESPONSE
10I.02(d)1C Public Notice	H: Insert "knows" after Director in 1st line.	Inserted.
10I.02 Paragraph on Page 10-71	R: A copy of the draft permit and permit application must accompany the fact sheet.	Comment Incorporated. See 10J.02(d)(3).
10L.02(b) General Permits	H: State must have the authority to issue an individual permit to a storm sewer significant contributor and sites that aren't covered in 10L.01.	First comment rejected; storm sewers not subject to program, Division of Water Resources will retain jurisdiction. Second comment incorporated. Sites not covered in 10L.01 will be permitted individually.
10N.01 Enforcement (General)	H: "State Act" includes both Article 6 and 5A. Article 6 penalties may be less severe than Article 5A's penalties. State must provide assurance that minimum and maximum penalties under Article 5A will be imposed.	Comment Incorporated, "State Act" deleted and the regulation has been clarified to make Article 5A provisions applicable.
10N.01 Enforcement	H: State must include an appropriateness of penalty clause.	Specific penalties have been deleted. Comment Incorporated.
10N.03 After the Fact Permitting	<p>H: State must make clear that the after the fact penalty is in addition to other penalties.</p> <p>R: Amount of fine is less stringent than Federal regulations. As long as this fine is in addition to other penalties the region has no problem with the reg.</p>	<p>Regulation deleted</p> <p>Regulation deleted</p>

REGULATION	COMMENT	RESPONSE
10B.10 "Coal Mines"	<p>Sewage treatment facilities and dredging operations should not be excluded from these regulations.</p> <p>Definition is not consistent with the SSCMRA because there are no exemptions for mine offices, supply areas, parking lots, etc.</p>	<p>Have included sewage treatment facilities and bathhouses in the regulations. Have not included dredging because the recovery process, equipment, mode of operations is not within DR expertise</p> <p>Have made a minor change to the definition which improves consistency with the SSCMRA</p>
10B.12 "Coal Prep Plant"	Definition is not consistent with EPA's at 40 CFR 434.	Have modified definition to be consistent.
10B.32 "New Source"	Delete the fifth factor for new source determination to be consistent with settlement agreement.	Fifth factor deleted.
10B.34 "Owner"	Definition of owner when taken with definition of facility implies that a land owner could be liable under these regulations. Kolb doesn't agree with this premise.	Comment considered, but discussions with EPA leave no choice but to leave definition as is. EPA intends for an owner to be potentially responsible, however, it is the operator who must obtain the permit.
10C.01 Permit Requirement; Exemptions	<p>Provide an exemption for haulroad sumps, excavated sediment channels and other sumps with a volume less than 5000 cubic feet because these structures cause no environmental harm.</p> <p>Many of the activities listed are unrelated to mining. Suggests that these activities be deleted.</p>	<p>An attractive suggestion for administrative efficiency, however, the law doesn't allow for such an exemption, and past experience indicates that these structures can cause serious environmental impacts in certain areas.</p> <p>Incorrect reading of Article 5A. The transfer of authority of NPDES to the Director is all of the Chief's powers under Article 5A which includes all of the activities listed. The SWPCA regulates both mining practices impacts on water quality and discharges related to mining.</p>

REGULATION	COMMENT	RESPONSE
10C.06 NPDES Permits Issued by EPA and Chief	What happens when a permit is not adopted by the Director? Clarify regulation.	No clarification is needed. If the Director doesn't adopt a permit then EPA will maintain jurisdiction and administrate the permit.
10D.02 Responsible Party Applies	Objects to permits being issued to both owner and operator. Suggests issuance to person who applies.	Comment generally accepted. Generally, the Director will be permitting the operator, however, there may be a need to permit other responsible parties in certain situation.
10D.05(b)2,3,&4 Information Required for Existing Sources.	Delete Regulations because the mapping requirements are too detailed.	Comment Rejected. EPA Requirement.
10D.05(b)6.A.2 Effluent Characteristics	Since sewage treatment facilities and bathhouses are excluded from regulation then this regulation should be deleted.	Sewage treatment facilities and bathhouses are now included and this regulation is an EPA requirement.
10D.05(b)6.B Toxic Metals, etc.	Quantitative data for large numbers of outfalls may be impossible to obtain.	The regulations provide relief for outfalls that are essentially identical. No intent to require quantitative data for haulroad sumps.
10D.05(b)7 Small Business Exemption	100,000 tons is too small; suggests 300,000 tons.	Comment Rejected. EPA Requirement.
10D.05(d)1.A Deep Mine Map	Requirements to color code maps should be deleted because of the labor required to construct the maps.	Comment Rejected. Color coded maps needed to aid application review.
10D.05(b)15 Additional Information	Specifying types of information is unnecessary.	Comment Rejected. Retained to put regulated community on notice that such information may be required.
10D.05(d)4.c. Report of Water Quality	Data may not be available. Suggests that data be required if reasonably available.	Regulation modified. If data is unavailable then provide an analysis of current quality and quantity.

REGULATION	COMMENT	RESPONSE
10D.05(d) Plan for Abandonment	All mines should have an abandonment plan and obtain an abandonment permit. For surface mines the reclamation plan is not an adequate plan for abandonment. Suggests that the intention to issue an abandonment permit with the operating permit is ridiculous. Suggests that the regulation be modified to require abandonment plans and permits. For surface mines the plan could be a reclamation plan with a yearly update reflecting on-site experience.	The reclamation plan is an adequate plan for abandonment. The Phase II bond release will also be a permit to abandon.
10D.05(e) Discharges into Noncomplying Waters	This regulations doesn't adequately address abandoned mine drainage affected streams which do not comply with present water quality standards. Clarify close of comment period.	10D.05(e)3 addresses this issue. Alternate water quality based effluent limitations are available. No clarification necessary. See 10J.02.
10D.05(f)1. Variance Requests	Regulation should be clarified to indicate that variances relate to changing permit conditions.	Comment Rejected. The introductory paragraph explains that they are "variances from effluent limitations".
10E.05 Proper Operation and Maintenance	Objects to "back-up" provisions as they relate to ponds.	On September 26, 1984 EPA final rulemaking deleted the requirement for back-up equipment. 10E.05 now reflects the new EPA regulation language.
10E.10 Inspection and Entry	Suggests that an authorized representative be described as an employee of the Reclamation Division.	Comment Rejected. Concern understood, however, there may be times (emergencies) where authorized inspectors other than DR inspectors will be needed. DNR plans to limit the routine inspection of coal facilities to DR personnel.
10E.13(d) Immediate Reporting	Noncompliance should be reported to the Reclamation Division, not Water Resources. Therefore, DR should establish another toll free "Hotline"	Comment Rejected. DNR will retain the toll free number already in effect and develop procedures whereby appropriate Reclamation personnel are notified.
10E.13(d)2 Immediate Reporting	Reporting of spills and accidental discharges should be consistent with the Water Resources Board's Regulations.	The requirements of this regulations are consistent with the Water Resources Board's Regulations.

REGULATION	COMMENT	RESPONSE
10E.14(d)1.B. Prohibition of Bypass	Objects to "back-up" ponds.	Comment Rejected. Do not agree that reg requires back-up ponds. This regulation gives the permittee the right to bypass if the bypass won't exceed limits under certain circumstances. Permittees are expected to conduct routine maintenance without exceeding limits.
10E.16 Reopener Clause	Questions legal authority. Objects because it reopens for more stringent regulations but not less stringent regulations.	Legal authority is at 20-5A-14 and this requirement is taken from EPA. Does allow for upgrade to meet more stringent regs. Federal regs prevent "back-sliding" toward less stringent regs unless conditions of 122.44(1) which is incorporated in these regs as 10F.02(1).
10F.02(d) Reopener Clause	Same comment as above.	Same response as above.
10G.07(c) Net Limitations	Wants credit for pollutants in intake waters universally if not put there by permittee. Wants credit even if taken from underground sources.	Comment Rejected. Regulation contains EPA required language. Commenter's suggestion would make this provision less stringent.
10H.01(b) Permit Actions	Specify a time frame to deny a request for modification. Suggest 30 days.	Comment Rejected. Sometimes 30 days isn't enough time. However, the agency will attempt to meet 30 days in most cases.
10H.02(c) Minor Modification	Include as a minor modification an addition of a new outfall which is similar to existing ones, and which do not discharge into a new drainage basin.	Comment Rejected. Commenter's suggestion would make this reg less stringent than EPA's.
10G.08 Internal Waste Streams	Objects to internal monitoring requirements.	Comment Rejected. Need to retain especially for situations where sewage is commingled with mine drainage before final discharge.
10H.02(c)2.C. Major Modification	Wants Director to keep permittees informed of changes to these regulations.	Comment Rejected. Good idea, and Director plans to do so, however, no regulation stipulating this plan is necessary.

REGULATION	COMMENT	RESPONSE
10H.02(c)2.C.(3) General Modification	Wants permittees directly notified of a general modification. Suggests certified mail.	This regulations was eliminated in response to an EPA objection.
10I.02(2)B Public Notice	14 day notice of a Public Hearing is not enough.	Comment Adopted. Changed to 30 days.
10I.02(d) Methods	Not clear who applicant must send a copy of the public notice.	Will provide a list to permit applicants in the permit application instructions.
10I.02(d)2 Methods	See duplication with 10I.02(d)1.	Should be no duplication since (d)1 is for State and Federal agencies, and (d)2 is for general public.
10N.03 Enforcement	<p>No legal authority. If there is legal authority then provide a grace period to submit application.</p> <p>Add that facilities which cause water quality violations must be shut down.</p>	<p>Regulation deleted.</p> <p>Regulation deleted.</p>

AUGUST 8, 1984 EPA CHANGES:

EPA REG. CITE	DR REG. CITE	EXPLANATION	EPA ADOPTED AS PROPOSED	STATE ACTION
122.21(d)(2)	10D.05(b)(15)	EPA published rule allowing submission of effluent data after expiration of permit.	Partially	Adopted
122.44;122.46	--	EPA revised rule to require that all permits must meet BPT, BCT, and toxics limits whether or not applicable effluent guidelines are promulgated.	No	Did not adopt; unnecessary because Coal Mining Guidelines are promulgated.

SEPTEMBER 26, 1984 EPA CHANGES

EPA REG. CITE	DR REG. CITE	EXPLANATION	EPA ADOPTED AS PROPOSED	FINAL ACTION
122.21(g)(7)(ii) Mandatory Testing	10D.05(b)6A.2	Waiver of testing for 7 conventional and nonconventional pollutants if demonstrated that Director still has enough information to write adequate permit limits.	Yes	Adopted
122.21(g)(7)(iii)(A)&(B) Potentially Required Testing -- Toxic Pollutants	10D.05(b)(6)	Set threshold limit for testing at 10 ppb and 100 ppb for 4 toxics	No	Propose Next Year
122.21(g)(iii)(A) Sampling for Conventional and Non-Conventional Pollutants	10D.05(b)(6) C.2 and 10D.05(b)(6)F	Applicants required to submit quantitative data only if pollutants were either directly or indirectly (through an indicator) limited in an applicable effluent limitation guideline but applicant still required to identify any pollutants that they know or have reason to believe are present.	Yes	Didn't adopt because DR needs some of these pollutants, such as Aluminum, sulfates to be reported all the time for water quality standards setting purposes

122.21(g)(7) Sampling	10D.05(b)6 and 10D.05(b)(6)F	Changes sampling from composite to grab samples with retention time of over 24 hours and storm water discharges (requires 4 grab samples - once per hour) or could allow waiver of composite if applicant demonstrates that use of composite samples is infeasible for storm water.	Yes	Adopted
122.21(g)(10) Potential Discharges	10D.05(b)(9)	Deleted application requirement	Yes	Adopted
122.21(g)(9); 122.42(a)(2); 122.44(e)(1) (11); 122.62(a)(13) Used or Manufactured Toxic Pollu- tants 122.21(g)(9)	10D.05(b)8 10E.03(d)4B 10F.02(g)(1)B 10H.02(c)2F	Deleted 3 EPA regulation sections relating to toxics used or manufactured pollutants; retained application requirements for listing all toxic pollutants currently used or manufactured; allows Director to waive this application requirement if applicant can demonstrate that it is overly burdensome	Yes (3) No (1)	Did not Adopt; Propose next Year
122.42(a) (Toxics notification)	10E.13(d)4A	Requires an existing industrial permittee to notify Director when some activity occurred or will occur causing it to discharge toxics not previously limited in the permit.	Yes	Did not adopt; Propose it Next Year
125.3(c)(4) Toxicity Limits	---	No Change	No	Nothing to do
122.21; 122.22; 122.26 (Storm Water Runoff)	---	Made substantial changes to storm water discharge requirements	No	No change now- will be studied for potential rulemaking
122.29(c)(4), (c)(5) (Construction Prohibition)	---	Retained construction ban prior to EIS completion	Yes	Did not adopt; EIS not a State Program Requirement

EPA REG. CITE	DR REG. CITE	EXPLANATION	EPA ADOPTED AS PROPOSED	FINAL ACTION
122.44, 122.62(15) (Anti-backsliding)	10H.02(b)	Retains current policy with one exception. Will allow BPJ permits to be made less stringent if permittee can demonstrate that its removal costs are wholly disproportionate to those considered in a subsequently promulgated effluent guideline	Yes and No	Adopted modification provision; Propose other changes next year if necessary; policy not generally applicable since no BPJ permits in coal; should examine for rulemaking next year since we might develop BPJ limits for pollutants not regulated in guidelines
122.50 (Disposal into wells)	10G.09(b)	Retained existing policy - but clarified regulation to allow less stringent limitations if the character or treatability of discharged wastewater is changed	No	Did not adopt; Should reevaluate our current DR policy for consistency with EPA's explanation of this policy
124.56(b)(1); 125.3(c)(2)(3) 125.3(d) BPJ and Draft Development and Technical Manuals	----	EPA listed statutory factors which are used in BPJ but decided against adopting the fact sheet portion of the proposal	Partially	We are adopting this by reference since it is a change to \$125 which is adopted as of time of delegation. Also, non-substantive change
122.45(g) Net-Gross Limits	10G.07	Changed net-gross substantially	No	Did not adopt; Need to evaluate it for remaining situation in particular; EPA did not adopt as proposed; Will examine for rulemaking next year

EPA REG. CITE	DR REG. CITE	EXPLANATION	EPA ADOPTED AS PROPOSED	FINAL ACTION
122.45(c) Total Metals	10G.02	Allows metals limitation to be expressed as "total recoverable metal" as defined in 40CFR Part 136	Yes	Adopted one subsection; however, Fe & Mn are expressed as total metals; therefore, regulation change is generally irrelevant
122.45(b)(2) Actual Production	---	Allows use of alternate limits for increased production; originally proposed only for auto industry - but expanded it to all industries in final regulation	No	Did not adopt; should not impact coal mining since the effluent limits are not production based; should, however, examine the concept to reduce need for modifications when water flow is increased; May propose next year
122.44(d)(3) Importance of Water Quality Conditions Stayed by a Court or Agency	---	Allowed EPA to include 401 conditions	Yes	Nothing required; 401 certification not applicable to State Programs
122.7(g); 122.29(c)(3) 122.49(d)(9) 124.85(e); 124.121(f) Incorporation of NEPA based Conditions in Permits	---	Allows incorporation of NEPA based conditions	Yes - except for 124.85(e)	Did not adopt; No impact since NEPA not part of State Program

EPA REG. CITE	DR REG. CITE	EXPLANATION	EPA ADOPTED AS PROPOSED	FINAL ACTION
122.47; 122.29(d)(4) Compliance Schedule Prohibition	10F.02(n) 10L.02(d)	Allows compliance schedules for new source if requirements were issued or revised after construction began but less than 3 years before they begin to discharge	Yes	Adopted
122.41(e)(1) Notice of Physical Alterations or Additions	10E.13(a)	Requires notice to state of alterations or additions which could "significantly" change the discharge for pollutants which would otherwise not require notice	Yes - with minor clarifications	Did not adopt; our regulations already have similar requirement
122.22(b)(2) Signatories to Reports	10D.07(b)2	Allows environmental managers with corporation-wide responsibility to sign reports	Adopted equivalent provisions	Adopted
122.41(m) By-pass	10E.14(d)1B	Retained existing regulation governing by-passes not exceeding limitations; adopted new language regarding back-up equipment	Yes and No	Adopted back-up provision; propose to change remainder next year
122.41(n) Upset Defense	10E.15	Retained original regulation concerning defense for technology based limits; Adopted proposal deleting "specific" cause	No and Yes	Deleted the word "specific"
122.41(e) Proper O & M	10E.05	Deleted reference to specific examples of O & M; clarified O & M provision for back-up facilities	Yes	Did not adopt; Unnecessary
122.62(a)(16) (17); Mistake and failure to meet BPJ Limits as Grounds for Permit Modification	10H.02M 10H.02N	Allows permits to be modified if a mistake was made in determining BPJ limits or the technology cannot meet the limit	Yes	Adopted
40CFR Part 124 Non-Adversary Panel Procedures	---			Irrelevant to State Programs

EPA REG. CITE	DR REG. CITE	EXPLANATION	EPA ADOPTED AS PROPOSED	FINAL ACTION
124.13; 124.14; 124.76 Hearing Procedures	---			Irrelevant to State Programs
122.21(k)(4) Deferral of Hearing on New Source Determination	---	Eliminated deferral of hearing which deferred the hearing until after permit issuance unless <u>all</u> parties agreed	Yes	Not relevant to State Programs
122.29(b) New Source Criteria	10L.03	Adopted new source criteria where EPA had previously suspended regulations	Yes - with clarification	Adopted
122.62; 122.63 Modifications of Permits		Permits after March 9, 1982 can be modified to conform to new final rules for "actual production" and "total methods"; minor modifications for by-pass, toxics notification, and up-sets	Yes	Adopted for minor modifi- cation, by- pass, and upsets

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10A. GENERAL

- 10A.01 Scope and Purpose - This section establishes requirements implementing the powers, duties and responsibilities of Article five-a of Chapter 20 with respect to all coal mines, preparation plants and all refuse and waste therefrom in the state which are vested in the Director pursuant to W. Va. Code §20-6-43.
- 10A.02 Authority - The regulations in this section are promulgated by the Reclamation Commission under authority of West Virginia Code Chapter 20, Article 6, Section 43(b).
- 10A.03 Effective Date - The regulations in this section become effective _____, 1984 being the date on which the Governor issued a proclamation stating that final approval of the partial transfer of the National Pollutant Discharge Elimination System (NPDES) established under the Federal Clean Water Act contemplated by W. Va. Code § 20-6-43(e) has been given by the Administrator of the United States Environmental Protection Agency.
- 10A.04 Filing Date - The regulations in this section were filed in the Office of the Secretary of State on October 19, 1984.
- 10A.05 Applicability - The regulations in this section shall apply to all coal mines, preparation plants and refuse and waste therefrom as defined in this section upon the effective date in §10A.03. The regulations in this section also establish a transition program for those pending Article 5A/NPDES Applications for which a draft permit has been prepared. See § 10C.07.
- 10A.06 Invalidity - If any provision of these regulations or the application thereof to any person or circumstance is held invalid, then such invalidity shall not affect other provisions or applications of these regulations.
- 10A.07 Incorporation by Reference - Whenever federal statutes or regulations are incorporated into this section, the reference is to the statute or regulation in effect on the effective date specified in 10A.03.

- 10B. DEFINITIONS - The definitions set forth in Chapter 20, Article 5A, Section 2, of the Code of West Virginia shall apply to this section of these regulations along with the following definitions which also apply unless the context clearly indicates otherwise.
- 10B.01 "Administrator" means the administrator of the United States Environmental Protection Agency, or an authorized representative.
- 10B.02 "Applicable standards and limitations" means all State, interstate, and Federal standards and limitations to which a discharge or a related activity is subject under the Clean Water Act (CWA) Sections 301, 302, 303, 304, 306, 307, 308, 403, and 405 and Article 5A, including effluent limitations, water quality standards, standards of performance, toxic effluent standards or prohibitions, best management practices, and pretreatment standards.
- 10B.03 "Application" means a WV/NPDES application as defined in 10B.48.
- 10B.04 "Article 5A" or "SWPCA" means the West Virginia Water Pollution Control Act, West Virginia Code Chapter 20, Article 5A, Section 1 et seq.
- 10B.05 "Average monthly discharge limitation" means the highest allowable average of daily discharges over a calendar month, calculated as the sum of all daily discharges measured during a calendar month divided by the number of daily discharges measured during that month.
- 10B.06 "Best Management Practices" or "BMPs" means schedules of activities, prohibitions of practices, maintenance procedures, and other management practices to prevent or reduce the pollution of waters of the State. BMPs may include treatment requirements, operating procedures, and practices to control plant site runoff, spillage or leaks, sludge or waste disposal, or drainage from raw material storage.

- 10B.07 "Clean Water Act" or "CWA" means Public Law 92-500, as amended by Public Law 95-217 Public Law 95-576; 33 U.S.C. §1251 et seq. (formerly referred to as the Federal Water Pollution Control Act or Federal Water Pollution Control Act Amendments of 1972)
- 10B.08 "Continuous discharge" means a discharge which occurs without interruption throughout the operating hours of the facility, except for infrequent shutdowns for maintenance, process changes, or other similar activities.
- 10B.09 "Coal mines, preparation plants and all refuse and waste therefrom" means any point source covered under 40 CFR Part 434 and any coal mine, coal preparation plant, coal preparation plant associated areas, refuse pile, coal waste pile, or other related activity including any related sewage treatment facilities and bath houses required to have a permit under the CWA or Article 5A of Chapter 20 of the Code, but excluding dredging operations or the extraction of coal incidental to the extraction of other minerals where coal does not exceed sixteen and two-thirds percent of the tonnage of minerals removed for purposes of commercial use or sale.
- 10B.10 "Coal Mine" or "Mine" means the area, and any related structures, on and beneath land, used or disturbed in activity related to the extraction, removal or recovery of coal.
- 10B.11 "Coal preparation plant" means a facility where coal is subjected to cleaning, concentrating, or other processing or preparation in order to separate coal from its impurities and is loaded for transit to a consuming facility.
- 10B.12 "Coal preparation plant associated areas" means the coal preparation plant yards, immediate access roads, coal refuse piles, tipples, loadouts and coal storage piles and facilities.

- 10B.13 "Daily discharge" means the discharge of a pollutant measured during a calendar day or within any specified period that reasonably represents the calendar day for purposes of sampling. For pollutants with limitations expressed in units of mass, the daily discharge is calculated as the total mass of the pollutant discharged over the day. For pollutants with limitations expressed in other units of measurement, the daily discharge is calculated as the average measurement of the pollutant over the day.
- 10B.14 "Discharge" when used without qualification means the discharge of a pollutant.
- 10B.15 "Discharge of a pollutant" means:
- (a) any addition of any pollutant or combination of pollutants to waters of the State from any point source;
 - (b) this definition includes additions of pollutants into waters of the State from: surface runoff which is collected or channelled by man; discharges through pipes, other conveyances owned by a person which do not lead to a treatment works; and discharges through pipes, sewers, or other conveyances leading into privately owned treatment works. This term does not include an addition of pollutants by any indirect discharger.
- 10B.16 "Discharge Monitoring Report" or "DMR" means the form(s) prescribed by the Director and approved by EPA for the reporting of self-monitoring results by permittees under WV/NPDES.
- 10B.17 "Draft permit" means a document prepared under Section 10J.01, indicating the Director's tentative decision to issue, modify, reissue, suspend or revoke a permit.

- 10B.18 "Effluent limitation" means any restriction established under State or Federal law on quantities, discharge rates and concentrations of pollutants which are discharged from point sources into waters of the State.
- 10B.19 "Effluent limitations guidelines" means a regulation published by the Administrator under Section 304(b) of the CWA to adopt or revise effluent limitations. For the coal industry these regulations are published at 40 CFR Part 434. (See Appendix G)
- 10B.20 "Environmental Protection Agency" or "EPA" means the United States Environmental Protection Agency.
- 10B.21 "Existing Source" means any coal mine, preparation plant and all refuse or waste therefrom:
- (a) from which there is or may be a discharge of pollutants which commenced prior to September 19, 1977; and
 - (b) which is not a new source.
- 10B.22 "Facility" or "activity" means any coal mine, preparation plant and all refuse and waste therefrom or any other facility or activity (including land or appurtenances thereto) that is subject to regulation under this section.
- 10B.23 "General permit" means a WV/NPDES permit authorizing a category of discharges within a geographical area.
- 10B.24 "Hazardous substance" means any substance designated under 40 CFR Part 116 pursuant to Section 311 of the CWA.
- 10B.25 "Indirect Discharger" means a nondomestic discharger introducing pollutants to publicly owned treatment works.
- 10B.26 "Interstate agency" means an agency of two or more states, including West Virginia, established on or under an agreement or compact approved by the Congress, or any other agency of two or more States

including West Virginia, having substantial powers or duties pertaining to the control of pollution as determined and approved by the Administrator under the CWA and regulations.

- 10B.27 "Major facility" means any WV/NPDES facility or activity classified as such by the Regional Administrator in conjunction with the Director, or which is classified as such by the Director.
- 10B.28 "Maximum daily discharge limitation" means the highest allowable daily discharge.
- 10B.29 "National Pollutant Discharge Elimination System" or "NPDES" means the national program for issuing, denying, modifying, revoking and reissuing, suspending, revoking, monitoring and enforcing permits, and imposing and enforcing pretreatment requirements under Sections 307, 318, 402, and 405 of CWA, including any approved State program.
- 10B.30 "New source" means (a) any coal mining facility covered under 40 CFR Part 434, including an abandoned mine which is being mined, the construction of which is commenced after the date of promulgation of a new source performance standard (NSPS) or of the proposal of a NSPS which is subsequently promulgated in accordance with section 306 of the CWA, or which is determined to constitute a major alteration.
- (b) In making the determination of major alteration the Director shall take into account whether one or more of the following events resulted in a new, altered or increased discharge of pollutants after the date of a new source performance standard or of the proposal of a new source performance standard subsequently promulgated in accordance with Section 306 of the CWA in connection with the facility covered under 40 CFR Part 434 for which the WV/NPDES permit is being considered:

1. Extraction of a coal seam not previously extracted by that mine;
2. Discharge into a drainage area not previously affected by waste water discharge from the facility covered under 40 CFR Part 434;
3. Extensive new surface disruption at the mining operation;
4. A construction of a new shaft, slope or drift.

(c) For a preparation plant or associated areas under 40 CFR Part 434, a new source shall be a preparation plant or associated area, the construction of which is commenced after the date of promulgation of a new source performance standard (NSPS) or of the proposal of a NSPS which is subsequently promulgated in accordance with section 306 of the CWA, and which meets the criteria of 10L.03.

(d) No provision in this definition shall be deemed to affect the classification of a facility as a new source which was so classified under previous EPA regulations, but would not be classified as a new source under this definition. Nor shall any provision in this definition be deemed to affect the standards applicable to such facilities, except as provided in 10L.03.

10B.31 "Operator" means any person, firm or company who is granted or who should obtain a WV/NPDES permit.

10B.32 "Owner" means the owner of the facility subject to regulation.

10B.33 "Point source" means any discernible, confined and discrete conveyance, including, but not limited to, any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, or vessel or other floating craft, from which pollutants are or may be discharged.

10B.34 "Privately owned treatment works" means any device or system which is used to treat wastes other than the owner's wastes and is not a POTW.

- 10B.35 "Process wastewater" means any water which, during manufacturing or processing, comes into direct contact with or results from the production or use of any raw material, intermediate product, finished product, byproduct, or waste product.
- 10B.36 "Proposed permit" means a WV/NPDES permit prepared after the close of the comment period (and, when applicable, any public hearing) and which is sent to EPA (pursuant to the Memorandum of Agreement) for review before final issuance by the Director.
- 10B.37 "Publicly owned treatment works" or POTW means any device or system used in the treatment (including recycling and reclamation) of municipal sewage or industrial wastes of a liquid nature which is owned by a State or municipality, public service district, sanitary district or other public body. This definition includes sewers, pipes, or other conveyances only if they convey wastewater to a POTW providing treatment.
- 10B.38 "Recommencing discharger" means a source which recommences discharge after terminating operations.
- 10B.39 "Regional Administrator" means the Regional Administrator of Regional Office (III) of the Environmental Protection Agency, or an authorized representative.
- 10B.40 "Reissuance" means the issuance of a permit to a facility which has a previously issued effective permit and includes automatic revocation of the previously issued permit.
- 10B.41 "Schedule of compliance" means a schedule of remedial measures in a WV/NPDES permit, including an enforceable sequence of interim requirements (for example, actions, operations, or milestone events) leading to compliance with the CWA, State Act and their regulations.

- 10B.42 "Secretary" as used in this section is the Secretary of the Army acting through the Chief of Engineers.
- 10B.43 "Site" means the land or water area where any facility or activity is physically located or conducted, including adjacent land used in connection with the facility or activity.
- 10B.44 "State" means the State of West Virginia.
- 10B.45 "Total dissolved solids" means the total dissolved (filterable) solids as determined by the use of the method specified in 40 CFR Part 136.
- 10B.46 "Toxic pollutant" means any pollutant listed as a toxic under Section 307(a)(1) of CWA (Appendix A).
- 10B.47 "Variance" means any mechanism or provision under Sections 301 or 316 of CWA or under 40 CFR Part 125 (Appendix B) or in the applicable effluent limitations guidelines which allows modification to or waiver of the generally applicable effluent limitation requirements or time deadlines of CWA. This includes provisions which allow the establishment of alternative limitations based on fundamentally different factors or on Sections 301(c), 301(g), 301(i), 302(b)(2), and 316(a) of the CWA, where appropriate.
- 10B.48 "WV/NPDES Application" - means the forms prescribed by the Director and approved by the EPA for applying for a permit or permit modification, including any additions, revisions or modifications to the WV/NPDES forms.
- 10B.49 "WV/NPDES Permit" or "Permit" means an authorization issued by the Director to implement the requirements of Article 5A including modifications to permits.
- 10B.50 "Wetlands" means those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that, under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.

10C. PERMITS10C.01 Permit Requirement; Exemptions; Prohibitions.

(a) Except as authorized by a WV/NPDES permit no person shall:

1. discharge pollutants from a point source associated with any coal mine, preparation plant, and all refuse and waste therefrom;
2. make, cause or permit to be made any outlet, or substantially enlarge or add to the load of any existing outlet from a facility for the discharge of pollutants or the effluent therefrom into the waters of the State;
3. acquire, construct, install, modify or operate a disposal system or part thereof for the direct or indirect discharge or deposit of treated or untreated waste or effluent from any facility into the waters of this state, or any extension to or addition to such disposal system;
4. extend, modify, add to or increase in volume or concentration any pollutants or effluent from any point source associated with any facility in excess of the discharges or disposition specified or permitted under any existing permit;
5. construct, install, modify, open, reopen, operate or abandon any coal mine, coal preparation plant or coal preparation plant associated areas, whenever such facilities have associated with them or might reasonably be expected to have associated with them a discharge into or pollution of waters of the State except that a WV/NPDES permit shall be required for any coal preparation plant regardless of whether it has, may have or might reasonably be expected to have a discharge.

- (b) A WV/NPDES permit issued pursuant to this section shall be deemed to be a permit issued in accordance with Article 5A and the CWA.
- (c) A WV/NPDES permit shall not be required for activities conducted under and in conformity with Section 9C.
- (d) No facility may be an indirect discharger.

10C.02 Prohibition Against Issuing a WV/NPDES Permit

A WV/NPDES permit may not be issued:

- (a) when the conditions of the permit do not provide for compliance with the applicable requirements of the CWA and Article 5A;
- (b) by the Director where the Regional Administrator has objected to issuance of the WV/NPDES permit;
- (c) when in the judgement of the Secretary, anchorage and navigation in or on any waters of the State would be substantially impaired by the discharge;
- (d) for the discharge of any radiological, chemical or biological warfare agent or high level radioactive waste;
- (e) for any discharge inconsistent with a plan or plan amendment approved under Section 208(b) of the CWA;
- (f) to a new source if the discharge from its construction or operation will cause or contribute to the violation of water quality standards unless the applicant has met the requirements of 10D.05(e) (Discharges into con-complying waters) or has met the requirements for a variance under 10D.05(f);
- (g) when the imposition of conditions cannot ensure compliance with the applicable water quality requirements of all affected states; or
- (h) to any facility which is an indirect discharger.

10C.03 Denial of Permits

WV/NPDES permits may be denied for noncompliance with Article 5A and this section including the reasons specified in 10H.04 or when a surface mining permit under Article 6 has been denied. In the case of an application for reissuance an outstanding violation of an existing permit is grounds for denial. Any denial of the WV/NPDES permit is appealable to the Water Resources Board pursuant to W.Va. Code §20-6-43(d) and in accordance with the procedures and authority of W.Va. Code §20-5A-15.

10C.04 Effect of a Permit

- (a) Except for any toxic effluent standards and prohibitions imposed under Section 307 of the CWA, compliance with a permit during its term constitutes compliance, for purposes of enforcement with Sections 301, 302, 306, 307, 318, 403, and 405 of the CWA and Article 5A. However, a permit may be modified, reissued or revoked during its term for cause as set forth in Section 10H.
- (b) The issuance of a WV/NPDES permit does not convey any property rights of any sort, or any exclusive privilege.

10C.05 Duration and Transferability of Permits

- (a) Duration - WV/NPDES permits shall be effective for a fixed term not to exceed five (5) years. The Director may shorten the term of a WV/NPDES permit to ensure that expiration dates of the WV/NPDES permit and the Article 6 Surface Mining permit coincide, but a WV/NPDES permit may not be shortened to less than three and one-half years for the sole purpose of reconciling expiration dates of Article 6 and WV/NPDES permits unless the permittee agrees.

- (b) Extensions - A WV/NPDES permit may be extended by the Director for a period not to exceed eighteen (18) months beyond its expiration date if the applicant has made a timely and complete application for permit reissuance. Timeliness of an application for permit reissuance is governed by Section 10D.04 (120 days prior to permit expiration). A complete application for the purpose of this extension shall mean that the required number of copies of the application were submitted, including the filing fee of \$50.00, the application questions are sufficiently answered except those required by 10D.05(b) 6, 7 and 9, and the application forms were signed as required under Section 10D.07. A determination of the application's completeness as set forth in this section, shall not preclude the Director from requesting additional information from the applicant during the subsequent substantive review. Permits extended under this section remain fully effective and enforceable. When a WV/NPDES permit is reissued the existing permit is automatically void.
- (c) Transfer of Permits - Permits may be transferred from a permittee to a new operator by either modifying an existing permit pursuant to Section 10H.02 (c)1(D), reissuing the permit under 10H.03(c)3 or by an automatic transfer under Paragraph (d) of this subsection. In transferring a permit from a permittee to a new operator, the Director shall determine that the proposed permittee has all necessary permit responsibility.
- (d) Automatic Transfer of Permits - Any permit may be automatically transferred to a new permittee if:

1. the current permittee notifies the director on the forms prescribed (DR-19A) at least thirty (30) days in advance of the proposed transfer date; and
2. the notice includes a written agreement between the existing and proposed permittee containing a proposed date for transfer of the permit and explaining the extent of permit responsibility, coverage, and liability between them; and
3. the proposed permittee complies with Section 3L.04 and 3L.05;
4. the Director does not notify the existing permittee and the proposed new permittee of his intent:
 - A. to deny the transfer request, or
 - B. to require the transfer through permit modification, or
 - C. to require the transfer through reissuance and require a new application be filed rather than approving the transfer; and
5. Notification is not received by the permittee and proposed new permittee within thirty (30) days after receipt of proof of publication then the transfer is effective on the date specified in the agreement required by Paragraph 2 above.

10C.06 NPDES Permits Issued by EPA and the Chief of the Division of Water Resources

- (a) The Director shall administer and enforce all WV/NPDES or Article 5A permits relating to coal mines, preparation plants and all refuse and waste therefrom issued by the Chief.
- (b) The Director shall administer and enforce all NPDES permits relating to coal mines, preparation plants, and all refuse and waste therefrom that have been adopted by the Chief prior to the effective date of this section, provided that in the event of a conflict between an adopted NPDES permit and a WV/NPDES permit or Article 5A permit the more stringent provisions shall apply.

- (c) The Director may adopt as WV/NPDES permits issued under Article 5A all NPDES permits relating to coal mines, preparation plants and all refuse and waste therefrom issued by the Regional Administrator which are transferred by the Regional Administrator and accepted by the Director. Acceptance of an NPDES permit from the Regional Administrator shall not supercede any permit previously issued under Article 5A. All provisions of both permits shall be in force, except that, in the event of a conflict, the more stringent provisions shall apply. All permits relating to the same facility shall be deemed consolidated and considered as a single permit for the purposes of reporting, administration and enforcement.
- (d) Unexpired permits previously issued under Article 5A shall be void whenever a new WV/NPDES permit is issued for the same facility. Any unexpired NPDES permit issued by the EPA shall not be enforceable by the Director upon the issuance of a new WV/NPDES permit for the same facility.

10C.07 Transition and Consolidation Program for WV/NPDES and Article 6 Permits.

- (a) Transition - Any WV/NPDES or Article 5A permit already in public notice pursuant to Article 5A on the effective date of these regulations shall continue to be processed by the Division of Water Resources; however the Director will be the permit issuing authority for any such permit recommended to be issued by the Chief of the Division of Water Resources.
- (b) Consolidation of permit processing
1. Whenever a facility requires a permit under both Article 6 and Article 5A processing of two or more applications for those permits may be consolidated.

2. Whenever the permits are jointly noticed, the public hearings under 10J and informal conferences under W. Va. Code §20-6-20 may be held on the same day.
3. The final permits may be issued together. They need not be issued together if in the judgement of the Director, joint issuance would result in unreasonable delay in the issuance of one or more of the permits.
4. Whenever a facility or activity requires additional permits under both of the statutes covered by these regulations, the Director may coordinate the expiration date(s) of the new permit(s) with the expiration date(s) of the existing permit(s) so that all permits expire simultaneously subject to the provision of 10C.05(a). Processing of the subsequent applications for renewal permits may then be consolidated.
5. Any permittee who has either an NPDES, WV/NPDES or Article 5A permit must apply for reissuance in accordance with Section 10D.04(a). If such permit expires within eighteen (18) months of the expiration of the Article 6 permit then such permit will automatically be given an extension to the expiration date of the Surface Mining permit provided the permittee complies with Subsection 10C.05(b).
6. Any permittee who has either an NPDES, WV/NPDES or Article 5A permit which will expire within eighteen (18) months after the expiration of an Article 6 permit for that facility must apply for the reissuance of the NPDES, WV/NPDES or Article 5A permit when requesting renewal of the Surface Mining permit pursuant to Section 3M.

10D. APPLICATION FOR PERMITS10D.01 Duty to Apply

Any person who discharges or proposes to discharge pollutants, or who proposes to undertake any activity listed in 10C.01(a) and who does not have an effective permit for such discharge or activity, except persons covered by general permits or those covered by 10C.01(c), shall submit a complete application in the manner and form prescribed by the Director and in accordance with the following applicable subsections.

10D.02 Responsible Party Applies - When a facility or activity is owned by one

person but is operated by another the operator shall be the applicant. The Director may require documentation of the WV/NPDES permit responsibility and liability of the owner and operator and may propose and issue the WV/NPDES permit to the responsible person or persons, but only after notice to the responsible person or persons or the Director may refuse to issue the WV/NPDES permit until the responsible person applies for the WV/NPDES permit.

10D.03 Completeness - Any person who requires a WV/NPDES permit shall complete, sign and submit to the Director a WV/NPDES application. An application for a permit is complete when the Director receives an application form and any supplemental information including maps, plans, designs and other application materials which are completed to the Director's satisfaction. The completeness of any application for a WV/NPDES permit shall be judged independently of the status of any other permit application or permit for the same facility or activity. The Director shall not begin the processing of a permit until the applicant has fully complied with the application requirements.

10D.04 Time to Apply

- (a) Reissuance - Any person with an existing WV/NPDES permit shall submit an application for reissuance of such permit at least 120 days before the expiration date of the existing WV/NPDES, NPDES or Article 5A permit.
- (b) Permit to Abandon - Any person proposing to abandon a deep mine facility under W.Va. Code §20-5A-5(b)(6) and Section 10C.01(a)5 shall apply for an abandonment permit at least 180 days prior to sealing of the deep mine. Any person proposing to abandon a surface mine facility under W.Va. Code §20-5A-5(b)(6) and 10C.01(a)5 shall apply for an abandonment permit with a request for Phase II bond release under 4I.

10D.05 Information Required from Applicants

- (a) Information required from all applicants - All applicants for WV/NPDES permits shall provide the Director with a complete application in the manner and on a form prescribed by the Director. The form may require information in addition to that specified in this section.
1. The activities conducted by the applicant which require it to obtain a permit.
 2. Name, mailing address, and location of the facility for which the application is submitted.
 3. Up to four Standard Industrial Classification (SIC) codes which best reflect the principal products or services provided by the facility.
 4. The operator's name, address, telephone number, ownership status, including the name and address of the owner if different, and status as Federal, State, private, public, or other entity.

5. Other relevant environmental permits necessary for the construction and/or operation of this facility such as dredge and fill permits under CWA §404 and Article 6 permits.
6. A topographic map drawn to a reasonable scale and extending at least one thousand (1000) feet beyond the site, depicting the facility and each of its intake and discharge structures; and those wells, springs, other surface water bodies, and drinking water wells listed in public records or otherwise known to the applicant in the map area.

(b) Information required from Existing Sources - All applicants (including all applicants for reissuance) for WV/NPDES permits whose facilities are existing sources shall also provide the following information to the Director:

1. Outlet location. For each point source, the latitude and longitude to the nearest second and the name of the immediate receiving water and river mile point. For haulroads and on-bench drainage control, the outlet location shall be considered to be the lowest downstream discharge point where water leaving the permit area enters the stream.
2. Line Drawing. A line drawing of the water flow through the facility with a water balance, showing operations contributing influent to the treatment units and effluent. Similar processes, operations, or production areas may be indicated as a single unit, labeled to correspond to the more detailed identification under paragraph (b)(3) of this subsection. The water balance must show approximate average flows at intake and discharge points and between units, including treatment units. If a

water balance cannot be determined the applicant may instead provide a pictorial description of the nature and amount of any sources of water and any collection and treatment measures.

3. Average flows and treatment. A narrative identification of each type of process, operation, or production area which contributes wastewater to the effluent for each outlet, including process wastewater and storm water runoff (including material storage area runoff), the average flow each process contributes and a description of the treatment, if any, the wastewater receives, including the ultimate disposal of any solid or fluid wastes other than by discharge. Processes, operations or production areas may be described in general terms.
4. Intermittent flows. If any of the discharges described in paragraph (b)(3) of this subsection are intermittent or seasonal, a description of the frequency, duration and flow rate of each discharge occurrence (except for storm water runoff, spillage, or leaks).
5. Improvements. If the applicant is subject to any present requirements or compliance schedules for construction, upgrading or operation of waste treatment equipment, an identification of the abatement project, and a listing of the required and projected final compliance dates.
6. Effluent characteristics. Information on the discharge of pollutants is specified in this subparagraph. When "quantitative data" (concentration and mass) for a pollutant is required, the applicant must collect a sample of effluent and analyze it for the pollutant in accordance with analytical methods

approved under 40 CFR Part 136. When no analytical method is approved the applicant may use any suitable method but must provide a description of the method. Grab samples must be used for pH, temperature, cyanide, total phenols, residual chlorine, oil and grease, and fecal coliform. For all other pollutants, 24-hour composite samples must be used. However, a minimum of one (1) grab sample may be taken for effluents from holding ponds or other impoundments with a retention period greater than 24 hours, and a minimum of one (1) to four (4) grab samples may be taken for storm water discharges depending on the duration of the discharge. One grab sample shall be taken in the first hour (or less) of discharge with one additional grab sample taken in each succeeding hour of discharge up to a minimum of four grab samples for discharges lasting four or more hours. In addition, the Director may waive composite sampling for any outfall for which the applicant demonstrates that the use of an automatic sampler is infeasible and that the minimum of four (4) grab samples will be a representative sample of the effluent being discharged. When an applicant has two or more outlets with substantially identical effluents the Director may allow the applicant to test only one outfall and report that the quantitative data also applies to the substantially identical outlet.

A. Mandatory Testing:

(1) Every applicant must report quantitative data for every outlet for the following pollutants:

a. Biochemical Oxygen Demand (BOD₅)

- b. Chemical Oxygen Demand (COD)
- c. Total Organic Carbon (TOC)
- d. Total Suspended Solids
- e. Ammonia (as N)
- f. Temperature (both winter and summer)
- g. pH

(2) The reporting requirements for biochemical oxygen demand, COD, TOC and ammonia are waived if sewage or bath house waste is not a part of the effluent.

B. Each applicant contributing to a discharge must report quantitative data for the pollutants listed in Appendix C (the toxic metals, cyanide, and total phenols) in each outlet.

C. Potentially Required Testing:

Each applicant must indicate whether the applicant knows or has reason to believe that the pollutant is discharged from the outlet (see Paragraph F. below) and must report for each outlet quantitative data for the following pollutants:

- (1) All pollutants listed in Appendix C or Appendix D (the toxic pollutants) for which quantitative data is not otherwise required under paragraph (b)6(B) of this section unless the applicant qualifies for a small business exemption under (b)(7);
- (2) All pollutants in Appendix E (certain conventional and nonconventional pollutants).

- D. Each applicant must indicate whether it knows or has reason to believe that any of the pollutants in Appendix F (certain hazardous substances and asbestos) are discharged from each outlet (see paragraph F below). For every pollutant expected to be discharged, the applicant must briefly describe the reasons the pollutant is expected to be discharged, and report any quantitative data it has for any pollutant.
- E. Each applicant must report qualitative data generated using a screening procedure not calibrated with analytical standards, for TCDD [2, 3, 7, 8 - tetrachlorodibenzo-p-dioxin] if:
- (1) it uses or manufactures 2, 4, 5, -T [2, 4, 5 - trichlorophenoxy acetic acid]; Silvex, 2, 4, 5, -TP [2-(2, 4, 5 - trichlorophenoxy propanoic acid]; Erbon [2-(2, 4, 5-trichlorophenoxy) ethyl, 2, 2-dichloropropionate]; Ronnel [0, 0-dimethyl 0-(2, 4, 5-trichlorophenyl) phosphorothioate]; TCP [(2, 4, 5-trichlorophenol)]; or HCP [(hexachlorophene)]; or
 - (2) knows or has reason to believe that TCDD is or may be present in an effluent.
- F. The requirements in paragraphs (b)6(C) and (D) of this section that an applicant must provide quantitative data for certain pollutants known or believed to be present does not apply to pollutants present in a discharge solely as the result of their presence in intake water; however, an applicant must report such pollutants as present. An applicant is expected to "know or have reason to believe" that a

pollutant is present in an effluent based on an evaluation of the expected use, production, or storage of the pollutant, or on any previous analyses for the pollutant.

7. Small business exemption. Coal mines or preparation plants with a probable total annual production of less than 100,000 tons per year per mine or plant are exempt from the requirements in paragraph (b)6(C)(1) of this section to submit quantitative data for the pollutants listed in Appendix D (the organic toxic pollutants).
8. Used or manufactured toxics. A listing of any toxic pollutant which the applicant does or expects to use or manufacture as an intermediate or final product or by-product during the next five (5) years.
9. Biological toxicity tests. An identification of any biological toxicity tests which the applicant knows or has reason to believe have been made within the last three (3) years on any of the applicant's discharges or on a receiving water in relation to a discharge.
10. Contract analyses. If a contract laboratory or consulting firm performed any of the analyses required by paragraph (b)(6) of this subsection, the identity of each laboratory or firm and the analyses performed.
11. Plan for Abandonment. The information required in a plan for abandonment pursuant to 10D.05(d).
12. Discharges into non-complying waters. Compliance with 10D.05(e).
13. Variiances. Compliance with 10D.05(f) or (g) if applicable.
14. Delayed Submission. In case of reissuance applications, the Director may grant permission to submit the information required by paragraphs 6, 8 and 9 of this section after the permit expiration date.

15. Additional information. In addition to the information reported on the application form, applicants shall provide to the Director, at his or her request, such other information as the Director may reasonably require to assess the facility and discharges from the facility and to determine whether to issue a WV/NPDES permit. The additional information may include additional quantitative data and bioassays to assess the relative toxicity to aquatic life of the discharges and requirements to determine the cause of the toxicity.

(c) Information Required for New Sources.

1. All applicants for WV/NPDES permits whose facilities are new sources must submit a complete application for a surface mining permit under Article 6 (Sections 3A through 3L) and the information required by Section 10D.05(a), 10D.05(b). Incorporation by reference of material supplied in the Article 6 application is permissible.
2. Any new source which is applying for a reissuance permit must submit an application consisting of the material required by 10D.05(a) and (b).

(d) Plan for Abandonment and Application to Abandon a Mine.

1. Deep Mines - the plan for abandonment may incorporate information contained in the surface mining permit under Article 6 (see § 7A.04). Unless waived in writing, in whole or in part by the Director, an applicant for a deep mine under either Section 10D.05(b) or (c) shall provide a plan for abandonment which contains the following information:
 - A. A mine map to scale showing among other things:

- (1) the proposed mine boundary for the initial five (5) years of the mine and the proposed final limits of mining (to be shown in different colors); thickness of barriers against outcrop;
 - (2) any adjacent deep and strip mines and auger holes and the thickness of barriers between the proposed mine and adjacent mine or auger holes;
 - (3) predicted final water elevation in the proposed mine;
 - (4) water level and its elevation in any adjacent mines;
 - (5) seam structural contours at 10 feet intervals and surface elevation contours at an interval not to exceed those available on the latest U.S.G.S. 7.5 minute quadrangle, fault plane or weak plane;
 - (6) proposed location of all mine seals and sectional dams if any;
 - (7) all proposed mine portals, boreholes;
 - (8) surface and seam elevations of all mine openings;
 - (9) the north line;
 - (10) general strike and dip direction of the mineral bed and the average dip.
- B. If there are mine workings either below or above the mine workings to be abandoned, information on whether they are active, inactive or abandoned, the final limits of mining (to be shown in different colors on the mine map in A(1)), elevation of water pools in these mines, the thickness and nature of parting between the workings, whether water from the mine to be abandoned will flow through the adjacent mines or the mines above or below, and whether water from adjacent

- mines or mines below or above will flow through the mine to be abandoned and if it will, the quality of the water.
- C. The type and number of permanent seals proposed, their design details and drawings and the materials to be used for construction.
 - D. Whether there will or might reasonably be expected to be a discharge from the mine after abandonment; the maximum rate of discharge expected; whether the discharge, if any, will need treatment; if treatment is required the type of treatment proposed and its details and if treatment will not be required, the reasons for assuming so.
 - E. Provisions that shall be made for assuring acceptable water quality from any discharges after abandonment of the mine. Should the mine become filled with water, the effect on groundwater quality and plans to eliminate or minimize the adverse effects if any on groundwater quality.
 - F. Any other information which the Director may deem necessary to evaluate the water pollution potential of the facility.
 - G. The information required in Section 7A.04.
2. Other Facilities Requiring Plans for Abandonment. For all coal mines, other than deep mines, preparation plants and preparation plant associated areas, the reclamation plan required under Article 6 shall be the plan for abandonment.
 3. Plan for Abandonment; Reissuance. Unless waived in writing in whole or in part by the Director, in addition to the information required by Sections 4.04(a) and (b), an applicant

for the reissuance of a WV/NPDES permit shall provide information to update or add to the information required in Paragraph 1 and 2 above.

4. Application for Permit to Abandon.

- A. For deep mines - An application for a permit to abandon shall contain the information requested under Paragraph 1 and 2 updated to show final determinations which reflects current knowledge, on each item provided that where the information submitted under 1 and 2 has not significantly changed further updating will not be required, and the following:
1. a statement from the applicant which predicts the likelihood of a discharge from the abandoned mine.
 2. At least one representative cross section map across the coal seam and overburden along a line parallel to the dip of the mineral bed showing the name and thickness of each strata above and the immediate strata below the mineral bed, the position of the water table and the direction of the flow of water, the final likely level of water in the mineral bed on abandonment and the likely extent of fracturing in the overburden due to mining. The line of cross section shall be shown on the mine map submitted under (d)1.A.
 3. A report on the quality of water being discharged from the mine during the past two years or, if such data is unavailable, then an analyses of current discharge quality and a prediction of expected discharge quality should a discharge occur.

B. For facilities other than deep mines, the application for a permit to abandon shall be the application for a Phase II bond release.

(e) Discharges into non-complying waters - The owner or operator of a facility proposing to discharge into a water segment which does not meet applicable water quality standards for the pollutants to be discharged or is not expected to meet those standards even after the application of effluent limitations required by either Section 301(b)(2)(A)2 or (E) or 306 of the CWA, and for which the State has performed a pollutant load allocation for the pollutants to be discharged, must demonstrate, before the close of the comment period, that either:

1. There are sufficient remaining pollutant load allocations to allow for the discharge; and
2. The existing dischargers into that segment are subject to compliance schedules designed to bring the segment into compliance with applicable water quality standards; or
3. that the applicant qualifies for an alternate water quality based effluent limitation by making an adequate demonstration to the Director pursuant to the Water Resources Board's Administrative Regulations, Series I, Section 8.

(f) Variance Requests - A facility may request a variance from effluent limitations under any of the following statutory or regulatory provisions within the times specified. Requests must explain how the requirements of EPA variance regulations have been met. EPA regulations governing the variances in this section are promulgated at 40 CFR Part 125 (Appendix B).

1. Fundamentally different factors. A request for a variance based on the presence of "fundamentally different factors" from those on which the effluent limitations guideline was based shall be made by the close of the public comment period under Section 10J.02. The request shall explain how the requirements of 40 CFR Part 125, Subpart D have been met.
2. Non-conventional pollutants. A request for a variance from the BAT requirements for CWA Section 301(b)(2)(F) pollutants (commonly called "non-conventional" pollutants) pursuant to Section 301(c) of CWA because of the economic capability of the owner or operator, or pursuant to Section 301(g) of CWA because of certain environmental considerations, when those requirements were based on effluent limitation guidelines, must be made by:
 - A. Submitting an initial request to the Regional Administrator, as well as to the Director, stating the name of discharger, the permit number, the outlet number(s), the applicable effluent guideline, and whether the discharger is requesting a Section 301(c) or Section 301(g) modification or both. This request must have been filed not later than 270 days after promulgation of an applicable effluent limitation guideline for guidelines promulgated after December 27, 1977; or
 - B. Submitting a completed request no later than the close of the public comment period under Section 10J.02 demonstrating that the applicable requirements of 40 CFR Part 125 have been met, unless an extension is granted under 10D.05(g)(2).
 - C. Requests for variance from effluent limitations not based on effluent limitation guidelines need only comply with

paragraph (B) of this section and need not be preceded by an initial request under paragraph (A) of this section.

3. Innovative technology. An extension under CWA Section 301(k) from the statutory deadline of July 1, 1984 under Section 301(b)(2)(A) for best available technology based on the use of innovative technology may be requested no later than the close of the public comment period under Section 10J.02 for the discharger's initial permit requiring compliance with Section 301(b)(2)(A). The request shall demonstrate that the requirements of 40 CFR § 124.13 and Part 125, Subpart C have been met.
4. Water quality related effluent limitations. A modification to any water quality related effluent limitation under Section 302(b)(2) of the CWA of requirements under 302(a) of the CWA for achieving water quality related effluent limitations may be requested no later than the close of the public comment period under Section 10J.02 on the permit from which the modification is sought.

(g) Expedited Variance Procedures and Time Extensions

1. Notwithstanding the time requirements in paragraph (f) of this subsection, the Director may notify a permit applicant before a draft permit is issued that the draft permit will likely contain limitations which are eligible for variance. In the notice the Director may require the applicant as a condition of consideration of any potential variance request to submit information explaining how the requirements applicable to the variance have been met and may require its submission within a specified reasonable time after receipt of the notice. The notice may be sent

before the permit application has been submitted. The draft or final permit may contain the alternative limitations which may become effective upon final grant of the variance.

2. A discharger who cannot file a complete request required under paragraph (f)(2)(B) of this subsection may request an extension. The extension may be granted or denied at the discretion of the Director. Extensions shall be no more than 6 months in duration.

10D.06 Record Keeping by Applicant - Applicants shall keep records of all data used to complete permit applications and any supplemental information submitted for a period of at least three (3) years from the date the application is signed.

10D.07 Signatories to Permit Applications and Reports

(a) Applications. All permit applications shall be signed as follows:

1. For a corporation: by a responsible corporate officer. For the purpose of this section, a responsible corporate officer means:
 - A. A president, secretary, treasurer, or vice-president of the corporation in charge of a principal business function, or any other person who performs similar policy or decision-making functions for the corporation, or
 - B. the manager of one or more manufacturing, production, or operating facilities employing more than 250 persons or having gross annual sales or expenditures exceeding \$25 million (in second quarter 1980 dollars), if authority to sign documents has been assigned or delegated to the manager in accordance with corporate procedures.
2. For a partnership or sole proprietorship: by a general partner or the proprietor.

- (b) Reports. All reports required by WV/NPDES permits and other information requested by the Director for compliance with Article 5A, shall be signed by a person described in paragraph (a) of this subsection, or by a duly authorized representative of that person. A person is a duly authorized representative only if:
1. The authorization is made in writing by a person described in paragraph (a) of this section;
 2. The authorization specifies either an individual or a position having responsibility for the overall operation of the regulated facility or activity such as the position of plant manager, superintendent, an individual or position having overall responsibility for environmental matters for the company, or position of equivalent responsibility. (A duly authorized representative may thus be either a named individual or any individual occupying a named position); and
 3. The written authorization is submitted to the Director.
- (c) Changes to authorization. If an authorization under paragraph (b) of this section is no longer accurate because a different individual or position has responsibility for the overall operation of the facility, a new authorization satisfying the requirements of paragraph (b) of this section must be submitted to the Director prior to or together with any reports, information, or applications to be signed by an authorized representative.
- (d) Certification. Any person signing a document under paragraphs (a) or (b) of this section shall make the following certification:
"I certify under penalty of law that this document and all attachments were prepared under the direction or supervision in

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

10D.08 Filing Fee - A filing fee of \$50 shall be required with all WV/NPDES Applications and shall be deposited with the State Treasurer to the credit of the operating permit Fees Fund in accordance with 20-6-9(f) of the State Act.

10E. CONDITIONS APPLICABLE TO ALL PERMITS

The following conditions apply to all WV/NPDES permits. All conditions shall be incorporated into the WV/NPDES permits either expressly or by reference. If incorporated by reference, a specific citation to these regulations must be given in the permit.

10E.01 Duty to comply: Penalties

(a) The permittee must comply with all conditions of this permit.

Permit noncompliance constitutes a violation of the CWA, Article 5A and Article 6 and is grounds for enforcement action; for WV/NPDES permit modification, suspension or revocation; or for denial of a WV/NPDES permit reissuance application.

(b) The permittee shall comply with all effluent standards or prohibitions established under Section 307(a) of the CWA for toxic pollutants within the time provided in the regulations that establish these standards or prohibitions, even if the permit has not yet been modified to incorporate the requirement.

- (c) The Clean Water Act and Article 5A provide that any person who violates a permit condition implementing sections 301, 302, 306, 307, 308, 318 or 405 of the Clean Water Act, or any provision of a WV/NPDES permit or rule or regulation promulgated under Article 5A, is subject to a civil penalty not to exceed \$10,000 per day of such violation. Any person who willfully or negligently violates permit conditions implementing sections 301, 302, 306, 307, or 308 of the Act or any provision of Article 5A or its WV/NPDES permit, is subject to a fine of not less than \$2,500 nor more than \$25,000 per day of violation, or by imprisonment for not more than one (1) year, or both.
- (d) Any person who falsifies, tampers with, or knowingly renders inaccurate any monitoring device or method required to be maintained under this permit shall, upon conviction, be punished by a fine of not more than \$10,000 per violation, or by imprisonment for not more than 6 months per violation, or be both.
- (e) The CWA and Article 5A provide that any person who knowingly makes any false statement, representation, or certification in any record or other document submitted or required to be maintained under this permit, including monitoring reports or reports of compliance or non-compliance shall, upon conviction, be punished by a fine of not more than \$10,000 per violation, or by imprisonment for not more than six (6) months per violation, or by both.
- (f) The effluent or effluents covered by this permit are to be of such quality so as not to cause violation of applicable water quality standards adopted by the State Water Resources Board. Further, any activities covered under this permit shall not lead

to pollution of the groundwater of the state as a result of the disposal or discharge of such wastes covered herein.

(g) Nothing in this subsection shall be construed to limit or prohibit any other authority the Director may have under Article 5A or Article 6, or to relieve the permittee from any responsibilities, liabilities or penalties for not complying with Series I and III of the Water Resources Board's regulations.

10E.02 Duty to reapply. If the permittee wishes to continue an activity regulated by this permit after the expiration date of this WV/NPDES permit, the permittee must apply for a new permit at least 120 days prior to expiration of the permit.

10E.03 Duty to halt or reduce activity. Upon reduction, loss or failure of the treatment facility the permittee shall, to the extent necessary to maintain compliance with its permit, control production or all discharges or both until the facility is restored or an alternative method of treatment is provided. This requirement applies, for example, when the primary source of power to the treatment facility fails or is reduced or lost. It shall not be a defense for a permittee in an enforcement action that it would have been necessary to halt or reduce the permitted activity in order to maintain compliance with the conditions of this permit.

10E.04 Duty to mitigate. The permittee shall take all reasonable steps to minimize, correct or prevent any discharge in violation of this permit which has a reasonable likelihood of adversely affecting human health or the environment.

10E.05 Proper operation and maintenance. The permittee shall at all times properly operate and maintain all facilities and systems of treatment

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

- 10E.06 Permit actions. This WV/NPDES permit may be modified, reissued, suspended, or revoked for cause (see Section 10H). The filing of a request by the permittee for a permit modification, reissuance, termination or a notification of planned changes or anticipated noncompliance, does not stay any permit condition.
- 10E.07 Transfer. This permit is not transferable to any person except after notice to the Director and by following one of the procedures listed in 10C.05(c).
- 10E.08 Property rights. This WV/NPDES permit does not convey any property rights of any sort, or any exclusive privilege.
- 10E.09 Duty to provide information. The permittee shall furnish to the Director, within a specified time, any information which the Director may request to determine whether cause exists for modifying, reissuing, suspending, or revoking this permit, or to determine compliance with this permit. The permittee shall also furnish to the Director, upon request, copies of records required to be kept by this WV/NPDES permit.
- 10E.10 Inspection and entry. The permittee shall allow the Director, or an authorized representative, upon the presentation of credentials and other documents as may be required by law, to:

- (a) Enter upon the permittee's premises where a regulated facility or activity is located or conducted, or where records must be kept under the conditions of the WV/NPDES permit;
- (b) Have access to and copy at reasonable times, any records that must be kept under the conditions of this permit;
- (c) Inspect at reasonable times any facilities, equipment (including monitoring and control equipment), practices, or operations regulated or required under this permit; and
- (d) Sample or monitor at reasonable times, for the purposes of assuring permit compliance or as otherwise authorized by Article 6 or Article 5A, any substances or parameters at any location.

10E.11 Monitoring and records

- (a) Monitoring must be conducted according to test procedures approved under 40 CFR Part 136, unless other test procedures have been specified in this WV/NPDES permit.
- (b) Samples and measurements taken for the purpose of monitoring shall be representative of the monitored activity.
- (c) The permittee shall retain records of all monitoring information, including all calibration and maintenance records and all original chart recording for continuous monitoring instrumentation, copies of all reports required by this permit, and records of all data used to complete the application for this permit, for a period of at least three (3) years from the date of the sample, measurement, report or application. This period may be extended by request of the Director at any time.
- (d) Records of monitoring information shall include:
 - 1. The date, exact place, and time of sampling or measurements;

2. The individual(s) who performed the sampling or measurements;
3. The date(s) analyses were performed;
4. The individual(s) who performed the analyses; if a commercial laboratory is used, the name and address of the laboratory;
5. The analytical techniques or methods used; and
6. The results of such analyses.

This information need not be submitted to the Department, unless requested, but should be retained in accordance with 10E.11(c).

- (e) Monitoring results shall be reported on DMRs and at the intervals specified in the permit. DMR's should be sent to the Reclamation Chief so that they are received no later than twenty (20) days following the end of the reporting period.
- (f) If the permittee monitors any pollutant at any monitoring point specified in the permit more frequently than required by the permit, using approved test procedures under 40 CFR Part 136 or as specified in the permit, the results of this monitoring shall be included in the calculation and reporting of the data submitted in the DMR. Such increased frequency shall also be indicated.
- (g) Calculations for all limitations which require averaging of measurements shall utilize an arithmetic mean unless otherwise specified by the Director in the permit.

10E.12 Signatory requirement. - All applications, reports, or information submitted to the Director shall be signed and certified as required in Section 10D.07 of this section.

10E.13 Reporting requirements

- (a) Planned changes. The permittee shall give notice to the Director as soon as possible but not later than thirty (30) days prior to

any planned physical alterations or additions to the permitted facility and of any planned changes in the method of operating the facility which may affect the nature or quantity of the discharge, or qualify that facility for designation as a new source under 10B.30.

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

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

(d) Immediate reporting

1. The permittee shall report any noncompliance with the WV/NPDES permit or Article 5A which may endanger health or the environment immediately but not later than 24 hours after becoming aware of the circumstances by using the Division of Water Resources' Emergency Notification Number 1-800-642-3074. A written submission shall be provided to the Reclamation Chief within five (5) days of the time the permittee becomes aware of the circumstances. The written submission shall contain a description of the noncompliance and its cause; the period of noncompliance, including exact dates and times, and if the noncompliance has not been corrected, the anticipated time it is expected to continue; and steps taken or planned to reduce, eliminate, and prevent recurrence of the noncompliance.
2. The following shall also be reported immediately but not later than 24 hours after:

- A. Any unanticipated bypass (see Section 10E.14(a)) which exceeds any effluent limitation in the permit;
 - B. Any spill or accidental discharge (upset) (see Section 10E.15) shall be reported to the Director via the Division of Water Resources designated spill telephone number. Such notification shall set forth the time and place of such spill or discharge, type and quantities of pollutants and any actions taken to stop or mitigate the spill or accidental discharge and any other information as may be requested. A written verification of such notification shall be submitted upon request of the Reclamation Chief.
 - C. Violation of a maximum daily discharge limitation for any of the pollutants which the Director has required in the permit to be reported immediately.
3. The Director may waive the written report for 2 above on a case-by-case basis if the oral report has been received in accordance with the above.
4. Notification Levels. The permittee must notify the Director in writing as soon as they know or have reason to believe:
- A. That any activity has occurred or will occur which would result in the discharge of any toxic pollutant which is not limited in the permit, if that discharge will exceed the highest of the following "notification levels":
 - (1) One hundred micrograms per liter (100 ug/l);
 - (2) Two hundred micrograms per liter (200 ug/l) for acrolein and acrylonitrile; five hundred micrograms per liter (500 ug/l) for 2,4-dinitrophenol and for

2-methyl-4, 6-dinitrophenol; and one milligram per liter (1 mg/l) for antimony;

- (3) Five (5) times the maximum concentration value reported for that pollutant in the permit application in accordance with Section 10D.05(b)(6);and
- (4) The level established by the Director in accordance with Section 10F.02(h).

B. That they have begun or expect to begin to use or manufacture as an intermediate or final product or byproduct any toxic pollutant which was not reported in the permit application under Section 10D.05(b)(8).

- (e) Other noncompliance - The permittee shall report all instances of noncompliance not reported under paragraphs 10E.11(e),(f) and (g), and 10E.13(c) and (d) of this section, at the time monitoring reports are submitted. The reports shall contain the information listed in paragraph 10E.13(d)(1) of this section.
- (f) Net limitations - If net limitations are established, then the permittee shall notify the Director if eligibility for such limitations has been altered or no longer exists.
- (g) Other information. Where the permittee becomes aware that it failed to submit any relevant facts in a permit application, or submitted incorrect information in a permit application or in any report to the Director, it shall promptly submit such facts or information.

10E.14 Bypass

(a) Definitions

1. "Bypass" means the intentional temporary diversion of waste streams from any portion of a treatment facility; and

2. "Severe property damage" means substantial physical damage to property, damage to the treatment facilities which causes them to become inoperable, or substantial and permanent loss of natural resources which can reasonably be expected to occur in the absence of a bypass. Severe property damage does not mean economic loss caused by delays in production.

(b) Bypass not exceeding limitations. The permittee may allow any bypass to occur (for reasons other than sediment control) which does not cause effluent limitations to be exceeded, but only if it is for essential maintenance to assure efficient operation. These bypasses are not subject to the provisions of paragraphs (c) and (d) of this section.

(c) Notice

1. Anticipated Bypass. If the permittee knows in advance of the need for a bypass, he or she shall submit prior written notice, if possible, at least ten (10) days before the date of the bypass;
2. Unanticipated Bypass. If the permittee does not know in advance of the need for a bypass, notice shall be submitted as required in paragraph 10E.13(d) of this section.

(d) Prohibition of bypass exceeding limitations

1. Bypass exceeding limitations is permitted only under the following conditions, and the Director may take enforcement action against a permittee for bypass, unless:
 - A. Bypass exceeding limitations was unavoidable to prevent loss of life, personal injury, or severe property damage;
 - B. There were no feasible alternatives to the bypass, such as the use of auxiliary treatment facilities, retention of

untreated wastes, or maintenance during normal periods of equipment downtime. This condition is not satisfied if adequate backup equipment should have been installed in the exercise of reasonable engineering judgement to prevent a bypass which occurred during normal periods of equipment downtime or preventive maintenance; and

C. The permittee submitted notices as required under paragraph (c) of this subsection.

(e) Approval of Bypass exceeding limitations. The Director may approve an anticipated bypass exceeding limitations, after considering its adverse effects, if the Director determines that it will meet the three conditions listed above in paragraph (d)(1) of this subsection.

10E.15 Upset

(a) Definition. "Upset" means an exceptional incident in which there is unintentional and temporary noncompliance with technology based permit effluent limitations because of factors beyond the reasonable control of the permittee. An upset does not include noncompliance to the extent caused by operational error, improperly designed treatment facilities, inadequate treatment facilities, lack of preventive maintenance, or careless or improper operation.

(b) Effect of an upset. An upset constitutes an affirmative defense to an action brought for noncompliance with such technology based permit effluent limitations if the requirements of paragraph (c) of this subsection are met. No determination made during administrative review of claims that noncompliance was caused by upset, and before an action for noncompliance, is final administrative action subject to judicial review.

(c) Conditions necessary for a demonstration of upset. A permittee who wishes to establish the affirmative defense of upset shall demonstrate, through properly signed, contemporaneous operating logs, or other relevant evidence that:

1. An upset occurred and that the permittee can identify the cause(s) of the upset;
2. The permitted facility was at the time being properly operated;
3. The permittee submitted notice of the upset as required in paragraph 10E.13(d)2(B) of this section; and
4. The permittee complied with any remedial measures required under Section 10E.04.

(d) Burden of proof. In any enforcement proceeding the permittee seeking to establish the occurrence of an upset has the burden of proof.

10E.16 Reopener Clause. In accordance with W. Va. Code §20-5A-14, the Director may reopen the permit through modification or by reissuance to incorporate an applicable effluent standard or limitation under Sections 301(b)(2)(C) and W.Va. Code §20-5a-7(b) (water quality based effluent limitations and standards), 301 (b)(2)(D) (Toxics), 304(b)(2) (best available treatment) and 307(a)(2) (Toxics) of the CWA, which is promulgated or approved after the permit is issued if that effluent standard or limitation is more stringent than any effluent limitation in the permit, or controls a pollutant not limited in the permit.

10E.17 Removed Substances - Where removed substances are not otherwise covered by the terms and conditions of this permit or other existing permit issued by the Department, any solids, sludges, filter backwash or other pollutants removed in the course of treatment or control of wastewaters and which are intended for disposal within the State,

shall be disposed of only in a manner and at a site subject to the approval by the Department. If such substances are intended for disposal outside the State or for reuse, i.e., as a material used for making another product, which in turn has another use, the permittee shall notify the Department in writing of the proposed disposal or use of such substances, the identity of the prospective disposer or users, the intended place of disposal or use, as appropriate, and shall take reasonable measures to insure that the use does not cause pollution of the waters of the State.

10E.18 New Sources

- (a) The owner or operator of a new source or a recommencing discharger shall install and have in operating condition, and shall "start up" all pollution control equipment required to meet the conditions of its permit before beginning to discharge.
- (b) After the effective date of new source performance standards, it shall be unlawful for any owner or operator of any new source to operate the source in violation of those standards applicable to the source, except in accordance with 10L.02(d).
- (c) Any new source classified as such under previous EPA regulations may, notwithstanding Section 10H of these regulations, apply to have its WV/NPDES permit modified to incorporate the revised new source performance standards.
- (d) When a WV/NPDES permit is issued to a new source the protection period of 10L.02(a) shall apply. After expiration of such protection period, the permittee must immediately comply with any more stringent technology based limitations promulgated under Section 301 of the CWA. If, however, the more stringent technology

based limitations are promulgated less than three (3) years before the expiration of the WV/NPDES permit, then the permittee has three (3) years from the date of their promulgation to comply with such stricter limits.

10E.19 Definitions - When used in the WV/NPDES permits the terms of Section 10B shall apply and the following terms shall mean:

- (a) The "daily average fecal coliform" bacteria is the geometric average of all samples collected during the month.
- (b) "Measured Flow" means any method of liquid volume measurement, the accuracy of which has been previously demonstrated in engineering practice, or for which a relationship to absolute volume has been obtained.
- (c) "Composite Sample" is a combination of individual samples obtained at regular intervals over a time period. Either the volume of each individual sample is proportional to discharge flow rates or the sampling interval (for constant volume samples) is proportional to the flow rates over the time period used to produce the composite. The maximum time period between individual samples shall be two (2) hours.
- (d) "Grab Sample" is an individual sample collected in less than fifteen (15) minutes.

10F. ESTABLISHING WV/NPDES PERMIT CONDITIONS

10F.01 General - In addition to conditions required in all WV/NPDES permits, the Director shall establish conditions in WV/NPDES permits as required on a case-by-case basis, to provide for and assure compliance with all applicable requirements of the CWA, Article 5A and this section.

An applicable requirement is a State or Federal or Interstate compact, statutory or regulatory requirement which takes effect prior to final administrative disposition of a permit, or is any requirement which takes effect prior to final administrative disposition and is also any requirement which takes effect prior to the modification or reissuance of a permit. Section 10J.02(b) (Reopening of comment period) provides a means for reopening a WV/NPDES permit proceeding at the discretion of the Director where new requirements become effective during the permitting process. An applicable requirement is also any requirement which takes effect prior to a modification or reissuance of a permit.

10F.02 Effluent Limitations - Each permit shall include conditions meeting the following requirements when applicable:

- (a) Technology based effluent limitations and standards for existing sources based on effluent limitations and standards under Section 301 of CWA or new source performance standards promulgated under Section 306 of CWA, or case-by-case effluent limitations determined under Section 402(a)(1) of CWA (Best Professional Judgement or BPJ), or a combination of the two in accordance with 40 CFR Part 125. For new sources these technology based limitations and standards are subject to the provisions of Subsection 10L (protection period).
- (b) Other effluent limitations and standards under Section 301, 302, 303, 307, and 318 of CWA. If any applicable toxic effluent standard or prohibition (including any schedule of compliance specified in such effluent standard or prohibition) is promulgated under Section 307(a) of CWA for a toxic pollutant and that standard or prohibition

is more stringent than any limitation on the pollutant in the permit, the Director shall institute proceedings under these regulations to modify or reissue the permit to conform to the toxic effluent standard or prohibition.

- (c) Water Quality Standards - Any more stringent requirements necessary to achieve water quality standards established pursuant to the CWA or Article 5A and regulations, including requirements of other affected States; or to attain or maintain a specified water quality related effluent limit established under Section 302 of the CWA.
- (d) Reopener Clause - Any WV/NPDES permit issued shall include effluent limitations to meet the requirements of Sections 301(b)(2)(A), (C), (D), (E) and (F) of CWA whether or not applicable effluent limitations guidelines have been promulgated or approved. These permits shall also include a reopener condition (10E.16) stating that, if an applicable standard or limitation is promulgated under Sections 301(b)(2)(C) and (D), 304(b)(2), and 307(a)(2) and that effluent standard or limitation is more stringent than any effluent limitation in the permit or controls a pollutant not limited in the permit, the permit may be modified or revoked and reissued to conform to that effluent standard or limitation.
- (e) Water Quality Management Plans - Any requirements necessary to ensure consistency with the requirements of a Water Quality Management Plan approved by EPA under Section 208(b) of CWA.
- (f) Alternate limits - Incorporate alternate effluent limitations or standards where warranted by "fundamentally different factors" under 40 CFR Part 125, Subpart D. [Sec. § 10D.05(f)]

(g) For toxic pollutants - limitations established under paragraphs (a), (b), or (c) of this section, to control pollutants meeting the criteria listed in paragraph 1 of this subsection. Limitations will be established in accordance with paragraph 2 of this subsection. An explanation of the development of these limitations shall be included in the fact sheet.

1. Limitations must control all toxic pollutants which:

A. The Director determines (based on information reported in a permit application under §10D.05(b)(6) and (8) or in a notification under 10E.13(d)4 or on other information) are or may be discharged at a level greater than the level which can be achieved by the technology based treatment requirements appropriate to the permittee; or

B. The discharger does or may use or manufacture a toxic pollutant as an intermediate or final product or by-product.

2. The requirement that the limitations control the pollutants meeting the criteria of paragraph 1 of this section above will be satisfied by:

A. Limitations on those pollutants; or

B. Limitations on other pollutants which, in the judgement of the Director, will provide the necessary treatment of the pollutants.

(h) Notification level. A "notification level" which exceeds the notification level of Section 10E.13(d)4, upon a petition from the permittee or on the Director's initiative. This new notification level may not exceed the level which can be achieved by the technology based treatment requirements appropriate to the permittee.

- (i) Immediate Reporting. Pollutants for which the permittee must report violations of maximum daily discharge limitations under 10E.13(d)2(C) (Immediate Reporting) shall be listed in the permit. This list shall include any toxic pollutant or hazardous substance, or any pollutant specifically identified as the method to control a toxic pollutant or hazardous substance.
- (j) Monitoring requirements - In addition to Section 10E.11, all permits shall specify:
1. Requirements concerning the proper use, maintenance, and installation, when appropriate, of monitoring equipment or methods (including biological monitoring methods when appropriate);
 2. Required monitoring including type, intervals, and frequency sufficient to yield data which are representative of the monitored activity including, when appropriate, continuous monitoring;
 3. Applicable reporting requirements based upon the impact of the regulated activity and as specified in 4 below. Reporting shall be no less frequent than specified in the above regulations.
 4. To assure compliance with permit limitations, requirements to monitor:
 - A. The volume of effluent discharged from each outlet;
 - B. Other measurements as appropriate, including pollutants in internal waste streams under Section 10G.08; pollutants in intake water for net limitations under Section 10G.07; frequency rate of discharge, etc., for noncontinuous dischargers under Section 10G.04; and pollutants subject to notification requirements under Section 10E.13(d)4.

5. Requirements to report monitoring results with a frequency dependent on the nature and effect of the discharge, but in no case less than once a year.

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

1. Authorized under Section 304(e) of CWA for the control of toxic pollutants and hazardous substances from ancillary activities; or
2. Numeric effluent limitations are infeasible; or
3. The practices are reasonably necessary to achieve effluent limitations and standards or to carry out the purposes and intent of CWA.

(l) Reissued Permits

1. Except as provided in paragraph (1)(2), when a permit is reissued, interim limitations, standards or conditions which are at least as stringent as the final limitations, standards or conditions in the previous permit (unless the circumstances on which the previous permit was based have materially and substantially changed since the time the permit was issued and would constitute cause for permit modification or revocation and reissuance).
2. When effluent limitations were imposed under Section 402 (a)(1) (BPJ) of the CWA in a previously issued permit and these limitations are more stringent than the subsequently promulgated effluent guidelines, this subsection shall apply unless:
 - A. The discharger has installed the treatment facilities required to meet the effluent limitations in the previous

permit and has properly operated and maintained the facilities but has nevertheless been unable to achieve the previous effluent limitations. In this case the limitations in the reissued permit may reflect the level of pollutant control actually achieved (but shall not be less stringent than required by the subsequently promulgated effluent limitation guidelines);

- B. The subsequently promulgated effluent guidelines are based on best conventional pollutant control technology (Section 301(b)(2)(E) of CWA);
- C. The circumstances on which the previous permit was based have materially and substantially changed since the time the permit was issued and would constitute cause for permit modification or revocation and reissuance; or
- D. There is increased production at the facility which results in significant reduction in treatment efficiency, in which case the permit limitations will be adjusted to reflect any decreased production and raw waste loads, but in no event shall permit limitations be less stringent than those required by subsequently promulgated standards and limitations.

(m) Navigation. Any conditions that the Secretary considers necessary to ensure that navigation and anchorage will not be substantially impaired.

(n) Schedules of Compliance - The permit may, when appropriate, specify a schedule of compliance leading to compliance with the CWA and State Act and regulations.

1. Any schedules of compliance for existing sources shall require compliance as soon as possible, but in no case later than the applicable statutory deadline (i.e. July 1, 1984 for technology based limits under CWA §301(b)(1)(B); July 1, 1977 for water quality based effluent limits under CWA §301 (b)(1)(C); or July 1, 1987 or three years after promulgation for control of a toxic pollutant under CWA §207(a)).
2. The first WV/NPDES permit issued to a new source or a recommencing discharger may contain a schedule of compliance under this section. Any first time WV/NPDES permit issued to a new source or recommencing discharge shall contain a schedule of compliance only when necessary to allow a reasonable opportunity to attain compliance with requirements issued or revised after commencement of construction but less than three (3) years before commencement of the relevant discharge. For recommencing dischargers, a schedule of compliance shall be available only when necessary to allow a reasonable opportunity to attain compliance with requirements issued or revised less than three (3) years before recommencement of discharge.
3. Interim dates. Any permit may contain a schedule of compliance for completion of interim requirements and require submission of reports detailing progress toward completion of such interim requirements. If a permit establishes a schedule of compliance which exceeds one (1) year from the date of permit issuance, the schedule shall set forth interim requirements (for example, actions, operations or milestone events) and the dates for

their achievement, but the time between interim dates shall not exceed one (1) year.

4. If the time necessary for completion of any interim requirement is more than one (1) year and is not readily divisible into stages for completion, the permit shall specify interim dates for the submission of reports of progress toward completion of the interim requirements and indicate a projected completion date.
5. Reporting. The permit shall be written to require that no later than 14 days following each interim date and the final compliance date, the permittee shall notify the Director in writing of its compliance or noncompliance with the interim or final requirements or submit progress reports if section (d) is applicable.

10G. CALCULATING WV/NPDES CONDITIONS

- 10G.01 Outlets and discharge points. All permit effluent limitations, standards, and prohibitions shall be established for each outlet or discharge point of the permitted facility, except as otherwise provided under Section 10F.02(k)2 (BMP's where limitations are infeasible) and Section 10G.08 (limitations on internal waste streams). Where a person has a number of outlets emerging into the waters of this State in close proximity to one another, such outlets may be treated as a unit for the purposes of this subsection.
- 10G.02 Metals. All permit effluent limitations, standards, or prohibitions for a metal shall be expressed in terms of the total metal (that is, the sum of the dissolved and suspended fractions of the metal) unless:

- (a) An applicable effluent standard or limitation has been promulgated under CWA and specifies the limitation for the metal in the dissolved or valent form;
- (b) In establishing permit limitations on a case-by-case basis, it is necessary to express the limitation on the metal in the dissolved or valent form in order to carry out the provisions of CWA; or
- (c) All approved analytical methods for the metal inherently measures its dissolved form.

10G.03 Continuous Discharges. For all continuous discharges, all permit effluent limitations, standards, and prohibitions, including those necessary to achieve water quality standards, shall be stated as maximum daily and average monthly discharge limitations.

10G.04 Non-continuous Discharges. Discharges which are not continuous, shall be particularly described and limited, considering the following factors, as appropriate:

- (a) Frequency;
- (b) Total mass;
- (c) Maximum rate of discharge of pollutants during the discharge;
- (d) Prohibition or limitation of specified pollutants by mass, concentration, or other appropriate measure.

10G.05 Mass limitations - Any pollutants limited in terms of mass additionally may be limited in terms of other units of measurement, and the permit shall require the permittee to comply with both limitations.

10G.06 Pollutants in intake water. Except as provided in section 10G.07, effluent limitations imposed in permits shall not be adjusted for pollutants in the intake water.

10G.07 Net limitations.

- (a) Upon request of the permittee, effluent limitations or standards imposed in a permit shall be calculated on a "net" basis; that is, adjusted to reflect credit for pollutants in the permittee's intake water, if the permittee demonstrates that its intake water is drawn from the same body of water into which its discharge is made and if:
1. A. The applicable effluent limitations and standards specifically provide that they shall be applied on a net basis; or
 - B. The permittee demonstrates that pollutants present in the intake water will not be entirely removed by its treatment systems operated by the permittee; and
 2. The permit contains conditions requiring the permittee to conduct additional monitoring as necessary to determine continued eligibility for and compliance with any such adjustments.
- (b) The permittee shall notify the Director if eligibility for an adjustment under this section has been altered or no longer exists. In such case, the permit may be modified or reissued.
- (c) Permit effluent limitations or standards adjusted under this subsection shall be calculated on the basis of the amount of pollutants present after any treatment steps have been performed on the intake water by or for the permittee. Adjustments under this subsection shall be given only to the extent that pollutants in the intake water which are limited in the permit are not removed by the treatment technology employed by the permittee. In addition, effluent limitations or standards shall not be adjusted to the extent that the pollutants in the intake water

vary physically, chemically, or biologically from the pollutants limited in the permit. Nor may effluent limitations or standards be adjusted to the extent that the permittee significantly increases concentrations of pollutants in the intake water, even though the total amount of pollutants might remain the same. Nor shall effluent limitations or standards be calculated on a "net" basis for permittees whose intake water comes from underground water systems.

10G.08 Internal waste streams.

- (a) When permit effluent limitations or standards imposed at the point of discharge are impractical or infeasible, effluent limitations or standards for discharges of pollutants may be imposed on internal waste streams before mixing with other waste streams or cooling water streams. In those instances, the monitoring requirements under Section 10E.11 shall also be applied to the internal waste streams.
- (b) Limits on internal waste streams will be imposed only when the fact sheet under Section 10K sets forth the exceptional circumstances which make such limitations necessary, such as when the final discharge point is inaccessible (for example beneath 10 meters of water), the wastes at the point of discharge are so diluted as to make monitoring impractical, or the interferences among pollutants at the point of discharge would make detection or analysis impracticable.

10G.09 Disposal of pollutants into wells, underground mines or by land application.

- (a) Calculations of Effluent Limitations - Generally. When part of a discharger's process wastewater is not being discharged into surface waters of the State because it is disposed into a well, underground mine or by land application thereby reducing the flow

or level of pollutants being discharged into surface waters of the State, the Director may establish limits on the concentration and quantity of such discharge and applicable effluent standards and the limitations for the surface discharge in a WV/NPDES permit shall be adjusted to reflect the reduced raw waste resulting from such disposal.

(b) Calculations of Effluent Limitations for Pollutants Specified

Paragraph (a) of this subsection shall not apply to the extent that promulgated effluent limitations guidelines specify a different specific technique for adjusting effluent limitations to account for well injection, underground mine disposal or land application.

(c) Paragraph (a) of this section does not alter a discharger's obligation to meet any more stringent requirements established under Sections 10E or 10F of this chapter.

10H. MODIFICATION, REISSUANCE, SUSPENSION AND REVOCATION OF PERMITS

10H.01 General

(a) WV/NPDES permits may be modified, reissued, suspended or revoked either at the request of any interested person (including the permittee) or upon the Director's initiative. However, permits may be modified, reissued, suspended or revoked only for the reasons specified in this section. All requests shall be submitted to the Director in writing and shall contain facts or reasons supporting the request. The Director may require additional information, and in the case of a major modification, may require submission of an updated permit application.

- (b) If the Director decides the request is not justified, he or she shall send the requester a brief written response giving a reason for the decision. Denials of requests for modification, suspension or revocation are not subject to public notice, comment, or hearings.

10H.02 Modifications

- (a) General - All requests for modification shall be submitted in writing to the Director citing facts or reasons supporting the request for modification and indicating under which subsection the request is made. The Director may request additional information and may require the submission of an updated permit application. When a permit modification is requested, only the conditions subject to modification are reopened. All other conditions of the permit shall remain in effect for the duration of the permit.
- (b) If the Director tentatively decides to modify a permit and the modification is made under paragraph (c)(2) (Major Modifications), he or she shall prepare a draft permit under Section 10J.01, follow the public notice procedures in Section 10J.02, and shall follow the procedural requirements in Section 8 of Article 5A. The draft permit shall fulfill the requirement of notice under Section 8 of the State Act. When a draft permit is prepared for the modification, only those conditions to be modified shall be reopened when the draft permit is prepared.
- (c) Causes for modification.
1. Minor modifications - Upon the consent of the permittee, the Director may modify a permit to make the corrections or

allowances for changes in the permitted activity listed in this section without preparing a draft permit under Section 10J.01, or following the procedures of Section 10J or 10K or procedures in Section 8 of the State Act. Minor modifications may:

- A. Correct typographical errors.
- B. Require more frequent monitoring or reporting by the permittee.
- C. Change an interim compliance date in a schedule of compliance, provided the new date is not more than 120 days after the date specified in the existing permit and does not interfere with attainment of the final compliance date requirement.
- D. Allow for a change in ownership or operational control of a facility where the Director determines that no other change in the permit is necessary, provided that any forms prescribed by the Director, including a written agreement containing a specific date for transfer of permit responsibility, coverage, and liability between the current and new permittees have been submitted to the Director.
- E. Change the construction schedule for a discharger which is a new source. No such change shall affect a discharger's obligation to have all pollution control equipment installed and in operation prior to discharge.
- F. Delete a point source outfall when the discharge from that outfall is terminated and does not result in discharge

of pollutants from other outfalls except in accordance with permit limits

- G. Allow disposal system equipment substitution, when the substituted equipment would not alter the degree of treatment required by the permit.
 - H. Allow rerouting of discharging lines, when the rerouted line would not discharge to a different receiving stream.
 - I. Allow relocation of elements of treatment facilities or disposal systems, due to topography or equipment failures.
 - J. When the WV/NPDES or NPDES permit becomes final and effective after March 9, 1982 conform to changes regarding 10E.14(b) and 10E.15(c)(1).
 - K. Other causes not specified as major causes of modification which do not affect the quality or quantity of the effluent or change the outlet location to a different stream.
2. Major Modifications - The following are causes for major modification, but not reissuance of a permit unless the permittee requests or agrees, and requires the preparation of a draft permit under Section 10J.01 and the public notice procedures of Section 10J.02. If the permittee requests or agrees, then the following causes can be reason for a permit reissuance which will open the entire permit for comment and change.
- A. Alterations. There are material and substantial alterations or additions to the permitted facility or activity which occurred after permit issuance which justify the application

of permit conditions that are different or absent in the existing permit (Note: Certain reconstruction activities may cause the new source provisions of 40 CFR §122.29 and Part 434 to be applicable. See also Sections 10B.30 and 10L).

- B. Information. The Director has received new information. Permits may be modified during their terms for this cause only if the information was not available at the time of permit issuance (other than revised regulations, guidance, or test methods) and would have justified the application of different permit conditions at the time of issuance. This cause shall include any information indicating that cumulative effects on the environment are unacceptable.
- C. New Regulations or Judicial Decision. The standards or regulations on which the permit was based have been changed by promulgation of amended standards or regulations or by judicial decision after the permit was issued. Permits may be modified during their terms for this cause only as follows:
- (1) For promulgation of amended standards or regulations, when:
 - a. The permit condition to be modified was based on a promulgated effluent limitation guideline or water quality standards; and
 - b. The EPA or State has revised, withdrawn or modified that portion of the effluent limitation guideline or water quality standard on which the permit condition was based; and

c. If a modification request is made by the permittee, such request is within ninety (90) days of Federal Register or State Register notice of the action on which the request is based.

(2) For judicial decisions, when a court of competent jurisdiction has remanded and stayed State or Federal promulgated regulations, if the remand and stay concern that portion of the regulations on which the permit condition was based and if the permittee is requesting the change, the request is filed by the permittee within ninety (90) days of judicial remand.

- D. Compliance schedules. The Director determines good cause exists for modification of a compliance schedule, (see Section 10F.02(n)) such as an act of God, strike, flood, or materials shortage or other events over which the permittee has little or no control and for which there is no reasonably available remedy. However, in no case shall a compliance schedule be modified to extend beyond an applicable CWA statutory deadline (e.g. July 1, 1984 for technology based effluent limits under CWA 301(b)(1)(B) or July 1, 1977 for water quality based effluent limits under CWA 301 (b)(1)(C).
- E. Variances - When the permittee has filed a timely request for a variance under CWA Sections 301(c), 301(g), 301(h), 301(i), 301(k), 302(b)(2), or 316(a), or for "fundamentally different factors" (See Appendix B).
- F. Toxics - When required to incorporate an applicable 307(a) toxic effluent standard or prohibition.

- G. Reopener - When required by the "reopener" conditions in a permit, which are established in the permit under Section 10F.02(d).
- H. Net Limits - Upon request of a permittee who qualifies for effluent limitations on a net basis, or when a discharger is no longer eligible for net limitations, as provided in Section 10G.07(a) and (b).
- I. Non-limited Pollutants - When the level of discharge of any pollutant which is not limited in the permit exceeds the level which can be achieved by the technology based treatment requirements appropriate to the permittee.
- J. Use or manufacture of Toxics - When the permittee begins or expects to begin to use or manufacture as an intermediate or final product or by-product any toxic pollutant which was not reported in the permit application.
- K. Notification Levels - To establish a "notification level" as provided in Section 10E.13(d)4.
- L. Failure to Notify Affected State - Upon failure of the Director to notify another State as required by Section 10J.02(d) whose waters may be affected by a discharge from this State and different permit conditions are required to comply with the other states water quality standards.
- M. Correction of Mistakes - To correct technical mistakes, such as errors in calculation, or mistaken interpretations of law made in determining permit conditions.
- N. Failure to Achieve BPJ Limitations - When the discharger has installed the treatment technology considered by the permit writer

in setting effluent limitations imposed under section 402(a)(1) ("BPJ") of the CWA and has properly operated and maintained the facilities but nevertheless has been unable to achieve those effluent limitations. In this case, the limitations in the modified permit may reflect the level of pollutant control actually achieved (but shall not be less stringent than required by a subsequently promulgated effluent guideline).

0. BPJ Limitation Costs are Disproportionate - When the permittee's effluent limitations were imposed under section 402(a)(1) ("BPJ") of the CWA and the permittee demonstrates operation and maintenance costs that are totally disproportionate from the operation and maintenance costs considered in the development of a subsequently promulgated effluent limitations guideline, but in no case may the limitation be less stringent than the subsequent guideline.

10H.03 Reissuance

- (a) General - The Director may reissue permits prior to their expiration date for any cause specified in this section. When a WV/NPDES permit is to be reissued the entire permit is reopened and the Director shall require submission of a new permit application. During any reissuance proceeding the permittee shall comply with all conditions of the existing permit until a new final permit is issued. Reissuance requires a draft permit under Section 10J.01 and the public notice procedures of Section 10J.02. Processing of a reissuance application does not exempt the permittee from compliance with any permit term or condition.

(b) Reissuance Based on Permittee Request or Agreement - The following are causes for reissuance of a permit when the permittee requests or agrees:

1. All causes for modification listed under 10H.02(c)2.
2. The WV/NPDES permit will expire within eighteen (18) months and the permittee has submitted an application for reissuance which is approvable.

(c) Reissuance Without Permittee Request or Agreement - The following are causes for reissuance of a permit:

1. Cause exists for suspension or revocation of the WV/NPDES permit under 10H.04 and the Director determines reissuance is appropriate.
2. The facility has an Article 5A permit which was issued prior to July 1, 1974 which does not have an expiration date.
3. The Director has received notification of a proposed transfer of the permit and has determined to reissue both the WV/NPDES permit and surface mining permit.
4. Conditions exist which allow reopening and reissuance of the permit under 10E.16.

10H.04 Suspension and Revocation of Permits - Permits may be suspended or revoked in whole or in part. When suspending or revoking a permit the Director shall follow the procedures of Section 10J and 10K. A Notice of Intent to revoke a permit is a type of draft permit which follows the same procedures as any draft permit under Section 10J.01. The following may be causes for revocation or suspension of a permit during its term, or for denying a permit reissuance application:

- (a) Noncompliance by the permittee with any condition of the WV/NPDES permit or Article 5A; or
- (b) The permittee's failure in the application or during the permit issuance process to disclose fully all relevant facts, or the permittee's misrepresentation of any relevant facts at any time; or
- (c) A determination that the permitted activity endangers human health or the environment and can only be regulated to acceptable levels by permit modification or revocation; or
- (d) A change in any condition that requires either a temporary or a permanent reduction or elimination of any discharge controlled by the permit (for example, plant closure or termination of discharge by connection to a POTW).
- (e) Revocation of a permit issued under Article 6.

10I. PERMITS FOR MAJOR FACILITIES

10I.01 Designation of Major Facilities

- (a) Because of their size of discharge, location in an environmentally sensitive area, or for other reasons, certain facilities have been classified as major facilities by the EPA Regional Administrator. All such major facilities are facilities for which EPA has not waived the right to review, object to, or comment upon pursuant to the Memorandum of Agreement. In addition, the Director may make additional designations of major facility status of facilities not already classified as such.
- (b) Facilities designated as major will be informed at the time of permit issuance.
- (c) Such facilities will be subject to special requirements as set forth in 10I.02.

10I.02 Special Requirements for Major Facilities.

(a) All facilities designated as major facilities by the Regional Administrator in conjunction with the Director:

1. will have a Fact Sheet prepared on them pursuant to Section 10K whenever a draft permit is issued for them;
2. must submit all discharge monitoring reports and reports of non-compliance required by their WV/NPDES or NPDES permit or under 10E.11 to both the Director and the Regional Administrator;
3. will be annually subject to either a Compliance Sampling Inspection (CSI), Compliance Evaluation Inspection (CEI) or Performance Audit Inspection (PAI);
4. will have copies of compliance inspection reports and correspondence regarding non-compliance forwarded to EPA.

(b) All facilities classified as major solely by the Director will be subject to an annual inspection under 10I.02(a)3.

10J. PROCEDURE FOR PERMIT ISSUANCE10J.01 General

(a) Once an application is complete, the Director shall tentatively decide whether to prepare a draft permit or to deny the application.

(b) If the Director decides to prepare a draft permit, it shall contain the following information:

1. All applicable conditions under Sections 10E and 10F;
2. All monitoring requirements; and
3. Effluent limitations, standards, prohibitions and conditions and all variances under 10N that are to be included.

(c) All draft permits shall be accompanied by a fact sheet if required under Section 10K and shall be publicly noticed and available for public comment in accordance with Section 10J.02.

10J.02 Public Notice, Comment and Hearings(a) Public Notice

1. Scope

- A. Public notice shall be given that a draft permit has been prepared.
- B. Public notices may describe more than one permit or permit action.
- C. Public notice shall be given of any hearing granted under 10J.03.

2. Timing

- A. Public notice of the preparation of a draft permit shall allow at least 30 days for public comment. (Extra time may be allowed if requested.)
- B. Public notice of a public hearing shall be given at least 30 days before the hearing. Public notice of the hearing may be given at the same time as public notice of the draft permit and the two notices may be combined.

(b) Reopening of the Public Comment Period - If any data, information or arguments submitted during the public comment period appear to raise substantial new questions concerning a permit, the Director may reopen or extend the comment period to give interested persons an opportunity to comment on the information or arguments submitted. The Director may also extend the comment period for good cause.

(c) Proof of Publication. The applicant shall be responsible for publication of a legal advertisement in a qualified newspaper of general circulation in the location of the proposed permit area. Before the expiration of WV/NPDES notice period in 10J.02(a)2A,

the applicant shall send the Director a copy of the advertisement and proof of publishing along with an affidavit certifying that the notice, and a fact sheet, if required, was sent to all persons listed in paragraphs (d) 1. A, B, and C. A WV/NPDES permit may not be issued until such affidavit is received.

(d) Methods. In addition to the requirements of 10J.02(c) public notice of the draft permit shall be given by the following methods:

1. By the applicant mailing a copy of a notice to the following persons (any person otherwise entitled to receive notice under this paragraph may waive his or her rights to receive notice for any classes and categories of permits):

- A. Federal, State and interstate agencies with jurisdiction over fish and wildlife resources, (U.S. Fish and Wildlife Service; Dept. of Natural Resources, Division of Wildlife Resources), the U. S. Army Corps of Engineers, the State Historic Preservation Unit of the Department of Culture and History, the Advisory Council on Historic Preservation and other appropriate government authorities, including any affected States.
- B. The Division of Water Resources, Attn: Public Information Office.
- C. Any other State or Federal agency which the Director knows has issued or is required to issue a permit for the same facility or activity under any of the following Federal programs: RCRA, UIC, 404, and PSD. For RCRA, and UIC these are: The division of Water Resources, Solid and Hazardous Waste/Groundwater Branch and the W. Va. Air

Pollution Control Commission; for UIC, the Division of Water Resources, Solid and Hazardous Waste/Groundwater Branch and the Commission of Oil and Gas; for 404, the United States Army Corps of Engineers, Pittsburgh District or Huntington District; for PSD, the West Virginia Air Pollution Control Commission.

- D. Any other method reasonably calculated to give actual notice of the action in question to the persons potentially affected by it, including press releases or any other forum or medium to elicit public participation.
2. Public Notice will be sent to persons on a mailing list which is developed by:
- A. Including those who request in writing to be on the list;
 - B. Soliciting persons for "area lists" from participants in past permit proceedings in that area; and
 - C. Notifying the public of the opportunity to be put on the mailing list through periodic publication in the public press and in such publications as regional and State funded newsletters or environmental bulletins. (The list may be updated from time to time by requesting written indication of continued interest from those listed. Persons may be deleted from the list if they fail to respond to such a request).
3. In addition to the general public notice described in paragraph (e) of this section, all persons identified in (d)(A), (B) and (C) of this Section shall be mailed a copy of the fact sheet,

if any, and the draft permit and application unless such person requests, in writing, that these documents not be sent.

(e) Contents

1. All public notices. All public notices issued under this section shall contain the following minimum information:
 - A. Name and address of the office processing the permit action for which notice is being given;
 - B. Name and address of the permittee or permit applicant and a location map of the proposed area, except in the case of general permits;
 - C. A brief description of the business conducted at the facility or activity described in the permit application or in the draft permit, except in the case of general permits;
 - D. Name, address and telephone number of a person from whom interested persons may obtain further information, including copies of the draft permit or draft general permit, fact sheet, and the application;
 - E. A brief description of the comment procedures required and the time and place of any hearing that will be held, including a statement of procedures to request a hearing (unless a hearing has already been scheduled) and other procedures by which the public may participate in the final permit decision; and
 - F. A general description and map of the location of the facility and the name of the receiving water(s). For draft general permits, this requirement will be satisfied by a map or description of the permit area.

- G.* Any other information considered necessary or proper.
2. Public Notices for Hearings. In addition to the general public notice in (e)(1) above, a public notice of a public hearing shall contain the following information:
- A. Reference to the date of previous public notices relating to the permit;
 - B. Date, time and place of the hearing; and
 - C. A brief description of the nature and purpose of the hearing, including applicable rules and procedures.
- (f) Public Comments and Requests for Public Hearings. During the public comment period provided under Section 10J.02(a), any interested person may submit written comments on the draft permit and may request a public hearing, if a public hearing has not been already scheduled. A request for a public hearing shall be in writing and shall state the nature of the issues proposed to be raised in the hearing. All comments shall be considered in making the final decision and shall be answered as provided in Section 10J.04.

10J.03 Public Hearings.

- (a) The Director shall hold a public hearing whenever he or she finds, on the basis of requests, a significant degree of public interest on issues relevant to the draft permit(s). The Director also may hold a public hearing at his or her discretion, whenever, for instance, such a hearing might clarify one or more issues involved in the permit decision.
- (b) Any person may submit oral or written statements and data concerning the draft permit. Reasonable limits may be set upon the time allowed for oral statements, and the submission of statements in

writing may be required. The public comment period under paragraph 10J.02(a)2.A shall automatically be extended to the close of any public hearing under this section.

- (c) A tape recording or written transcript of the hearing shall be made available to the public, upon request.

10J.04 Response to Comments

(a) At the time that any final permit is issued, the Director shall issue a response to comments. This response shall:

1. Specify which provisions, if any, of the draft permit have been changed in the final permit decision, and the reasons for the change; and
2. Briefly describe and respond to all significant comments on the draft permit raised during the public comment period, or during any hearing.

(b) The response to comments shall be available to the public.

10J.05 Public Comment by Government Agencies

(a) If during the comment period for a draft permit, the District Engineer of the U. S. Army Corps of Engineers advises the Director in writing that anchorage and navigation of any of the waters of the State would be substantially impaired by the granting of a permit, the permit shall be denied and the applicant so notified. If the District Engineer advises the Director that imposing specified conditions upon the permit is necessary to avoid any substantial impairment of anchorage or navigation, then the Director shall include the specified conditions in the permit. Review or appeal of denial of a permit under this section or of conditions specified by the District Engineer shall be made

through the applicable procedures of the Corps of Engineers and may not be made under the provisions of this part. If the conditions are stayed by a court of competent jurisdiction or by applicable procedures of the Corps of Engineers, those conditions shall be stayed in the WV/NPDES permit for the duration of that stay.

(b) If during the comment period, any other State or Federal agency with jurisdiction over fish, wildlife, or public health advises the Director in writing that the imposition of specified conditions upon the permit is necessary to avoid substantial risk to public health, impairment of fish, shellfish, wildlife resources, the Director may include the specified conditions in the permit to the extent they are determined necessary to carry out the provisions of the CWA and Article 5A.

(c) In appropriate cases the Director may consult with one or more of the agencies referred to in this section before issuing a draft permit and may reflect their views in the fact sheet or the draft permit.

10J.06 Public Access to Information - Public access to information shall be governed by the Freedom of Information Act, Chapter 29B of the West Virginia Code.

10K FACT SHEET

10K.01 When Fact Sheet Prepared - A fact sheet shall be prepared for every draft permit for:

- (a) a major facility or activity;
- (b) every general permit;
- (c) every draft permit that incorporates a variance; and
- (d) every draft permit which the Director finds is the subject of widespread public interest or raises major issues.

- (e) The fact sheet shall briefly set forth the principal facts and the significant factual, legal, methodological and policy questions considered in preparing the draft permit. The Director shall send this fact sheet to the applicant, to the Division of Water Resources and, on request, to any other person.

10K.02 Contents - The fact sheet shall include, when applicable:

- (a) A brief description of the type of facility or activity which is the subject of the draft permit.
- (b) The type and quantity of wastes, fluids, or pollutants which are proposed to be or are being discharged.
- (c) A brief summary of the basis for the draft permit conditions including references to applicable statutory or regulatory provisions.
- (d) Reasons why any requested variances or alternatives to required standards do or do not appear justified.
- (e) A description of the procedures for reaching a final decision on the draft permit including:
 - 1. The beginning and ending dates of the comment period under Section 10J.02 and the address where comments will be received;
 - 2. Procedures for requesting a hearing and the nature of that hearing; and
 - 3. Any other procedures by which the public may participate in the final decision.
- (f) Name and phone number of a person to contact for additional information.
- (g) Any calculations or other necessary explanation of the derivation of specific effluent limitations and conditions, including a

citation to the applicable effluent limitation guideline or performance standard provisions and reasons why they are applicable or an explanation of how the alternate effluent limitations were developed.

- (h) When the draft permit contains any of the following conditions, an explanation of the reasons why such conditions are applicable:
1. Limitations to control toxic pollutants under Section 10F.02(g);
 2. Limitations on internal waste streams under Section 10G.08; or
 3. Limitations on indicator pollutants under 40 CFR §125.3(g).
 4. When appropriate, a sketch or detailed description of the location of the discharge described in the application.

10L NEW SOURCES

10L.01 Definitions.

For the purpose of this section:

- (a) "Source" means any building, structure, facility, or installation from which there is or may be a discharge of pollutants.
- (b) "Facilities or equipment" means buildings, structures, process or production equipment or machinery which form a permanent part of the new source and which will be used in its operation, if these facilities or equipment are of such value as to represent a substantial commitment to construct. It excludes facilities or equipment used in connection with feasibility, engineering, and design studies regarding the source or water pollution treatment for the source.

10L.02 Effect of Compliance With New Source Performance Standards.

- (a) Except as provided in paragraph (b) of this subsection, any new source which meets the applicable new source performance standards

promulgated before the commencement of discharge, may not be subject to any more stringent new source performance standards or to any more stringent technology based standards under Section 301(b)(2) of CWA for the shortest of the following periods:

1. Ten years from the date that construction is completed;
2. Ten years from the date the source begins to discharge process or other nonconstruction related wastewater; or
3. The period of depreciation or amortization of the facility for the purposes of Section 167 or 169 (or both) of the Internal Revenue Code of 1954.

(b) The protection from more stringent standards of performance afforded by paragraph (a) of this section does not apply to:

1. Additional or more stringent permit conditions which are not technology based; for example, conditions based on water quality standards, or toxic effluent standards or prohibitions under Section 307(a) of CWA; or
2. Additional permit conditions controlling pollutants listed as toxic under Section 307(a) (toxic pollutants) of the CWA or as hazardous substances under Section 311 of the CWA and which are not controlled by new source performance standards. This includes permit conditions controlling pollutants other than those identified as toxic pollutants or hazardous substances when control of these pollutants has been specifically identified as the method to control the toxic pollutants or hazardous substances; or
3. Existing sources which modify their pollution control facilities and achieve performance standards but which are not new

sources or otherwise do not meet the requirements of this paragraph.

- (c) When a WV/NPDES permit is issued to a source with a "protection period" under paragraph (a) of this subsection which will expire on or after the expiration of the protection period, such permit shall require the owner or operator of the source to comply with the requirements of Section 301 and any other applicable requirements of CWA immediately upon the expiration of the protection period. No additional period for achieving compliance with these requirements shall be allowed except when necessary to achieve compliance with requirements promulgated less than 3 years before the expiration of the protection period.
- (d) The owner or operator of a new source or a recommencing discharger shall install and have in operating condition, and shall "start up" all pollution control equipment required to meet the conditions of its permit before beginning to discharge. Within the shortest feasible time (not to exceed thirty (30) days), the permittee must meet all permit conditions. The requirements of this paragraph do not apply if the owner or operator is issued a permit containing a compliance schedule under 10F.02(n)2.
- (e) After the effective date of new source performance standards, it shall be unlawful for any owner or operator of any new source to operate the source in violation of those standards applicable to the source.

10L.03 Criteria for New Source Determination

- (a) A preparation plant or associated area except as otherwise provided is a "new source" if it meets the definition of "new source" in 10B.30(c), and

1. is constructed at a site at which no other source is located; or
 2. it totally replaces the process or production equipment that causes the discharge of pollutants at an existing source; or
 3. its processes are substantially independent of an existing source at the same site. In determining whether these processes are substantially independent, the Director shall consider such factors as the extent to which the new facility is integrated with the existing plant; and the extent to which the new facility is engaged in the same general type of activity as the existing source.
- (b) A source meeting the requirements of paragraph (a)3 of this section is a new source only if a new source performance standard is independently applicable to it.
- (c) Construction on a site at which an existing source is located results in a modification subject to 10H.02(c)2 rather than a new source if the construction does not create a new building, structure, facility or installation meeting the criteria of paragraphs (a)2 or (a)3 of this section but otherwise alters, replaces, or adds to existing process or production equipment.
- (d) Construction of a new source as defined under 10B.30(c) has commenced if the owner or operator has:
1. begun, or caused to begin as part of continuous on-site construction program:
 - A. any placement, assembly, or installation of facilities or equipment; or
 - B. significant site preparation work including clearing, excavation or removal of existing buildings, structures,

- or facilities which is necessary for the placement assembly or installation of new source facilities or equipment; or
2. entered into a binding contractual obligation for the purchase of facilities or equipment which are intended to be used in its operation with a reasonable time. Options to purchase or contract which can be terminated or modified without a substantial loss, and contracts for feasibility engineering, and design studies do not constitute a contractual obligation under the paragraph.

10L.04 Modification of NPDES Permits for New Sources

Any new source classified as such under previous EPA regulations may, notwithstanding Section 10H of these regulations, apply to have its WV/NPDES permit modified to incorporate the revised new source performance standards.

10M GENERAL PERMITS

10M.01 Coverage. - The Director may issue a general permit in accordance with the following:

- (a) Area. The general permit shall be written to cover a category of discharges described in the permit under paragraph (b) of this section, except those covered by individual permits, within a geographic area. The area shall correspond to existing geographic or political boundaries, such as:
 1. Designated planning areas under Sections 208 and 303 of CWA;
 2. City, County, or State political boundaries;
 3. State highway systems;
 4. Standard metropolitan statistical area as defined by the U.S. Office of Management and Budget;

5. Any other appropriate division or combination of boundaries.
- (b) Sources. The general permit shall be written to regulate, within the area described in paragraph (a) of this subsection, either:
1. A category of point sources from coal mines, preparation plants and refuse areas that:
 - A. Involve the same or substantially similar types of operations;
 - B. Discharge the same types of wastes;
 - C. Require the same effluent limitations or operating conditions;
 - D. Require the same or similar monitoring; and
 - E. In the opinion of the Director, are more appropriately controlled under a general permit than under individual permits.
 2. If the Director tentatively decides to issue a general permit, he or she shall prepare a draft general permit under Section 10J.01(a).

10M.02 Administration

- (a) In general. General permits may be modified, reissued, suspended, or revoked in accordance with the applicable requirements of 10H of this Section for either individual dischargers or for a category of point sources.
- (b) Requiring an individual permit - The Director may require any person authorized by a general permit to apply for and obtain an individual permit. Any interested person adversely affected or aggrieved may petition the Director to take action under this subparagraph. Cases where an individual permit may be required include the following:
1. The discharger is not in compliance with the conditions of the general permit;

2. A change has occurred in the availability of demonstrated technology or practices for the control or abatement of pollutants applicable to the point source;
3. Effluent limitation guidelines are promulgated for point sources covered by the general permit;
4. A Water Quality Management plan containing requirements applicable to such point sources is approved;
5. The requirements of 10M.01 are not met.

10N DECISION ON VARIANCES

10N.01 Actions by Director

(a) The Director may grant or deny requests for the following variances:

1. After consultation with the Regional Administrator, extensions under CWA Section 301(k) based on the use of innovative technology; or
2. Variances under CWA Section 316(a) for thermal pollution.

(b) The Director may deny, or forward to the Regional Administrator with a written concurrence, or submit to EPA without recommendation a completed request for:

1. A variance based on the economic capability of the applicant under CWA Section 301(c);
2. A variance based upon certain water quality factors under CWA Section 301(g); or
3. A variance based on water quality related effluent limitations under CWA Section 302(b)(2) [40 CFR part 125 (subpart D)].

10N.02 Actions By EPA

(a) The Regional Administrator may deny, forward, or submit to the EPA Deputy Assistant Administrator for Water Enforcement with a

recommendation for approval, a request for a variance listed in paragraph (b) of this section that is forwarded by the Director.

- (b) The EPA Deputy Assistant Administrator for Water Enforcement may approve or deny any variance request submitted under paragraph (c) of this section. If the Deputy Assistant Administrator approves the variance, the Director may prepare a draft permit incorporating the variance. Any public notice of a draft permit for which a variance or modification has been approved or denied shall identify the applicable procedures for appealing that decision under 40 CFR § 124.64.

100. ENFORCEMENT

100.01 General

The provisions of this chapter may be enforced by all of the applicable provisions in Article 6 and Article 5A, including:

- (a) Orders or notices issued by the Director in accordance with Sections 7, 8, 10 and 12A of Article 5A;
- (b) Civil penalties appropriate to the violation and injunctive relief in accordance with Article 5A, Section 17; and
- (c) Criminal penalties in accordance with Section 19 of Article 5A.

100.02 Citizen Participation. The Director shall provide for public participation in enforcement by the following:

- (a) Investigating and providing a written response to all signed, written complaints from citizens;
- (b) Not opposing intervention by any citizen in an Article 5A proceeding when permissive intervention is authorized by statute or rule; and
- (c) Publishing notice in a newspaper of general circulation in the county in which the discharge is located at least 30 days prior to the final

settlement of any civil action under Article 5A or consent order issued by the Board. This notice will identify the person discharging, the specific enforcement action to be taken, and the name and address where information on the proposed settlement can be obtained. The Director shall consider all comments received during the 30 day period.

Appendix A

307(a) Toxic Pollutants

1. Acenaphthene
2. Acrolein
3. Acrylonitrile
4. Aldrin/Dieldrin
5. Antimony and compounds
6. Arsenic and compounds
7. Asbestos
8. Benzene
9. Benzidine
10. Beryllium and compounds
11. Cadmium and compounds
12. Carbon tetrachloride
13. Chlordane (technical mixture and metabolites)
14. Chlorinated benzenes (other than dichlorobenzenes)
15. Chlorinated ethanes (including 1,2-dichloroethane, 1,1,1-trichloroethane, and hexachloroethane)
16. Chloroalkyl ethers chloroethyl and mixed ethers)
17. Chlorinated naphthalene
18. Chlorinated phenols (other than those listed elsewhere; includes trichlorophenols and chlorinated cresols)
19. Chloroform
20. 2-chlorophenol
21. Chromium and compounds
22. Copper and compounds
23. Cyanides
24. DDT and metabolites
25. Dichlorobenzenes (1,2-, 1,3-, and 1,4-dichlorobenzenes)
26. Dichlorobenzidine
27. Dichloroethylenes (1,1-, and 1,2-dichloroethylene)
28. 2,4-dichlorophenol
29. Dichloropropane and dichloropropene
30. 2,4-dimethylphenol
31. Dinitrotoluene
32. Diphenylhydrazine
33. Endosulfan and metabolites
34. Endrin and metabolites
35. Ethylbenzene
36. Fluoranthene
37. Haloethers (other than those listed elsewhere; includes chlorophenylphenyl ethers, -bromophenylphenyl ether, bis (chloroethoxy) methane and polychlorinated diphenyl ethers)
38. Halomethanes (other than those listed elsewhere; includes methylene chloride, methylchloride, methylbromide, bromoform, dichlorobromomethane)
39. Heptachlor and metabolites
40. Hexachlorobutadiene
41. Hexachlorocyclohexane
42. Hexachlorocyclopentadiene
43. Isophorone
44. Lead and compounds
45. Mercury and compounds
46. Naphthalene
47. Nickel and compounds
48. Nitrobenzene
49. Nitrophenols (including 2,4-dinitrophenol dinitrocresol)
50. Nitrosamines
51. Pentachlorophenol
52. Phenol
53. Phthalate ester
54. Polychlorinated biphenyls (PCBs)
55. Polynuclear aromatic hydrocarbons (including benzantracenes, benzopyrenes, benzofluoranthene, chrysenes, dibenzanthracenes, and indenopyrenes)
56. Selenium and compounds
57. Silver and compounds
58. 2,3,7,8-tetrachlorodibenzo-p-dioxin (TCDD)
59. Tetrachloroethylene
60. Thallium and compounds
61. Toluene
62. Toxaphene
63. Trichloroethylene
64. Vinyl chloride
65. Zinc and compounds

(This appendix is provided for informational purposes; the federal regulations may have changed since the publication date.)

APPENDIX B

**ENVIRONMENTAL PROTECTION AGENCY REGULATIONS
ON CRITERIA AND STANDARDS FOR THE NATIONAL POLLUTANT
DISCHARGE ELIMINATION SYSTEM**

(40 CFR 125; 38 FR 13527, May 22, 1973 As amended by Code of Federal Regulations, Volume 40, Revised as of July 1, 1982; 47 FR 52304, November 19, 1982; 47 FR 53675, November 26, 1982; 48 FR 14153, April 1, 1983; 48 FR 31404, July 8, 1983)

[*Editor's note:* In a notice published at 44 FR 47063, August 10, 1979, EPA deferred the effective date of the best management practices requirements (Subpart K) that were to be effective August 13. The requirements will become effective 60 days after EPA publishes notice that relevant technical information is available.]

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

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

- Sec.
- 125.1 Purpose and scope.
- 125.2 Definitions.
- 125.3 Technology-based treatment requirements in permits.

Subpart B—Criteria for Issuance of Permits to Aquaculture Projects

- 125.10 Purpose and scope.
- 125.11 Criteria.

Subpart C—Criteria for Extending Compliance Dates for Facilities Installing Innovative Technology Under Section 301(k) of the Act [Reserved]

Subpart D—Criteria and Standards for Determining Fundamentally Different Factors Under Sections 301(b)(1)(A), 301(b)(2)(A) and (E) of the Act

- 125.30 Purpose and scope.
- 125.31 Criteria.
- 125.32 Method of application.

Subpart E—Criteria for Granting Economic Variances From Best Available Technology Economically Achievable Under Section 301(c) of the Act [Reserved]

Subpart F—Criteria for Granting Water Quality Related Variances Under Section 301(g) of the Act [Reserved]

Subpart G—Criteria for Modifying the Secondary Treatment Requirements Under Section 301(h) of the Clean Water Act

- Sec.
- 125.56 Scope and purpose.
- 125.57 Law governing issuance of a section 301(h) modified permit.
- 125.58 Definitions.
- 125.59 General.
- 125.60 Existence of and compliance with applicable water quality standards.
- 125.61 Attainment or maintenance of water quality which assures protection of public water supplies, the protection and propagation of a balanced, indigenous population of

shellfish, fish, and wildlife, and allows recreational activities.

125.62 Establishment of a monitoring program.

125.63 Effect of discharge on other point and nonpoint sources.

125.64 Toxics control program.

125.65 Increase in effluent volume or amount of pollutants discharged.

125.66 [Reserved]

125.67 Special conditions for section 301(h) modified permits.

Appendix A—Small Applicant Questionnaire for Modification of Secondary Treatment Requirements

Appendix B—Large Applicant Questionnaire for Modification of Secondary Treatment Requirements

Subpart H—Criteria for Determining Alternative Effluent Limitations Under Section 316(a) of the Act.

- 125.70 Purpose and scope.
- 125.71 Definitions.
- 125.72 Early screening of applications for section 316(a) variances.
- 125.73 Criteria and standards for the determination of alternative effluent limitations under section 316(a).

Subpart I—Criteria Applicable To Cooling Water Intake Structures Under Section 316(h) of the Act [Reserved]

Subpart J—Criteria for Extending Compliance Dates Under Section 301(i) of the Act

- 125.90 Purpose and scope.
 125.91 Definition.
 125.92 Requests for permit modification and issuance under section 301(i)(1) of the Act.
 125.93 Criteria for permit modification and issuance under section 301(i)(1) of the Act.
 125.94 Permit terms and conditions under section 301(i)(1) of the Act.
 125.95 Requests for permit modification or issuance under section 301(i)(2) of the Act.
 125.96 Criteria for permit modification or issuance under section 301(i)(2) of the Act.
 125.97 Permit terms and conditions under section 301(i)(2) of the Act.

Subpart K—Criteria and Standards for Best Management Practices Under Section 304(e) of the Act

- 125.100 Purpose and scope.
 125.101 Definition.
 125.102 Applicability of best management practices.
 125.103 Permit terms and conditions.
 125.104 Best management practices programs.

Subpart L—Criteria and Standards for Imposing Conditions for the Disposal of Sewage Sludge Under Section 405 of the Act [Reserved]

Subpart M—Ocean Dumping Criteria Under Section 403 of the Act

- Sec.
 125.120 Scope and purpose.
 125.121 Definitions.
 125.122 Determination of unreasonable degradation of the marine environment.
 125.123 Permit requirements.
 125.124 Information required to be submitted by applicant.

Authority: Clean Water Act, as amended by the Clean Water Act of 1977, 33 U.S.C. 1251 et seq.

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

§ 125.1 Purpose and scope.

This Subpart establishes criteria and standards for the imposition of technology-based treatment requirements in permits under section 301(b) of the Act, including the application of EPA promulgated effluent limitations and case-by-case determinations of effluent limitations under section 402(a)(1) of the Act.

§ 125.2 Definitions.

For the purposes of this Part, any reference to "the Act" shall mean the Clean Water Act of 1977 (CWA). Unless otherwise noted, the definitions in Parts 122, 123 and 124 apply to this Part.

§ 125.3 Technology-based treatment requirements in permits.

(a) *General.* Technology-based treatment requirements under section 301(b) of the Act represent the minimum level of control that must be imposed in a permit issued under section 402 of the Act. (See §§ 122.41, 122.42 and 122.44 for a discussion of additional or more stringent effluent limitations and conditions.) Permits shall contain the following technology-based treatment requirements in accordance with the following statutory deadlines: [125.3(a) amended by 48 FR 14153, April 1, 1983]

(1) For POTW's, effluent limitations based upon:

- (i) Secondary treatment—from date of permit issuance; and
 (ii) The best practicable waste treatment technology—not later than July 1, 1983; and

(2) For dischargers other than POTW's except as provided in § 122.29(d), effluent limitations requiring: [125.3(a)(2) amended by 48 FR 14153, April 1, 1983]

- (i) The best practicable control technology currently available (BPT)—from date of permit issuance;
 (ii) For conventional pollutants, the best conventional pollutant control technology (BCT)—not later than July 1, 1984;

(iii) For all toxic pollutants referred to in Committee Print No. 95-30, House Committee on Public Works and Transportation, the best available technology economically achievable (BAT)—not later than July 1, 1984;

(iv) For all toxic pollutants other than those listed in Committee Print No. 95-30, effluent limitations based on the BAT not later than three years after the date such effluent limitations are incorporated into an NPDES permit; and
 (v) For all pollutants which are neither toxic nor conventional pollutants, effluent limitations based on BAT not later than three years after the date such effluent limitations are incorporated into an NPDES permit, or July 1, 1984, whichever is later, but in no case later than July 1, 1987.

(b) *Statutory variances and extensions.* (1) The following variances from technology-based treatment requirements are authorized by the Act and may be applied for under § 122.21; [125.3(b)(1) amended by 48 FR 14153, April 1, 1983]

(i) For POTW's, a section 301(h) marine discharge variance from secondary treatment (Subpart G);

(ii) For dischargers other than POTW's:

(A) A section 301(c) economic variance from BAT (Subpart E);

(B) A section 301(g) water quality related variance from BAT (Subpart F); and

(C) A section 316(a) thermal variance from BPT, BCT and BAT (Subpart H).

(2) The following extensions of deadlines for compliance with technology-based treatment requirements are authorized by the Act and may be applied for under § 122.53:

(i) For POTW's a section 301(i) extension of the secondary treatment deadline (Subpart J);

(ii) For dischargers other than POTW's:

(A) A section 301(i) extension of the BPT deadline (Subpart J); and

(B) A section 301(k) extension of the BAT deadline (Subpart C).

(c) *Methods of imposing technology-based treatment requirements in permits.* Technology-based treatment requirements may be imposed through one of the following three methods:

(1) Application of EPA-promulgated effluent limitations developed under section 304 of the Act to dischargers by category or subcategory. These effluent limitations are not applicable to the extent that they have been remanded or withdrawn. However, in the case of a court remand, determinations underlying effluent limitations shall be binding in permit issuance proceedings where those determinations are not required to be reexamined by a court remanding the regulations. In addition, dischargers may seek fundamentally different factors variances from these effluent limitations under § 122.21 and Subpart D of this Part. [125.3(c)(1) amended by 48 FR 14153, April 1, 1983]

(2) On a case-by-case basis under section 402(a)(1) of the Act, to the extent that EPA-promulgated effluent limitations are inapplicable. The permit writer shall apply the appropriate factors listed in section 304 of the Act, and shall consider:

[Sec. 125.3(c)(2)]

(i) The appropriate technology for the category or class of point sources of which the applicant is a member, based upon all available information (including EPA draft or proposed development documents or guidance); and

(ii) Any unique factors relating to the applicant.

[Comment: These factors must be considered in all cases, regardless of whether the permit is being issued by EPA or an approved State.]

(3) Through a combination of the methods in paragraphs (c) (1) and (2) of this section. Where promulgated effluent limitations guidelines only apply to certain aspects of the discharger's operation, or to certain pollutants, other aspects or activities are subject to regulation on a case-by-case basis in order to carry out the provisions of the Act.

(4) Limitations developed under paragraph (c)(2) of this section may be expressed, where appropriate, in terms of toxicity (e.g., "The LC 50 for fat head minnow of the effluent from outfall 001 shall be greater than 25%"), provided that is shown that the limits reflect the appropriate requirements (for example, technology-based or water-quality-based standards) of the Act.

(d) Technology-based treatment requirements are applied prior to or at the point of discharge.

(e) Technology-based treatment requirements cannot be satisfied through the use of "non-treatment" techniques such as flow augmentation and in-stream mechanical aerators. However, these techniques may be considered as a method of achieving water quality standards on a case-by-case basis when:

(1) The technology-based treatment requirements applicable to the discharge are not sufficient to achieve the standards;

(2) The discharger agrees to waive any opportunity to request a variance under sections 301 (c), (g) or (h) of the Act; and

(3) The discharger demonstrates that such a technique is the preferred environmental and economic method to achieve the standards after consideration of alternatives such as

advanced waste treatment, recycle and reuse, land disposal, changes in operating methods, and other available methods.

(f) Technology-based effluent limitations shall be established under this Subpart for solids, sludges, filter backwash, and other pollutants removed in the course of treatment or control of wastewaters in the same manner as for other pollutants.

(g)(1) The Director may set a permit limit for a conventional pollutant at a level more stringent than the best conventional pollution control technology (BCT), or a limit for a nonconventional pollutant which shall not be subject to modification under section 301 (c) or (g) of the Act where:

(i) Effluent limitations guidelines specify the pollutant as an indicator for a toxic pollutant, or

(ii)(A) The limitation reflects BAT-level control of discharges of one or more toxic pollutants which are present in the waste stream, and a specific BAT limitation upon the toxic pollutant(s) is not feasible for economic or technical reasons;

(B) The permit identifies which toxic pollutants are intended to be controlled by use of the limitation; and

(C) The fact sheet required by § 124.56 sets forth the basis for the limitation, including a finding that compliance with the limitation will result in BAT-level control of the toxic pollutant discharges identified in paragraph (g)(1)(ii)(B) of this section, and a finding that it would be economically or technically infeasible to directly limit the toxic pollutant(s).

(2) The Director may set a permit limit for a conventional pollutant at a level more stringent than BCT when:

(i) Effluent limitations guidelines specify the pollutant as an indicator for a hazardous substance, or

(ii)(A) The limitation reflects BAT-level control of discharges (or an appropriate level determined under section 301(c) or (g) of the Act) of one or more hazardous substance(s) which are present in the waste stream, and a specific BAT (or other appropriate) limitation upon the hazardous substance(s) is not feasible for economic or technical reasons;

(B) The permit identifies which hazardous substances are intended to

be controlled by use of the limitation; and

(C) The fact sheet required by § 124.56 sets forth the basis for the limitation, including a finding that compliance with the limitations will result in BAT-level (or other appropriate level) control of the hazardous substances discharges identified in paragraph (g)(2)(ii)(B) of this section, and a finding that it would be economically or technically infeasible to directly limit the hazardous substance(s).

(iii) Hazardous substances which are also toxic pollutants are subject to paragraph (g)(1) of this section.

(3) The Director may not set a more stringent limit under the preceding paragraphs if the method of treatment required to comply with the limit differs from that which would be required if the toxic pollutant(s) or hazardous substance(s) controlled by the limit were limited directly.

(4) Toxic pollutants identified under paragraph (g)(1) of this section remain subject to the requirements of § 122.42(a)(1) (notification of increased discharges of toxic pollutants above levels reported in the application form). [125.3(g)(4) amended by 48 FR 14153, April 1, 1983]

Subpart B—Criteria for Issuance of Permits to Aquaculture Projects

§ 125.10 Purpose and scope.

(a) These regulations establish guidelines under sections 318 and 402 of the Act for approval of any discharge of pollutants associated with an aquaculture project.

(b) The regulations authorize, on a selective basis, controlled discharges which would otherwise be unlawful under the Act in order to determine the feasibility of using pollutants to grow aquatic organisms which can be harvested and used beneficially. EPA policy is to encourage such projects, while at the same time protecting other beneficial uses of the waters.

(c) Permits issued for discharges into aquaculture projects under this Subpart are NPDES permits and are subject to the applicable requirements of Parts 122, 123 and 124. Any permit shall include such conditions (including monitoring and reporting requirements) as are necessary to comply with those Parts.

Technology-based effluent limitations need not be applied to discharges into the approved project except with respect to toxic pollutants.

§ 125.11 Criteria.

(a) No NPDES permit shall be issued to an aquaculture project unless:

(1) The Director determines that the aquaculture project:

(i) Is intended by the project operator to produce a crop which has significant direct or indirect commercial value (or is intended to be operated for research into possible production of such a crop); and

(ii) Does not occupy a designated project area which is larger than can be economically operated for the crop under cultivation or than is necessary for research purposes.

(2) The applicant has demonstrated, to the satisfaction of the Director, that the use of the pollutant to be discharged to the aquaculture project will result in an increased harvest of organisms under culture over what would naturally occur in the area;

(3) The applicant has demonstrated, to the satisfaction of the Director, that if the species to be cultivated in the aquaculture project is not indigenous to the immediate geographical area, there will be minimal adverse effects on the flora and fauna indigenous to the area, and the total commercial value of the introduced species is at least equal to that of the displaced or affected indigenous flora and fauna;

(4) The Director determines that the crop will not have a significant potential for human health hazards resulting from its consumption;

(5) The Director determines that migration of pollutants from the designated project area to water outside of the aquaculture project will not cause or contribute to a violation of water quality standards or a violation of the applicable standards and limitations applicable to the supplier of the pollutant that would govern if the aquaculture project were itself a point source. The approval of an aquaculture project shall not result in the enlargement of a pre-existing mixing zone area beyond what had been designated by the State for the original discharge.

(b) No permit shall be issued for any aquaculture project in conflict with a plan or an amendment to a plan approved under section 208(b) of the Act.

(c) No permit shall be issued for any aquaculture project located in the territorial sea, the waters of the contiguous zone, or the oceans, except

in conformity with guidelines issued under section 403(c) of the Act.

(d) Designated project areas shall not include a portion of a body of water large enough to expose a substantial portion of the indigenous biota to the conditions within the designated project area. For example, the designated project area shall not include the entire width of a watercourse, since all organisms indigenous to that watercourse might be subjected to discharges of pollutants that would, except for the provisions of section 318 of the Act, violate section 301 of the Act.

(e) Any modifications caused by the construction or creation of a reef, barrier or containment structure shall not unduly alter the tidal regimen of an estuary or interfere with migrations of unconfined aquatic species.

[Comment: Any modifications described in this paragraph which result in the discharge of dredged or fill material into navigable waters may be subject to the permit requirements of section 404 of the Act.]

(f) Any pollutants not required by or beneficial to the aquaculture crop shall not exceed applicable standards and limitations when entering the designated project area.

Subpart C—Criteria for Extending Compliance Dates for Facilities Installing Innovative Technology Under Section 301(k) of the Act— [Reserved]

Subpart D—Criteria and Standards for Determining Fundamentally Different Factors Under Sections 301(b)(1)(A), 301(b)(2)(A) and (E), of the Act

§ 125.30 Purpose and scope.

[125.30 revised by 46 FR 9460, January 28, 1981, effective January 31, 1982]

(a) This subpart establishes the criteria and standards to be used in determining whether effluent limitations alternative to those required by promulgated EPA effluent limitations guidelines under sections 301 and 304 of the Act (hereinafter referred to as "national limits") should be imposed on a discharger because factors relating to the discharger's facilities, equipment, processes or other factors related to the discharger are fundamentally different from the factors considered by EPA in development of the national limits. This subpart applies to all national limitations promulgated under Sections 301 and 304 of the Act, except for the BPT limits contained in 40 CFR 423.12 (steam electric generating point source category).

[125.30(a) amended by 47 FR 52304, November 19, 1982]

(b) In establishing national limits, EPA takes into account all the information it can collect, develop and solicit regarding the factors listed in sections 304(b) and 304(g) of the Act. In some cases, however, data which could affect these national limits as they apply to a particular discharge may not be available or may not be considered during their development. As a result, it may be necessary on a case-by-case basis to adjust the national limits, and make them either more or less stringent as they apply to certain dischargers within an industrial category or subcategory. This will only be done if data specific to that discharger indicates it presents factors fundamentally different from those considered by EPA in developing the limit at issue. Any interested person believing that factors relating to a discharger's facilities, equipment, processes or other facilities related to the discharger are fundamentally different from the factors considered during development of the national limits may request a fundamentally different factors variance under §122.21(l)(1). In addition, such a variance may be proposed by the Director in the draft permit.

[125.30(b) amended by 48 FR 14153, April 1, 1983]

§ 125.31 Criteria.

(a) A request for the establishment of effluent limitations under this Subpart (fundamentally different factors variance) shall be approved only if:

(1) There is an applicable national limit which is applied in the permit and specifically controls the pollutant for which alternative effluent limitations or standards have been requested; and

(2) Factors relating to the discharge controlled by the permit are fundamentally different from those considered by EPA in establishing the national limits; and

(3) The request for alternative effluent limitations or standards is made in accordance with the procedural requirements of Part 124.

(b) A request for the establishment of effluent limitations less stringent than those required by national limits guidelines shall be approved only if:

(1) The alternative effluent limitation or standard requested is no less stringent than justified by the fundamental difference; and

(2) The alternative effluent limitation or standard will ensure compliance with sections 208(e) and 301(b)(1)(C) of the Act; and

(3) Compliance with the national limits (either by using the technologies upon which the national limits are based

or by other control alternatives) would result in:

(i) A removal cost wholly out of proportion to the removal cost considered during development of the national limits; or

(ii) A non-water quality environmental impact (including energy requirements) fundamentally more adverse than the impact considered during development of the national limits.

(c) A request for alternative limits more stringent than required by national limits shall be approved only if:

(1) The alternative effluent limitation or standard requested is no more stringent than justified by the fundamental difference; and

(2) Compliance with the alternative effluent limitation or standard would not result in:

(i) A removal cost wholly out of proportion to the removal cost considered during development of the national limits; or

(ii) A non-water quality environmental impact (including energy requirements) fundamentally more adverse than the impact considered during development of the national limits.

(d) Factors which may be considered fundamentally different are:

(1) The nature or quality of pollutants contained in the raw waste load of the applicant's process wastewater;

[*Comment:* (1) In determining whether factors concerning the discharger are fundamentally different, EPA will consider, where relevant, the applicable development document for the national limits, associated technical and economic data collected for use in developing each respective national limit, records of legal proceedings, and written and printed documentation including records of communication, etc., relevant to the development of respective national limits which are kept on public file by EPA. (2) Waste stream(s) associated with a discharger's process wastewater which were not considered in the development of the national limits will not ordinarily be treated as fundamentally different under paragraph (a). Instead, national limits should be applied to the other streams, and the unique stream(s) should be subject to limitations based on section 402(a)(1) of the Act. See § 125.2(c)(2).]

(2) The volume of the discharger's process wastewater and effluent discharged;

(3) Non-water quality environmental impact of control and treatment of the discharger's raw waste load;

(4) Energy requirements of the application of control and treatment technology;

(5) Age, size, land availability, and configuration as they relate to the

discharger's equipment or facilities; processes employed; process changes; and engineering aspects of the application of control technology;

(6) Cost of compliance with required control technology.

(e) A variance request or portion of such a request under this section shall not be granted on any of the following grounds:

(1) The infeasibility of installing the required waste treatment equipment within the time the Act allows.

[*Comment:* Under this section a variance request may be approved if it is based on factors which relate to the discharger's ability ultimately to achieve national limits but not if it is based on factors which merely affect the discharger's ability to meet the statutory deadlines of sections 301 and 307 of the Act such as labor difficulties, construction schedules, or unavailability of equipment.]

(2) The assertion that the national limits cannot be achieved with the appropriate waste treatment facilities installed, if such assertion is not based on factor(s) listed in paragraph (d) of this section;

[*Comment:* Review of the Administrator's action in promulgating national limits is available only through the judicial review procedures set forth in section 509(b) of the Act.]

(3) The discharger's ability to pay for the required waste treatment; or

(4) The impact of a discharge on local receiving water quality.

(f) Nothing in this section shall be construed to impair the right of any State or locality under section 510 of the Act to impose more stringent limitations than those required by Federal law.

§ 125.32 Method of application.

(a) A written request for a variance under this Subpart shall be submitted in duplicate to the Director in accordance with Part 124 Subpart F.

(b) The burden is on the person requesting the variance to explain that:

(1) Factor(s) listed in § 125.31(b) regarding the discharger's facility are fundamentally different from the factors EPA considered in establishing the national limits. The requester should refer to all relevant material and information, such as the published guideline regulations development document, all associated technical and economic data collected for use in developing each national limit, all records of legal proceedings, and all written and printed documentation including records of communication,

etc., relevant to the regulations which are kept on public file by the EPA;

(2) The alternative limitations requested are justified by the fundamental difference alleged in paragraph (b)(1) of this section; and

(3) The appropriate requirements of § 125.31 have been met.

Subpart E—Criteria for Granting Economic Variances from Best Available Technology Economically Achievable Under Section 301(c) of the Act—[Reserved]

Subpart F—Criteria for Granting Water Quality Related Variances Under Section 301(g) of the Act—[Reserved]

Subpart G—Criteria for Modifying the Secondary Treatment Requirements Under Section 301(h) of the Clean Water Act

[Subpart G revised by 47 FR 53675, November 26, 1982]

[*Editor's note:* EPA April 1, 1983 deconsolidated its consolidated permit regulations in 40 CFR 122 and 123, thereby affecting the cross references to these Parts throughout Subpart G of this regulation (48 FR 14153).

EPA amended the cross references in 125.59 and 125.67 to former Parts 122 and 123. However, the changes do not correspond with the references made in the aforementioned sections since Subpart G was revised by 47 FR 53675 on November 26, 1982.

EPA said it will issue the appropriate corrections soon.]

§ 125.56 Scope and purpose.

This Subpart establishes the criteria to be applied by EPA in acting on section 301(h) requests for modifications to the secondary treatment requirements. It also establishes special permit conditions which must be included in any permit incorporating a section 301(h) modification of the secondary treatment requirements. ("section 301(h) modified permit").

§ 125.57 Law governing issuance of a section 301(h) modified permit.

(a) Section 301(h) of the Clean Water Act provides that:

The Administrator, with the concurrence of the State, may issue a permit under section 402 which modifies the requirements of subsection (b)(1)(B) of this section with respect to the discharge of any pollutant from a publicly owned treatment works into marine waters, if the applicant demonstrates to the satisfaction of the Administrator that—

[Sec. 125.57(a)]

(1) there is an applicable water quality standard specific to the pollutant for which the modification is requested, which has been identified under section 304(a)(6) of this Act;

(2) such modified requirements will not interfere with the attainment or maintenance of that water quality which assures protection of public water supplies and the protection and propagation of a balanced, indigenous population of shellfish, fish and wildlife, and allows recreational activities, in and on the water;

(3) the applicant has established a system for monitoring the impact of such discharge on a representative sample of aquatic biota, to the extent practicable;

(4) such modified requirements will not result in any additional requirements on any other point or nonpoint source;

(5) all applicable pretreatment requirements for sources introducing waste into such treatment works will be enforced;

(6) to the extent practicable, the applicant has established a schedule of activities designed to eliminate the entrance of toxic pollutants from nonindustrial sources into such treatment works;

(7) there will be no new or substantially increased discharges from the point source of the pollutant to which the modification applies above that volume of discharge specified in the permit.

For the purposes of this subsection the phrase "the discharge of any pollutant into marine waters" refers to a discharge into deep waters of the territorial sea or the waters of the contiguous zone, or into saline estuarine waters where there is strong tidal movement and other hydrological and geological characteristics which the Administrator determines necessary to allow compliance with paragraph (2) of this subsection, and section 101(a)(2) of this Act. A municipality which applies secondary treatment shall be eligible to receive a permit pursuant to this subsection which modifies the requirements of subsection (b)(1)(B) of this section with respect to the discharge of any pollutant from any treatment works owned by such municipality into marine waters. No permit issued under this subsection shall authorize the discharge of sewage sludge into marine waters.

(b) Section 301(j)(1) of the Clean Water Act provides that:

Any application filed under this section for a modification of the provisions of—

(A) subsection (b)(1)(B) under subsection (h) of this section shall be filed not later than the 365th day which begins after the date of enactment of the Municipal Wastewater Treatment Construction Grant Amendments of 1981;

(c) Section 22(e) of the Municipal Wastewater Treatment Construction Grant Amendments of 1981, Pub. L. 97-117, provides that:

The amendments made by this section shall take effect on the date of enactment of

this Act, except that no applicant, other than the city of Avalon, California, who applies after the date of enactment of this Act for a permit pursuant to subsection (h) of section 301 of the Federal Water Pollution Control Act which modifies the requirements of subsection (b)(1)(B) of section 301 of such Act shall receive such permit during the one-year period which begins on the date of enactment of this Act.

§ 125.58 Definitions.

For the purpose of this subpart:

(a) "Administrator" means the EPA Administrator or a person designated by the EPA Administrator.

(b) "Altered discharge" means any discharge other than a current discharge or improved discharge, as defined in this regulation.

(c) "Applicant" means an applicant for a section 301(h) modified permit. Large applicants have populations contributing to their POTWs equal to or more than 50,000 people or average dry weather flows of 5.0 millions gallons per day (mgd) or more; small applicants have contributing populations of less than 50,000 people and average dry weather flows of less than 5.0 mgd. For the purposes of this definition the contributing population and flows shall be based on projections for the end of the five year permit term. Average dry weather flows shall be the average daily total discharge flows for the maximum month of the dry weather season.

(d) "Application" means a final application previously submitted in accordance with the June 15, 1979, section 301(h) regulations (44 FR 34784) or an application submitted between December 29, 1981 and December 29, 1982. It does not include a preliminary application submitted in accordance with the June 15, 1979, section 301(h) regulations.

(e) "Application questionnaire" means EPA's "Applicant Questionnaire for Modification of Secondary Treatment Requirements". Individual questionnaires for small applicants and for large applicants are published as Appendix A and Appendix B to this subpart, respectively.

(f) "Balanced, indigenous population" means an ecological community which:

(1) Exhibits characteristics similar to those of nearby, healthy communities existing under comparable but unpolluted environmental conditions; or

(2) May reasonably be expected to become re-established in the polluted water body segment from adjacent

waters if sources of pollution were removed.

(g) "Current discharge" means the volume, composition, and location of an applicant's discharge as of anytime between December 27, 1977, and December 29, 1982, as designated by the applicant.

(h) "Improved discharge" means the volume, composition and location of an applicant's discharge following:

(1) Construction of planned outfall improvements, including, without limitation, outfall relocation, outfall repair, or diffuser modification; or

(2) Construction of planned treatment system improvements to treatment levels or discharge characteristics; or

(3) Implementation of a planned program to improve operation and maintenance of an existing treatment system or to eliminate or control the introduction of pollutants into the applicant's treatment works.

(i) "Industrial source" means any source of nonindustrial pollutants regulated under section 307 (b) or (c) of the Clean Water Act which discharges into a POTW.

(j) "Modified discharge" means the volume, composition and location of the discharge proposed by the applicant for which a modification under section 301(h) of the Act is requested. A modified discharge may be a current discharge, improved discharge, or altered discharge.

(k) "Nonindustrial source" means any source of pollutants which is not an industrial source.

(l) "Ocean waters" means those coastal waters landward of the baseline of the territorial seas, the deep waters of the territorial seas, or the waters of the contiguous zone.

(m) "Pesticides" means demeton, Guthion, malathion, mirex, methoxychlor and parathion.

(n) "Public water supplies" means water distributed from a public water system.

(o) "Public water system" means a system for the provision to the public of piped water for human consumption, if such system has at least fifteen (15) service connections or regularly serves at least twenty-five (25) individuals. This term includes (1) any collection, treatment, storage and distribution facilities under the control of the operator of the system and used

primarily in connection with the system, and (2) any collection or pretreatment storage facilities not under the control of the operator of the system which are used primarily in connection with the system.

(p) "Publicly owned treatment works" (POTW) means a treatment works, as defined in section 212(2) of the Act, which is owned by a State, municipality or intermunicipal or interstate agency.

(q) "Saline estuarine waters" means those semi-enclosed coastal waters which have a free connection to the territorial sea, undergo net seaward exchange with ocean waters, and have salinities comparable to those of the ocean. Generally, these waters are near the mouth of estuaries and have cross-sectional annual mean salinities greater than twenty-five (25) parts per thousand.

(r) "Secondary treatment" means the term as defined in 40 CFR Part 133.

(s) "Shellfish, fish and wildlife" means any biological population or community that might be adversely affected by the applicant's modified discharge.

(t) "Stressed waters" means those receiving environments in which an applicant can demonstrate to the satisfaction of the Administrator, that the absence of a balanced, indigenous population is caused solely by human perturbations other than the applicant's modified discharge.

(u) "Toxic pollutants" means those substances listed in 40 CFR 401.15.

(v) "Water quality standards" means applicable water quality standards which have been approved, left in effect, or promulgated under section 303 of the Clean Water Act.

(w) "Zone of initial dilution" (ZID) means the region of initial mixing surrounding or adjacent to the end of the outfall pipe or diffuser ports, provided that the ZID may not be larger than allowed by mixing zone restrictions in applicable water quality standards.

§ 125.59 General

(a) *Basis for application.* An application under this Subpart shall be based on a current, improved, or altered discharge into ocean waters or saline estuarine waters.

(b) *Prohibitions.* No section 301(h) modified permit shall be issued:

(1) Where such issuance would not assure compliance with all applicable requirements of this Subpart and Part 122;

(2) For the discharge of sewage sludge; and

(3) where such issuance would conflict with applicable provisions of State, local, or other Federal laws or Executive Orders. This includes compliance with the Coastal Zone Management Act of 1972, as amended, 16 U.S.C. 1451 *et seq.*; the Endangered Species Act of 1973, as amended, 16 U.S.C. 1531 *et seq.*; and Title III of the Marine Protection, Research and Sanctuaries Act, as amended, 16 U.S.C. 1431 *et seq.*

(c) *Applications.* Each applicant for a modified permit under this Subpart shall submit an application to EPA signed in compliance with 40 CFR 122.6(a)(3) which shall contain:

(1) A signed, completed NPDES Application Standard form A, Parts I, II, III;

(2) A completed Application Questionnaire;

(3) The following certification:

I certify under penalty of law that I have personally examined and am familiar with the information submitted in the attached document(s) and, based on my inquiry of those individuals immediately responsible for obtaining the information, I am convinced that the information is true, accurate and correct. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment.

(d) *Revisions to applications.* (1) POTWs which submitted applications in accordance with the June 15, 1979, Regulations (44 FR 34784) may revise their applications one time following a tentative decision to propose changes to treatment levels and/or outfall and diffuser location and design in accordance with section 125.59(e)(2)(i); and

(2) Other applicants may revise their applications one time following a tentative decision to propose changes to treatment levels and/or outfall and diffuser location and design in accordance with § 125.59(e)(3)(i). Revisions by such applicants which propose downgrading treatment levels and/or outfall and diffuser location and design must be justified on the basis of substantial changes in circumstances beyond the applicant's control since the time of application submission.

(3) Applicants authorized or requested to submit additional information under § 125.59(f) may submit a revised application in accordance with § 125.59(e)(2)(ii) where such additional information supports changes in proposed treatment levels and/or outfall

location and diffuser design. The opportunity for such revision shall be in addition to the one-time revision allowed under § 125.59(d)(1) and (2).

(4) POTWs which revise their applications must:

(i) Modify their NPDES form and Application Questionnaire as needed to assure that the information filed with their application is correct and complete;

(ii) Provide additional analysis and data as needed to demonstrate compliance with this subpart;

(iii) Obtain new State determinations under §§ 125.60(b)(2) and 125.63(b); and

(iv) Provide the certification described in paragraph (c)(3) of this section.

(e) *Deadlines and distribution.*

(1) *Applications.* (i) The original and one copy of an application must be submitted to the appropriate EPA Regional Administrator no later than December 29, 1982, and one copy to the Office of Marine Discharge Evaluation, WH-546, U.S. Environmental Protection Agency, 401 M St. SW., Washington, D.C. 20460.

(ii) A copy of the application must be provided to the State and interstate agency(s) authorized to provide certification/concurrence under § 124.53-124.55 on or before the date of the application is submitted to EPA.

(2) *Revisions to applications.*

(i) Applicants desiring to revise their applications under § 125.59(d)(1) or (2) must:

(A) Submit to the appropriate Regional Administrator a letter of intent to revise their application and a copy to the Office of Marine Discharge Evaluation either within 45 days of the date of EPA's tentative decision on their original application, or within 45 days of promulgation of this provision if a tentative decision has already been made, whichever is later. Following receipt by EPA of a letter of intent, further EPA proceedings on the tentative decision under 40 CFR Part 124 will be stayed.

(B) Submit the revised application as described for new applications in § 125.59(e)(1) either within one year of the date of EPA's tentative decision on their original application or within one year of promulgation of this provision if a tentative decision has already been made, whichever is later.

(ii) Applicants desiring to revise their applications under § 125.59(d)(3) must submit the revised application as

[Sec. 125.59(e)(2)(ii)]

described for new applications in § 125.59(e)(1) of this section concurrent with submission of the additional information under § 125.59(f).

(3) State determination deadline. State determinations, as required by § 125.60(b)(2) and § 125.63(b) shall be filed by the applicant with the appropriate Regional Administrator, no later than 90 days after submission of the application or revision to EPA. Extensions to this deadline may be provided by EPA upon request. However, EPA will not begin review of the application or revision until a favorable State determination is received by EPA.

(f)(1) The Administrator may authorize or request an applicant to submit additional information by a specified date not to exceed one year from the date of authorization or request.

(2) Applicants seeking authorization to submit additional information on current/modified discharge characteristics, water quality, biological conditions or oceanographic characteristics must:

(i) Demonstrate that they made a diligent effort to provide such information with their application and were unable to do so, and

(ii) Submit a plan of study, including a schedule, for data collection and submittal of the additional information. EPA will review the plan of study and may require revisions prior to authorizing submission of the additional information.

(g) Decisions on section 301(h) modifications. (1) The decision to grant or deny a section 301(h) modification shall be made by the Administrator and shall be based on the applicant's demonstration that it has met all the requirements of §§ 125.59 through 125.65.

(2) No section 301(h) modified permit shall be issued until the appropriate State certification/concurrence is granted or waived pursuant to § 124.54 or if the State denies certification/concurrence pursuant to § 124.54.

(3) In the case of a modification issued to an applicant in a State administering an approved permit program under 40 CFR Part 123, the State Director may:

(i) Revoke an existing permit as of the effective date of the EPA issued section 301(h) modified permit; and

(ii) Cosign the section 301(h) modified permit, if the Director has indicated an intent to do so in the written concurrence.

(4) Any section 301(h) modified permit shall:

(i) Be issued in accordance with the procedures set forth in 40 CFR Part 124, except that, because section 301(h) permits may only be issued by EPA, the terms "Administrator or a person designated by the Administrator" shall be substituted for the term "Director" as appropriate; and

(ii) Contain all applicable terms and conditions set forth in 40 CFR Part 122 and § 125.67.

(5) Appeals of section 301(h) determinations shall be governed by the procedures in 40 CFR Part 124.

(6) At the expiration of the section 301(h) modified permit, the POTW should be prepared to support the continuation of the modification based on studies and monitoring performed during the life of the permit. Upon a demonstration meeting the statutory criteria and requirements of this subpart, the permit may be renewed under the applicable procedures of 40 CFR Part 124.

§ 125.60 Existence of and compliance with applicable water quality standards.

(a) There must exist a water quality standard or standards applicable to the pollutant(s) for which a section 301(h) modified permit is requested, including:

(1) Water quality standards for biochemical oxygen demand or dissolved oxygen;

(2) Water quality standards for suspended solids, turbidity, light transmission, light scattering or maintenance of the euphotic-zone; and

(3) Water quality standards for pH.

(b) The applicant must:

(1) Demonstrate that the modified discharge will comply with the above water quality standard(s); and

(2) Provide a determination signed by the State or interstate agency(s) authorized to provide certification under §§ 124.53 and 124.54 that the proposed modified discharge will comply with applicable provisions of State law including applicable water quality standards. This determination shall include a discussion of the basis for the conclusion reached.

§ 125.61 Attainment or maintenance of water quality which assures protection of public water supplies, the protection and propagation of a balanced, indigenous population of shellfish, fish, and wildlife, and allows recreational activities.

(a) *Physical characteristics of discharge.* (1) The applicant's outfall and diffuser must be located and

designed to provide adequate initial dilution, dispersion and transport of wastewater to meet all applicable water quality standards at and beyond the boundary of the zone of initial dilution:

(i) During periods of maximum stratification and

(ii) During other periods when discharge characteristics, water quality, biological seasons, or oceanographic conditions indicate more critical situations may exist.

(2) Following initial dilution, the partially diluted wastewater and particulates must be transported and dispersed so as not to affect water use areas adversely (including recreational and fishing areas) and areas of biological sensitivity.

(b) *Impact of discharge on public water supplies.* (1) The applicant's modified discharge must allow for the attainment or maintenance of water quality which assures protection of public water supplies.

(2) The applicant's modified discharge must not:

(i) Prevent a planned or existing public water supply from being used, or from continuing to be used, as a public water supply; or

(ii) Have the effect of requiring treatment over and above that which would be necessary in the absence of such discharge in order to comply with local, and EPA drinking water standards.

(c) *Biological impact of discharge.* (1) The applicant's modified discharge must allow for the attainment or maintenance of water quality which assures protection and propagation of a balanced indigenous population of shellfish, fish, and wildlife.

(2) A balanced, indigenous population of shellfish, fish and wildlife must exist:

(i) Immediately beyond the zone of initial dilution of the applicant's modified discharge and;

(ii) In all other areas beyond the zone of initial dilution where marine life is actually or potentially affected by the applicant's modified discharge.

(3) Conditions within the zone of initial dilution must not contribute to extreme adverse biological impacts, including, but not limited to, the destruction of distinctive habitats of limited distribution, the presence of disease epicenters, or the stimulation of phytoplankton blooms which have adverse effects beyond the zone of initial dilution.

(4) In addition, for modified discharges into saline estuarine water:

(i) Benthic populations within the zone of initial dilution must not differ substantially from the balanced, indigenous populations which exist immediately beyond the boundary of the zone of initial dilution;

(ii) The discharge must not interfere with estuarine migratory pathways within the zone of initial dilution; and

(iii) The discharge must not result in the accumulation of toxic pollutants or pesticides at levels which exert adverse effects on the biota within the zone of initial dilution.

(d) *Impact of discharge on recreational activities.* (1) The applicant's modified discharge must allow for the attainment or maintenance of water quality which allows for recreational activities beyond the zone of initial dilution, including, without limitation, swimming, diving, boating, fishing, and picnicking and sports activities along shorelines and beaches.

(2) There must be no Federal, State, or local restrictions on recreational activities within the vicinity of the applicant's modified outfall unless such restrictions are routinely imposed around sewage outfalls. This exception shall not apply where the restriction would be lifted or modified, in whole or in part, if the applicant were discharging a secondary treatment effluent.

(e) Additional requirements for applications based on improved or altered discharges. An application for a section 301(h) modified permit on the basis of an improved or altered discharge must include:

(1) A demonstration that such improvements or alterations have been thoroughly planned and studied and can be completed or implemented expeditiously;

(2) Detailed analyses projecting changes in average and maximum monthly flow rates and composition of the applicant's discharge which are expected to result from proposed improvements or alterations.

(3) The assessments required by paragraphs (a) through (d) of this section

based on its current discharge;

(4) A detailed analysis of how the applicant's planned improvements or alterations will comply with the requirements of paragraphs (a) through (d) of this section.

(f) Stressed waters. If an applicant believes that its failure to meet the requirements of paragraphs (a) through (e) of this section is attributable to conditions resulting from human perturbations other than its modified discharge (including, without limitation, other municipal or industrial discharges, nonpoint source runoff and the applicant's previous discharges), the applicant must demonstrate, to the satisfaction of the Administrator, that its modified discharge does not or will not:

(1) Contribute to, increase, or perpetuate such stressed conditions;

(2) Contribute to further degradation of the biota or water quality if the level of human perturbation from other sources increases; and

(3) Retard the recovery of the biota or water quality if the level of human perturbation from other sources decreases.

§ 125.62 Establishment of a monitoring program.

(a) *General requirements.* (1) The applicant must:

(i) Have a monitoring program designed to provide data to evaluate the impact of the modified discharge on the marine biota, demonstrate compliance with applicable water quality standards, and measure toxic substances in the discharge;

(ii) Describe the sampling techniques, schedules and locations (including appropriate control sites), analytical techniques, quality control and verification procedures to be used in the monitoring program;

(iii) Demonstrate that it has the resources necessary to implement the program upon issuance of the modified permit and to carry it out for the life of the modified permit; and

(iv) Determine the frequency and extent of the monitoring program taking into consideration the applicant's rate of discharge, quantities of toxic pollutants discharged, and potentially significant impacts on receiving water quality, marine biota, and designated water uses.

(2) The Administrator may require revision of the proposed monitoring program before issuing a modified

permit and during the term of any modified permit.

(b) *Biological monitoring program.* The biological monitoring program for both small and large applicants shall provide data adequate to evaluate the impact of the modified discharge on the marine biota.

(1) Biological monitoring shall include to the extent practicable:

(i) Periodic surveys of the biological communities and populations which are most likely affected by the discharge to enable comparisons with baseline conditions described in the application and verified by sampling at the control stations/reference sites during the periodic surveys;

(ii) Periodic determinations of the accumulation of toxic pollutants and pesticides in organisms and examination of adverse effects, such as disease, growth abnormalities, physiological stress or death;

(iii) Sampling of sediments in areas of solids deposition in the vicinity of the ZID, in other areas of expected impact, and at appropriate reference sites to support the water quality and biological surveys and to measure the accumulation of toxic pollutants and pesticides; and

(iv) Where the discharge would affect commercial or recreational fisheries, periodic assessments of the conditions and productivity of fisheries.

(2) Small applicants are not subject to the requirements of paragraph (b)(1)(ii)-(iv) of this section if they discharge at depths greater than 10 meters and can demonstrate through a suspended solids deposition analysis that there will be negligible seabed accumulation in the vicinity of the modified discharge.

(3) For applicants seeking a section 301(h) modified permit based on:

(i) A current discharge, biological monitoring shall be designed to demonstrate ongoing compliance with the requirements of § 125.61(c);

(ii) An improved discharge or altered discharge other than outfall relocation, biological monitoring shall provide baseline data on the current impact of the discharge and data which demonstrate, upon completion of improvements or alterations, that the requirements of § 125.61(c) are met; or

(iii) An improved or altered discharge involving outfall relocation, the biological monitoring shall:

(A) Include the current discharge site until such discharge ceases; and

(B) Provide baseline data at the relocation site to demonstrate the impact of the discharge and to provide the basis for demonstrating that requirements of § 125.61(c) will be met.

(c) *Water quality monitoring program.* The water quality monitoring program shall to the extent practicable:

(1) Provide adequate data for evaluating compliance with applicable water quality standards;

(2) Measure the presence of toxic pollutants which have been identified or reasonably may be expected to be present in the discharge.

(d) *Effluent monitoring program.* In addition to the requirements of 40 CFR Part 122, to the extent practicable, monitoring of the POTW effluent shall provide quantitative and qualitative data which measure toxic substances and pesticides in the effluent and the effectiveness of the toxics control program.

§ 125.63 Effect of discharge on other point and nonpoint sources.

(a) No modified discharge may result in any additional pollution control requirements on any other point or nonpoint source.

(b) The applicant shall obtain a determination from the State or interstate agency(s) having authority to establish wasteload allocations indicating whether the applicant's discharge will result in an additional treatment, pollution control, or other requirement on any other point or nonpoint sources. The State determination shall include a discussion of the basis for its conclusion.

§ 125.64 Toxics control program.

(a) Chemical analysis. (1) The applicant shall submit at the time of application a chemical analysis of its current discharge for all toxic pollutants and pesticides as defined in § 125.58 (u) and (m). The analysis shall be performed on two 24 hour composite samples (one dry weather and one wet weather). Applicants may supplement or substitute chemical analyses if composition of the supplemental or substitute samples typifies that which occurs during dry and wet weather conditions.

(2) Unless required by the State, this requirement shall not apply to any small section 301(h) applicant which certifies that there are no known or suspected sources of toxic pollutants or pesticides and documents the certification with an industrial user survey as described by 40 CFR 403.8(f)(2).

(b) Identification of sources. The applicant shall submit at the time of application an analysis of the known or suspected sources of toxic pollutants or pesticides identified in § 125.64(a). The applicant shall to the extent practicable categorize the sources according to industrial and nonindustrial types.

(c) Industrial pretreatment requirements.

(1) An applicant which has known or suspected industrial sources of toxic pollutants shall have an approved pretreatment program, or shall develop an approved pretreatment program by July 1, 1983, or the date established in their NPDES permit, whichever is earlier. See, 40 CFR Part 403.

(2) This requirement shall not apply to any applicant which has no known or suspected industrial sources of toxic pollutants or pesticides and so certifies to the Administrator.

(3) The pretreatment program or proposed compliance schedule submitted by the applicant under this section shall be subject to revision as required by the Administrator prior to issuing any section 301(h) modified permit and during the term of any such permit.

(4) Implementation of all existing pretreatment requirements and authorities must be maintained through the period of development of any additional pretreatment requirements that may be necessary to comply with the requirements of this subpart.

(d) Nonindustrial source control program.

(1) The applicant shall submit a proposed public education program designed to minimize the entrance of nonindustrial toxic pollutants and pesticides into its POTW(s) which shall be implemented no later than 18 months after issuance of a 301(h) modified permit.

(2) The applicant shall also develop and implement additional nonindustrial source control programs on the earliest possible schedule. This requirement shall not apply to a small applicant which certifies that there are no known or suspected water quality, sediment accumulation, or biological problems related to toxic pollutants or pesticides in its discharge.

(3) The applicant's nonindustrial source control programs under paragraph (d)(2) of this section shall include the following schedules which are to be implemented no later than 18 months after issuance of a 301(h) modified permits:

(i) A schedule of activities for identifying nonindustrial sources of toxic pollutants and pesticides; and

(ii) A schedule for the development and implementation of control programs, to the extent practicable, for nonindustrial sources of toxic pollutants and pesticides.

(4) Each proposed nonindustrial source control program and/or schedule submitted by the applicant under this section shall be subject to revision as determined by the Administrator prior to issuing any section 301(h) modified permit and during the term of any such permit.

§ 125.65 Increase in effluent volume or amount of pollutants discharged.

(a) No modified discharge may result in any new or substantially increased discharges of the pollutant to which the modification applies above the discharge specified in the section 301(h) modified permit.

(b) Where pollutant discharges are attributable in part to combined sewer overflows, the applicant shall minimize existing overflows and prevent increases in the amount of pollutants discharged;

(c) The applicant shall provide projections of effluent volume and mass loadings for any pollutants to which the modification applies in 5 year increments for the design life of its facility.

§ 125.66 [Reserved]

§ 125.67 Special conditions for section 301(h) modified permits.

Each section 301(h) modified permit issued shall contain, in addition to all applicable terms and conditions required by 40 CFR Part 122, the following:

(a) Effluent limitations and mass loadings which will assure compliance with the requirements of this Subpart;

(b) A schedule or schedules of compliance for:

(1) Pretreatment program development required by § 125.64(c);

(2) Nonindustrial toxics control program required by § 125.64(d); and

(3) Control of combined sewer overflows required by § 125.65.

(c) Monitoring program requirements that include:

(1) Biomonitoring requirements of § 125.62(b);

(2) Water quality requirements of § 125.62(c);

(3) Effluent monitoring requirements of § 125.62(d).

(d) Reporting requirements that include the results of the monitoring programs required by paragraph (c) at such frequency as prescribed in the approved monitoring program.

Appendix A—Small Applicant Questionnaire for Modification of Secondary Treatment Requirements

I. Introduction

This questionnaire is to be used by small applicants for modification of secondary treatment requirements under section 301(h) of the Clean Water Act (CWA). A small applicant has a contributing population to its wastewater treatment facility of less than 50,000 and a projected average dry weather flow of less than 5.0 million gallons per day (mgd, 0.22m³/sec) [40 CFR 125.58(c)].

The questionnaire is in two sections, a general information and basic requirements section and a technical evaluation section. Satisfactory completion of this questionnaire is necessary to enable EPA to determine whether the applicant's modified discharge meets the criteria of section 301(h) and EPA regulations (40 CFR Part 125, Subpart G).

Where applicants diligently try but are unable to collect and submit all the information at the time of application, EPA requires that a plan of study for gathering and submitting the data be provided with the application. 40 CFR 125.59(f) states the procedures governing such post-application data collection activities.

Most small applicants should be able to complete the questionnaire using available information. However, small POTWs with low initial dilution discharging into shallow waters or waters with poor dispersion and transport characteristics, discharging near distinctive and susceptible biological habitats, or discharging substantial quantities of toxics should anticipate the need to collect additional information and/or conduct additional analyses to demonstrate compliance with section 301(h) criteria. Such small applicants are directed to the related sections in Parts II and III of the large applicant questionnaire and must answer the relevant questions of these sections. If there are questions in this regard, applicants should contact the appropriate EPA Regional Office for guidance.

Guidance for responding to this questionnaire is provided by the Revised Section 301(h) Technical Support Document. Where available information is incomplete and the applicant needs to collect additional data during the period it is preparing the application, EPA encourages the applicant to consult with EPA prior to data collection and submission of its application. Such consultation, particularly if the applicant provides a plan of study, will help assure that the proper data are gathered in the most efficient manner.

II. General Information and Basic Data Requirements

Applicants should answer all questions; where your response to a question is "yes", "no", or "not applicable" explain the basis for your response. Where your answer indicates that you cannot meet a regulatory or statutory criterion, discuss why you believe you qualify for a section 301(h) variance.

A. Treatment System Description: 1. Are you applying for a modification based on a current discharge, improved discharge, or altered discharge as defined in 40 CFR 125.58? [40 CFR 125.59(a)]

2. Description of the Treatment/Outfall System [40 CFR 125.61(a) and 125.61(e)]

a. Provide detailed descriptions and diagrams of the treatment system and outfall configuration which you propose to satisfy the requirements of section 301(h) and 40 CFR Part 125, Subpart G. What is the total discharge design flow upon which this application is based?

b. Provide a map showing the geographic location of the proposed outfall(s) (i.e., discharge). What is the latitude and longitude of the proposed outfall(s)?

c. For a modification based on an improved or altered discharge, provide a description and diagram of your current treatment system and outfall configuration. Include the current outfall's latitude and longitude if different from the proposed outfall.

3. Effluent Limitations and Characteristics [40 CFR 125.60(b) and 125.61(e)(2)]

a. Identify the final effluent limitations for five-day biochemical oxygen demand (BOD₅), suspended solids, and pH upon which your application for a modification is based:

BOD₅ ——— mg/l

Suspended solids ——— mg/l

pH ——— (range)

b. Provide available data on the following effluent characteristics for your current discharge as well as for the modified discharge if different from the current discharge:

—Flow (m³/sec): minimum; average dry weather; average wet weather; maximum; annual average.

—BOD₅ (mg/l) for the following plant flows: minimum; average dry weather; average wet weather; maximum; annual average.

—Suspended solids (mg/l) for the following plant flows: minimum; average dry weather; average wet weather; maximum; annual average.

—Toxic pollutants and pesticides (μg/l): list each identified toxic pollutant and pesticide.

—pH: minimum and maximum.

—Dissolved oxygen (mg/l, prior to chlorination) for the following plant flows: minimum; average dry weather; average wet weather; maximum; annual average.

—Immediate dissolved oxygen demand (mg/l).

4. Effluent Volume and Mass Emissions [40 CFR 125.61(e)(2) and 125.65]

a. Provide analyses showing projections of effluent volume (annual average, m³/sec) and

mass loadings (mt/year) of BOD₅ and suspended solids for the design life of your treatment facility in five-year increments. If the application is based upon an improved or altered discharge, the projections must be provided with and without the proposed improvements or alterations.

b. Provide projections for the end of your five year permit term for 1) the treatment facility contributing population and 2) the average daily total discharge flow for the maximum month of the dry weather season.

5. Average Daily Industrial Flow (m³/sec) [40 CFR 125.64] Provide or estimate the average daily industrial inflow to your treatment facility for the same time increments as in question II. A. 4. a. above.

6. Combined Sewer Overflows [40 CFR 125.65(b)]

a. Does (will) your collection and treatment system include combined sewer overflows?

b. If yes, provide a description of your plan for minimizing combined sewer overflows to the receiving water.

7. Outfall/Diffuser Design. Provide available data on the following for your current discharge as well as for the modified discharge: [40 CFR 125.61(a)(1)]

—Diameter and length of the outfall(s) (meters)

—Diameter and length of the diffuser(s) (meters)

—Angle(s) of port orientations from horizontal (degrees)

—Port diameter(s) in meters and the orifice contraction coefficient(s), if known

—Vertical distance in meters from mean lower low water (or mean low water) surface and outfall port(s) centerline (meters)

—Number of ports

—Port spacing (meters)

—Design flow rate for each port, if multiple ports are used (m³/sec)

B. Receiving Water Description:

1. Are you applying for a modification based on a discharge to the ocean or to a saline estuary (40 CFR 125.58(q))? [40 CFR 125.59(a)]

2. Is your current discharge or modified discharge to stressed waters? If yes, what are the pollution sources contributing to the stress? [40 CFR 125.61(f)]

3. Provide a description and available data on the seasonal circulation patterns in the vicinity of your current and modified discharge(s). [40 CFR 125.61(a)]

4. Ambient Water Quality Conditions During the Period(s) of Maximum Stratification.

a. Provide available data on the following in the vicinity of the current discharge location and for the modified discharge location if different from the current discharge: [40 CFR 125.60(b)(1)]

—Dissolved oxygen (mg/l)

—Suspended solids (mg/l)

—pH

—Temperature (°C)

[Appendix A]

- Salinity (ppt)
- Transparency (turbidity, percent light transmittance)
- Other significant parameters (eg, nutrients, toxic pollutants and pesticides, fecal coliforms)

b. Are there other periods when receiving water quality conditions may be more critical than the period(s) of maximum stratification? If so, describe these other critical periods and provide the data requested in 4.a. for the other critical periods. [40 CFR 125.61(a)(1)]

C. Biological Conditions:

1. a. Are distinctive habitats of limited distribution (such as kelp beds or coral reefs) located in areas potentially affected by the modified discharge? [40 CFR 125.61(c)]

b. If yes, provide available information on types, extent, and location of habitats.

2. a. Are commercial or recreational fisheries located in areas potentially affected by the modified discharge? [40 CFR 125.61(c)]

b. If yes, provide available information on types, location, and value of fisheries.

D. State and Federal Laws [40 CFR 125.60]

1. Are there water quality standards applicable to the following pollutants for which a modification is requested:

- Biochemical oxygen demand or dissolved oxygen?
- Suspended solids, turbidity, light transmission, light scattering, or maintenance of the euphotic zone?
- pH of the receiving water?

2. If yes, what is the water use classification for your discharge area? What are the applicable standards for your discharge area for each of the parameters for which a modification is requested? Provide a copy of all applicable water quality standards or a citation to where they can be found.

3. Will the modified discharge [40 CFR 125.59(b)(3)]:

- Be consistent with applicable State coastal zone management program(s) approved under the Coastal Zone Management Act as amended, 16 U.S.C. 1451 *et seq.* [See, 16 U.S.C. 1456(c)(3)(A)]
- Be located in a Marine sanctuary designated under Title III of the marine Protection, Research and Sanctuaries Act (MPRSA) as amended, 16 U.S.C. 1431 *et seq.* or in an estuarine sanctuary designated under the Coastal Zone Management Act as amended, 16 U.S.C. 1461? If located in a marine sanctuary designated under Title III of the MPRSA, attach a copy of any certification or permit required under regulations governing such marine sanctuary (See, U.S.C. 1432(f)(2)).
- Be consistent with the Endangered Species Act as amended, 16 U.S.C. 1531 *et seq.* Provide the names of any threatened or endangered species that inhabit or obtain nutrients from waters that may be affected by the modified discharge. Identify any critical habitat that may be affected by the modified discharge and evaluate whether

the modified discharge will affect threatened or endangered species or modify a critical habitat (See, 16 U.S.C. 1536(a)(2)).

4. Are you aware of any State or Federal Laws or regulations (other than the Clean Water Act or the three statutes identified in item 3 above) or an Executive Order which is applicable to your discharge? If yes, provide sufficient information to demonstrate that your modified discharge will comply with such law(s), regulation(s), or order(s). [40 CFR 125.59(b)(3)]

III. Technical Evaluation

Answers to the following questions will be used to assess the effects of the modified discharge. The responses will be used by the State agency(s) in their determination (as required by 40 CFR 125.60(b)(2) and 125.63(b)) and by EPA in preparing its decision on the applicant's request for a section 301(h) variance.

Your answers to the following questions must be supported by data and responses from Section II of this questionnaire. The analyses and calculations required below must show the input data for all calculations. Applicants should answer all questions: where your answer to a question is "yes", "no" or "not applicable" explain the basis for your response. Where your answer indicates that you cannot meet a regulatory or statutory criterion, discuss why you believe you qualify for a variance.

If EPA decides to check calculations in an application, the formulas and methods provided in the Revised Section 301(h) Technical Support Document may be used for that purpose. If applicants use methods other than those provided in the Technical Support Document, such methods must be described by the applicant.

A. Physical Characteristics of Discharge

[40 CFR 125.61(a)]. 1. What is the lowest initial dilution for your current and modified discharge(s) during 1) the period(s) of maximum stratification? and 2) any other critical period(s) of discharge volume/composition, water quality, biological seasons, or oceanographic conditions?

2. What are the dimensions of the zone of initial dilution for your modified discharge(s)?

3. Will there be significant sedimentation of suspended solids in the vicinity of the modified discharge?

B. Compliance with Applicable Water Quality Standards: [40 CFR 125.60(b) and 125.61(a)]

1. What is the concentration of dissolved oxygen immediately following initial dilution for the period(s) of maximum stratification and any other critical period(s) of discharge volume/composition, water quality, biological seasons, or oceanographic conditions?

2. What is the furfield dissolved oxygen depression and resulting concentration due to BOD exertion of the wastefield during the

period(s) of maximum stratification and any other critical period(s)?

3. What is the increase in receiving water suspended solids concentration immediately following initial dilution of the modified discharge(s)?

4. Does (will) the modified discharge comply with applicable water quality standards for:

- Dissolved oxygen?
- Suspended solids or surrogate standards?
- pH?

5. Provide the determination required by 40 CFR 125.60(b)(2) or, if the determination has not yet been received, a copy of a letter to the appropriate agency(s) requesting the required determination.

C. Impact on Public Water Supplies [40 CFR 125.61(b)]:

1. Is there a planned or existing public water supply (desalination facility) intake in the vicinity of the current or modified discharge?

2. If yes,

(a) What is the location of the intake(s) (latitude and longitude)?

(b) Will the modified discharge(s) prevent use of the intake(s) for public water supply?

(c) Will the modified discharge(s) cause increased treatment requirements for the public water supply(s) to meet local, State, and EPA drinking water standards?

D. Biological Impact of Discharge [40 CFR 125.61(c)]:

1. Does (will) a balanced indigenous population of shellfish, fish, and wildlife exist:

(a) Immediately beyond the ZID of the current and modified discharge(s)?

(b) In all other areas beyond the ZID where marine life is actually or potentially affected by the current and modified discharge(s)?

2. Have distinctive habitats of limited distribution been impacted adversely by the current discharge and will such habitats be impacted adversely by the modified discharge?

3. Have commercial or recreational fisheries been impacted adversely (e.g., warnings, restrictions, closures, or mass mortalities) by the current discharge and will they be impacted adversely by the modified discharge?

4. For discharges into saline estuarine waters: [40 CFR 125.61(c)(4)]

(a) Does or will the current or modified discharge cause substantial differences in the benthic population with the ZID and beyond the ZID?

(b) Does or will the current or modified discharge interfere with migratory pathways within the ZID?

(c) Does or will the current or modified discharge result in bioaccumulation of toxic pollutants or pesticides at levels which exert adverse effects on the biota within the ZID?

5. For improved discharges, will the proposed improved discharge(s) comply with the requirements of 40 CFR 125.61(a) through 125.61(d)? [40 CFR 125.61(e)].

6. For altered discharge(s), will the altered discharge(s) comply with the requirements of 40 CFR 125.61(a) through 125.61(d)? [40 CFR 125.61(e)]

7. If your current discharge is to stressed waters, does or will your current or modified discharge: [40 CFR 125.61(f)]

(a) Contribute to, increase, or perpetuate such stressed condition?

(b) Contribute to further degradation of the biota or water quality if the level of human perturbation from other sources increases?

(c) Retard the recovery of the biota or water quality if human perturbation from other sources decreases?

E. Impacts of Discharge on Recreational Activities: [40 CFR 125.61(d)]

1. Describe the existing or potential recreational activities likely to be affected by the modified discharge(s) beyond the zone of initial dilution.

2. What are the existing and potential impacts of the modified discharge(s) on recreational activities? Your answer should include, but not be limited to, a discussion of fecal coliforms.

3. Are there any Federal, State or local restrictions on recreational activities in the vicinity of the modified discharge(s)? If yes, describe the restrictions and provide citations to available references.

4. If recreational restrictions exist, would such restrictions be lifted or modified if you were discharging a secondary treatment effluent?

F. Establishment of a Monitoring Program [40 CFR 125.62]

(1) Describe the biological, water quality, and effluent monitoring programs which you propose to meet the criteria of 40 CFR 125.62.

(2) Describe the sampling techniques, schedules, and locations, analytical techniques, quality control and verification procedures to be used.

(3) Describe the personnel and financial resources available to implement the monitoring programs upon issuance of a modified permit and to carry it out for the life of the modified permit.

G. Effect of Discharge on Other Point and Nonpoint Sources: [40 CFR 125.63]

1. Does (will) your modified discharge(s) cause additional treatment or control requirements for any other point or nonpoint pollution source(s)?

2. Provide the determination required by 40 CFR 125.63(b) or, if the determination has not yet been received, a copy of a letter to the appropriate agency(s) requesting the required determination.

H. Toxic Control Program [40 CFR 125.64]

1. a. Do you have any known or suspected industrial sources of toxic pollutants and pesticides?

b. If no, provide the certification required by 40 CFR 125.64(a)(2).

c. If yes, provide the results of wet and dry weather effluent analyses for toxic pollutants and pesticides.

d. Provide an analysis of known or suspected industrial sources of toxic pollutants and pesticides identified in (1)(c) above.

2. Do you have an approved industrial pretreatment program?

a. If yes, provide the date of EPA approval.

b. If no, and if required by 40 CFR Part 403 to have an industrial pretreatment program, provide a proposed schedule for development and implementation of your industrial pretreatment program to meet the requirements of 40 CFR Part 403.

3. Describe the public education program you propose to minimize the entrance of nonindustrial toxic pollutants and pesticides into your treatment system.

4. a. Are there any known or suspected water quality, sediment accumulation, or biological problems related to toxic pollutants or pesticides from your modified discharge(s)?

b. If no, provide the certification required by 40 CFR 125.64(d)(2) together with available supporting data.

c. If yes, provide a schedule for development and implementation of nonindustrial toxics control programs to meet the requirements of 40 CFR 125.64(d)(3).

Appendix B—Large Applicant Questionnaire for Modification of Secondary Treatment Requirements

I. Introduction

This questionnaire is to be used by large applicants for modification of secondary treatment requirements under section 301(h) of the Clean Water Act (CWA). A large applicant has a population contributing to its wastewater treatment facility of at least 50,000 or a projected average dry weather flow of its discharge of at least 5.0 million gallons per day (mgd, 0.22 m³/sec) [40 CFR 125.59(c)].

The questionnaire is in two sections, a general information and basic requirements section and a technical evaluation section. Satisfactory completion of this questionnaire is necessary to enable EPA to determine whether the applicant's modified discharge meets the criteria of section 301(h) and EPA regulations (40 CFR Part 125, Subpart G).

Where applicants diligently try but are unable to collect and submit all the information at the time of application, EPA requires that a plan of study for gathering and submitting the data be provided with the application. 40 CFR 125.59(f) states the procedures governing such post-application data collection activities.

Guidance for responding to the questions is provided by the Revised Section 301(h) Technical Support Document. Where available information is incomplete and the applicant needs to collect additional data during the period it is preparing the application, EPA encourages the applicant to consult with EPA prior to data collection and submission of its application. Such consultation, particularly if the applicant

provides a plan of study, will help assure that the proper data are gathered in the most efficient manner.

II. General Information and Basic Data Requirements

Applicants should answer all questions; where your response to a question is "yes", "no", or "not applicable" explain the basis for your response. Where your answer indicates that you cannot meet a regulatory or statutory criterion, discuss why you believe you qualify for a section 301(h) variance.

A. Treatment System Description: 1. Are you applying for a modification based on a current discharge, improved discharge, or altered discharge as defined in 40 CFR 125.58? [40 CFR 125.59(a)]

2. Description of the Treatment/Outfall System [40 CFR 125.61(a) and 125.61(e)]
a. Provide detailed descriptions and diagrams of the treatment system and outfall configuration which you propose to satisfy the requirements of section 301(h) and 40 CFR Part 125, Subpart G. What is the total discharge design flow upon which this application is based?

b. Provide a map showing the geographic location of the proposed outfall(s) (i.e., discharge). What is the latitude and longitude of the proposed outfall(s)?

c. For a modification based on an improved or altered discharge, provide a description and diagram of your current treatment system and outfall configuration. Include the current outfall's latitude and longitude, if different from the proposed outfall.

3. Effluent Limitations and Characteristics [40 CFR 125.60(b) and 125.61(e)(2)]

a. Identify the final effluent limitations for five-day biochemical oxygen demand (BOD₅), suspended solids, and pH upon which your application for a modification is based:

BOD₅ ——— mg/l
Suspended solids ——— mg/l
pH ——— (range)

b. Provide data on the following effluent characteristics for your current discharge as well as for the modified discharge if different from the current discharge:

Flow (m³/sec): minimum; average dry weather; average wet weather; annual average; maximum.

BOD₅ (mg/l) for the following plant flows: minimum; average dry weather; average wet weather; maximum; annual average.

Suspended solids (mg/l) for the following plant flows: minimum; average dry weather; average wet weather; maximum; annual average.

Toxic pollutants and pesticides (μg/l): list each identified toxic pollutant and pesticide, pH: minimum and maximum.

Total dissolved oxygen (mg/l) prior to chlorination) for the following plant flows: minimum; average dry weather; average wet weather; maximum; annual average.

Immediate dissolved oxygen demand (mg/l)

4. Effluent Volume and Mass Emissions [40 CFR 125.61(e)(2) and 125.65]

a. Provide detailed analyses showing projections of effluent volume (annual average, m³/sec) and mass loadings (mt/year) of BOD₅ and suspended solids for the design life of your treatment facility in five-year increments. If the application is based upon an improved or altered discharge, the projections must be provided with and without the proposed improvements or alterations.

b. Provide projections for the end of your five year permit term for 1) the treatment facility contributing population and 2) the average daily total discharge flow for the maximum month of the dry weather season.

5. Average Daily Industrial Flow (m³/sec) [40 CFR 125.64] Provide or estimate the average daily industrial inflow to your treatment facility for the same time increments as in question II. A. 4. a. above.

6. Combined Sewer Overflows [40 CFR 125.65(b)]

a. Does (will) your collection and treatment system include combined sewer overflows?

b. If yes, provide a description of your plan for minimizing combined sewer overflows to the receiving water.

7. Outfall/Diffuser Design. Provide the following data for your current discharge as well as for the modified discharge, if different from the current discharge: [40 CFR 125.61(a)(1)]

Diameter and length of the outfall(s) (meters)

Diameter and length of the diffuser(s) (meters)

Angle(s) of port orientations from horizontal (degrees)

Port diameter(s) in meters and the orifice contraction coefficient(s), if known.

Vertical distance in meters from mean lower low water (or mean low water) surface and outfall port(s) centerline (meters)

Number of ports

Port spacing (meters)

Design flow rate for each port, if multiple ports are used (m³/sec)

B. Receiving Water Description: 1. Are you applying for a modification based on a discharge to the ocean or to a saline estuary [40 CFR 125.58(g)]? [40 CFR 125.59(a)]

2. Is your current discharge or modified discharge to stressed waters? If yes, what are the pollution sources contributing to the stress? [40 CFR 125.61(f)]

3. Provide a description and data on the seasonal circulation patterns in the vicinity of your current and modified discharge(s). [40 CFR 125.61(a)]

4. Oceanographic Conditions in the Vicinity of the Current and Proposed Modified Discharge(s).

Provide data on the following: [40 CFR 125.61(a)]

Lowest ten percentile current speed (m/sec)

Predominant current speed (m/sec) and direction (true) during the four seasons

Period(s) of maximum stratification (months)

Period(s) of natural upwelling events (duration and frequency, months)

Density profiles during period(s) of maximum stratification

5. Ambient Water Quality Conditions During the Period(s) of Maximum Stratification: at the zone of initial dilution (ZID) boundary, at other areas of potential impact, and at control stations: [40 CFR 125.61(a)(2)]

a. Provide profiles (with depth) on the following for the current discharge location and for the modified discharge location, if different from the current discharge:

BOD₅ (mg/l)

Dissolved oxygen (mg/l)

Suspended solids (mg/l)

pH

Temperature (°C)

Salinity (ppt)

Transparency (turbidity, percent light transmittance)

Other significant parameters (e.g., nutrients, toxic pollutants and pesticides, fecal coliforms)

b. Are there other periods when receiving water quality conditions may be more critical than the period(s) of maximum stratification? If so, describe these other critical periods and provide the data requested in 5.a. for the other critical period(s). [40 CFR 125.61(a)(1)]

6. Provide data on steady state sediment dissolved oxygen demand and dissolved oxygen demand due to resuspension of sediments in the vicinity of your current and modified discharge(s) (mg/l/day).

C. Biological Conditions: 1. Provide a detailed description of representative biological community (e.g., plankton, macrobenthos, demersal fish, etc.) in the vicinity of your current and modified discharge(s); within the ZID, at the ZID boundary, at other areas of potential, discharge-related impact, and at reference (control) sites. Community characteristics to be described shall include (but not be limited to) species composition; abundance; dominance and diversity; spatial/temporal distribution; growth and reproduction; disease frequency; trophic structure and productivity patterns; presence of opportunistic species; bioaccumulation of toxic materials; and the occurrence of mass mortalities.

2. a. Are distinctive habitats of limited distribution (such as kelp beds or coral reefs) located in areas potentially affected by the modified discharge? [40 CFR 125.61(c)]

b. If yes, provide information on type, extent, and location of habitats.

3. a. Are commercial or recreational fisheries located in areas potentially affected by the discharge? [40 CFR 125.61(c)]

b. If yes, provide information on types, location, and value of fisheries.

D. State and Federal Laws [40 CFR 125.60]

1. Are there water quality standards applicable to the following pollutants for which a modification is requested:

Biochemical oxygen demand or dissolved oxygen?

Suspended solids, turbidity, light transmission, light scattering, or maintenance of the euphotic zone?

pH of the receiving water?

2. If yes, what is the water use classification for your discharge area? What are the applicable standards for your discharge area for each of the parameters for which a modification is requested? Provide a copy of all applicable water quality standards or a citation to where they can be found.

3. Will the modified discharge: [40 CFR 125.59(b)(3)]

Be consistent with applicable State coastal zone management program(s) approved under the Coastal Zone Management Act as amended, 16 U.S.C. 1451 *et seq.*? (See, 16 U.S.C. 1456(c)(3)(A))

Be located in a marine sanctuary designated under Title III of the Marine Protection, Research and Sanctuaries Act (MPRSA) as amended, 16 U.S.C. 1431 *et seq.*, or in an estuarine sanctuary designated under the Coastal Zone Management Act as amended, 16 U.S.C. 1461? If located in a marine sanctuary designated under Title III of the MPRSA, attach a copy of any certification or permit required under regulations governing such marine sanctuary (See, 16 U.S.C. 1432(f)(2)).

Be consistent with the Endangered Species Act as amended, 16 U.S.C. 1531 *et seq.*? Provide the names of any threatened or endangered species that inhabit or obtain nutrients from waters that may be affected by the modified discharge. Identify any critical habitat that may be affected by the modified discharge and evaluate whether the modified discharge will affect threatened or endangered species or modify a critical habitat (See, 16 U.S.C. 1536(a)(2)).

4. Are you aware of any State or Federal Laws or regulations (other than the Clean Water Act or the three statutes identified in item 3 above) or an Executive Order which is applicable to your discharge? If yes, provide sufficient information to demonstrate that your modified discharge will comply with such law(s), regulations, or order(s). [40 CFR 125.59(b)(3)]

III. Technical Evaluation

Answers to the following questions will be used to assess the effects of the modified discharge. The responses will be used by the State agency(s) in their determination (as required by 40 CFR 125.60(b)(2) and

125.63(b)), and by EPA in preparing its decision on the applicant's request for a section 301(h) variance.

Your answers to the following questions must be supported by data and responses from Section II of this questionnaire. The analyses and calculations required below must show the input data for all calculations. Applicants should answer all questions; where your answer to a question is "yes", "no", or "not applicable", explain the basis for your response. Where your answer indicates that you cannot meet a regulatory or statutory criterion, discuss why you believe you qualify for a variance.

If EPA decides to check calculations in an application, the formulas and methods provided in the Revised Section 301(h) Technical Support Document may be used for that purpose. If applicants use methods other than those provided in the Technical Support Document, such methods must be described by the applicant.

A. Physical Characteristics of Discharge [40 CFR 125.61(a)]: 1. What is the critical initial dilution for your current and modified discharge(s) during 1) the period(s) of maximum stratification? and 2) any other critical period(s) of discharge volume/composition, water quality, biological seasons, or oceanographic conditions?

2. What are the dimensions of the zone of initial dilution for your modified discharge(s)?

3. What are the effects of ambient currents and stratification on dispersion and transport of the discharge plume/wastefield?

4. Sedimentation of suspended solids.

a. What fraction of the modified discharge's suspended solids will accumulate within the vicinity of the modified discharge?

b. What are the calculated area(s) and rate(s) of sediment accumulation within the vicinity of the modified discharge(s) (g/m²/yr)?

c. What is the fate of settleable solids transported beyond the calculated sediment accumulation area?

B. Compliance with Applicable Water Quality Standards [40 CFR 125.60(b) and 125.61(a)]:

1. What is the concentration of dissolved oxygen immediately following initial dilution for the period(s) of maximum stratification and any other critical period(s) of discharge volume/composition, water quality, biological seasons, or oceanographic conditions?

2. What is the farfield dissolved oxygen depression and resulting concentration due to BOD exertion of the wastefield during the period(s) of maximum stratification and any other critical period(s)?

3. What are the dissolved oxygen depressions and concentrations due to steady sediment demand and resuspension of sediments?

4. What is the increase in receiving water suspended solids concentration immediately following initial dilution of the modified discharge(s)?

5. What is the change in receiving water pH immediately following initial dilution of the modified discharge(s)?

6. Does (will) the modified discharge comply with applicable water quality standards for:

Dissolved oxygen?

Suspended solids or surrogate standards? pH?

7. Provide the determination required by 40 CFR 125.60(b)(2) or, if the determination has not yet been received, a copy of a letter to the appropriate agency(s) requesting the required determination.

C. Impact on Public Water Supplies [40 CFR 125.61(b)]:

1. Is there a planned or existing public water supply (desalinization facility) intake in the vicinity of the current or modified discharge?

2. If yes,

a. What is the location of the intake(s) (latitude and longitude)?

b. Will the modified discharge(s) prevent use of the intake(s) for public water supply?

c. Will the modified discharge(s) cause increased treatment requirements for the public water supply(s) to meet local, State, and EPA drinking water standards?

D. Biological Impact of Discharge [40 CFR 125.61(c)]:

1. Does (will) a balanced indigenous population of shellfish, fish, and wildlife exist:

a. Immediately beyond the ZID of the current and modified discharge(s)?

b. In all other areas beyond the ZID where marine life is actually or potentially affected by the current and modified discharge(s)?

2. Have distinctive habitats of limited distribution been impacted adversely by the current discharge and will such habitats be impacted adversely by the modified discharge?

3. Have commercial or recreational fisheries been impacted adversely by the current discharge (e.g., warnings, restrictions, closures, or mass mortalities) or will they be impacted adversely by the modified discharge?

4. Does the current or modified discharge cause the following within or beyond the ZID: [40 CFR 125.61(c)(3)]

a. Mass mortality of fishes or invertebrates due to oxygen depletion, high concentrations of toxics or other conditions?

b. An increased incidence of disease in marine organisms?

c. An abnormal body burden of any toxic material in marine organisms?

d. Any other extreme, adverse biological impacts?

5. For discharges into saline estuarine waters: [40 CFR 125.61(c)(4)]

a. Does or will the current or modified discharge cause substantial differences in the benthic population within the ZID and beyond the ZID?

b. Does or will the current or modified discharge interfere with migratory pathways within the ZID?

c. Does or will the current or modified discharge result in bioaccumulation of toxic pollutants or pesticides at levels which exert adverse effects on the biota within the ZID?

6. For improved discharges, will the proposed improved discharge(s) comply with the requirements of 40 CFR 125.61(a) through 125.61(d)? [40 CFR 125.61(e)]

7. For altered discharge(s), will the altered discharge(s) comply with the requirements of 40 CFR 125.61(a) through 125.61(d)? [40 CFR 125.61(e)]

8. If your current discharge is to stressed waters, does or will your current or modified discharges: [40 CFR 125.61(f)]

a. Contribute to, increase, or perpetuate such stressed condition?

b. Contribute to further degradation of the biota or water quality if the level of human perturbation from other sources increases?

c. Retard the recovery of the biota or water quality if human perturbation from other sources decreases?

E. Impacts of Discharge on Recreational Activities [40 CFR 125.61(d)]:

1. Describe the existing or potential recreational activities likely to be affected by the modified discharge(s) beyond the zone of initial dilution.

2. What are the existing and potential impacts of the modified discharge(s) on recreational activities? Your answer should include, but not be limited to, a discussion of fecal coliforms.

3. Are there any Federal, State or local restrictions on recreational activities in the vicinity of the modified discharge(s)? If yes, describe the restrictions and provide citations to available references.

4. If recreational restrictions exist, would such restrictions be lifted or modified if you were discharging a secondary treatment effluent?

F. Establishment of a Monitoring Program [40 CFR 125.62]:

1. Describe the biological, water quality, and effluent monitoring programs which you propose to meet the criteria of 40 CFR 125.62.

2. Describe the sampling techniques, schedules, and locations, analytical techniques, quality control and verification procedures to be used.

3. Describe the personnel and financial resources available to implement the monitoring programs upon issuance of a modified permit and to carry it out for the life of the modified permit.

G. Effect of Discharge on Other Point and Nonpoint Sources [40 CFR 125.63]:

1. Does (will) your modified discharge(s) cause additional treatment or control requirements for any other point or nonpoint pollution source(s)?

2. Provide the determination required by 40 CFR 125.63(b) or, if the determination has not yet been received, a copy of a letter to the appropriate agency(s) requesting the required determination.

[Appendix B]

H. Toxics Control Program (40 CFR 125.64):

1. a. Do you have any known or suspected industrial sources of toxic pollutants or pesticides?

b. If no, provide the certification required by 40 CFR 125.64(c)(2).

2. Provide the results of wet and dry weather effluent analyses for toxic pollutants and pesticides as required by 40 CFR 125.64(a)(1).

3. Provide an analysis of known or suspected industrial sources of toxic pollutants and pesticides identified in 2. above.

4. Do you have an approved industrial pretreatment program?

a. If yes, provide the date of EPA approval.

b. If no, and if required by 40 CFR Part 403 to have an industrial pretreatment program, provide a proposed schedule for development and implementation of your industrial pretreatment program to meet the requirements of 40 CFR Part 403.

5. Describe the public education program you propose to minimize the entrance of nonindustrial toxic pollutants and pesticides into your treatment system.

6. Provide a schedule for development and implementation of a nonindustrial toxics control program to meet the requirements of 40 CFR 125.64(d)(3).

(Approved by the Office of Management and Budget under control number 2000-0427)

[125.67(d) (Appendices A and B) amended by 48 FR 31404, July 8, 1983]

Subpart H—Criteria for Determining Alternative Effluent Limitations Under Section 316(a) of the Act

§ 125.70 Purpose and scope.

Section 316(a) of the Act provides that:

"With respect to any point source otherwise subject to the provisions of section 301 or section 306 of this Act, whenever the

owner or operator of any such source, after opportunity for public hearing, can demonstrate to the satisfaction of the Administrator (or, if appropriate, the State) that any effluent limitation proposed for the control of the thermal component of any discharge from such source will require effluent limitations more stringent than necessary to assure the protection (sic) and propagation of a balanced, indigenous population of shellfish, fish and wildlife in and on the body of water into which the discharge is to be made, the Administrator (or, if appropriate, the State) may impose an effluent limitation under such sections on such plant, with respect to the thermal component of such discharge (taking into account the interaction of such thermal component with other pollutants), that will assure the protection and propagation of a balanced indigenous population of shellfish, fish and wildlife in and on that body of water."

This Subpart describes the factors, criteria and standards for the establishment of alternative thermal effluent limitations under section 316(a) of the Act in permits issued under section 402(a) of the Act.

§ 125.71 Definitions.

For the purpose of this Subpart:

(a) "Alternative effluent limitations" means all effluent limitations or standards of performance for the control of the thermal component of any discharge which are established under section 316(a) and this Subpart.

(b) "Representative important species" means species which are representative, in terms of their biological needs, of a balanced, indigenous community of shellfish, fish and wildlife in the body of water into which a discharge of heat is made.

(c) The term "balanced, indigenous community" is synonymous with the term "balanced, indigenous population"

in the Act and means a biotic community typically characterized by diversity, the capacity to sustain itself through cyclic seasonal changes, presence of necessary food chain species and by a lack of domination by pollution tolerant species. Such a community may include historically non-native species introduced in connection with a program of wildlife management and species whose presence or abundance results from substantial, irreversible environmental modifications. Normally, however, such a community will not include species whose presence or abundance is attributable to the introduction of pollutants that will be eliminated by compliance by all sources with section 301(b)(2) of the Act; and may not include species whose presence or abundance is attributable to alternative effluent limitations imposed pursuant to section 316(a).

§ 125.72 Early screening of applications for section 316(a) variances.

(a) Any initial application for a section 316(a) variance shall include the following early screening information:

(1) A description of the alternative effluent limitation requested;

(2) A general description of the method by which the discharger proposes to demonstrate that the otherwise applicable thermal discharge effluent limitations are more stringent than necessary;

(3) A general description of the type of data, studies, experiments and other information which the discharger intends to submit for the demonstration; and

(4) Such data and information as may be available to assist the Director in

selecting the appropriate representative important species.

(b) After submitting the early screening information under paragraph (a), the discharger shall consult with the Director at the earliest practicable time (but not later than 30 days after the application is filed) to discuss the discharger's early screening information. Within 60 days after the application is filed, the discharger shall submit for the Director's approval a detailed plan of study which the discharger will undertake to support its section 316(a) demonstration. The discharger shall specify the nature and extent of the following type of information to be included in the plan of study: biological, hydrographical and meteorological data; physical monitoring data; engineering or diffusion models; laboratory studies; representative important species; and other relevant information. In selecting representative important species, special consideration shall be given to species mentioned in applicable water quality standards. After the discharger submits its detailed plan of study, the Director shall either approve the plan or specify any necessary revisions to the plan. The discharger shall provide any additional information or studies which the Director subsequently determines necessary to support the demonstration, including such studies or inspections as may be necessary to select representative important species. The discharger may provide any additional information or studies which the discharger feels are appropriate to support the demonstration.

(c) Any application for the renewal of a section 316(a) variance shall include only such information described in paragraphs (a) and (b) of this section and § 124.73(c)(1) as the Director requests within 60 days after receipt of the permit application.

(d) The Director shall promptly notify the Secretary of Commerce and the Secretary of the Interior, and any affected State of the filing of the request and shall consider any timely recommendations they submit.

(e) In making the demonstration the discharger shall consider any information or guidance published by EPA to assist in making such demonstrations.

(f) If an applicant desires a ruling on a section 316(a) application before the ruling on any other necessary permit terms and conditions, (as provided by § 124.65), it shall so request upon filing its application under paragraph (a) of this section. This request shall be granted or denied at the discretion of the Director.

[Note.—At the expiration of the permit, any discharger holding a section 316(a) variance should be prepared to support the continuation of the variance with studies based on the discharger's actual operation experience.]

§ 125.73 Criteria and standards for the determination of alternative effluent limitations under section 316(a).

(a) Thermal discharge effluent limitations or standards established in permits may be less stringent than those required by applicable standards and limitations if the discharger demonstrates to the satisfaction of the director that such effluent limitations are more stringent than necessary to assure the protection and propagation of a balanced, indigenous community of shellfish, fish and wildlife in and on the body of water into which the discharge is made. This demonstration must show that the alternative effluent limitation desired by the discharger, considering the cumulative impact of its thermal discharge together with all other significant impacts on the species affected, will assure the protection and propagation of a balanced indigenous community of shellfish, fish and wildlife in and on the body of water into which the discharge is to be made.

(b) In determining whether or not the protection and propagation of the affected species will be assured, the Director may consider any information contained or referenced in any applicable thermal water quality criteria and thermal water quality information published by the Administrator under section 304(a) of the Act, or any other information he deems relevant.

(c)(1) Existing dischargers may base their demonstration upon the absence of prior appreciable harm in lieu of predictive studies. Any such demonstrations shall show:

(i) That no appreciable harm has resulted from the normal component of the discharge (taking into account the interaction of such thermal component with other pollutants and the additive effect of other thermal sources to a balanced, indigenous community of shellfish, fish and wildlife in and on the body of water into which the discharge has been made; or

(ii) That despite the occurrence of such previous harm, the desired alternative effluent limitations (or appropriate modifications thereof) will nevertheless assure the protection and propagation of a balanced, indigenous community of shellfish, fish and wildlife in and on the body of water into which the discharge is made.

(2) In determining whether or not prior appreciable harm has occurred, the Director shall consider the length of time in which the applicant has been discharging and the nature of the discharge.

Subpart I—Criteria Applicable to Cooling Water Intake Structures Under Section 316(b) of the Act [Reserved]

Subpart J—Criteria for Extending Compliance Dates Under Section 301(i) of the Act

§ 125.90 Purpose and scope.

Under sections 301(i)(1) and (2) of the Act, extensions of the 1977 statutory deadline for compliance with certain treatment requirements may be granted by the Director through permit issuance or modification. This Subpart establishes criteria for granting these extensions and the method for incorporating these extensions into permits issued under section 402(a) of the Act.

§ 125.91 Definition.

For purposes of this Subpart, "construction" includes any one of the following preliminary planning to determine the feasibility of treatment works: engineering, architectural, legal fiscal, or economic investigations or studies, surveys, designs, plans, working drawings, specifications, procedures, or other necessary actions, erection, building, acquisition, alteration, remodeling, improvement, or extension of treatment works, or the inspection or supervision of any of the foregoing items provided that completion of the facility and attainment of operational level by no later than July 1, 1983, is a reasonable expectation.

§ 125.92 Requests for permit modification and issuance under section 301(i)(1) of the Act.

Any owner or operator of a publicly owned treatment works (POTW) that requires construction to achieve limitations under sections 301(b)(1)(B) or 301(b)(1)(C) of the Act may request modification or issuance of a permit extending the date for compliance with these limitations in accordance with the provisions of § 122.21(m).

[125.92 amended by 48 FR 14153, April 1, 1983]

§ 125.93 Criteria for permit modification and issuance under section 301(i)(1) of the Act.

No request for a permit modification or issuance under section 301(i)(1) shall be granted unless the Director finds that the POTW requires construction to achieve limitations under sections 301(b)(1)(B) or 301(b)(1)(C) of the Act and did not complete construction for either of the following reasons:

(a) The issuance of a notice to proceed under a construction contract for any segment of Step 3 project work (or if notice to proceed is not required, the execution of the construction contract) occurred before July 1, 1977, but construction could not physically be completed by July 1, 1977, despite all expeditious efforts of the POTW (see initiation of construction as defined in 40 CFR § 35.905 for Step 3); or

(b) Federal financial assistance was not available, or was not available in time for construction required to achieve these limitations, and the POTW did not in any significant way contribute to this unavailability or delay.

§ 125.94 Permit terms and conditions under section 301(i)(1) of the Act.

(a) All permits modified or issued by the Director under section 301(i)(1) of the Act shall contain at a minimum the following permit terms and conditions:

(1) the shortest reasonable schedule of compliance for achievement of limitations under sections 301(b)(1)(B) and (C) but in no event later than July 1, 1983. This schedule shall be based upon the earliest date that Federal financial assistance will be available and construction can be completed and on any additional information submitted by the POTW or otherwise available.

(i) When a facility plan has been approved in accordance with 40 CFR 35, Subpart E, this schedule shall contain dates certain for the completion of actions leading toward the attainment of statutory treatment limitations.

(ii) When the POTW has not completed Step 1 of the construction grants process in accordance with 40 CFR 35, Subpart E, this schedule shall contain a date certain for the submission of a facility plan (completion of Step 1) upon which date the permit should be set to expire. In this case, in order to assure compliance by the POTW by July 1, 1983, the following requirements must be met:

(A) Certification by the State, based on its one or five year project priority list developed pursuant to 40 CFR 35.915(c), that funding will be available in time to ensure compliance by July 1, 1983; and

(B) Reporting once a year (if necessary) by the POTW as to its

progress in obtaining Federal funding.

[Comment: EPA recognizes that the date for submission of the facility plan may not take into account all the uncertainties of the Step 1 planning process. Because of the uncertainties inherent in the Step 1 planning process, EPA recommends that section 301(i)(1) requests (and permit issuance) for projects that are presently in Step 2 or 3 should be acted on before requests from projects in Step 1. When Federal funding in the form of a Step 2 construction grant award is made available, and the Step 1 permit has expired, the permit is to be reissued containing a date certain schedule derived from the facility plan and coordinated with the State Project Priority List.]

(2) A statement ensuring compliance with requirements under sections 201 (b) through (g) of the Act consistent with the terms of the POTW's construction grant.

(3) Abatement practices and interim effluent limitations reflecting optimum operation and maintenance of the existing facilities. These shall include:

(i) Adequate operator staffing and training;

(ii) Adequate laboratory and process controls; and

(iii) Effluent limitations derived from reports of operation and maintenance inspections conducted by EPA or the State, or other guidance.

[Comment: Only in exceptional circumstances should in-depth plant evaluations be conducted, e.g., when existing information does not represent the true capabilities of the plant.]

(4) Interim effluent limitations reflecting other non-capital intensive measures for increased pollution control. This shall include any possible minor facility modifications such as piping changes, additional metering and instrumentation or the use of skimming and vacuuming equipment. When an existing POTW is currently violating limitations imposed under section 301(b)(1)(C) of the Act, interim effluent limitations shall be established to minimize adverse water quality impact; these limitations shall not be made less stringent or allow more pollutants to be discharged than are currently being discharged during the term of an extension granted under section 301(i)(1) of the Act.

(b) If a POTW has industrial users, any permit issued or modified by the Director under section 301(i)(1) shall contain any terms and conditions necessary to ensure compliance with 40 CFR 403.

§ 125.95 Requests for permit modification or issuance under section 301(i)(2) of the Act.

Any owner or operator of a point source other than a POTW that will not

achieve the requirements of sections 301(b)(1)(A) and 301(b)(1)(C) of the Act because it was scheduled to discharge into a POTW that is presently unable to accept the discharge without construction, may request modification or issuance of a permit extending the date of compliance with these limitations in accordance with the provisions of § 122.21(i). [125.95 amended by 48 FR 14153, April 1, 1983]

§ 125.96 Criteria for permit modification or issuance under section 301(i)(2) of the Act.

No request for a permit modification or issuance under section 301(i)(2) of the Act shall be granted unless the Director finds that the discharger has failed to achieve the requirements of sections 301(b)(1)(A) and 301(b)(1)(C) of the Act because it was scheduled to discharge into a POTW that is presently unable to accept the discharge without construction, and:

(a) The discharger has indicated an intent to discharge into the POTW before July 1, 1977, in one of the following ways:

(1) The discharger was issued a permit before July 1, 1977, based upon a discharge into a POTW;

(2) The discharger had a binding contractual obligation before July 1, 1977, (enforceable against the discharger) to discharge into a POTW. Contracts which can be terminated or modified without substantial loss and contracts for feasibility, engineering and design studies do not constitute a contractual obligation under this paragraph.

(3) A construction grant application made by the POTW before July 1, 1977, clearly demonstrated that the discharger was to discharge into the POTW; or

(4) Engineering plans, architectural plans or working drawings prepared for the POTW before July 1, 1977, clearly demonstrated the discharger was to discharge into the POTW. Plans and drawings, such as those accompanying a bona fide application for a Federal construction grant, are sufficient only to the extent that they were truly representative of the intent of the discharger and the POTW;

(b) The Director finds that the discharger has acted in good faith in its efforts to effectuate discharge into the POTW and to minimize or abate pollution prior to discharge into the POTW. This shall include the following findings:

(i) Failure of the discharger to meet the July 1, 1977, deadline was for reasons beyond its control;

[Sec. 125.96(b)(i)]

(ii) A history of a high degree of commitment to meet the requirements of the Act as manifested by cooperation with the State or EPA in attempting to resolve disputed issues;

(iii) No history of unjustified delay;

(iv) No past serious or intentional violations of the Act; and

(v) All reasonable measures are being taken to expedite compliance.

[Comment: The Director may also consider whether the discharger has operated its facilities competently and responsibly and the extent to which the discharger has completed the necessary prerequisites to having its waste treated by the POTW.]

(c) The POTW will be in operation and available to the discharger July 1, 1983;

(d) The POTW will be able to meet secondary treatment and water quality standard effluent limitations by July 1, 1983, after receiving the waste from the discharger;

(e) The discharger and the POTW have entered into an enforceable contract providing that:

(i) The discharger agrees to discharge its waste to the POTW;

(ii) The POTW agrees to accept and treat that waste by a date certain; and

(iii) The discharger agrees to pay all user charges and industrial cost recovery charges required under section 204 of the Act; and

(f) In the case of a discharge into an existing POTW, such POTW has been granted an extension under section 301(i)(1) of the Act.

§ 125.97 Permit terms and conditions under section 301(i)(2) of the Act.

All permits modified or issued by the Director under section 301(i)(2) of the Act shall contain at a minimum the following permit terms and conditions:

(a) The shortest reasonable schedule of compliance leading to discharge into the POTW, not to extend beyond the earliest date practicable for compliance, or beyond the final compliance date of any extension granted to the appropriate POTW under section 301(i)(1) of the Act, but in no event later than July 1, 1983. This schedule shall be based upon the earliest date by which the appropriate POTW can receive the waste from the discharger and the discharger can complete the necessary prerequisites to having its waste treated by that POTW.

(b) Achievement of effluent limitations and standards under sections 301(b)(1)(A) and 301(b)(1)(C) of the Act by the same final date in the schedule established in paragraph (a) of this section in the event that the permittee does not discharge its wastes to the POTW by the date established under paragraph (a) of this section.

(c) Abatement practices and interim effluent limitations reflecting optimum operation and maintenance of the discharger's existing facilities. These shall include:

(1) Effective performance of facility design removals;

(2) Adequate operator staffing and training; and

(3) Adequate laboratory and process control.

(d) Interim effluent limitations reflecting other non-capital intensive measures for increased pollution control.

(e) Requirements to meet applicable toxic effluent standards and prohibitions after they are promulgated under section 307(a) of the Act.

(f) Requirements to ensure compliance with:

(1) Pretreatment requirements imposed by the POTW pursuant to any extension granted to the POTW under section 301(i)(1);

(2) Any State or local pretreatment requirements; and

(3) Pretreatment standards as promulgated under section 307(b) of the Act.

[Comment: The legislative history cites the following example: "[I]f an industry is planning on participating in a municipal system which will not be available until January 1983, that industry would still have to install and operate pretreatment facilities within the time specified for compliance at the time the applicable pretreatment standard was promulgated and in no event later than three years from the date of said promulgation. Thus, if the pretreatment regulations are promulgated March 1, 1979, and require compliance within two years, that industry would be required to comply by March 1, 1981." H.R. Rep. No. 95-830, 95th Cong., 1st Sess., 12712 (daily ed. Dec. 8, 1977).]

(g) Any water conservation requirements necessary to carry out the provisions of the Act or imposed by the POTW pursuant to the contract executed between the discharger and the POTW.

[Comment: The existence of such a contract is a prerequisite to granting an extension under section 301(i)(2)(B) of the Act and § 125.96(e).]

Subpart K—Criteria and Standards for Best Management Practices Authorized Under Section 304(e) of the Act

§ 125.100 Purpose and scope.

This Subpart describes how best management practices (BMPs) for ancillary industrial activities under section 304(e) of the Act shall be reflected in permits, including best

management practices promulgated in effluent limitations under section 304 and established on a case-by-case basis in permits under section 402(a)(1) of the Act. Best management practices authorized by section 304(e) are included in permits as requirements for the purposes of sections 301, 302, 306, 307, or 403 of the Act, as the case may be.

§ 125.101 Definition.

"Manufacture" means to produce as an intermediate or final product, or by-product.

§ 125.102 Applicability of best management practices.

Dischargers who use, manufacture, store, handle or discharge any pollutant listed as toxic under section 307(a)(1) of the Act or any pollutant listed as hazardous under section 311 of the Act are subject to the requirements of this Subpart for all activities which may result in significant amounts of those pollutants reaching waters of the United States. These activities are ancillary manufacturing operations including: materials storage areas; in-plant transfer, process and material handling areas; loading and unloading operations; plant site runoff; and sludge and waste disposal areas.

§ 125.103 Permit terms and conditions.

(a) Best management practices shall be expressly incorporated into a permit where required by an applicable EPA promulgated effluent limitations guideline under section 304(e);

(b) Best management practices may be expressly incorporated into a permit on a case-by-case basis where determined necessary to carry out the provisions of the Act under section 402(a)(1). In issuing a permit containing BMP requirements, the Director shall consider the following factors:

(1) Toxicity of the pollutant(s);

(2) Quantity of the pollutant(s) used, produced, or discharged;

(3) History of NPDES permit violations;

(4) History of significant leaks or spills of toxic or hazardous pollutants;

(5) Potential for adverse impact on public health (e.g., proximity to a public water supply) or the environment (e.g., proximity to a sport or commercial fishery); and

(6) Any other factors determined to be relevant to the control of toxic or hazardous pollutants.

(c) Best management practices may be established in permits under paragraph

[Sec. 125.103(c)]

(b) of this section alone or in combination with those required under paragraph (a) of this section.

(d) In addition to the requirements of paragraphs (a) and (b) of this section, dischargers covered under § 125.102 shall develop and implement a best management practices program in accordance with § 125.104 which prevents, or minimizes the potential for, the release of toxic or hazardous pollutants from ancillary activities to waters of the United States.

§ 125.104 Best management practices programs.

(a) BMP programs shall be developed in accordance with good engineering practices and with the provisions of this Subpart.

(b) The BMP program shall:

(1) Be documented in narrative form, and shall include any necessary plot plans, drawings or maps;

(2) Establish specific objectives for the control of toxic and hazardous pollutants.

(i) Each facility component or system shall be examined for its potential for causing a release of significant amounts of toxic or hazardous pollutants to waters of the United States due to equipment failure, improper operation, natural phenomena such as rain or snowfall, etc.

(ii) Where experience indicates a reasonable potential for equipment failure (e.g., a tank overflow or leakage), natural condition (e.g., precipitation), or other circumstances to result in significant amounts of toxic or hazardous pollutants reaching surface waters, the program should include a prediction of the direction, rate of flow and total quantity of toxic or hazardous pollutants which could be discharged from the facility as a result of each condition or circumstance;

(3) Establish specific best management practices to meet the objectives identified under paragraph (b)(2) of this section, addressing each component or system capable of causing a release of significant amounts of toxic or hazardous pollutants to the waters of the United States;

(4) The BMP program:

(i) May reflect requirements for Spill Prevention Control and Countermeasure (SPCC) plans under section 311 of the Act and 40 CFR Part 151, and may incorporate any part of such plans into the BMP program by reference;

[Comment: EPA has proposed section 311(j)(1)(c) regulations (43 FR 39276) which require facilities subject to NPDES to develop

and implement SPCC plans to prevent discharges of reportable quantities of designated hazardous substances. While Subpart K requires only procedural activities and minor construction, the proposed 40 CFR 151 (SPCC regulations) are more stringent and comprehensive with respect to their requirements for spill prevention. In developing BMP programs in accordance with Subpart K, owners or operators should also consider the requirements of proposed 40 CFR 151 which may address many of the same areas of the facility covered by this Subpart.]

(ii) Shall assure the proper management of solid and hazardous waste in accordance with regulations promulgated under the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act of 1976 (RCRA) (40 U.S.C. 6901 *et seq.*) Management practices required under RCRA regulations shall be expressly incorporated into the BMP program; and

(iii) Shall address the following points for the ancillary activities in § 125.102:

- (A) Statement of Policy;
- (B) Spill Control Committee;
- (C) Material Inventory;
- (D) Material Compatibility;
- (E) Employee Training;
- (F) Reporting and Notification Procedures;
- (G) Visual Inspections;
- (H) Preventive Maintenance;
- (I) Housekeeping; and
- (J) Security.

[Comment: Additional technical information on BMPs and the elements of a BMP program is contained in a publication entitled "NPDES Best Management Practices Guidance Document." Copies may be obtained by written request to Edward A. Kramer (EN-336), Office of Water Enforcement, Environmental Protection Agency, Washington, D.C. 20460.]

(c)(1) The BMP program must be clearly described and submitted as part of the permit application. An application which does not contain a BMP program shall be considered incomplete. Upon receipt of the application, the Director shall approve or modify the program in accordance with the requirements of this Subpart. The BMP program as approved or modified shall be included in the draft permit (§ 124.6). The BMP program shall be subject to the applicable permit issuance requirements of Part 124, resulting in the incorporation of the program (including any modifications of the program resulting from the permit issuance procedures) into the final permit.

(2) Proposed modifications to the BMP program which affect the discharger's

permit obligations shall be submitted to the Director for approval. If the Director approves the proposed BMP program modification, the permit shall be modified in accordance with §122.62, provided that the Director may waive the requirements for public notice and opportunity for hearing on such modification if he or she determines that the modification is not significant. The BMP program, or modification thereof, shall be fully implemented as soon as possible but not later than one year after permit issuance, modification, or revocation and reissuance unless the Director specifies a later date in the permit.

[125.104(c)(2) amended by 48 FR 14153, April 1, 1983]

[Note.—A later date may be specified in the permit, for example, to enable coordinated preparation of the BMP program required under these regulations and the SPCC plan required under 40 CFR Part 151 or to allow for the completion of construction projects related to the facility's BMP or SPCC program.]

(d) The discharger shall maintain a description of the BMP program at the facility and shall make the description available to the Director upon request.

(e) The owner or operator of a facility subject to this Subpart shall amend the BMP program in accordance with the provisions of this Subpart whenever there is a change in facility design, construction, operation, or maintenance which materially affects the facility's potential for discharge of significant amounts of hazardous or toxic pollutants into the waters of the United States.

(f) If the BMP program proves to be ineffective in achieving the general objective of preventing the release of significant amounts of toxic or hazardous pollutants to those waters and the specific objectives and requirements under paragraph (b) of this section, the permit and/or the BMP program shall be subject to modification to incorporate revised BMP requirements.

Subpart L—Criteria and Standards for Imposing Conditions for the Disposal of Sewage Sludge Under Section 405 of the Act [Reserved]

Subpart M—Ocean Dumping Criteria Under Section 403 of the Act

[Subpart M added by 45 FR 65953, October 3, 1980]

[Sec. 125.104(f)]

§ 125.120 Scope and purpose.

This subpart establishes guidelines for issuance of National Pollutant Discharge Elimination System (NPDES) permits for the discharge of pollutants from a point source into the territorial seas, the contiguous zone, and the oceans.

§ 125.121 Definitions.

(a) "Irreparable harm" means significant undesirable effects occurring after the date of permit issuance which will not be reversed after cessation or modification of the discharge.

(b) "Marine environment" means that territorial seas, the contiguous zone and the oceans.

(c) "Mixing zone" means the zone extending from the sea's surface to seabed and extending laterally to a distance of 100 meters in all directions from the discharge point(s) or to the boundary of the zone of initial dilution as calculated by a plume model approved by the director, whichever is greater, unless the director determines that the more restrictive mixing zone or another definition of the mixing zone is more appropriate for a specific discharge.

(d) "No reasonable alternatives" means: (1) No land-based disposal sites, discharge point(s) within internal waters, or approved ocean dumping sites within a reasonable distance of the site of the proposed discharge the use of which would not cause unwarranted economic impacts on the discharger, or, notwithstanding the availability of such sites,

(2) On-site disposal is environmentally preferable to other alternative means of disposal after consideration of: (i) The relative environmental harm of disposal on-site, in disposal sites located on land, from discharge point(s) within internal waters, or in approved ocean dumping sites, and

(ii) The risk to the environment and human safety posed by the transportation of the pollutants.

(e) "Unreasonable degradation of the marine environment" means: (1) Significant adverse changes in ecosystem diversity, productivity and stability of the biological community within the area of discharge and surrounding biological communities.

(2) Threat to human health through direct exposure to pollutants or through consumption of exposed aquatic organisms, or

(3) Loss of esthetic, recreational, scientific or economic values which is unreasonable in relation to the benefit derived from the discharge.

§ 125.122 Determination of unreasonable degradation of the marine environment.

(a) The director shall determine whether a discharge will cause unreasonable degradation of the marine environment based on consideration of:

(1) The quantities, composition and potential for bioaccumulation or persistence of the pollutants to be discharged;

(2) The potential transport of such pollutants by biological, physical or chemical processes;

(3) The composition and vulnerability of the biological communities which may be exposed to such pollutants, including the presence of unique species or communities of species, the presence of species identified as endangered or threatened pursuant to the Endangered Species Act, or the presence of those species critical to the structure or function of the ecosystem, such as those important for the food chain;

(4) The importance of the receiving water area to the surrounding biological community, including the presence of spawning sites, nursery/forage areas, migratory pathways, or areas necessary for other functions or critical stages in the life cycle of an organism.

(5) The existence of special aquatic sites including, but not limited to marine sanctuaries and refuges, parks, national and historic monuments, national seashores, wilderness areas and coral reefs;

(6) The potential impacts on human health through direct and indirect pathways;

(7) Existing or potential recreational and commercial fishing, including finfishing and shellfishing;

(8) Any applicable requirements of an approved Coastal Zone Management plan;

(9) Such other factors relating to the effects of the discharge as may be appropriate;

(10) Marine water quality criteria developed pursuant to section 304(a)(1).

(b) Discharges in compliance with sections 301(g), 301(h), or 316(a) variance requirements or State water quality standards shall be presumed not to cause unreasonable degradation of the marine environment, for any specific pollutants or conditions specified in the variance or the standard.

§ 125.123 Permit requirements.

(a) If the director on the basis of available information including that supplied by the applicant pursuant to § 125.124 determines prior to permit issuance that the discharge will not cause unreasonable degradation of the

marine environment after application of any necessary conditions specified in § 125.123(d), he may issue an NPDES permit containing such conditions.

(b) If the director, on the basis of available information including that supplied by the applicant pursuant to § 125.124 determines prior to permit issuance that the discharge will cause unreasonable degradation of the marine environment after application of all possible permit conditions specified in § 125.123(d), he may not issue an NPDES permit which authorizes the discharge of pollutants.

(c) If the director has insufficient information to determine prior to permit issuance that there will be no unreasonable degradation of the marine environment pursuant to § 125.122, there shall be no discharge of pollutants into the marine environment unless the director on the basis of available information, including that supplied by the applicant pursuant to § 125.124 determines that: (1) Such discharge will not cause irreparable harm to the marine environment during the period in which monitoring is undertaken, and

(2) There are no reasonable alternatives to the on-site disposal of these materials, and

(3) The discharge will be in compliance with all permit conditions established pursuant to paragraph (d) of this section.

(d) All permits which authorize the discharge of pollutants pursuant to paragraph (c) of this section shall: (1) Require that a discharge of pollutants will: (A) following dilution as measured at the boundary of the mixing zone not exceed the limiting permissible concentration for the liquid and suspended particulate phases of the waste material as described in section 227.27(a) (2) and (3), section 227.27(b), and section 227.27(c) of the Ocean Dumping Criteria; and (B) not exceed the limiting permissible concentration for the solid phase of the waste material or cause an accumulation of toxic materials in the human food chain as described in sections 227.27 (b) and (d) of the Ocean Dumping Criteria;

(2) Specify a monitoring program, which is sufficient to assess the impact of the discharge on water, sediment, and biological quality including, where appropriate, analysis of the bioaccumulative and/or persistent impact on aquatic life of the discharge;

(3) Contain any other conditions, such as performance of liquid or suspended particulate phase bioaccumulation tests, seasonal restrictions on discharge,

[Sec.125.123(d)(3)]

process modifications, dispersion of pollutants, or schedule of compliance for existing discharges, which are determined to be necessary because of local environmental conditions, and

(4) Contain the following clause: In addition to any other grounds specified herein, this permit shall be modified or revoked at any time if, on the basis of any new data, the director determines that continued discharges may cause unreasonable degradation of the marine environment.

§ 125.124 Information required to be submitted by applicant.

The applicant is responsible for providing information which the director may request to make the determination required by this subpart. The director may require the following information as well as any other pertinent information:

(a) An analysis of the chemical constituents of any discharge;

(b) Appropriate bioassays necessary to determine the limiting permissible concentrations for the discharge;

(c) An analysis of initial dilution;

(d) Available process modifications which will reduce the quantities of pollutants which will be discharged;

(e) Analysis of the location where pollutants are sought to be discharged, including the biological community and the physical description of the discharge facility;

(f) Evaluation of available alternatives to the discharge of the pollutants including an evaluation of the possibility of land-based disposal or disposal in an approved ocean dumping site.

**ENVIRONMENTAL PROTECTION AGENCY REGULATIONS
ON CRITERIA AND STANDARDS FOR THE NATIONAL POLLUTANT
DISCHARGE ELIMINATION SYSTEM**

(40 CFR 125; 38 FR 13527, May 22, 1973; as amended by Code of Federal Regulations, Volume 40, Revised as of July 1, 1975; 40 FR 29848, July 16, 1975; 41 FR 11303 and 11458, March 18, 1976; 41 FR 24709, June 18, 1976; 41 FR 24893, July 12, 1976; 41 FR 36918, September 1, 1976; 43 FR 22160, May 23, 1978; 44 FR 32854, June 7, 1979; Effective August 13, 1979; 44 FR 34816, June 15, 1979; 45 FR 33512, May 19, 1980; 45 FR 65953, October 3, 1980; 46 FR 9460, January 28, 1981, Effective January 31, 1982; 47 FR 24919, June 8, 1982; 47 FR 52304, November 19, 1982; 47 FR 53675, November 26, 1982)

[*Editor's note:* In a notice published at 44 FR 47063, August 10, 1979, EPA deferred the effective date of the best management practices requirements (Subpart K) that were to be effective August 13. The requirements will become effective 60 days after EPA publishes notice that relevant technical information is available.]

Authority: (Clean Water Act, Secs. 301, 304, 501, Pub. L. 92-500, 86 Stat. 816, as amended by Pub. L. 95-217, 91 Stat. 1565, as amended by Pub. L. 97-117, 95 Stat. 1623 (33 U.S.C. 1311, 1314, 1361).

[Authority citation revised by 47 FR 24919, June 8, 1982; amended by 47 FR 53675, November 26, 1982]

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

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Subpart C—Criteria for Extending Compliance Dates for Facilities Installing Innovative Technology Under Section 301(k) of the Act [Reserved]

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- 125.30 Purpose and scope.
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Subpart E—Criteria for Granting Economic Variances From Best Available Technology, Economically Achievable Under Section 301(c) of the Act [Reserved]

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applicable water quality standards.

125.61 Attainment or maintenance of water quality which assures protection of public water supplies, the protection and propagation of a balanced, indigenous population of shellfish, fish, and wildlife, and allows recreational activities.

125.62 Establishment of a monitoring program.
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125.67 Special conditions for section 301(h) modified permits.

Appendix A—Small Applicant Questionnaire for Modification of Secondary Treatment Requirements

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Subpart H—Criteria for Determining Alternative Effluent Limitations Under Section 316(a) of the Act.

- 125.70 Purpose and scope.
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Subpart I—Criteria Applicable To Cooling Water Intake Structures Under Section 316(h) of the Act [Reserved]

Subpart J—Criteria for Extending Compliance Dates Under Section 301(i) of the Act

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Subpart K—Criteria and Standards for Best Management Practices Under Section 304(e) of the Act

- 125.100 Purpose and scope.
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Subpart L—Criteria and Standards for Imposing Conditions for the Disposal of Sewage Sludge Under Section 405 of the Act [Reserved]

Subpart M—Ocean Dumping Criteria Under Section 403 of the Act

- Sec.
 125.120 Scope and purpose.
 125.121 Definitions.
 125.122 Determination of unreasonable degradation of the marine environment.
 125.123 Permit requirements.
 125.124 Information required to be submitted by applicant.

Authority: Clean Water Act, as amended by the Clean Water Act of 1977, 33 U.S.C. 1251 et seq.

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

§ 125.1 Purpose and scope.

This Subpart establishes criteria and standards for the imposition of technology-based treatment requirements in permits under section 301(h) of the Act, including the application of EPA promulgated effluent limitations and case-by-case determinations of effluent limitations under section 402(a)(1) of the Act.

§ 125.2 Definitions.

For the purposes of this Part, any reference to "the Act" shall mean the Clean Water Act of 1977 (CWA). Unless otherwise noted, the definitions in Parts 122, 123 and 124 apply to this Part.

[125.2 revised by 45 FR 33512, May 19, 1980]

§ 125.3 Technology-based treatment requirements in permits.

(a) *General.* Technology-based treatment requirements under section 301(b) of the Act represent the minimum level of control that must be imposed in a permit issued under section 402 of the Act. (See §§ 122.60, 122.61 and 122.62 for a discussion of additional or more stringent effluent limitations and conditions.) Permits shall contain the following technology-based treatment requirements in accordance with the following statutory deadlines:

[125.3(a) amended by 45 FR 33512, May 19, 1980]

(1) For POTW's, effluent limitations based upon:

(i) Secondary treatment—from date of permit issuance; and

(ii) The best practicable waste treatment technology—not later than July 1, 1983; and

(2) For dischargers other than POTW's except as provided in §122.67(d), effluent limitations requiring:

[125.3(a)(2) amended by 45 FR 33512, May 19, 1980]

(i) The best practicable control technology currently available (BPT)—from date of permit issuance;

(ii) For conventional pollutants, the best conventional pollutant control technology (BCT)—not later than July 1, 1984;

(iii) For all toxic pollutants referred to in Committee Print No. 95-30, House Committee on Public Works and Transportation, the best available technology economically achievable (BAT)—not later than July 1, 1984;

(iv) For all toxic pollutants other than those listed in Committee Print No. 95-30, effluent limitations based on the BAT not later than three years after the date such effluent limitations are incorporated into an NPDES permit; and

(v) For all pollutants which are neither toxic nor conventional pollutants, effluent limitations based on BAT not later than three years after the date such effluent limitations are incorporated into an NPDES permit, or July 1, 1984, whichever is later, but in no case later than July 1, 1987.

(b) *Statutory variances and extensions.* (1) The following variances from technology-based treatment requirements are authorized by the Act and may be applied for under §122.53; [125.3(b)(1) amended by 45 FR 33512, May 19, 1980]

(i) For POTW's, a section 301(h) marine discharge variance from secondary treatment (Subpart G);

(ii) For dischargers other than POTW's:

(A) A section 301(c) economic variance from BAT (Subpart E);

(B) A section 301(g) water quality related variance from BAT (Subpart F); and

(C) A section 316(a) thermal variance from BPT, BCT and BAT (Subpart H).

(2) The following extensions of deadlines for compliance with technology-based treatment requirements are authorized by the Act and may be applied for under §122.53; [125.3(b)(2) amended by 45 FR 33512, May 19, 1980]

(i) For POTW's a section 301(i) extension of the secondary treatment deadline (Subpart J);

(ii) For dischargers other than POTW's:

(A) A section 301(i) extension of the BPT deadline (Subpart J); and

(B) A section 301(k) extension of the BAT deadline (Subpart C);

(c) *Methods of imposing technology-based treatment requirements in permits.* Technology-based treatment requirements may be imposed through one of the following three methods:

(1) Application of EPA-promulgated effluent limitations developed under section 304 of the Act to dischargers by category or subcategory. These effluent limitations are not applicable to the extent that they have been remanded or withdrawn. However, in the case of a court remand, determinations underlying effluent limitations shall be binding in permit issuance proceedings where those determinations are not required to be reexamined by a court remanding the regulations. In addition, dischargers may seek fundamentally different factors variances from these effluent limitations under §122.53 and Subpart D of this Part.

[125.3(c)(1) amended by 45 FR 33512, May 19, 1980]

(2) On a case-by-case basis under section 402(a)(1) of the Act, to the extent that EPA-promulgated effluent limitations are inapplicable. The permit writer shall apply the appropriate factors listed in section 304 of the Act, and shall consider:

(i) The appropriate technology for the category or class of point sources of which the applicant is a member, based upon all available information (including EPA draft or proposed development documents or guidance); and

(ii) Any unique factors relating to the applicant.

Comment: These factors must be considered in all cases, regardless of whether the permit is being issued by EPA or an approved State.

(3) Through a combination of the methods in paragraphs (c) (1) and (2) of this section. Where promulgated effluent limitations guidelines only apply to certain aspects of the discharger's operation, or to certain pollutants, other aspects or activities are subject to regulation on a case-by-case basis in order to carry out the provisions of the Act.

(4) Limitations developed under paragraph (c)(2) of this section may be expressed, where appropriate, in terms of toxicity (e.g., "The LC 50 for fat head minnow of the effluent from outfall 001 shall be greater than 25%"), provided that is shown that the limits reflect the appropriate requirements (for example, technology-based or water-quality-based standards) of the Act.

[125.3(c)(4) added by 45 FR 33512, May 19, 1980]

(d) Technology-based treatment requirements are applied prior to or at the point of discharge.

(e) Technology-based treatment requirements cannot be satisfied through the use of "non-treatment" techniques such as flow augmentation and in-stream mechanical aerators. However, these techniques may be considered as a method of achieving water quality standards on a case-by-case basis when:

(1) The technology-based treatment requirements applicable to the discharge are not sufficient to achieve the standards;

(2) The discharger agrees to waive any opportunity to request a variance under sections 301 (c), (g) or (h) of the Act; and

(3) The discharger demonstrates that such a technique is the preferred environmental and economic method to achieve the standards after consideration of alternatives such as

advanced waste treatment, recycle and reuse, land disposal, changes in operating methods, and other available methods.

(f) Technology-based effluent limitations shall be established under this Subpart for solids, sludges, filter backwash, and other pollutants removed in the course of treatment or control of wastewaters in the same manner as for other pollutants.

[125.3(g) added by 45 FR 33512, May 19, 1980]

(g)(1) The Director may set a permit limit for a conventional pollutant at a level more stringent than the best conventional pollution control technology (BCT), or a limit for a nonconventional pollutant which shall not be subject to modification under section 301 (c) or (g) of the Act where:

(i) Effluent limitations guidelines specify the pollutant as an indicator for a toxic pollutant, or

(ii)(A) The limitation reflects BAT-level control of discharges of one or more toxic pollutants which are present in the waste stream, and a specific BAT limitation upon the toxic pollutant(s) is not feasible for economic or technical reasons;

(B) The permit identifies which toxic pollutants are intended to be controlled by use of the limitation; and

(C) The fact sheet required by § 124.56 sets forth the basis for the limitation, including a finding that compliance with the limitation will result in BAT-level control of the toxic pollutant discharges identified in paragraph (g)(1)(ii)(B) of this section, and a finding that it would be economically or technically infeasible to directly limit the toxic pollutant(s).

(2) The Director may set a permit limit for a conventional pollutant at a level more stringent than BCT when:

(i) Effluent limitations guidelines specify the pollutant as an indicator for a hazardous substance, or

(ii)(A) The limitation reflects BAT-level control of discharges (or an appropriate level determined under section 301(c) or (g) of the Act) of one or more hazardous substance(s) which are present in the waste stream, and a specific BAT (or other appropriate) limitation upon the hazardous substance(s) is not feasible for economic or technical reasons;

(B) The permit identifies which hazardous substances are intended to be controlled by use of the limitation; and

(C) The fact sheet required by § 124.56 sets forth the basis for the limitation, including a finding that compliance with the limitations will result in BAT-level (or other appropriate level) control of the hazardous substances discharges identified in paragraph (g)(2)(ii)(B) of this section, and a finding that it would be economically or technically infeasible to directly limit the hazardous substance(s).

(iii) Hazardous substances which are also toxic pollutants are subject to paragraph (g)(1) of this section.

(3) The Director may not set a more stringent limit under the preceding paragraphs if the method of treatment required to comply with the limit differs from that which would be required if the toxic pollutant(s) or hazardous substance(s) controlled by the limit were limited directly.

(4) Toxic pollutants identified under paragraph (g)(1) of this section remain subject to the requirements of § 122.61(a)(1) (notification of increased discharges of toxic pollutants above levels reported in the application form).

Subpart B—Criteria for Issuance of Permits to Aquaculture Projects

§ 125.10 Purpose and scope.

(a) These regulations establish guidelines under sections 318 and 402 of the Act for approval of any discharge of pollutants associated with an aquaculture project.

(b) The regulations authorize, on a selective basis, controlled discharges which would otherwise be unlawful under the Act in order to determine the feasibility of using pollutants to grow aquatic organisms which can be harvested and used beneficially. EPA policy is to encourage such projects, while at the same time protecting other beneficial uses of the waters.

(c) Permits issued for discharges into aquaculture projects under this Subpart are NPDES permits and are subject to the applicable requirements of Parts 122, 123 and 124. Any permit shall include such conditions (including monitoring and reporting requirements) as are necessary to comply with those Parts.

Appendix C

Other Toxic Pollutants: Metals, Cyanide, and Total Phenols

Antimony, Total	Nickel, Total
Arsenic, Total	Selenium, Total
Beryllium, Total	Silver, Total
Cadmium, Total	Thallium, Total
Chromium, Total	Zinc, Total
Copper, Total	Cyanide, Total
Lead, Total	Phenols, Total
Mercury, Total	

Appendix D

Organic Toxic Pollutants in Each of Four Fractions in Analysis by Gas Chromatography/Mass Spectroscopy (GC/MS).

I. Volatiles

1V	acrolein	17V	1,2-dichloropropane
2V	acrylonitrile	18V	1,2-dichloropropylene
3V	benzene	19V	ethybenzene
5V	bromoform	20V	methyl bromide
6V	carbon tetrachloride	21V	methyl chloride
7V	chlorobenzene	22V	methylene chloride
8V	chlorodibromomethane	23V	1,1,2-2tetrachloroethane
9V	chloroethane	24V	tetrachloroethylene
10V	2-chloroethylvinyl ether	25V	toluene
11V	chloroform	26V	1,2-trans-dichloroethylene
12V	dichlorobromomethane	27V	1,1,1-trichloroethane
14V	1,1-dichloroethane	28V	1,1,2-trichloroethane
15V	1,2-dichloroethane	29V	trichloroethylene
16V	1,1-dichloroethylene	31V	vinyl chloride

II. Acid Compounds

1A	2-chlorophenol	6A	2-nitrophenol
2A	2,4-dichlorophenol	7A	4-nitrophenol
3A	2,4-dimethylphenol	8A	p-chloro-m-cresol
4A	4,6-dinitro-o-cresol	9A	pentachlorophenol
5A	2,4-dinitrophenol	10A	phenol
		11A	2,4,6-trichlorophenol

Appendix D Cont.

III. Base/Neutral

1B	acenaphthene	24B	diethyl phthalate
2B	acenaphthylene	25B	dimethyl phthalate
3B	anthracene	26B	di-n-butyl phthalate
4B	benzidine	27B	2,4-dinitrotoluene
5B	benzo(a)anthracene	28B	2,6-dinitrotoluene
6B	benzo(a)pyrene	29B	di-n-octyl phthalate
7B	3,4-benzofluoranthene	30B	1,2-diphenylhydrazine (as azobenzene)
8B	benzo(ghi)perylene	31B	fluoranthene
9B	benzo(k)fluoranthene	32B	fluorene
10B	bis(2-chloroethoxy)methane	33B	hexachlorobenzene
11B	bis(2-chloroethyl)ether	34B	hexachlorobutadiene
12B	bis(2-chloroisopropyl)ether	35B	hexachlorocyclopentadiene
13B	bis(2-ethylhexyl)phthalate	36B	hexachloroethane
14B	4-bromophenyl phenyl ether	37B	indeno(1,2,3-cd)pyrene
15B	butylbenzyl phthalate	38B	isophorone
16B	2-chloronaphthalene	39B	naphthalene
17B	4-chlorophenyl phenyl ether	40B	nitrobenzene
18B	chrysene	41B	N-nitrosodimethylamine
19B	dibenzo(a,h)anthracene	42B	N-nitrosodi-n-propylamine
20B	1,2-dichlorobenzene	43B	N-nitrosodiphenylamine
21B	1,3-dichlorobenzene	44B	phenanthrene
22B	1,4-dichlorobenzene	45B	pyrene
23B	3,3'-dichlorobenzidine	46B	1,2,4-trichlorobenzene

IV. Pesticides

1P	aldrin	13P	endosulfan sulfate
2P	a-BHC	14P	endrin
3P	B-BHC	15P	endrin aldehyde
4P	γ-BHC	16P	heptachlor
5P	d-BHC	17P	heptachlor epoxide
6P	chlordane	18P	PCB-1242
7P	4,4'-DDT	19P	PCB-1254
8P	4,4'-DDE	20P	PCB-1221
9P	4,4'-DDD	21P	PCB-1232
10P	dieldrin	22P	PCB-1248
11P	a-endosulfan	23P	PCB-1260
12P	B-endosulfan	24P	PCB-1016
		25P	toxaphene

Appendix E

Conventional and Nonconventional Pollutants Required to be Tested by Existing Dischargers if Expected to be Present

Bromide	Sulfite
Chloride	Surfactants
Chloride, Total Residual	Aluminum, Total
Color	Barium, Total
Fecal Coliform	Boron, Total
Fluoride	Cobalt, Total
Nitrate-Nitrite	Iron, Total
Nitrogen, Total Organic	Magnesium, Total
Oil and Grease	Molybdenum, Total
Phosphorus, Total	Manganese, Total
Radioactivity	Tin, Total
Sulfate	Titanium, Total
Sulfide	

Appendix F

Toxic Pollutants and Hazardous Substances Required to be Identified by Existing Dischargers if Expected to be Present

I. Toxic Pollutants

Asbestos

II. Hazardous Substances

Acetaldehyde	Carbofuran
Allyl alcohol	Carbon disulfide
Allyl chloride	Chlorpyrifos
Amyl acetate	Coumaphos
Aniline	Cresol
Benzonitrile	Crotonaldehyde
Benzyl chloride	Cyclohexane
Butyl acetate	2,4-D(2,4-Dichlorophenoxy acetic acid)
Butylamine	Diazinon
Captan	Dicamba
Carbaryl	Dichlobenil

Appendix F Cont.

Dichlone	Monomethyl amine
2,2-Dichloropropionic acid	Naled
Dichlorvos	Napthenic acid
Diethyl amine	Nitrotoluene
Dimethyl amine	Parathion
Dintrobenzene	Phenolsulfanate
Diquat	Phosgene
Disulfoton	Propargite
Diuron	Propylene oxide
Epichlorohydrin	Pyrethrins
Ethanolamine	Quinoline
Ethion	Resorcinol
Ethylene diamine	Strontium
Ethylene dibromide	Strychnine
Formaldehyde	Styrene
Furfural	2,4,5-T(2,4,5-Trichlogophenoxiy acetic acid)
Guthion	TDE (Tetrachlorodiphenylethan)
Isoprene	2,4,5-TP[2-(2,4,5-Trichlorophenoxy) propanoic acid]
Isopropaolamine	Trichlorofon
Kelthane	Triethylamine
Kepone	Trimethylamine
Malathion	Uranium
Mercaptodimethur	Vanadium
Methoxychlor	Vinyl Acetate
Methyl mercaptan	Xylene
Methyl methacrylate	Xylenol
Methyl parathion	Zirconium
Mevinphos	
Mexacarbate	
Monoethyl amine	

Wednesday
October 13, 1982

Final Rule

Part II

**Environmental
Protection Agency**

**Coal Mining Point Source Category;
Effluent Limitations Guidelines for
Existing Sources and Standards of
Performance for New Sources; Final Rule**

**ENVIRONMENTAL PROTECTION
AGENCY****40 CFR Part 434**

[WH-FRL2202-6]

**Coal Mining Point Source Category;
Effluent Limitations Guidelines for
Existing Sources and Standards of
Performance for New Sources**AGENCY: Environmental Protection
Agency (EPA).

ACTION: Final rule.

SUMMARY: These regulations limit the discharge of pollutants into navigable waters from existing and new sources in the coal mining industry.

The Clean Water Act and a consent decree require EPA to issue this regulation.

The purpose of this regulation is to amend the previously promulgated "best practicable technology" (BPT) and "new source performance standards" (NSPS) and establish effluent limitation guidelines for "best available technology economically achievable" (BAT) for direct dischargers.

Pretreatment standards for both existing and new sources are not being issued since no known indirect dischargers exist nor are any known to be planned. Effluent limitations for "best conventional technology" (BCT) are reserved pending finalization of the BCT cost methodology.

DATES: In accordance with 40 CFR 100.01 (45 FR 26048), the regulations developed in this rulemaking shall be considered issued for purposes of judicial review at 1:00 p.m. Eastern time on October 27, 1982. These regulations shall become effective November 26, 1982, except for § 434.25(b) which contains information collection requirements which are under review at OMB.

Under Section 509(b)(1) of the Clean Water Act judicial review of these regulations is available only by filing a petition for review in the United States Court of Appeals within ninety days after these regulations are considered issued for purpose of judicial review. Under Section 509(b)(2) of the Clean Water Act, the requirements of the regulations promulgated today may not be challenged later in civil or criminal proceedings brought by EPA to enforce these requirements.

Those portions of the existing coal mining effluent guidelines limitations and standards that are not substantively amended by this notice are not subject to judicial review nor is their effective date altered by this notice.

ADDRESSES: The basis for this regulation is detailed in three major documents. See section XVII. "Availability of Technical Information" under Supplementary Information for a brief description of each document.

Technical information may be obtained by writing to William A. Telliard, Effluent Guidelines Division (WH-552), EPA, 401 M Street SW., Washington, D.C. 20460, or by calling (202) 382-7131. Copies of the technical and economic documents can be obtained from the National Technical Information Service, Springfield, Virginia 22161 (703/487-6000).

The record will be available to the public [45 days from publication date] in EPA's Public Information Reference Unit, Room 2004 (Rear) (EPA Library), 401 M Street SW., Washington, D.C. The EPA information regulation (40 CFR Part 2) provides that a reasonable fee may be charged for copying.

FOR FURTHER INFORMATION CONTACT: Dennis Ruddy or Allison Phillips, (202) 382-7167

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I. Legal Authority

These regulations are being promulgated under the authority of Sections 301, 304, 306, 307, and 501 of the Clean Water Act (the Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. 1251 *et seq.*, as amended by the Clean Water Act of 1977, Pub. L. 95-217) also called the "Act." These regulations are also being promulgated in response to the Settlement Agreement in *Natural Resources Defense Council, Inc. v. Train*, 8 ERC 2120 (D.D.C. 1976), modified, 12 ERC 1833 (D.D.C. 1979).

II. Scope of this Rulemaking

The coal mining industry is included within the U.S. Department of Commerce, Bureau of the Census, Standards Industrial Classification (SIC) 111 for Anthracite Mining and 121 for Bituminous Coal and Lignite Mining. The final regulation applies to subgroups 1111 Anthracite, 1112 Anthracite Mining Services, 1211, Bituminous Coal and Lignite, and 1213 Bituminous Coal and Lignite Mining Services.

As a result of the Clean Water Act of 1977, the emphasis of EPA's program has shifted from "classical" pollutants to the control of a list of toxic substances. Therefore, in this rulemaking, EPA's efforts are primarily directed toward ensuring the achievement of limitations based upon the best available technology economically achievable (BAT) by July 1, 1984.

EPA today is amending the previously promulgated NSPS and BPT for the coal mining industry and in addition to promulgating BAT limitations equal to the revised BPT limitations.

III. Summary of Legal Background

A. Clean Water Act

The Federal Water Pollution Control Act Amendments of 1972 established a comprehensive program to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." Section 101(a). To implement the Act, EPA was to issue effluent standards, pretreatment standards, and new source performance standards for industry discharges.

The Act included a timetable for issuing these standards. However, EPA was unable to meet many of the deadlines and, as a result, in 1976, was sued by several environmental groups. In settling this lawsuit EPA and the plaintiffs executed a court-approved "Settlement Agreement". This Agreement required EPA to develop a program and adhere to a schedule in promulgating effluent limitations guidelines and pretreatment standards for 65 "priority" pollutants and classes of pollutants, for 21 major industries. See *Natural Resources Defense Council, Inc. v. Train*, 8 ERC 2120 (D.D.C. 1976), modified, 12 ERC 1833 (D.D.C. 1979).

Many of the basic elements of this Settlement Agreement program were incorporated into the Clean Water Act of 1977. Like the Agreement, the Act stressed control of toxic pollutants, including the 65 "priority" pollutants. In addition, to strengthen the toxic control program, Section 304(e) of the Act authorizes the Administrator to prescribe "best management practices" (BMOs) to prevent the release of toxic and hazardous pollutants from plant site runoff, spillage or leaks, sludge or waste disposal, and drainage from raw material storage associated with, or ancillary to, the manufacturing or treatment process.

Under the Act, the EPA program is to set a number of different kinds of effluent limitations. These are discussed in detail in the proposed regulation and Development Document. The following is a brief summary:

1. *Best Practicable Control Technology (BPT)*. BPT limitations are generally based on the average of the best existing performance by plants of various sizes, ages, and unit processes within the industry or subcategory.

In establishing BPT limitations, we consider the total cost of applying the technology in relation to the effluent reduction derived, the age of equipment and facilities involved, the process employed, the engineering aspects of the control technologies, process changes, and non-water-quality environmental impacts (including energy requirements). We balance the total cost of applying

the technology against the effluent reduction.

2. *Best Available Technology (BAT)*. BAT limitations, in general, represent the best existing performance in the industrial subcategory or category. The Act establishes BAT as the principal national means of controlling the direct discharge of toxic and nonconventional pollutants to navigable waters.

In arriving at BAT, the Agency considers the age of the equipment and facilities involved, the process employed, the engineering aspects of the control technologies, process changes, the cost of achieving such effluent reduction, and non-water-quality environmental impacts. The Administrator retains considerable discretion in assigning the weight to be accorded these factors.

3. *Best Conventional Pollutant Control Technology (BCT)*. The 1977 Amendments added Section 301(b)(2)(E) to the Act establishing "best conventional pollutant control technology" (BCT) for discharge of conventional pollutants from existing industrial point sources. Conventional pollutants are those defined in Section 304(a)(4) [biological oxygen demanding pollutants (BOD5), total suspended solids (TSS), fecal coliform and pH], and any additional pollutants defined by the Administrator as "conventional" [oil and grease, 44 FR 44501, July 30, 1979].

BCT is not an additional limitation but replaces BAT for the control of conventional pollutants. In addition to other factors specified in section 304(b)(4)(B), the Act requires that BCT limitations be assessed in light of a two part "cost-reasonableness" test. *American Paper Institute v. EPA*, 660 F. 2d 954 (4th Cir. 1981). The first test compares the cost for private industry to reduce its conventional pollutants with the costs to publicly owned treatment works for similar levels of reduction in their discharge of these pollutants. The second test examines the cost-effectiveness of additional industrial treatment beyond BPT. EPA must find that limitations are "reasonable" under both tests before establishing them as BCT. In no case may BCT be less stringent than BPT.

EPA published its methodology for carrying out the BCT analysis on August 29, 1979 (44 FR 50732). In the case mentioned above, the Court of Appeals ordered EPA to correct data errors underlying EPA's calculation of the first test, and to apply the second cost test. (EPA had argued that a second cost test was not required). BCT for this regulation is reserved pending finalization of the BCT cost methodology.

4. *New Source Performance Standards (NSPS)*. NSPS are based on the best available demonstrated technology. These standards apply to all pollutants: toxic, conventional and nonconventional. New plants have the opportunity to install the best and most efficient production processes and wastewater treatment technologies.

5. *Pretreatment Standards for Existing Sources (PSES), and Pretreatment Standards for New Sources (PSNS)*. Pretreatment standards (PSES & PSNS) are designed to control the discharge of pollutants into publicly owned treatment works. Pretreatment standards were not proposed for the coal mining category since no known indirect dischargers exist nor are any known to be planned. Coal mines are located in rural areas, generally far from a POTW. EPA expects that the cost of pumping coal mine wastewater to a POTW would be prohibitive in most cases, and on-site treatment is more cost effective in virtually every instance.

B. Prior EPA Coal Mining Regulations

On October 17, 1975, EPA proposed Regulations adding Part 434 to Title 40 of the Code of Federal Regulations (40 FR 48830). These regulations, with subsequent amendments, established effluent limitations guidelines based on the use of the best practicable control technology currently available (BPT) for existing sources in the coal mining point source category. These were followed, on April 28, 1977, by final BPT effluent limitations guidelines for this category (42 FR 21380).

On September 19, 1977, the Agency published proposed standards of performance for new sources (NSPS) within this industrial category based on application of the best available demonstrated control technology (42 FR 46932). On January 12, 1979, EPA promulgated final NSPS for this industry (44 FR 2586).

Both the BPT and NSPS regulations contained an exemption from otherwise applicable requirements during and immediately after precipitation events. These storm exemptions were re-examined, subjected to further public comment and ultimately revised on December 28, 1979 (44 FR 76788).

Moreover, the NSPS regulations contained a definition of "new source coal mine" which was challenged by petitioners in *Pennsylvania Citizens Coalition v. EPA*, 618 F. 2d 991 (3rd Cir. 1980). In response to the Court's decision in that case, the Agency amended its definition of a "new source coal mine" on June 27, 1980 (45 FR 43413).

On January 13, 1981, amendments to the NSPA and BPT regulations and effluent limitations based on BAT and BCT were proposed (46 FR 3136). On May 29, 1981 the proposal was amended to change the criteria for the "storm exemption" (46 FR 28873).

After consideration of public comment (summarized in Section VI of this notice and detailed in the comments-response document), revised BPT and NSPS, and new BAT effluent limitations guidelines and standards are being promulgated today.

IV. Technology Overview

A. Overview of the Industry.

The coal mining industry currently operates in 26 states in Appalachia, the Midwest, and the Mountain and Pacific regions. There were 6,309 mines in 1980. There are currently about 540 coal preparation plants using wet coal cleaning methods in the country.

Total coal production in the United States in 1980 was 830,000,000 short tons.

In the 1920's underground mining accounted for nearly all coal production, and surface mining accounted for virtually none. By 1980, underground mining accounted for only 40.3 percent of all domestic production, with surface mining accounting for the rest.¹ This rapid growth of surface mining was made possible by improved machinery and mining methods, the general geology of the coal fields, and the expansion of the western, surface-mined, coal fields.¹

B. Wastewater Sources.

Water is not used in, and in fact interferes with, the mining of coal. The major sources of wastewater in the coal mining industry are: (1) Surface runoff and groundwater discharged from the active mine area; (2) wastewater generated by the removal of impurities from raw coal in preparation plants; (3) precipitation-induced runoff in preparation plant associated areas; and (4) runoff generated from reclamation areas and discharges from underground mines after mining ceases. Coal mine wastewater flows range from zero to over 12 million gallons per day (MGD), with an average discharge flow of approximately one MGD.

Process water used for coal cleaning can be correlated with production for any given preparation plant. However, most facilities commingle preparation plant wastewater with runoff from the associated areas, making correlation of wastewater flows with production

infeasible for purposes of an effluent regulation.

C. Treatment Technology.

Current technologies employed by coal mines and coal preparation plants to achieve BPT limitations for wastewater treatment typically include:

(a) Neutralization, aeration (where required), flocculation (where required), and sedimentation for acid mines; (b) aeration (where required), flocculation (where required), and sedimentation for alkaline mines; (c) neutralization (where required), flocculation (where required) and sedimentation for preparation plants and associated areas.

Neutralization is the addition of lime or another alkaline chemical to counteract the acidity. The resulting increase in pH (a measure of the acidity) causes the metal ions to chemically react to its hydroxide form which is insoluble and can be settled from the wastewater. Aeration involves the turbulent introduction of air into the wastewater to cause a series of chemical reactions that result in oxidation of certain metal ions and their enhanced precipitation (formation of solids). Flocculation is the addition of a compound that enhances agglomeration of solids, thus increasing their settling rate. Sedimentation involves containing the wastewater in a tank or basin for a sufficient amount of time to allow the solids to settle to the bottom.

V. Data Gathering Efforts

The data gathering efforts and methodology used in developing the proposed regulations were summarized in the "Preamble to the Proposed Coal Mining Point Source Category; Effluent Limitations Guidelines for Existing Sources, Standards of Performance for New Source and Pretreatment Standards" (46 FR 3136, January 13, 1981). *The Development Document for Effluent Limitations Guidelines and Standards for the Coal Mining Point Source Category* is the technical basis for this regulation. The Development Document includes new data acquired since January 1981. This new data includes results from (1) *Coal Mine Drainage Precision and Accuracy Determination for Settleable Solids at Less Than 1 ml/l*, and (2) *Coal Mining Industry Self-Monitoring Program*.

The Agency proposed in January 1981 (later amended in May 1981), to establish settleable solids and pH limitations for the coal mining industry during precipitation events and also for coal mining areas undergoing reclamation. The settleable solids and pH limitations were proposed as 0.5 ml/l and 6-9 respectively. The two studies

referenced above were performed to supplement the previously acquired data² supporting these alternate limitations.

VI. Summary of Proposal, Response to Major Comments, and Final Rule.

On January 13, 1981, and as later amended on May 29, 1981, EPA proposed BAT and BCT limitations and proposed revisions and amendments to existing BPT limitations and NSPS. A detailed description of the factors affecting the development of the proposed rule and the regulatory options considered is contained in the preamble to the January 13 proposal (46 FR 28873). To summarize briefly, the proposed rule set BAT, BCT, and NSPS equal to BPT except that a zero discharge limitation was proposed for new source coal preparation plants. The reader is directed to the preambles to the January 1981 proposal and subsequent May 1981 amendment for more detailed discussions of the substantive changes the proposal made to prior coal mining regulations. With the following three exceptions, the changes proposed in May 1981 are being adopted by today's action: (1) The design criteria to qualify for alternate limitations for rainfall events is deleted; (2) An allowance is made to the NSPS for coal preparation plants for necessary purges and blowdowns; and (3) BCT regulations are being reserved pending finalization of the EPA BCT cost methodology. These new changes have been incorporated into the final regulation as a result of comments received since proposal and as a result of further evaluation based on data collected since proposal.

The Agency received 56 comments on the proposed regulations from the industry, state and federal agencies, environmental organizations, and concerned individuals. Five major issues were identified from an evaluation of the comments, and these issues are addressed below. Responses to all of the comments are contained in a separate document available in the rulemaking record which will be filed in the Public Information Reference Unit at the EPA Library, 401 M St., S.W., Washington, D.C. 20460.

A. BPT

The amendments to BPT involving the "storm exemption", regulation of post-mining discharges, and western mines,

¹ Skelly & Loy, "Evaluation of Performance Capability of Surface Mine Sediment Basins", Harrisburg, PA, 1979, and also D'Appolonia Consulting Engineers, Inc. "Evaluation Sedimentation Pond Design Relative to Capacity & Effluent Discharge." Pittsburgh, PA, 1979.

¹ Nielsen, George, ed., 1981 *Keystone Coal Industry Manual*, McGraw-Hill, New York, New York, 1981

are described below in E and F of this section.

B. BCT

1. *Proposed Regulation.* The proposed regulation recommended that BCT be set equal to BPT for the removal of TSS and pH control.

2. *Final Rule.* BCT for the final rule is being reserved pending finalization of EPA's BCT cost methodology.

C. BAT

1. *Proposed Regulation.* EPA proposed BAT effluent limitations equivalent to those promulgated under BPT (based on the same BPT technology). Iron and manganese would be the regulated pollutant parameters. Three other options were considered in the proposal. Two of these involved the use of supplemental treatment technology (flocculant addition and granular media filtration) beyond BPT. The third option considered zero discharge for coal preparation plants only. These options were rejected for reasons explained in the preamble to the January 1981 proposal.

2. *Response to Major Comments.* Comments concerning the proposed BAT options, except as discussed in E and F of this section, addressed areas such as regulated parameters, commingling of wastewater streams, and technology evaluations. These comments are responded to in EPA's Response to Comment Document.

3. *Final Rule.* EPA is promulgating BAT equal to BPT as proposed. This conclusion was based on five factors: (1) After BPT level treatment the toxic metals were found at levels very near or at concentrations considered to be the detection limit by state-of-the-art analytical techniques; (2) treatability studies, pilot plant studies, and statistical analyses indicated that very low, if any, additional reductions of toxic metal are achievable beyond BPT levels; (3) toxic organics that were detected in BPT-treated effluents occurred at levels too low to be effectively treated, were uniquely related to only a few facilities or were attributable to sampling or analytical contamination; (4) technical and cost considerations (e.g., producing power for and access to these additional water treatment technologies in remote areas in Appalachia) make it infeasible to implement the two BAT candidate technologies requiring supplemental treatment beyond BPT throughout the industry on a national basis; and (5) the insignificant amounts of incremental toxics removed by the zero discharge

requirement³ (for coal preparation plants) do not justify the resulting retrofit expenditures of \$291 million capital, \$52.6 million annual (1980 dollars).

D. NSPS

1. *Active Mines.* a. *Proposed Regulation.* The Agency considered the same treatment options for NSPS as it did for BAT. The Agency proposed to set NSPS equal to BPT for coal mines.

b. *Final Rule.* EPA is promulgating NSPS based on BPT for coal mines as proposed. However, the proposal has been corrected in the final rule so that the limitations for iron are the same as those originally promulgated for NSPS on January 12, 1979 (44 FR 2586).

2. *Coal Preparation Plants and Associated Areas.* a. *Proposed Regulations.* The Agency considered the same treatment options for NSPS as for BAT. The Agency proposed to set NSPS equal to BAT for coal preparation plant associated areas, and establish a zero discharge requirement for coal preparation plants.

b. *Response to Major Comments.* (i) *Zero Discharge Requirement.* Several commenters argued that EPA misinterpreted the results of its survey of existing coal preparation plants (conducted to evaluate zero discharge systems).⁴ Some commenters argued that if BAT limitations adequately control toxic pollutants, then a more stringent standard cannot be required for new sources. Several commenters also asserted that little or no net environmental benefits would result from the more stringent new source standards for preparation plants.

EPA has devoted substantial resources to the question of coal preparation plant discharges. Although every effort was made to clearly request data and information on water management practices in this industry during the EPA/NCA survey, responses from the industry participants were often rather ambiguous. Supplemental data provided by commenters were analyzed by EPA to clarify the survey results. (We note the inherent limitation in this analysis was that the data concerned existing plants, while only new source preparation plants were considered for a zero discharge

³See Section VI, "Selection of Pollutant Parameters," in the Final Coal Mining Development Document.

⁴EPA conducted a survey on preparation plants in cooperation with the National Coal Association (NCA) in early 1980. The purpose of the survey was to assess water usage and treatment in coal preparation plants. See Appendix E, "Preparation Plant Questionnaire Package", to the Proposed Development Document for Coal Mining, (EPA 440/1-81/057-b).

regulation in the proposal.) The basic finding from the results of data analysis was that of an estimated 650 preparation plants operating in 1978, 42 of these were achieving zero discharge.

In most cases, enough water, in a properly designed total recycle system, leaves with the refuse and the cleaned coal such that there is no excess water to be discharged. Data obtained from the EPA sponsored preparation plant study indicated that of the total volume of process water in a closed circuit, approximately 3 percent left the system with the cleaned coal and the refuse. A significant amount of water may also be lost via evaporation and seepage from slurry treatment ponds. (Slurry treatment ponds are necessary to treat the slurry generated by cleaning the coal. The slurry is generally sent to a treatment facility, usually a pond or clarifier, where solids settle to the bottom. The decant, or solid free water, is then recycled back to the coal cleaning operations.)

This water loss must be "made-up" from sources external to the plant's recycle system. Typical sources might be a fresh water lake or creek, mine drainage, well water, or precipitation and run-off from the surrounding area. The make-up into the system usually maintains an acceptable dissolved solids level for preparation plant operation in conjunction with the water that leaves, or is "blown down", with the coal and refuse.

Some preparation plants use chemicals in the slurry treatment process prior to water recycle. This is another potential area of concern. The chemicals consist primarily of light oils and/or surfactants used in the froth flotation process, and polymers used to aid settling in the clarifiers.

If these components were allowed to build up within the system, problems could occur with the coal cleaning process and/or equipment. However, EPA believes that the chances of this occurring are minimal, for the following reasons. The oils used in the froth flotation process are generally skimmed from the surface of the clarifiers/thickeners and recycled back to the process. There should be no excess oil if the supply is replenished only as needed. Similarly, the introduction of additional polymers or other chemicals to the system is generally halted until the supply already in circulation needs replenishment. If this practice is followed, there should be sufficient control over the chemical concentration in the recycled water.

Despite the above indications that zero discharge is demonstrated,

available technology, there are some facilities where an occasional discharge from a recycle system is necessary. Commenters cited build-up of dissolved solids in the water system and other factors which can require such discharge. EPA agrees that in a total recycle system, a need may arise for a blowdown or purge to reduce the concentration of dissolved solids (TDS) in the recirculated water, in order to prevent the deposition of the solids in pipes, pumps, and other equipment. The level of dissolved solids which will interfere with coal preparation and treatment is determined by the water chemistry, (including pH) and the type of coal cleaning process.

(ii) Definition of a Coal Preparation Plant. The proposal defined a coal preparation plant as "a facility where coal is crushed, screened, sized, cleaned, dried or otherwise prepared and loaded for transit to a consuming facility". The Agency has reconsidered the applicability of this definition and has determined it to be unnecessarily inclusive of those facilities that do not have an effluent and thus do not require effluent limitations guidelines. Many plants that crush or size coal, for example, do not use water in the process and do not have a discharge. Thus, the definition has been changed to reflect only those coal preparation plants that use wet cleaning methods.

c. Final Rule. (i) Coal Preparation Plant Associated Areas. EPA is promulgating NSPS equal to BPT/BAT for coal preparation plant associated areas.

(ii) Coal Preparation Plants. Based on the above considerations, EPA is establishing NSPS for coal preparation plants at zero discharge of pollutants, with the following exception: occasional purges will be allowed when necessary to reduce the concentration of solids and/or process chemicals in the water circuit to a level which will not interfere with the preparation process. The zero discharge requirement is being promulgated for coal preparation plants because it is a demonstrated technology in this subcategory. Many existing facilities are currently practicing total recycle of preparation plant wastewaters. Further, this option is feasible for new sources at a reasonable cost, since wastewater treatment and management practices can be planned at the design stage, thereby avoiding costly retrofit. Finally, total recycle will remove considerable amounts of conventional pollutants (TSS), pollutants not regulated under BAT. Facilities using the purge allowance will be subject to alternate limitations (equal to BAT/BPT) while purging. In

order to use the purge allowance, the coal preparation plant operator must submit a written notice in advance to the permitting authority which provides anticipated purge frequency, and explains why it is necessary to purge in order to continue operations. The purge may not take place if the permitting authority disapproves. The permitting authority may also include in the permit a provision limiting the frequency of the purge.

Coal preparation plants are more precisely defined in the final rule as "a facility where coal is subjected to cleaning, concentrating, or other processing or preparation in order to separate coal from its impurities and then is loaded for transit to a consuming facility."

3. Definition of New Source. a. Proposed Regulation. EPA proposed to amend the existing first paragraph [§ 434.11(j)(1)] of the definition for "new source" coal mines. (Note: The general definition for new sources at 40 CFR 122.3 applies to coal preparation plants and associated areas at 40 CFR 122.3 and should not be confused with the definition of a new source coal mine as presented in this Part 434). EPA proposed to delete the prior reference to a Mining Safety and Health Administration (MSHA) identification number because of substantial controversy that arose over the MSHA criteria (see 46 FR 3146). Under that first paragraph, new sources would be defined as "having commenced construction after the date of NSPS proposal." The second paragraph of the definition remained unaltered from previous regulations. That portion provides that, in addition to the definition contained in the first paragraph, a new source coal mine is one which the EPA Regional Administrator determines to constitute a "major alteration." That determination would be based on, among other factors, the extraction of a coal seam not previously extracted by that mine, discharges into a drainage area not previously affected by wastewater discharges from the mine, extensive new surface disruption, and the investment of significant capital in additional equipment.

b. Response to Major Comments. Commenters argued that the itemized list of factors in the second part of the definition should be deleted, since such situations are common to every mine, whether existing or planned. They fear that potentially every existing mine could be reclassified as a new source subject to NEPA review, EIS preparation, and a resultant one-year disruption of mining activity. Several

commenters also felt that the regulation would discourage the practice of remining (the extraction of residual coal from abandoned mines) by subjecting such operations to NEPA review.

EPA believes that the determination of a "new source," must be based on all the environmental factors considered together. The purpose of these factors is to identify mining activities that may result in significant new or environmental effects.

The commenters presented no facts or case histories to support the concern that the factors listed were not appropriate. They also did not suggest any alternate language that would be useful in formulating a definition for new source coal mines.

c. Final Rule. As proposed, EPA is deleting the reference to MSHA identification numbers and replacing it by the phrase: "a new source is that which commences construction after May 29, 1982." The second paragraph of the definition is unaltered from that of the previous regulation.

Today's regulation does not affect the status as new sources of those coal mines on which construction began before May 29, 1981, and which were defined as new sources under the NSPS regulations promulgated January 12, 1979 (44 FR 2586). In other words, if a coal mine did not obtain an MSHA number before September 19, 1977, it will continue to be considered a new source, even if construction began before May 29, 1982. However, those coal mines which have not yet been issued an NPSES permit and which are defined as "new sources" under either the old or new definition, will be subject to the standards promulgated in today's regulations. Facilities may apply to have existing permits modified, pursuant to 40 CFR 122.15, to reflect today's promulgation.

E. Applicability of Regulation

1. Western Mines. a. Proposed Regulation. The prior TSS limitation under BPT regulations did not apply to Western mines in six specified states (see 40 CFR 434.32(a) (1980)). Those mines are subject to permit limitations on TSS which are generally more stringent than the effluent guidelines limitation. In addition, the prior NSPS requirements created a subcategory for "Western Coal Mines", defined as mines located west of the 100-degree meridian (40 CFR 434.60). NSPS requirements for this subcategory were reserved. Under the proposed January 1981 regulation, western mines would no longer be a separate subcategory and would not be exempt from national TSS limitations.

Recent data collected by EPA has indicated that the effluent characteristics of discharges from western mines are very similar to discharges from mines in other geographic regions.⁵

b. **Final Rule.** Today's final rule will apply to all coal mines wherever located in the United States. (It should be noted, however, that where western mines have been subject to more stringent requirements under NPDES permits, they may, under certain conditions, continue to be subject to those requirements under 40 CFR 122.62(1) and 40 CFR 123.7.) Of course, permit writers in all areas may impose more stringent limitations where necessary to meet state water quality standards or other requirements.

2. **Post Mining Discharges.** a. **Proposed Regulation.** The proposed regulation would establish effluent limitations for post-mining discharges (discharges from mining areas after active mining operations cease) for both surface and underground mines. However, these limitations would apply only until release of the performance bond required by the Surface Mining Control Reclamation Act (SMCRA).

In the proposal, EPA solicited comment on whether regulations should be applied after release of the SMCRA bond, and stated that it was conducting a data gathering effort to determine if such regulations were necessary. Most comments received were in favor of the proposal to regulate only until release of the SMCRA bond.

b. **Rationale for post-mining regulations prior to bond release.** If a surface mine is properly reclaimed, storm runoff from the inactive mining areas generally will be of acceptable quality. However, in the absence of proper reclamation, runoff from these post-mining areas can contain unacceptable levels of solids and metals, and be highly acidic. Underground mines must also be properly sealed and otherwise closed upon cessation of active mining operations or else the drainage can have degrading effects on water quality. The Office of Surface Mining (OSM) has promulgated regulations under SMCRA to control both surface coal mining and the surface effects of underground coal mining. SMCRA requires coal mines to post a bond to secure their performance with requirements of the Act. Upon cessation of active surface mining, bond will not be fully released until the

SMCRA regulatory authority is satisfied that the mine operator has successfully met all reclamation requirements and that the untreated drainage from the area meets Federal and State requirements. (See 30 CFR. Section 807.11 and 807.12). Bond liability with respect to underground mines will be released when the SMCRA regulatory authority is satisfied that reclamation of the disturbed surface area is successful, and that the underground workings have been properly sealed and closed. Id. This bonding period lasts a minimum of five years (10 years west of the 100th meridian). Until those determinations are made by SMCRA authorities, EPA believes that effluent limitations guidelines and standards are appropriate.

The parameters proposed to be regulated and their respective effluent limitations for post mining discharges from underground mines are the same as those for active mines: pH, TSS, iron, and manganese. Post-mining discharges from underground mines exhibit wastewater characteristics similar to those found in active mine drainage.⁶

The parameters proposed to be regulated for post-mining discharges from surface mines are settleable solids and pH. Their effluent limitations are 0.5 ml/l and 6-9 respectively. The reasons for regulation of these specific parameters and selection of their numerical limitations are the same as those discussed below for the storm exemption provisions because post mining discharges from surface mines are primarily a result of runoff from precipitation.

c. **Rationale for not regulating post-mining discharges after SMCRA bond release.** EPA initiated a study on post-bond release discharges to further ascertain the need for post-bond release regulations. This study was not completed because insufficient data exist to determine the need for, or support the development of, post-bond release regulations.⁷ There are not enough reclaimed mines that have obtained bond release under the current SMCRA regulations to conduct a water discharge characterization sampling program. What data EPA has reviewed does not indicate a problem warranting the promulgation of nationally applicable regulations.

⁵Frontier Technical Associates, Inc., "Inventory of Anthracite Coal Mining Operations, Wastewater Treatment and Discharges Practices," Buffalo, N.Y., June 10, 1980.

⁷See "Investigation of Post-Mining Wastewater Discharges after SMCRA Bond Release," in Appendix C of the Final Development Document for Coal Mining.

These results, coupled with the fact that the release of bond by SMCRA authorities signifies their determination that post-mining pollution problems are abated and can be reasonably expected not to occur, indicate that a need for nationally applicable regulations for discharges after bond release currently does not exist. However, any point source discharge after bond release does require a permit and will be addressed on a case-by-case basis.

d. **Final Rule.** The Agency is promulgating effluent limitations for settleable solids and pH for post-mining discharges from surface mine drainage and limitations for TSS, pH, iron, and manganese for underground mine drainage. These limitations will remain in effect until release of the performance bond by SMCRA authorities.

F. *Alternate Limitations for Precipitation Events*

1. **Proposed Regulation.** Under existing regulations prior to this rulemaking, both surface and underground coal mines are exempt from all otherwise applicable requirements if: (a) The treatment facility is designed to treat or contain the volume from a 10-year, 24-hour precipitation event⁸ and (b) there is an overflow, increase in volume of a discharge, or discharge from a bypass system as a result of precipitation. This exemption permits a discharge without regard to effluent quality if conditions (a) and (b) were satisfied.

The proposal differed from these existing regulations in that it would have added the requirement that the facility comply with a 0.5 ml/l settleable solids limitation during storms which do not exceed the 10-year, 24-hour event for discharges from active mining areas. In addition, EPA proposed that pH limitations between 6 and 9 be met at all times. In order to qualify for the alternate effluent limitations during precipitation events, the proposal retained the requirement that the treatment facility must be designed, constructed and operated to contain the disturbed area runoff from a 10-year, 24-hour storm.

The proposed alternate limitations would not apply to discharges from underground workings at underground

⁸The term "10-year, 24-hour precipitation event" means the maximum 24-hour precipitation event with a probable recurrence interval of once in ten years as defined by the National Weather Service and Technical Paper No. 40 "Rainfall Frequency Atlas of the U.S.," May 1961, or the NOAA Atlas Volumes I-XI or equivalent regional rainfall probability information developed therefrom.

⁵Effluent Guidelines Division, Environmental Protection Agency, "Comparison of Coal Mine Wastewaters from Eastern and Western Mines," Washington, D.C., January 1981.

mines, but would apply to drainage from surface areas of underground mines.

Response to Major Comments on Regulation of Settleable Solids Instead of TSS. Several commenters questioned whether any settleable solids limitation would adequately control sediment during precipitation events of any size. The concern was that a settleable solids limitation can mask levels of suspended solids as high as 2,000 mg/l.

In 1979, Skelly & Loy conducted a study for EPA to define pond performance, particularly for those storms less than the 10-year, 24-hour event.⁹ This study concluded that a number of site-specific factors make it extremely difficult to predict, on a generic basis, what TSS effluent concentrations can be expected from a sediment pond of a given size and design during precipitation events (and also during reclamation). However, the Agency undertook a one year data collection effort, completed in 1981, with industry participation under Section 308 of the Act to characterize the effluent quality during and immediately after storm events from sediment ponds receiving waters from active mines as well as reclamation areas across the country.¹⁰ This study was completed in May 1981. The 24 ponds for which data was submitted included treatment ponds sized to contain a 10-year, 24-hour storm and also those that were of smaller sizes. One of the results of this study confirmed the earlier conclusions of the Skelly & Loy study that TSS effluent concentrations vary too widely, due to site specific factors, to base a national regulation on this parameter. However, this does not preclude permit writers from establishing a TSS limitation on a case-by-case basis when such limitations are necessary to carry out the purposes of the Act.

While national TSS limitations could not be supported, EPA found that settleable solids limitations control sediment during precipitation events. Analysis of the settleable solids data base with consideration of limits of detection and precision resulted in what EPA believes to be a justifiable method to control "solids" during precipitation. Moreover, the choice of settleable solids as a control parameter during precipitation events would assure installation and operation of a technology to control solids discharge

and siltation—the primary reason for regulating such discharges.

b. *Settleable Solids Limitations.* (i) *Limit of Detection.* Several commenters pointed out that a settleable solids limitation of 0.5 ml/l is inconsistent with *Standard Methods* (14th Ed. American and Public Health Association, Washington, D.C., 1975) protocol, which provides that the detection limit for settleable solids is "about 1.0 ml/l".¹¹

EPA believes that a lower settleable solids detection limit for the coal mining industry is practical. Accordingly, EPA's Office of Water, in collaboration with EPA's Environmental Monitoring and Support Laboratory (EMSL), undertook a test program which estimated the method detection limit as part of a study to determine the precision and accuracy of measuring settleable solids below 1.0 ml/l.¹² This study was conducted on effluents from active mining area and reclamation area discharges from both eastern and western coal mines. Under this program, eight treatment ponds were sampled and analyzed for settleable solids using the *Standard Methods* protocol. Based on the results of this study, EPA has concluded that it is possible to measure settleable solids levels below 1.0 ml/l and thus, the data submitted in the self-monitoring survey provide a reasonable basis for establishing a limitation below 1.0 ml/l. Repeated determinations of the method detection limit produced estimates well below 1.0 ml/l.¹³ The average of the 8 field determinations of the method detection limit for settleable solids was 0.22 ml/l and the maximum estimated detection was 0.40 ml/l. As a result of this study, the method detection limit for settleable solids in the coal mining industry is redefined conservatively in this rulemaking at 0.4 ml/l, the maximum of the field determinations.

(ii) *0.5 ml/l Limitations.* Some commenters charged that the 0.5 ml/l settleable solids limitation was too low,

¹¹ 40 CFR 401.13 provides that "the test procedures for measurement which are prescribed at Part 136 of this chapter shall apply to expressions of pollutant amounts, characteristics or properties in effluent limitations guidelines and standards of performance and pretreatment standards as set forth at Parts 402 through 699 of this subchapter, unless otherwise specifically noted or defined in said parts." Part 136 currently refers to EPA's *Standard Method* (14th Ed., American and Public Health Association, Washington, D.C., 1975).

¹² See Appendix B, "Coal Mine Drainage Precision and Accuracy Determination for Settleable Solids at Less than 1.0 ml/l", in the Final Development Document for Coal Mining.

¹³ The detection limit was calculated according to the "Definition and Procedure for the Determination of Method Detection Limit," Rev. 1.11 Environmental Monitoring and Support Laboratory, U.S. EPA, Cincinnati, OH 45268, 21 Jan. 1981 [Ref.: Environmental Science and Technology" 15 (1981), p. 1426].

noting that some settleable solids values in EPA's data base (obtained from the industry self-monitoring survey) exceeded 0.5 ml/l.

The Agency analyzed the self-monitoring data and concluded that 0.5 ml/l is a reasonable limitation value. Of the 24 ponds that submitted responses to the survey, 17 were sized to contain the runoff from a 10-year, 24-hour storm (according to the revised definition of a "10-year, 24-hour" pond as presented in the May 26, 1981 amendment to the January 13, 1981 *Federal Register* proposal). Two of the 17 were excluded from the analysis because of design and operational problems, (see Section VII of the Final Coal Development Document) and 4 were excluded because there was no discharge reported during wet weather conditions. Two hundred and sixty-two wet weather settleable solids measurements of effluent quality were reported for the remaining 11 ponds over a one year period. 98.5% of these measurements did not exceed 0.5 ml/l. Based on a statistical analysis of this data, the Agency concluded that the 0.5 ml/l value is consistent with the 99 percent compliance criteria generally used to establish effluent limitations and thus is a reasonable limitation.

Furthermore, EPA's confidence in the 0.5 ml/l limitations is strengthened by data from smaller ponds included in the 308 self-monitoring survey. That data revealed that in addition to the performance of the 10-year, 24-hour ponds, a large portion of the effluent from smaller ponds met the 0.5 ml/l limitation as well. Indeed, when data from all 24 ponds in the survey (except the 2 with design and operational problems and the 4 without discharges) are analyzed together, 98.3% of a total of 414 measurements were less than or equal to 0.5 ml/l.

Additional consideration of the operation and design of the ponds surveyed that some of the ponds with high values may have been improperly designed or operated. The Agency believes that slight upgrading of the ponds exhibiting some large effluent values would very likely result in improved performance. Thus, on the basis of all ponds surveyed, EPA is confident that 0.5 ml/l settleable solids is an appropriate limitation for the industry.

c. *Pond Design Criteria.* Several commenters believed that either the design criteria or numerical effluent limitations, but not both, should be specified.

The treatment facility design criteria in the "storm exemption" as written in

⁹ Skelly & Loy, Engineers Consultants, "Evaluation of Performance Capability of Surface Mine Sediment Basins, Harrisburg, PA, July 1979.

¹⁰ See Appendix A, "Coal Mining Industry Self-Monitoring Program," of the Final Coal Mining Development Document.

the previously promulgated regulation and the proposed regulation to this rule, compels the construction of a particular type of treatment facility—a pond—in order to qualify for the exemption. In the absence of this design criteria, other options for treatment, such as diversion ditching or diking, may be available. These options may permit some conservation of water for other uses, particularly in arid areas. For these reasons, the Office of Surface Mining (OSM) has proposed to delete its design criteria (46 FR 34684 (July 2, 1981)).

EPA is deleting the pond design criteria also. In order to allow this flexibility, final regulations contain numerical limitations but not a pond design criteria. EPA will no longer require that a pond be sized to contain the runoff from the 10-year, 24-hour event in order for a facility to qualify for alternate limitations during precipitation events. Instead, a settleable solids and pH limitation of 0.5 ml/l and 6-9 respectively will apply as alternate limitations during precipitation events less than or equal to the 10-year, 24-hour storm event for any treatment facility. Only a pH limitation (of 6-9) will apply during precipitation events greater than a 10-year, 24-hour storm event.

d. **Applicable Time Frame for Alternate Limitations.** The alternate limitations in the proposed regulation would have been keyed to a 10-year, 24-hour event, that is a storm occurring within a 24-hour event. Comments were submitted expressing a concern over the possibility of experiencing consecutive storms over a greater than 24-hour period such that the resulting combined runoff volume exceeds that of the 10-year, 24-hour storm. Data obtained from previous studies has shown this occurrence to be very rare.¹⁴ Moreover, EPA's data base shows that treatment facilities can meet a settleable solids limitation of 0.5 ml/l even during heavy rains. However, if such consecutive rainfall events do occur over a greater than 24-hour period causing a facility to exceed its settleable solids limitation, the facility may invoke the Agency's upset or by-pass provisions. (See Section XII.)

e. **Discharges from Underground Mines.** Several commenters argued that where discharges from underground workings of underground mines are commingled with surface mine drainage, they should be subject to the "storm exemption". EPA agrees with these

commenters and has clarified the proposal accordingly.

f. **pH Limitation.** Comments were submitted that expressed concern over the potential lack of data representative of a 10-year, 24-hour precipitation event. They stated that the pH limitation for storm events greater than the 10-year, 24-hour event has no basis in EPA's proposal and should be deleted. Actually, the data were not lacking in this area. Based upon rainfall data submitted with self-monitoring and analytical results, one participant experienced a 10-year, 24-hour precipitation event and three others experienced large events virtually equivalent to the 10-year, 24-hour precipitation event and three others experienced large events virtually equivalent to the 10-year, 24-hour event, as indicated in the following table.

Mine code	10-yr, 24-hr event (inches)	Rainfall experienced (inches)
101.....	3.7	3.7
33-01.....	4.5	4.25
33-02.....	4.5	4.25
25-04.....	3.7	3.69

These results indicate that a pH within the range of 6 to 9 can, in fact, be maintained at all times. Accordingly, EPA is promulgating the pH limitations to be met at all times.

g. **Alternate Limitation Enforcement.** Comments were raised expressing general concern over the enforceability of the alternate storm limitations. The Agency intends to develop a supplemental guidance package which will provide a more detailed explanation of the meaning of the regulation and how it should be enforced. This guidance package will be distributed to Regional and State permitting authorities whereby it will be reviewed during a series of workshops.

However, the Agency expects that all coal mining facilities must maintain a good faith effort to comply with these limitations as intended. Alternate storm limitations are to apply only when "dry weather" limitations cannot be met due to a discharge resulting from a particular precipitation event.

3. **Final Rule.** EPA is promulgating alternate limitations for coal mines and coal preparation plants and associated areas. These alternate limitations limit pH at 6-9, and settleable solids at 0.5 ml/l during precipitation events less than a 10-year, 24-hour storm. pH only is limited during precipitation events equal to or greater than a 10-year, 24-hour storm. The method detection limit for settleable solids in the coal mining category is set at 0.4 ml/l. This

supersedes the detection limit for settleable solids set forth in 40 CFR Part 136.

These alternate limitations are available to any treatment facility. The permittee must show that the discharge of increase in discharge resulted from a precipitation event. For this purpose, the permittee may maintain a precipitation gage at the facility or rely on data from the nearest weather station with a precipitation gage.

The alternate limitations do not apply to discharges from underground workings at underground coal mines. The limitations will apply, though, to drainage from the surface area of underground mines. In addition, the proposal has been clarified for the final rulemaking so that the alternate limitations apply also where surface area discharges are commingled with discharges from underground workings at underground mines. Also, the alternate limitations are not available for new source preparation plants, which, subject to the purge allowance (see VI, D.2), will be required to meet zero discharge of process wastewater pollutants.

VII. Regulated Pollutants

The bases upon which the regulated pollutants were selected is presented in Section VI of the Development Document. The summary below presents the regulated pollutants for BAT, and also the new or changed standards or limitations for BPT and NSPS.

A. Amended BPT.

EPA is amending the "storm exemption" provided to BPT limitations. The design criteria (capacity to contain the discharge from a 10-year, 24-hour storm) is deleted and settleable solids and pH limitations are established for control of discharges during precipitation events of less than a 10-year, 24-hour magnitude and for reclamation areas. pH limitations are applied for precipitation events greater than or equal to that magnitude. These limitations are applicable to discharges from (1) preparation plant associated areas; (2) surface area drainage; (3) reclamation areas, and (4) underground mine drainage that is commingled with any of the first three types of discharges. **Note:** The pH and settleable solids limitations are applicable to reclamation areas during dry weather as well as wet weather conditions.

B. BAT.

The pollutants selected for control are: (1) Total iron; and (2) total manganese during dry weather flows. Settleable

¹⁴ D'Appolonia Consulting Engineers, Inc., "Evaluation of Sedimentation Pond design Relative to Capacity and Effluent Discharge", Pittsburgh, PA, 1979.

solids and pH are limited during precipitation events and for post-mining areas as described above in (A).

C. NSPS.

The pollutants selected for control during dry weather flows are: (1) Total suspended solids; (2) total iron; (3) total manganese; (4) pH. Settleable solids and pH are regulated during precipitation events and for post-mining areas as described in (A) above.

VIII. Pollutants Not Regulated.

Paragraph 8(a)(iii) of the Settlement Agreement contains provisions authorizing the exclusion from regulation, in certain instances, of toxic pollutants and industry subcategories.

The analytical results from the sampling program, summarized in the preamble to the proposed regulation, were used in making the determination of what pollutants should be excluded from regulation under the Settlement Agreement. We have made no change in the pollutants excluded since proposal. The selection criteria is also summarized in the preamble and described in more detail in the Development Document for Coal Mining. All the toxic 129 Priority Pollutants are not being regulated under BAT or NSPS in accordance with paragraph 8(a)(iii) of the Settlement Agreement. These pollutants are listed in Appendices B-H of this Notice.

IX. Costs and Economic Impacts

Executive Order 12291 requires EPA and other agencies to perform regulatory impact analyses of "major rules." Major rules are those that impose an annual cost to the economy of \$100 million or more, or meet other economic impact criteria. This proposed regulation for coal mining is not a major rule and therefore does not require a formal regulatory impact analysis. This proposed rulemaking satisfies the requirement of the Executive Order for a non-major rule.

The economic impact assessment is presented in *Economic Impact Analysis of Final Effluent Standards and Limitations for the Coal Mining Industry*, EPA 440 2-82/006. This report details the investment and annual costs for the industry as a whole and for typical plants covered by the regulation. Compliance costs are based on engineering estimates of capital requirements for the effluent control systems described earlier in this preamble. The report assesses the impact of effluent control costs in terms of price changes, production change, mine closures, employment effects, and balance of trade effects. These impacts

are discussed in the report for each of the regulatory options.

The estimated economic impact of the regulatory alternatives considered for this rulemaking were analyzed through the simulation of supply and demand in the spot and contract coal markets in 1984. Regional supplies and costs were forecast for 1984 in the steam (spot and contract) and metallurgical coal markets, incorporating differentials in coal prices due to differing production, transportation and coal utilization costs. These estimates were used in the coal market simulation model to evaluate the economic impact of the alternatives in 1984. The impact is measured as the difference in levels of production, employment, wages and investment requirements for pollution control between the base case and alternative levels of treatment. The base case incorporates the compliance costs of the BPT limitations.

No additional costs or impacts are expected due to the post-mining discharge limitations for acid and alkaline mines under the amended BPT regulations, the BAT regulations and NSPS regulations. OSM already requires that when mine drainage occurs within the bonding period at a mine it must be treated until the discharge ceases or meets the applicable State and Federal water quality requirements. (See 30 CFR 816.42 and 817.42.) Therefore, any capital and operating costs resulting from compliance with the proposed EPA regulation are already incurred as a result of compliance with OSM regulations. There will not be any incremental impact for this extended coverage.

A. BPT.

The amendments to existing BPT regulations do not generally impose additional requirements and so are not expected to generate additional compliance costs. This regulation does expand the applicability of BPT regulations to post-mining areas, but as described above, that expansion will not cause additional costs. The revised storm exemption will not require the installation of new or additional technologies, nor will the deletion of the western mine subcategory. Thus, no incremental economic impacts are projected for these amendments.

B. BAT.

The BAT limitations promulgated today for existing source mines and preparation plants and associated areas do not require any additional treatment technology beyond that already needed to meet promulgated BPT standards. Therefore, no additional costs or

impacts are expected for these existing sources.

C. NSPS.

The requirement of no discharge for new source coal preparation plants is different than that currently required for existing sources. (The limitations for associated areas are unchanged.) Incremental capital requirements and annualized costs above BPT/BAT technology for a typical new source coal preparation facility are projected to be as high as \$1.6 million and \$379 thousand respectively (1982 dollars). It is estimated that these requirements could potentially increase the cost to clean coal by 3.5 percent. The cost of the "cleaned" coal would increase by less than 1 percent. No change is expected in the demand for coal preparation as a result of the zero discharge requirement. This requirement is not expected to decrease the number of plants entering the industry in the near term.

D. Regulatory Flexibility Analysis.

Public Law 96-354 requires EPA to prepare an Initial Regulatory Flexibility Analysis for all proposed regulations that have a significant impact on a substantial number of small entities. The analysis may be conducted in conjunction with or as part of other Agency analysis. EPA has determined that this regulation will not have a significant impact on a substantial number of small entities. Therefore, a formal Regulatory Flexibility Analysis is not required.

X. Non-Water-Quality Aspects of Pollution Control.

The elimination or reduction of one form of pollution may aggravate other environmental problems. Therefore, Sections 304(b) and 306 of the Act require EPA to consider the non-water quality environmental impacts (including energy requirements) of certain regulations.

While it is difficult to balance pollution problems against each other and against energy utilization and economic constraints, EPA is promulgating regulations which it believes best serve competing national goals.

This regulation was circulated to and reviewed by EPA personnel responsible for nonwater quality environmental programs. The following are the nonwater quality environmental aspects (including energy requirements) associated with the proposed regulations.

A. Air Pollution.

Imposition of the amended BPT, BAT, and NSPS standards will not create any additional air pollution problems.

B. Solid Waste.

Some of the solid waste production associated with the coal mining industry is generated by current treatment systems installed primarily to treat wastewater. Imposition of BAT and NSPS standards will not measurably increase the solid waste production for the industry. BAT standards will add no additional solid waste since BAT limitations would be equivalent to the BPT requirement in all subcategories. The Agency is issuing BPT/BAT requirements for areas under reclamation and for sites where mining has ceased; however, sediment control for these areas is already required by other federal regulations, and thus no additional solid waste would result.

The same is true for NSPS, with the exception of the coal preparation plant subcategory. The Agency is requiring that new source preparation plants achieve zero discharge of process wastewater pollutants except for a purge allowance. The additional solid waste production associated with implementation of zero discharge would be minimal. This is demonstrated by examining concentrations of suspended solids at different points in the preparation plant treatment system. The average concentration of total suspended solids in the raw wastewater is 34,100 mg/l. BPT technology reduces this to 35 mg/l, daily maximum, or less. Therefore, the vast majority of solid waste would be generated from the BPT requirement, with relatively small additional amounts produced by the NSPS requirement.

C. Energy Requirements.

Achievement of BAT and NSPS effluent limitations will not result in a significant net increase in energy requirements because these standards are equivalent to BPT effluent limitations, with the exception of the NSPS requirement of zero discharge for coal preparation plants. The zero discharge standard may mandate installation of additional pump equipment and, in a few cases, chemical addition equipment to provide recycle water of adequate quality to be reused in the plant. However, the energy requirements of recycle pump operation, for instance, will be offset to a great extent by decreased fresh-water-make-up pump energy requirements. Thus, the incremental amount of energy associated with these techniques,

beyond the BPT or BAT requirement, is insignificant.

XI. Best Management Practices

Section 304(e) of the Clean Water Act authorizes the Administrator to prescribe "best management practices" ("BMP's") to control "plant site runoff, spillage or leaks, sludge or waste disposal, and drainage from raw material storage." However, the Administrator may prescribe BMP's only where he finds that they are needed to prevent "significant amounts" of toxic or hazardous pollutants from entering navigable waters.

In contrast to this authority, Congress, through SMCRA, directed OSM to prescribe a range of management practices for coal mines. SMCRA and OSM's implementing regulations are essentially a BMP program tailored for coal mines, reflecting Congress' awareness that a comprehensive regulatory scheme is needed to remedy the host of environmental degradations caused by past mining practices.

Therefore, it is not EPA's intention at this time to promulgate BMP's for coal mining under the Clean Water Act. Rather, it is anticipated that today's regulations governing point source discharges, coupled with OSM's program, will provide a coherent and complementary framework for the regulation of this industry. The two agencies have worked closely on this rulemaking and related rulemaking by OSM to ensure that duplication and conflict in federal regulation does not occur. If, in the future, it appears that BMP's under the Clean Water Act are necessary to supplement OSM's program, EPA will propose them as appropriate.

XII. Upset and Bypass Provisions

A recurring issue of concern has been whether industry guidelines should include provisions authorizing noncompliance with effluent limitations during periods of "upset" or "bypass." An upset, sometimes called an "excursion", is an unintentional noncompliance occurring for reasons beyond the reasonable control of the permittee. It has been argued that an upset provision is necessary in EPA's effluent limitations because such upsets will inevitably occur even in properly operated control equipment. Because technology based limitations require only what technology can achieve, it is claimed that liability for such situations is improper. When confronted with this issue, courts have disagreed on whether an explicit upset or excursion exemption is necessary, or whether upset or excursion incidents may be handled

through EPA's exercise of enforcement discretion. Compare *Marathon Oil Co. v. EPA*, 564 F.2d 1253 (9th Cir. 1977) with *Weyerhaeuser v. Costle*, *supra*, and *Corn Refiners Association, et al. v. Costle*, No. 78-1069 (8th Cir., April 2, 1979). See also *American Petroleum Institute v. EPA*, 540 R. 2d 1023 (10th Cir. 1976); *American Petroleum Institute v. EPA*, 661 F.2d 340 (5th Cir. 1981); *CPC International, Inc. v. Train*, 540 F.2d 1320 (8th Cir. 1976); and *FMC Corp. v. Train*, 539 F.2d 973 (4th Cir. 1976).

A by pass however, is an act of intentional noncompliance during which waste treatment facilities are circumvented in emergency situations. We have, in the past, included bypass provisions in NPDES permits.

EPA has determined that both upset and bypass provisions should be included in NPDES permits and have promulgated Consolidated Permit Regulations that include upset and bypass permit provisions (see 40 CFR 122.60, 45 FR 33290, May 19, 1980.) The upset provision establishes an upset as an affirmative defense to prosecution for violation of technology-based effluent limitations. The bypass provision authorizes bypassing to prevent loss of life, personal injury, or severe property damage.

The Agency has received numerous inquiries concerning the relationship between the general upset and bypass provisions set forth in the consolidated permit regulations and the storm exemption contained in the BPT/BAT and NSPS regulations for coal mining. The storm "exemption" in today's regulation provides alternate limitations during precipitation events only. Similarly, the "purge" provision in Section 434.25(b) provides alternative limitations with respect to specified discharges from coal preparation plants. The upset and bypass provisions are also available to coal mine operations.

XIII. Variances and Modifications

Upon the promulgation of this regulation, the effluent limitations for the appropriate subcategory must be applied in all Federal and State NPDES permits thereafter issued to direct dischargers in the coal mining industry.

For the BPT effluent limitations, the only exception to the binding limitations is EPA's "fundamentally different factors" variance. (See *E. I. du Pont de Nemours & Co. v. Train*, 430 U.S. 112 (1977); *Weyerhaeuser Co. v. Costle*, *supra*). This variance recognizes factors concerning a particular discharger that are fundamentally different from the factors considered in this rulemaking. Although this variance clause was set

forth in EPA's original coal mining regulations, it is now included in EPA's Consolidated Permit Regulations (40 CFR Part 125, Subpart D) and is included only by reference in the coal mining guidelines.

The BAT limitations in this regulation are also subject to EPA's "fundamentally different factors" variance. BAT limitations for nonconventional pollutants are subject to modifications under Sections 301(c) and 301(g) of the Act. These statutory modifications do not apply to toxic or conventional pollutants. According to Section 301(j)(1)(B), applications for these modifications must be filed within 270 days after promulgation of final effluent limitations guidelines. (See 43 FR 40895, September 13, 1978).

XIV. Relationship to NPDES Permits

The BAT, and NSPS limitations in this regulation will be applied to individual coal mines through NPDES permits issued by EPA or approved state agencies, under Section 402 of the Act. As discussed in the preceding section of this preamble, these limitations must be applied in all Federal and State NPDES permits except to the extent that variances and modifications are expressly authorized. Other aspects of the interaction between these limitations and NPDES permits are discussed below.

One issue that warrants consideration is the effect of this regulation on the powers of NPDES permit-issuing authorities. The promulgation of this regulation does not restrict the power of any permitting authority to act in any manner consistent with law or these or any other EPA regulations, guidelines, or policy. For example, even if this regulation does not control a particular pollutant, the permit issuer may still limit such pollutant on a case-by-case basis when limitations are necessary to carry out the purposes of the Act. In addition, to the extent that State water quality standards or other provisions of State or Federal law require limitation of pollutants not covered by this regulation (or require more stringent limitations on covered pollutants), such limitations must be applied by the permit-issuing authority.

A second topic that warrants discussion is the operation of EPA's NPDES enforcement program, many aspects of which were considered in developing this regulation. We emphasize that although the Clean Water Act is a strict liability statute, the initiation of enforcement proceedings by EPA is discretionary. We have exercised and intend to exercise that discretion in a manner that recognizes and promotes

good-faith compliance efforts and conserves enforcement resources for those who fail to make good-faith efforts to comply with the Act.

The alternate storm limitations provided in this regulation present a new enforcement concept. As discussed in Section VI. F. of this preamble, the Agency intends to develop a supplemental guidance package which will provide a more detailed explanation of the meaning of the alternate limitations and how they should be enforced. This guidance package will be sent to Regional and State permitting authorities.

XV. Public Participation

Numerous agencies and groups have participated during the development of these effluent guidelines and standards. Following the publication of the proposed rules on May 29, 1981, in the *Federal Register*, EPA provided the development document supporting the proposed rules to industry, Government agencies, and the public sector for comments. Two workshops were held on the BAT Rulemaking in August 1981 in Louisville, KY., and in Denver, CO.

All comments received have been carefully considered, and appropriate changes in the regulation have been made whenever available data and information supported those changes. Major issues raised by the comments are addressed under the relevant section within the body of this preamble. A summary of the comments received and our detailed responses to all comments are included in a report, "Responses to Public Comments, Proposed Coal Mining Effluent Guidelines and Standards," which is a part of the public record for this regulation.

XVI. Small Business Administration (SBA) Financial Assistance

The Agency is continuing to encourage small manufacturers to use Small Business Administration (SBA) financing as needed for pollution control equipment. Three basic programs are in effect: the Guaranteed Pollution Control Bond Program, the Section 503 Program, and the Regular Guarantee Program. All the SBA loan programs are only open to businesses with net assets less than \$6 million, with an average annual after-tax income of less than \$2 million, and with fewer than 250 employees.

The guaranteed pollution control bond is a full faith and credit instrument with a tax free feature, making it the most favorable of the programs. Although all 1981 funds have already been committed, the SBA is attempting to obtain additional funding for this program. The program applies to

projects that cost from \$150,000 to \$2,000,000.

The Section 503 Program, as amended in July 1980, allows for long-term loans to small and medium-sized businesses. These loans are made by SBA-approved local development companies, which for the first time are authorized to issue Government-backed debentures that are bought by the Federal Financing Bank, an arm of the U.S. Treasury.

Through SBA's Regular Guarantee Program, loans are made available by commercial banks and are guaranteed by the SBA. This program has interest rates equivalent to market rates.

For additional information on the Regular Guarantee and Section 503 Programs contact your district or local SBA Office. The coordinator at EPA headquarters is Ms. Frances Desselle who may be reached at (202) 382-5373.

For further information and specifics on the Guaranteed Pollution Control Bond Program contact: U.S. Small Business Administration, Office of Pollution Control Financing, 404 North Fairfax Drive, Rosslyn, Virginia 22203, (703) 235-2902.

The regulation was submitted to the Office of Management and Budget for review as required by Executive Order 12291.

XVII. Availability of Technical Assistance

The basis for this regulation is detailed in three major documents. Analytical methods are discussed in *Sampling and Analysis Procedures for Screening of Industrial Effluents for Priority Pollutants*, EPA's technical conclusions are detailed in *Development Document for Effluent Guidelines, New Source Performance Standards, and Pretreatment Standards for the Coal Mining Industry Point Source Category*, EPA 440/1-82/057. The Agency's economic analysis presented in *Economic Impact Analysis of Final Effluent Standards and Limitations Pollution Control Technologies for the Coal Mining Industry*, EPA 440/2-82/006. A summary of the public comments received on the proposed regulation is presented in a report "Responses to Public Comments, Proposed Coal Mining Industry Effluent Guidelines and Standards," which is part of the public record for this regulation.

XVIII. Reporting Requirements

Under the Paperwork Reduction Act of 1980, 44 U.S.C. 3501 *et seq.*, the information provisions in § 434.25(b) of this rule have been submitted to the Office of Management and Budget (OMB) for approval. They are not

effective until OMB approves them. A notice of the approval will be published in the Federal Register.

List of Subjects in 40 CFR Part 434

Mines, Water pollution control, Waste treatment and disposal.

Dated: September 30, 1982

John W. Hernandez, Jr.,
Acting Administrator.

Part 434 of Title 40 is revised to read as follows:

PART 434—COAL MINING POINT SOURCE CATEGORY; BPT, BAT, BCT LIMITATIONS AND NEW SOURCE PERFORMANCE STANDARDS

Subpart A—General Provisions

Sec.

- 434.10 Applicability.
- 434.11 General definitions.

Subpart B—Coal Preparation Plants and Coal Preparation Plant Associated Areas

- 434.20 Applicability.
- 434.21 [Reserved].
- 434.22 Effluent limitations guidelines representing the degree of effluent reduction attainable by the application of the best practicable control technology currently available [BPT].
- 434.23 Effluent limitations guidelines representing the degree of effluent reduction attainable by the application of the best available technology economically achievable [BAT].
- 434.24 Effluent limitations guidelines representing the degree of effluent reduction attainable by the application of the best conventional pollutant control technology [BCT]. [Reserved]
- 434.25 New Source Performance Standard [NSPS].

Subpart C—Acid or Ferruginous Mine Drainage

- 434.30 Applicability.
- 434.31 [Reserved].
- 434.32 Effluent limitations guidelines representing the degree of effluent reduction attainable by the application of the best practicable control technology currently available [BPT].
- 434.33 Effluent limitations guidelines representing the degree of effluent reduction attainable by the application of the best available technology economically achievable [BAT].
- 434.34 Effluent limitations guidelines representing the degree of effluent reduction attainable by the application of the best conventional pollutant control technology [BCT]. [Reserved]
- 434.35 New Source Performance Standards [NSPS].

Subpart D—Alkaline Mine Drainage

- 434.40 Applicability.
- 434.41 [Reserved].
- 434.42 Effluent limitations guidelines representing the degree of effluent reduction attainable by the application of

Sec.

- the best practicable control technology currently available (BPT).
- 434.43 Effluent limitations guidelines representing the degree of effluent reduction attainable by the application of the best available technology economically achievable (BAT).
- 434.44 Effluent limitations guidelines representing the degree of effluent reduction attainable by the application of the best conventional pollutant control technology [BCT]. [Reserved]
- 434.45 New Source Performance Standards [NSPS].

Subpart E—Post-Mining Areas

- 434.50 Applicability.
- 434.51 [Reserved].
- 434.52 Effluent limitations guidelines representing the degree of effluent reduction attainable by the application of the best practicable control technology currently available (BPT).
- 434.53 Effluent limitations guidelines representing the degree of effluent reduction attainable by the application of the best available technology economically achievable (BAT).
- 434.54 Effluent limitations guidelines representing the degree of effluent reduction attainable by the application of the best conventional pollutant control technology [BCT]. [Reserved]
- 434.55 New Source Performance Standards [NSPS].

Subpart F—Miscellaneous Provisions

- 434.60 Applicability.
- 434.61 Commingling of waste streams.
- 434.62 Alternate effluent limitations for pH.
- 434.63 Effluent limitations during precipitation events.
- 434.64 Procedure and method detection limit for measurement of settleable solids.

Authority: Sections 301, 304 (b), (c), (e), and (g), 306 (b) and (c), 307 (b) and (c), and 501 of the Clean Water Act (the Federal Water Pollution Control Act Amendments of 1972, as amended by the Clean Water Act of 1977), (the "Act"); 33 United States 1311, 1314 (b), (c), (e), and (g), 1316 (b) and (c), 1317 (b) and (c), and 1361; 86 Stat. 816, Pub. L. 92-500; 91 Stat. 1567, Pub. L. 95-217.

Subpart A—General Provisions

§ 434.10 Applicability.

This part applies to discharges from any coal mine at which the extraction of coal is taking place or is planned to be undertaken and to coal preparation plants and associated areas.

§ 434.11 General definitions.

(a) The term "acid or ferruginous mine drainage" means mine drainage which, before any treatment, either has a pH of less than 6.0 or a total iron concentration equal to or more than 10 mg/l.

(b) The term "active mining area" means the areas, on and beneath land, used or disturbed in activity related to the extraction, removal, or recovery of coal from its natural deposits. This term

excludes coal preparation plants, coal preparation plant associated areas and post-mining areas.

(c) The term "alkaline mine drainage" means mine drainage which, before any treatment, has a pH equal to or more than 6.0 and a total iron concentration of less than 10 mg/l.

(d) The term "bond release" means the time at which the appropriate regulatory authority returns a reclamation or performance bond based upon its determination that reclamation work (including, in the case of underground mines, mine sealing and abandonment procedures) has been satisfactorily completed.

(e) The term "coal preparation plant" means a facility where coal is subjected to cleaning, concentrating, or other processing or preparation in order to separate coal from its impurities and then is loaded for transit to a consuming facility.

(f) The term "coal preparation plant associated areas" means the coal preparation plant yards, immediate access roads, coal refuse piles, and coal storage piles and facilities.

(g) The term "coal preparation plant water circuit" means all pipes, channels, basins, tanks, and all other structures and equipment that convey, contain, treat, or process any water that is used in coal preparation processes within a coal preparation plant.

(h) The term "mine drainage" means any drainage, and any water pumped or siphoned, from an active mining area or a post-mining area.

(i) The abbreviation "ml/l" means milliliters per liter.

(j)(1) Subject to subparagraph (2) of this paragraph, the term "new source coal mine" means a coal mine (excluding coal preparation plants and coal preparation plant associated areas):

(i) The construction of which is commenced after May 29, 1981 (the date of publication of the proposal of these regulations); or

(ii) Which is determined by the EPA Regional Administrator to constitute a "major alteration." In making this determination, the Regional Administrator shall take into account the occurrence of one or more of the following events, in connection with the mine for which the NPDES permit is being considered, after the date of proposal of applicable new source performance standards:

(A) A mine operation initiates extraction of a coal seam not previously extracted by that mine;

(B) A mine operation discharges into a drainage area not previously affected by wastewater discharges from the mine;

(C) A mine operation causes extensive new surface disruption:

(D) A mine operation initiates construction of a new shaft, stope, or drift;

(E) A mine operation acquires additional land or mineral rights;

(F) A mine operation makes significant capital investment in additional equipment or additional facilities; and

(G) Such other factors as the Regional Administrator deems relevant.

(2) No provision in this part shall be deemed to affect the classification as a new source, pursuant to EPA's promulgation of January 13, 1981 (46 FR 3136), of a coal mine on which construction began prior to May 29, 1981.

(k) The term "post-mining area" means: (1) A reclamation area or (2) the underground workings of an underground coal mine after the extraction, removal, or recovery of coal from its natural deposit has ceased and prior to bond release.

(l) The term "reclamation area" means the surface area of a coal mine which has been returned to required contour and on which revegetation (specifically, seeding or planting) work has commenced.

(m) The term "settleable solids" is that matter measured by the volumetric method specified in § 434.64.

(n) The term "10-year, 24-hour precipitation event" means the maximum 24-hour precipitation event with a probable recurrence interval of once in ten years as defined by the National Weather Service and Technical Paper No. 40, "Rainfall Frequency Atlas of the U.S.," May 1961, or equivalent regional or rainfall probability information developed therefrom.

(o) The terms "treatment facility" and "treatment system" mean all structures which contain, convey, and as necessary, chemically or physically treat coal mine drainage, coal preparation plant process wastewater, or drainage, from coal preparation plant associated areas, which remove pollutants regulated by this part from such waters. This includes all pipes, channels, ponds, basins, tanks and all other equipment serving such structures.

Subpart B—Coal Preparation Plant and Coal Preparation Plant Associated Areas

§ 434.20 Applicability.

The provisions of this subpart are applicable to discharges from coal preparation plants and coal preparation plant associated areas, as indicated, including discharges which are pumped,

siphoned, or drained from the coal preparation plant water circuit and coal storage, refuse storage, and ancillary areas related to the cleaning or beneficiation of coal of any rank including, but not limited to, bituminous, lignite, and anthracite.

§ 434.21 [Reserved]

§ 434.22 Effluent limitations guidelines representing the degree of effluent reduction attainable by the application of the best practicable control technology currently available (BPT).

(a) Except as provided in 40 CFR 125.30–125.32, 40 CFR 401.17, and § 434.61, 434.62 and 434.63 of this part, the following limitations establish the concentration or quality of pollutants which may be discharged by any existing coal preparation plant and coal preparation plant associated areas subject to the provisions of this subpart after application of the best practicable control technology currently available if discharges from such point sources normally exhibit a pH of less than 6.0 prior to treatment:

BPT EFFLUENT LIMITATIONS

Pollutant or pollutant property	Maximum for any 1 day	Average of daily values for 30 consecutive days
Iron, total	7.0	3.5
Manganese, total	4.0	2.0
TSS	70	35
pH	(¹)	(¹)

¹ Within the range of 6.0 to 9.0 at all times.

(b) Except as provided in 40 CFR 125.30–125.32, 40 CFR 401.17 and §§ 434.61 and 434.63 of this part, the following limitations establish the concentration or quality of pollutants which may be discharged by any existing coal preparation plant and coal preparation plant associated areas subject to the provisions of this subpart after application of the best practicable control technology currently available if discharges from such point sources normally exhibit a pH equal to or greater than 6.0 prior to treatment:

BPT EFFLUENT LIMITATIONS

Pollutant or pollutant property	Maximum for any 1 day	Average of daily values for 30 consecutive days
Iron, total	7.0	3.5
TSS	70	35
pH	(¹)	(¹)

¹ Within the range of 6.0 to 9.0 at all times.

§ 434.23 Effluent limitations guidelines representing the degree of effluent reduction attainable by application of the best available technology economically achievable (BAT).

(a) Except as provided in 40 CFR 125.30–125.32, and §§ 434.61, 434.62 and 434.63 of this part, the following limitations establish the concentration or quality of pollutants which may be discharged by any existing coal preparation plant and coal preparation plant associated areas subject to the provisions of this subpart after application of the best available technology economically achievable if discharges from such point sources normally exhibit a pH of less than 6.0 prior to treatment:

BAT EFFLUENT LIMITATIONS

Pollutant or pollutant property	Maximum for any 1 day	Average of daily values for 30 consecutive days
Iron, total	7.0	3.5
Manganese, total	4.0	2.0

(b) Except as provided in 40 CFR 125.30–125.32, and §§ 434.61 and 434.63 of this part, the following limitations establish the concentration or quality of pollutants which may be discharged by any existing coal preparation plant and coal preparation plant associated areas subject to the provisions of this subpart after application of the best available technology economically achievable if discharges from such point sources normally exhibit a pH equal to or greater than 6.0 prior to treatment:

BAT EFFLUENT LIMITATIONS

Pollutant or pollutant property	Maximum for any 1 day	Average of daily values for 30 consecutive days
Iron, total	7.0	3.5

§ 434.24 [Reserved]

§ 434.25 New source performance standards (NSPS).

The following new source performance standards (NSPS) shall be achieved by any new source coal preparation plant and coal preparation plant associated areas, as indicated:

(a) Except as provided in paragraph (b) of this section, for new source coal preparation plants, there shall be no discharge of process wastewater

pollutants from the coal preparation plant water circuit to surface waters.

(b) An occasional discharge or purge of pollutants may occur when necessary to reduce the concentration of solids or process chemicals in the water circuit to a level which would not interfere with the preparation process or process equipment, provided that:

(1) Advance written notice must be submitted to the permitting authority and the permitting authority does not disapprove the discharge. Such notice shall include: (i) Description of the need for the discharge or purge; (ii) the period of discharge or purge including anticipated dates and times; (iii) an estimate of discharge volume; and (iv) the intended receiving area.

(2) The occasional purge or discharge, if discharged to waters of the United States, shall be subject to the limitations specified in § 434.23(a) if the discharge normally exhibits a pH of less than 6.0, and § 434.23(b) if the discharge normally exhibits a pH of 6.0 or greater. The operator shall have the burden of proof that the purge was necessary to reduce the concentration of solids or process chemicals in the water circuit to a level which would not interfere with the preparation process or process equipment. This paragraph shall not exempt a facility subject to this part from complying with the other effluent limitations and standards set forth in this part, as appropriate. The permitting authority may include in the permit a provision limiting the amount or frequency of the purge.

(c) Except as provided in 40 CFR 401.17 and §§ 434.61, 434.62 and 434.63 of this part, the following new source performance standards shall apply for discharges from new source coal preparation plant associated areas:

NSPS EFFLUENT LIMITATIONS

Pollutant or pollutant property	Maximum for any 1 day	Average of daily values for 30 consecutive days
Concentration in mg/l		
Iron, total	6.0	3.0
Manganese	4.0	2.0
TSS	70.0	35.0
pH		

¹ Within the range 6.0 to 9.0 at all times.

Subpart C—Acid or Ferruginous Mine Drainage

§ 434.30 **Applicability; description of the acid or ferruginous mine drainage subcategory.**

The provisions of this subpart are

applicable to acid or ferruginous mine drainage from an active mining area resulting from the mining of coal of any rank including, but not limited to, bituminous, lignite, and anthracite.

§ 434.31 [Reserved]

§ 434.32 **Effluent limitations guidelines representing the degree of effluent reduction attainable by the application of the best practicable control technology currently available (BPT).**

(a) Except as provided in 40 CFR 125.30–125.32, 40 CFR 401.17, and §§ 434.61, 434.62 and, with respect to mine drainage from surface areas of a coal mine and drainage from the underground workings of underground mines which is commingled with surface mine discharges, § 434.63 of this part, the following limitations establish the concentration or quality of pollutants which may be discharged by a point source subject to the provisions of this subpart after application of the best practicable control technology currently available:

BPT EFFLUENT LIMITATIONS

Pollutant or pollutant property	Maximum for any 1 day	Average of daily values for 30 consecutive days
Concentration in mg/l		
Iron, total	7.0	3.5
Manganese, total	4.0	2.0
TSS	70.0	35.0
pH	(¹)	(¹)

¹ Within the range 6.0 to 9.0 at all times.

§ 434.33 **Effluent limitations guidelines representing the degree of effluent reduction attainable by the application of the best available technology economically achievable (BAT).**

(a) Except as provided in 40 CFR 125.30–125.32, 40 CFR 401.17, §§ 434.61, 434.62 and, with respect to mine drainage from surface areas of a coal mine and drainage from the underground workings of underground mines which is commingled with surface mine discharges, § 434.63 of this part, the following limitations establish the concentration or quality of pollutants which may be discharged by a point source subject to the provisions of this subpart after application of the best available technology economically achievable:

BAT EFFLUENT LIMITATIONS

Pollutant or pollutant property	Maximum for any 1 day	Average of daily values for 30 consecutive days
Concentration in mg/l		
Iron, Total	7.0	3.5
Manganese total	4.0	2.0

§ 434.34 [Reserved]

§ 434.35 **New Source Performance Standards (NSPS)**

(a) Except as provided in 40 CFR 401.17 §§ 434.61, 434.62 and, with respect to mine drainage from surface areas of a coal mine and drainage from the underground workings of underground mines which is commingled with surface mine discharges, § 434.63 of this part, the following new source performance standards shall be achieved for any discharge from a new source subject to this subpart:

NSPS EFFLUENT LIMITATIONS

Pollutant or pollutant property	Maximum for any 1 day	Average of daily values for 30 consecutive days
Concentration in mg/l		
Iron, total	6.0	3.0
Manganese, total	4.0	2.0
TSS	70.0	35.0
pH	(¹)	(¹)

¹ Within the range 6.0 to 9.0 at all times.

Subpart D—Alkaline Mine Drainage

§ 434.40 **Applicability; description of the alkaline mine drainage subcategory.**

The provisions of this subpart are applicable to alkaline mine drainage from an active mining area resulting from the mining of coal of any rank including, but not limited to, bituminous, lignite, and anthracite.

§ 434.41 [Reserved]

§ 434.42 **Effluent limitations guidelines representing the degree of effluent reduction attainable by the application of the best practicable control technology currently available (BPT).**

(a) Except as provided in 40 CFR 125.30–125.32, 40 CFR 401.17, § 434.61 and, with respect to mine drainage from surface areas of a coal mine and drainage from the underground workings of underground mines which is commingled with surface mine discharges, § 434.63 of this part, the following limitations establish the concentration or quality of pollutants which may be discharged by a point

source subject to the provisions of this subpart after application of the best practicable control technology currently available:

BPT EFFLUENT LIMITATIONS

Pollutant or pollutant property	Maximum for any 1 day	Average of daily values for 30 consecutive days
Iron, total.....	7.0	3.5
TSS.....	70.	35.
pH.....	(¹)	(¹)

¹Within the range 6.0 to 9.0 at all times.

§ 434.43 Effluent limitations guidelines representing the degree of effluent reduction attainable by application of the best available technology economically achievable (BAT).

(a) Except as provided in 40 CFR 125.30-125.32, § 434.61 and, with respect to mine drainage from surface areas of a coal mine and drainage from the underground workings of underground mines which is commingled with surface mine discharges, § 434.63 of this part, the following limitations establish the concentration or quality of pollutants which may be discharged by a point source subject to the provisions of this subpart after application of the best available technology economically achievable:

BAT EFFLUENT LIMITATIONS

Pollutant or pollutant property	Maximum for any 1 day	Average of daily values for 30 consecutive days
Iron, total.....	7.0	3.5

§ 434.44 [Reserved]

§ 434.45 New source performance standards (NSPS).

(a) Except as provided in 40 CFR 401.17 and § 434.61 and, with respect to mine drainage from surface areas of a coal mine and drainage from the underground workings of underground mines which is commingled with surface mine discharges, § 434.63 of this part, the following new source performance standards shall be achieved for any discharge from a new source subject to this subpart:

NSPS EFFLUENT LIMITATIONS

Pollutant or pollutant property	Maximum for any 1 day	Average of daily values for 30 consecutive days
Iron, total.....	6.0	3.0
TSS.....	70.0	35.0
pH.....	(¹)	(¹)

¹Within the range 6.0 to 9.0 at all times.

Subpart E—Post-Mining Area

§ 434.50 Applicability: The provisions of this subpart are applicable to discharges from post-mining areas.

§ 434.51 [Reserved]

§ 434.52 Effluent limitations guidelines representing the degree of effluent reduction attainable by the application of the best practicable control technology currently available (BPT).

(a) *Reclamation Areas.* The limitations in this subparagraph apply to discharges from reclamation areas until the performance bond issued to the facility by the appropriate SMCRA authority has been released.

(1) Except as provided in 40 CFR 125.30-125.32, 40 CFR 401.17 and §§ 434.61 and 434.63(b) of this part, the following limitations establish the concentration or quality of pollutants which may be discharged by a point source subject to the provisions of this subsection after application of the best practicable control technology currently available:

BPT EFFLUENT LIMITATIONS

Pollutant or pollutant property	Maximum for any 1 day	Average of daily values for 30 consecutive days
Settleable Solids.....	0.5ml/l	(¹)
pH.....	(¹)	(¹)

¹Within the range 6.0 to 9.0 at all times.

(b) *Underground Mine Drainage.* The limitations in this subparagraph apply to discharges from the underground workings of underground mines until SMCRA bond release.

(1) Except as provided in 40 CFR 125.30-125.32, 40 CFR 401.17 and §§ 434.61 and 434.62 and, with respect to mine drainage from the underground workings of underground mines which is commingled with surface mine discharges, § 434.63 of this part, the following limitations establish the

concentration or quality of pollutants in acid or ferruginous mine drainage subject to the provisions of this subsection after application of the best practicable control technology currently available:

BPT EFFLUENT LIMITATIONS

Pollutant or pollutant property	Maximum for any 1 day	Average of daily values for 30 consecutive days
Iron, total.....	7.0	3.5
Manganese, total.....	4.0	2.0
TSS.....	70.0	35.0
pH.....	(¹)	(¹)

¹Within the range 6.0 to 9.0 at all times.

(2) Except as provided in 40 CFR 125.30-125.32, 40 CFR 401.17, § 434.61 and, with respect to mine drainage from the underground workings of underground mines which is commingled with surface mine discharges, § 434.63 of this part, the following limitations establish the concentration or quality of pollutants in alkaline mine drainage subject to the provisions of this subsection after application of the best practicable control technology currently available:

BPT EFFLUENT LIMITATIONS

Pollutant or pollutant property	Maximum for any 1 day	Average of daily values for 30 consecutive days
Iron, total.....	7.0	3.5
TSS.....	70.0	35.0
pH.....	(¹)	(¹)

¹Within the range 6.0 to 9.0 at all times.

§ 434.53 Effluent limitations guidelines representing the degree of effluent reduction attainable by application of the best available technology economically achievable (BAT).

(a) *Reclamation Areas.* The limitations of this subsection apply to discharges from reclamation areas until SMCRA bond release.

(1) Except as provided in 40 CFR 125.30-125.32, and §§ 434.61 and 434.63(b) of this part, the following limitations establish the concentration or quality of pollutants which may be discharged by a point source subject to the provisions of this subsection after application of the best available technology economically achievable:

BAT EFFLUENT LIMITATIONS

Pollutant or pollutant property	Maximum for any 1 day	Average of daily values for 30 consecutive days
Settleable Solids.....	0.5 (ml/l)	

(b) *Underground Mine Drainage.* The limitations in this subsection apply to discharges from the underground workings of underground mines until SMCRA bond release.

(1) Except as provided in 40 CFR 125.30-125.32, and §§ 434.61, 434.62, and, with respect to mine drainage from the underground workings of underground mines which is commingled with surface mine discharges, § 434.63 of this part, the following limitations establish the concentration or quality of pollutants in acid or ferruginous mine drainage subject to the provisions of this subsection after application of the best available technology economically achievable:

BAT EFFLUENT LIMITATIONS

Pollutant or pollutant property	Maximum for any 1 day	Average of daily values for 30 consecutive days
Concentration in mg/l		
Iron, total.....	7.0	3.5
Manganese, total.....	4.0	2.0

(2) Except as provided in 40 CFR 125.30-125.32, and § 434.61, and, with respect to mine drainage from the underground workings of underground mines which is commingled with surface mine discharges, § 434.63 of this part, the following limitations establish the concentration or quality of pollutants in alkaline mine drainage subject to the provisions of this subsection after application of the best available technology economically achievable:

BAT Effluent Limitations

Pollutant or pollutant property	Maximum for any 1 day	Average of daily values for 30 consecutive days
Concentration in mg/l		
Iron, total.....	7.0	3.5

§ 434.54 [Reserved]

§ 434.55 New source performance standards (NSPS).

The following new source performance standards shall apply to the post-mining areas of all new source coal mines:

(a) *Reclamation Areas.* The standards of this subparagraph apply to discharges from reclamation areas at new source coal mines until SMCRA bond release.

(1) Except as provided in 40 CFR 401.17 and §§ 434.61 and 434.63(b) of this part, the following new source performance standards shall be achieved for a discharge subject to the provisions of this subparagraph:

NSPS Effluent Limitations

Pollutant or pollutant property	Maximum for any 1 day	Average of daily values for 30 consecutive days
Settleable Solids.....	0.5 ml/l	
pH.....	(¹)	

¹ Within the range of 6.0 to 9.0 at all times.

(b) *Underground Mine Drainage.* The standards in this subsection apply to discharges from the underground workings of new source underground mines until bond release.

(1) Except as provided in 40 CFR 401.17 and §§ 434.61, 434.62, and, with respect to mine drainage from the underground workings of underground mines which is commingled with surface mine discharges, § 434.63 of this part, the following new source performance standards shall be achieved for the discharge of any acid or ferruginous mine drainage subject to this subparagraph:

NSPS Effluent Limitations

Pollutant or pollutant property	Maximum for any 1 day	Average of daily values for 30 consecutive days
Concentration in mg/l		
Iron, total.....	6.0	3.0
Manganese, total.....	4.0	2.0
TSS.....	70.0	35.0
pH.....	(¹)	(¹)

¹ Within the range 6.0 to 9.0 at all times.

(2) Except as provided in 40 CFR 401.17, § 434.61, and, with respect to mine drainage from the underground workings of underground mines which is commingled with surface mine discharges, § 434.63 of this part, the following new source performance standards shall be achieved for the discharge of any alkaline mine drainage subject to this subparagraph:

NSPS Effluent Limitations

Pollutant or pollutant property	Maximum for any 1 day	Average of daily values for 30 consecutive days
Concentration in mg/l		
Iron, total.....	6.0	3.0

NSPS Effluent Limitations—Continued

Pollutant or pollutant property	Maximum for any 1 day	Average of daily values for 30 consecutive days
TSS.....	70.0	35.0
pH.....	(¹)	(¹)

¹ Within the range 6.0 to 9.0 at all times.

Subpart F—Miscellaneous Provisions

§ 434.60 Applicability.

The provisions of this Subpart apply to this part as specified in Subparts B, C, D, and E.

§ 434.61 Commingling of waste streams.

Where waste streams from any facility covered by this Part are combined for treatment or discharge with waste streams from another facility covered by this Part, the concentration of each pollutant in the combined discharge may not exceed the most stringent limitations for that pollutant applicable to any component waste stream of the discharge.

§ 434.62 Alternate effluent limitation for pH.

Where the application of neutralization and sedimentation treatment technology results in inability to comply with the otherwise applicable manganese limitations, the permit issuer may allow the pH level in the final effluent to exceed 9.0 to a small extent in order that the manganese limitations can be achieved.

§ 434.63 Effluent limitations for precipitation events.

(a) Any discharge or increase in the volume of a discharge caused by precipitation within any 24 hour period less than or equal to the 10-year, 24-hour precipitation event (or snowmelt of equivalent volume) may comply with the following limitations instead of the otherwise applicable limitations:

EFFLUENT LIMITATIONS DURING PRECIPITATION

Pollutant or pollutant property	Maximum for any 1 day (ml/l)	Average of daily values for 30 consecutive days
Settleable Solids.....	0.5	
pH.....	(¹)	(¹)

¹ Within the range of 6.0 to 9.0 at all times.

(b) Any discharge or increase in volume of a discharge caused by precipitation within any 24 hour period greater than the 10-year, 24-hour precipitation event (or series of storms of snowmelt of equivalent volume) may comply with the following limitations:

instead of the otherwise applicable limitations:

EFFLUENT LIMITATIONS DURING PRECIPITATION

Pollutant or pollutant property	Maximum for any 1 day	Average of daily values for 30 consecutive days
pH	(¹)	(¹)

¹ Within the range of 8.0 to 9.0 at all times.

(c) The operator shall have the burden of proof that the discharge or increase in discharge was caused by the applicable precipitation event described in paragraph (a) and (b) of this section.

§ 434.64 Determination of settleable solids.

For the purposes of this part, the following procedure shall be used to determine settleable solids:

(a) Fill an Imhoff cone to the one-liter mark with a thoroughly mixed sample. Allow to settle undisturbed for 45 minutes. Gently stir along the inside surface of the cone with a stirring rod. Allow to settle undisturbed for 15 minutes longer. Record the volume of settled material in the cone as milliliters per liter. Where a separation of settleable and floating materials occurs, do not include the floating material in the reading.

(b) Notwithstanding any provision of 40 CFR Part 136, the method detection limit for measuring settleable solids under this part shall be 0.4 ml/l.

Appendixes

Note.—These appendixes will not appear in the CFR.

Appendix A—Abbreviations, Acronyms and Units Used in This Notice

- Act—The Clean Water Act.
 Agency—The United States Environmental Protection Agency.
 BADT—Best Available Demonstrated Technology under Sections 304(c) and 306 of the Act.
 BAT (BAT)—The Best Available Technology Economically Achievable, under Section 304(b)(2)(B) of the Act.
 BCT (BCT)—The Best Conventional Pollutant Control Technology, under Section 304(b)(4) of the Act.
 BMP—Best Management Practices under Section 304(e) of the Act.
 BOD—Biochemical Oxygen Demand.
 BPT (BPTA)—The Best Practicable Control Technology Currently Available under Section 304(b)(1) of the Act.
 CWA—The Federal Water Pollution Control Act Amendments of 1972 (33 U.S.C. 1251 et seq.), as amended by the Clean Water Act of 1977 (Pub. L. 95-217).
 FWPCA—Federal Water Pollution Control Act.
 NPDES Permit—A National Pollutant Discharge Elimination System permit issued under Section 402 of the Act.
 NSPS—New Source Performance Standards under Section 306 of the Act.

OSM—Department of Interior, Office of Surface Mining Reclamation and Enforcement.

POTW—Publicly Owned Treatment Works.

PSES—Pretreatment Standards for Existing Sources of indirect discharges, under Section 307(b) of the Clean Water Act.

PSNS—Pretreatment Standards for New Sources of indirect discharges, under Section 307 (b) and (c) of the Clean Water Act.

RCRA—Resource Conservation and Recovery Act (Pub. L. 94-580) of 1976, Amendments to Solid Waste Disposal Act.

SMCRA—Surface Mining Control and Reclamation Act of 1977 (Pub. L. 95-87, 30 U.S.C. 1201 et seq.).

SS—Settleable Solids.

TSS—Total Suspended Solids.

UNITS g/kg—gram(s) per kilogram; gps—gallons per day; mgd—million gallons per day; mg/l—milligram(s) per liter; ug/l microgram(s) per liter; ml/l—milliliter(s) per liter.

Appendix B—Priority Organics Not Detected in Treated Effluents of Screening and Verification Samples

1. acenaphthene
2. acrolein
3. acrylonitrile
4. benzidine
5. carbon tetrachloride (tetrachloromethane)
6. chlorobenzene
7. 1,2,4-trichlorobenzene
8. hexachlorobenzene
9. 1,1-dichloroethane
10. 1,1,2-trichloroethane
11. chloroethane
12. bis(chloromethyl) ether
13. bis(2-chloroethyl) ether
14. 2-chloroethyl vinyl ether (mixed)
15. 2-chloronaphthalene
16. 2,4,6-trichlorophenol
17. parachlorometa cresol
18. 2-chlorophenol
19. 1,3-dichlorobenzene
20. 2,4-dichlorophenol
21. 1,2-dichloropropane
22. 1,2-dichloropropylene (1,3-dichloropropene)
23. 2,4-dimethylphenol
24. 2,4-dinitrotoluene
25. 2,6-dinitrotoluene
26. 1,2-diphenylhydrazine
27. bis(2-chloroisopropyl) ether
28. 4-chlorophenyl phenyl ether
29. 4-bromophenyl phenyl ether
30. methyl chloride (chloromethane)
31. methyl bromide (bromomethane)
32. bromoform (tribromomethane)
33. dichlorobromomethane
34. dichlorodifluoromethane
35. chlorodibromomethane
36. hexachlorobutadiene
37. hexachlorocyclopentadiene
38. isophorone
39. nitrobenzene
40. 2-nitrophenol
41. 4-nitrophenol
42. dimethyl phthalate
43. N-nitrosodimethylamine
44. N-nitrosodiphenylamine
45. N-nitrosodi-n-propylamine
46. benzo(a)pyrene
47. 3,4-benzofluoranthene

48. benzo(k)fluoranthene(11, 12-benzofluoranthene)
49. acenaphthylene
50. vinyl chloride (chloroethylene)
51. dieldrin
52. chlordane (technical mixture and metabolites)
53. 4,4'-DDE (p,p-DDX)
54. a-endosulfan-Alpha
55. b-endosulfan-Beta
56. endosulfan sulfate
57. endrin
58. endrin aldehyde
59. PCB 1242 (Arochlor 1242)
60. PCB 1254 (Arochlor 1254)
61. PCB 1221 (Arochlor 1221)
62. PCB 1232 (Arochlor 1232)
63. PCB 1248 (Arochlor 1248)
64. PCB 1260 (Arochlor 1260)
65. PCB 1016 (Arochlor 1016)
66. toxaphene
67. 2,3,7,8-tetrachlorodibenzo-p-dioxin (TCDD)

Appendix C—Priority Organics Detected in Treated Effluents at One or Two Mines Always at Levels Below 10 ug/l

1. 1,2-dichloroethane
2. hexachloroethane
3. 1,1,2,2-tetrachloroethane
4. 1,4-dichlorobenzene
5. 3,3'-dichlorobenzidine
6. fluoranthene
7. bis(2-chloroethoxy) methane
8. 2,4-dinitrophenol
9. 4,6-dinitro-o-cresol
10. pentachlorophenol
11. di-n-octyl phthalate
12. benzo(a)anthracene
13. chrysene
14. anthracene
15. fluorene
16. phenanthrene
17. pyrene
18. benzo(g,h,i)perylene
19. aldrin
20. 4,4'-DDT
21. 4,4'-DDD
22. heptachlor
23. heptachlor epoxide

Appendix D—Priority Organics Detected But Present Due to Contamination of Screening and Verification Samples by Sources Other Than Those Sampled

1. benzene
2. chloroform
3. methylene chloride
4. phenol
5. bis(2-ethylhexyl) phthalate
6. butyl benzyl phthalate
7. di-n-butyl phthalate
8. diethyl phthalate
9. toluene
10. tetrachloroethylene

Appendix E—Priority Organics Detected But Present in Amounts Too Small To Be Effectively Reduced

1. 1,1,1-trichloroethane
2. 1,1-dichloroethylene
3. 1,2-trans-dichloroethylene
4. ethylbenzene
5. trichlorofluoromethane
6. trichloroethylene
7. 1,2-dichlorobenzene

8. naphthalene
9. dibenzo(a,h)anthracene
10. indeno(1,2,3-c,d)pyrene
11. BHC-Alpha
12. BHC-Beta
13. BHC-Gamma
14. BHC-Delta

Appendix F—Priority Metals Detected But At Levels Too Small To Be Effectively Reduced

1. antimony
2. beryllium
3. cadmium

4. silver
5. thallium

Appendix G—Priority Metals Detected But Effectively Controlled By BPT Technology

1. arsenic
2. chromium
3. copper
4. lead
5. mercury
6. nickel
7. selenium
8. zinc

Appendix H—Other Priority Pollutants Excluded

1. Cyanide—detected in six treated effluents, although at or below accepted levels of analytical precision.

2. Chrysotile asbestos—detected at levels where the analytical method used to measure asbestos is imprecise. The Agency will re-examine, if necessary, levels of chrysotile asbestos when the method is refined.

[FR Doc. 82-27770 Filed 10-12-82; 8:45 am]

BILLING CODE 8560-50-M

evaluate the proposed dumping in accordance with those criteria. In either case, EPA has the right to disapprove the actual dumping, if it determines that environmental concerns under the Act have not been met.

The State of Florida has determined that this site designation is consistent to the maximum extent practicable with the State's coastal zone management plan. For any comments by the State of Florida on the DEIS, interested persons should consult the public record, which may be found at the two locations identified in the beginning of this rulemaking.

Under the Regulatory Flexibility Act, EPA is required to perform a Regulatory Flexibility Analysis for all rules which may have a significant impact on a substantial number of small entities. EPA has determined that this action will not have a significant impact on small entities. The site designation will only have the effect of providing a disposal site for dredged material. Consequently, this action does not necessitate preparation of a Regulatory Flexibility Analysis.

Under Executive Order 12291, EPA must judge whether a regulation is "major" and therefore subject to the requirement of a Regulatory Impact Analysis. This action will not result in an annual effect on the economy of \$100 million or more, or cause any of the other effects which would result in its being classified by the Executive Order as a "major" rule. Consequently, this action does not necessitate preparation of a Regulatory Impact Analysis.

This rule was submitted to the Office of Management and Budget for review as required by Executive Order 12291. This rule does not contain any information collection requirements subject to OMB review under the Paperwork Reduction Act of 1980, 44 U.S.C. 3501 et seq.

List of Subjects in 40 CFR Part 228

Water pollution control.

Authority: 33 U.S.C. 1412 and 1418.

Dated: October 27, 1983.

Rebecca W. Hanmer,

Acting Assistant Administrator for Water

PART 228—[AMENDED]

In consideration of the foregoing, Subchapter H of Chapter I of Title 40 is amended by adding paragraph (b)(14) to § 228.12 as follows:

§ 228.12 Delegation of management authority for ocean disposal sites.

(b) * * *

(14) Tampa Harbor Site 4—Region IV.

Location: 27°32'27"N., 83°03'46"W.; 27°30'27"N., 83°03'46"W.; 27°30'27"N., 83°06'02"W.; 27°32'27"N., 83°06'02"W.

Size: 4 nautical square miles.

Depth: Ranges from 21.8 to 24.1 meters.

Primary Use: Dredged material.

Period of Use: Three years.

Restrictions: Disposal shall be limited to dredged material from the Tampa Harbor Project.

[FR Doc. 83-29719 Filed 11-1-83; 8:45 am]

BILLING CODE 6560-50-M

40 CFR Part 434

[WH-FRL 2461-5]

Coal Mining Point Source Category; Effluent Limitations Guidelines and New Source Performance Standards

AGENCY: Environmental Protection Agency.

ACTION: Corrections to the final rule.

SUMMARY: On October 13, 1982 EPA promulgated effluent limitations guidelines and standards under the Clean Water Act for the Coal Mining Industrial Category (47 FR 45382). This notice makes various corrections to that final rulemaking which involve typographical, spelling, and wording errors.

FOR FURTHER INFORMATION CONTACT: Ms. Allison Phillips at the Environmental Protection Agency at (202) 382-7167.

SUPPLEMENTARY INFORMATION:

I. Corrections to the October 13, 1982 Rulemaking

Corrections are as follows:

1. On page 45382, column 1, second line of summary; "navigable" is deleted.
2. On page 45382, column 2, line 9 from the bottom; "Regulations" is replaced by "Discharges".
3. On page 45382, column 3, line 3 from the bottom; "to" is replaced by "is".
4. On page 45382, column 2, 16th line from the top; "487-6000" is replaced by "487-4600".
5. On page 45383, column 1, line 29 from the bottom; "(BMOs)" is replaced by "(BMPs)".
6. On page 45384, column 2, line 9 from the top; ")" is added after the word "required".

7. On page 45384, column 2, line 15 from the bottom; "This" is replaced by "These".

8. On page 45385, column 1, line 18 from the bottom; "metal" is replaced by "metals".

9. On page 45385, column 3, line 29 from the top; the comma after "system" is replaced by a period.

10. On page 45386, column 3, line 29 from the bottom; "May 29, 1982" is replaced by "May 29, 1981".

11. On page 45388, column 1, line 30 from the top; "for discharges" is added between "events" and "from".

12. On page 45388, column 2, line 8 from the top; "and" is deleted.

13. On page 45388, column 2, line 10 from the top of footnote 11; "and" is deleted.

14. On page 45388, column 3, line 28 from the top; "this" is replaced by "these".

15. On page 45388, column 3, line 18 from the bottom; "suggests" is added between "surveyed" and "that".

16. On page 45389, column 1, line 19 from the bottom (not including footnote); "has" is replaced by "have".

17. On page 45389, column 2, line 21 from the bottom; "workshops" is replaced by "workshops".

18. On page 45389, column 2, line 19 from the top; a comma is inserted after "event" and the words "and three others" is deleted. Lines 20 and 21 from the top are also deleted.

19. On page 45389, column 3, line 7 from the top; "of" is replaced by "or".

20. Page 45390, column 1, line 13 from the bottom; "EPA 440 2-82/006" is replaced by "EPA 440/2-82/006".

21. Page 45390, column 2, line 5 from the top; "were" is replaced by "was".

22. Page 45390, column 3, line 31 from the bottom; "analysis" is replaced by "analyses".

23. Page 45391, column 3, line 8 from the top; "540 R." is replaced by "540 F."

24. Page 45393, column 1, line 29 from the bottom; "Standard" is replaced by "Standards" in the entry for § 434.25 in the table of contents for Part 434.

25. Page 45393, column 2, line 9 from the top; "43.44" is replaced by "434.44" in the table of contents for Part 434.

26. Page 45394, column 1, line 4 from the top; "slope" is replaced by "slope" in § 434.11(j)(1)(ii)(D).

27. Page 45394, column 2, line 16 from the top; "S" is added to the beginning of the line in § 434.22(a).

28. Page 45395, column 1, line 10 from the bottom (not including table);

"sources" is replaced by "source" in § 434.25(c).

29. Page 45395, column 1, table at bottom in § 434.25(c): "{" around the "1's" in the "pH row is added.

30. Page 45396, column 1, table at top of § 434.42(a); the numbers in the TSS column are changed to read "70.0" and "35.0" instead of "70." and "35."

31. Page 45396, column 1, table at bottom in § 434.43(a); the vertical lines similar to those shown in the table at the top of the column are added.

32. Page 45396, column 2, tables at top and bottom of column in §§ 434.45(a) and 434.52(a)(1); the vertical lines similar to those shown in the table at the top of column 1 are added.

33. Page 45397, column 3, line 2 from the bottom; "of" is replaced by "or" in § 434.63(b).

34. Page 45397, column 3, line 3 from the bottom in § 434.63(b); "or series of storms" is deleted.

35. Page 45398, column 1, line 34 from the bottom; "Appendixes" is replaced by "Appendices".

36. Page 45398, column 1, line 23 from the bottom; "[BAT]" is deleted.

37. Page 45398, column 1, line 20 from the bottom; "[BCT]" is deleted.

38. Page 45398, column 2, line 20 from the top; "gps" is replaced by "gpd".

Date: October 24, 1983.

Rebecca W. Hanmer,

Acting Assistant Administrator for Water.

[FR Doc. 83-29575 Filed 10-31-83; 8:45 am]

BILLING CODE 6560-50-M

40 CFR Part 439

[WH-FRL 2443-21]

Pharmaceutical Manufacturing Point Source Category Effluent Limitations Guidelines, Pretreatment Standards, and New Source Performance Standards

Correction

In FR Doc. 83-28778, beginning on page 49808, in the issue of Thursday, October 27, 1983, make the following corrections:

1. On page 49821, in the third column, the first section heading in the table of contents now reading "439 Applicability," should read "439.0 Applicability."

2. On page 49822, in the second column, the section heading now reading "§ 439 Applicability," should read "§ 439.0 Applicability."

BILLING CODE 1505-01-M

DEPARTMENT OF THE INTERIOR Bureau of Land Management

43 CFR Public Land Order 6477

[F-81398]

Alaska; Partial Revocation; Opening of Lands Withdrawn by Public Land Order Nos. 399, 5170, 5179, 5180, and 5184, as Amended

Correction

In FR Doc. 83-27140 beginning on page 45395 of the issue of Wednesday, October 5, 1983, make the following corrections:

1. On page 45396, first column, "T. 21 N., R. 8 W.," should read "T. 26 N., R. 8 W."

2. On page 45397, middle column, in "T. 6 S., R. 9 W.," the third line should read "Sec. 6, W½NE¼, W½, and W½SE¼."

3. On page 45398, middle column, "R. 6 S., R. 16 W.," the first "R" should be changed to "T".

4. On page 45399, first column, in "T. 4 S., R. 24 W.," the fifth line; "S½SW¼," should be added before the "and".

5. On the same page, second column, in "T. 4 S., R. 28 W.," the fifth line, "SW" should read "SE".

6. On the same page, third column, in "T. 6 S., R. 21 W.," fourth line, "NW" should read "NE".

7. On the same page, same column, in "T. 4 S., R. 23 W.," the figure "23" should read "24".

BILLING CODE 1505-01-M

FEDERAL COMMUNICATIONS COMMISSION

47 CFR PARTS 2, 21, 74 and 94

[Gen. Docket No. 79-188; RM-3247; RM-3497; FCC 83-392]

Use of Radio in Digital Termination Systems and in Point-to-Point Microwave Radio Systems for Provision of Digital Electronic Message and Other Specific Services

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: The Commission expands the eligibility for access to the 10.6 GHz DTS band to accommodate private licensees. This action is taken to allocate a portion of the 18 GHz band for use by digital termination systems (DTS) in the Common Carrier and Private Operational-Fixed Microwave services. Further, another portion of the 18 GHz band is rechannelized to accommodate stations more efficiently

in the Broadcast, Common Carrier, and Private Radio Services. This action is in response to a Further Notice of Proposed Rule Making in this proceeding.

EFFECTIVE DATE: December 1, 1983.

FOR FURTHER INFORMATION CONTACT: Mr. Melvin Murray, Office of Science and Technology, 2025 "M" Street, NW., Washington, D.C. 20554. (202) 653-8168.

List of Subjects

47 CFR Part 2

Frequency allocations, Radio.

47 CFR Part 21

Communications common carriers, Point-to-point microwave.

47 CFR Part 74

Communications equipment, Radio.

47 CFR Part 94

Radio.

Second Report and Order

In the matter of amendment of Parts 2, 21, 74 and 94 of the Commission's rules to allocate spectrum at 18 GHz for, and to establish other rules and policies pertaining to, the use of radio in Digital Termination Systems and in Point-to-Point Microwave Radio Systems of the provision of Digital Electronic Message Services, and for other Common Carrier, Private Radio, and Broadcast Auxiliary Services; and to establish rules and policies for the private radio use of Digital Termination Systems at 10.6 GHz. (General Docket No. 79-188, RM-3247, RM-3497, FCC 83-392).

Adopted: September 9, 1983.

Released: September 30, 1983.

By the Commission.

Introduction

1. On August 4, 1981, the Commission adopted a *Further Notice of Proposed Rulemaking* which proposes the allocation of spectrum at 18 GHz (specifically 18.38-19.04 GHz) for use by Digital Termination Systems (DTS) and by Point-to-Point Microwave Radio Systems.¹ This proposal was made in addition to the allocation at 10.6 GHz previously adopted.² Moreover, whereas that Order provided only for the licensing of DTS facilities and related internodal links under common carrier rules, the *Further Notice* proposed rules to make the frequencies at 10.6 and 18 GHz also available to private radio applicants.

¹ *Further Notice of Proposed Rulemaking* in Gen. Docket No. 79-188, 46 FR 45635 (September 14, 1981).

² *First Report and Order* in Gen. Docket No. 79-188, 46 FR 23428 (April 27, 1981); 66 FCC 2d 360 (1981). Also, *Memorandum Opinion and Order*, 90 FCC 2d 319 (1982).

APPENDIX B

**ENVIRONMENTAL PROTECTION AGENCY REGULATIONS
ON CRITERIA AND STANDARDS FOR THE NATIONAL POLLUTANT
DISCHARGE ELIMINATION SYSTEM**

(40 CFR 125; 38 FR 13527, May 22, 1973 As amended by Code of Federal Regulations, Volume 40, Revised as of July 1, 1982; 47 FR 52304, November 19, 1982; 47 FR 53675, November 26, 1982; 48 FR 14153, April 1, 1983; 48 FR 31404, July 8, 1983)

[*Editor's note:* In a notice published at 44 FR 47063, August 10, 1979, EPA deferred the effective date of the best management practices requirements (Subpart K) that were to be effective August 13. The requirements will become effective 60 days after EPA publishes notice that relevant technical information is available.]

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

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

- Sec.
125.1 Purpose and scope.
125.2 Definitions.
125.3 Technology-based treatment requirements in permits.

Subpart B—Criteria for Issuance of Permits to Aquaculture Projects

- 125.10 Purpose and scope.
125.11 Criteria.

Subpart C—Criteria for Extending Compliance Dates for Facilities Installing Innovative Technology Under Section 301(k) of the Act [Reserved]

Subpart D—Criteria and Standards for Determining Fundamentally Different Factors Under Sections 301(b)(1)(A), 301(b)(2)(A) and (E) of the Act

- 125.30 Purpose and scope.
125.31 Criteria.
125.32 Method of application.

Subpart E—Criteria for Granting Economic Variances From Best Available Technology Economically Achievable Under Section 301(c) of the Act [Reserved]

Subpart F—Criteria for Granting Water Quality Related Variances Under Section 301(g) of the Act [Reserved]

Subpart G—Criteria for Modifying the Secondary Treatment Requirements Under Section 301(h) of the Clean Water Act

- Sec.
125.56 Scope and purpose.
125.57 Law governing issuance of a section 301(h) modified permit.
125.58 Definitions.
125.59 General.
125.60 Existence of and compliance with applicable water quality standards.
125.61 Attainment or maintenance of water quality which assures protection of public water supplies, the protection and propagation of a balanced, indigenous population of

shellfish, fish, and wildlife, and allows recreational activities.

125.62 Establishment of a monitoring program.

125.63 Effect of discharge on other point and nonpoint sources.

125.64 Toxics control program.

125.65 Increase in effluent volume or amount of pollutants discharged.

125.66 [Reserved]

125.67 Special conditions for section 301(h) modified permits.

Appendix A—Small Applicant Questionnaire for Modification of Secondary Treatment Requirements

Appendix B—Large Applicant Questionnaire for Modification of Secondary Treatment Requirements

Subpart H—Criteria for Determining Alternative Effluent Limitations Under Section 316(a) of the Act.

- 125.70 Purpose and scope.
125.71 Definitions.
125.72 Early screening of applications for section 316(a) variances.
125.73 Criteria and standards for the determination of alternative effluent limitations under section 316(a).

Subpart I—Criteria Applicable To Cooling Water Intake Structures Under Section 316(h) of the Act [Reserved]

Subpart J—Criteria for Extending Compliance Dates Under Section 301(i) of the Act

- 125.90 Purpose and scope.
 125.91 Definition.
 125.92 Requests for permit modification and issuance under section 301(i)(1) of the Act.
 125.93 Criteria for permit modification and issuance under section 301(i)(1) of the Act.
 125.94 Permit terms and conditions under section 301(i)(1) of the Act.
 125.95 Requests for permit modification or issuance under section 301(i)(2) of the Act.
 125.96 Criteria for permit modification or issuance under section 301(i)(2) of the Act.
 125.97 Permit terms and conditions under section 301(i)(2) of the Act.

Subpart K—Criteria and Standards for Best Management Practices Under Section 304(e) of the Act

- 125.100 Purpose and scope.
 125.101 Definition.
 125.102 Applicability of best management practices.
 125.103 Permit terms and conditions.
 125.104 Best management practices programs.

Subpart L—Criteria and Standards for Imposing Conditions for the Disposal of Sewage Sludge Under Section 405 of the Act [Reserved]

Subpart M—Ocean Dumping Criteria Under Section 403 of the Act

- Sec.
 125.120 Scope and purpose.
 125.121 Definitions.
 125.122 Determination of unreasonable degradation of the marine environment.
 125.123 Permit requirements.
 125.124 Information required to be submitted by applicant.

Authority: Clean Water Act, as amended by the Clean Water Act of 1977, 33 U.S.C. 1251 et seq.

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

§ 125.1 Purpose and scope.

This Subpart establishes criteria and standards for the imposition of technology-based treatment requirements in permits under section 301(b) of the Act, including the application of EPA promulgated effluent limitations and case-by-case determinations of effluent limitations under section 402(a)(1) of the Act.

§ 125.2 Definitions.

For the purposes of this Part, any reference to "the Act" shall mean the Clean Water Act of 1977 (CWA). Unless otherwise noted, the definitions in Parts 122, 123 and 124 apply to this Part.

§ 125.3 Technology-based treatment requirements in permits.

(a) *General.* Technology-based treatment requirements under section 301(b) of the Act represent the minimum level of control that must be imposed in a permit issued under section 402 of the Act. (See §§122.41, 122.42 and 122.44 for a discussion of additional or more stringent effluent limitations and conditions.) Permits shall contain the following technology-based treatment requirements in accordance with the following statutory deadlines: [125.3(a) amended by 48 FR 14153, April 1, 1983]

(1) For POTW's, effluent limitations based upon:

- (i) Secondary treatment—from date of permit issuance; and
 (ii) The best practicable waste treatment technology—not later than July 1, 1983; and

(2) For dischargers other than POTW's except as provided in §122.29(d), effluent limitations requiring: [125.3(a)(2) amended by 48 FR 14153, April 1, 1983]

(i) The best practicable control technology currently available (BPT)—from date of permit issuance;

(ii) For conventional pollutants, the best conventional pollutant control technology (BCT)—not later than July 1, 1984;

(iii) For all toxic pollutants referred to in Committee Print No. 95-30, House Committee on Public Works and Transportation, the best available technology economically achievable (BAT) — not later than July 1, 1984;

(iv) For all toxic pollutants other than those listed in Committee Print No. 95-30, effluent limitations based on the BAT not later than three years after the date such effluent limitations are incorporated into an NPDES permit; and

(v) For all pollutants which are neither toxic nor conventional pollutants, effluent limitations based on BAT not later than three years after the date such effluent limitations are incorporated into an NPDES permit, or July 1, 1984, whichever is later, but in no case later than July 1, 1987.

(b) *Statutory variances and extensions.* (1) The following variances from technology-based treatment requirements are authorized by the Act and may be applied for under §122.21; [125.3(b)(1) amended by 48 FR 14153, April 1, 1983]

(i) For POTW's, a section 301(h) marine discharge variance from secondary treatment (Subpart G);

(ii) For dischargers other than POTW's;

(A) A section 301(c) economic variance from BAT (Subpart E);

(B) A section 301(g) water quality related variance from BAT (Subpart F); and

(C) A section 316(a) thermal variance from BPT, BCT and BAT (Subpart H).

(2) The following extensions of deadlines for compliance with technology-based treatment requirements are authorized by the Act and may be applied for under §122.53:

(i) For POTW's a section 301(i) extension of the secondary treatment deadline (Subpart J);

(ii) For dischargers other than POTW's:

(A) A section 301(i) extension of the BPT deadline (Subpart J); and

(B) A section 301(k) extension of the BAT deadline (Subpart C).

(c) *Methods of imposing technology-based treatment requirements in permits.* Technology-based treatment requirements may be imposed through one of the following three methods:

(1) Application of EPA-promulgated effluent limitations developed under section 304 of the Act to dischargers by category or subcategory. These effluent limitations are not applicable to the extent that they have been remanded or withdrawn. However, in the case of a court remand, determinations underlying effluent limitations shall be binding in permit issuance proceedings where those determinations are not required to be reexamined by a court remanding the regulations. In addition, dischargers may seek fundamentally different factors variances from these effluent limitations under §122.21 and Subpart D of this Part. [125.3(c)(1) amended by 48 FR 14153, April 1, 1983]

(2) On a case-by-case basis under section 402(a)(1) of the Act, to the extent that EPA-promulgated effluent limitations are inapplicable. The permit writer shall apply the appropriate factors listed in section 304 of the Act, and shall consider:

[Sec. 125.3(c)(2)]

(i) The appropriate technology for the category or class of point sources of which the applicant is a member, based upon all available information (including EPA draft or proposed development documents or guidance); and

(ii) Any unique factors relating to the applicant.

[Comment: These factors must be considered in all cases, regardless of whether the permit is being issued by EPA or an approved State.]

(3) Through a combination of the methods in paragraphs (c) (1) and (2) of this section. Where promulgated effluent limitations guidelines only apply to certain aspects of the discharger's operation, or to certain pollutants, other aspects or activities are subject to regulation on a case-by-case basis in order to carry out the provisions of the Act.

(4) Limitations developed under paragraph (c)(2) of this section may be expressed, where appropriate, in terms of toxicity (e.g., "The LC 50 for fat head minnow of the effluent from outfall 001 shall be greater than 25%"), provided that is shown that the limits reflect the appropriate requirements (for example, technology-based or water-quality-based standards) of the Act.

(d) Technology-based treatment requirements are applied prior to or at the point of discharge.

(e) Technology-based treatment requirements cannot be satisfied through the use of "non-treatment" techniques such as flow augmentation and in-stream mechanical aerators. However, these techniques may be considered as a method of achieving water quality standards on a case-by-case basis when:

(1) The technology-based treatment requirements applicable to the discharge are not sufficient to achieve the standards;

(2) The discharger agrees to waive any opportunity to request a variance under sections 301 (c), (g) or (h) of the Act; and

(3) The discharger demonstrates that such a technique is the preferred environmental and economic method to achieve the standards after consideration of alternatives such as

advanced waste treatment, recycle and reuse, land disposal, changes in operating methods, and other available methods.

(f) Technology-based effluent limitations shall be established under this Subpart for solids, sludges, filter backwash, and other pollutants removed in the course of treatment or control of wastewaters in the same manner as for other pollutants.

(g)(1) The Director may set a permit limit for a conventional pollutant at a level more stringent than the best conventional pollution control technology (BCT), or a limit for a nonconventional pollutant which shall not be subject to modification under section 301 (c) or (g) of the Act where:

(i) Effluent limitations guidelines specify the pollutant as an indicator for a toxic pollutant, or

(ii)(A) The limitation reflects BAT-level control of discharges of one or more toxic pollutants which are present in the waste stream, and a specific BAT limitation upon the toxic pollutant(s) is not feasible for economic or technical reasons;

(B) The permit identifies which toxic pollutants are intended to be controlled by use of the limitation; and

(C) The fact sheet required by § 124.56 sets forth the basis for the limitation, including a finding that compliance with the limitation will result in BAT-level control of the toxic pollutant discharges identified in paragraph (g)(1)(ii)(B) of this section, and a finding that it would be economically or technically infeasible to directly limit the toxic pollutant(s).

(2) The Director may set a permit limit for a conventional pollutant at a level more stringent than BCT when:

(i) Effluent limitations guidelines specify the pollutant as an indicator for a hazardous substance, or

(ii)(A) The limitation reflects BAT-level control of discharges (or an appropriate level determined under section 301(c) or (g) of the Act) of one or more hazardous substance(s) which are present in the waste stream, and a specific BAT (or other appropriate) limitation upon the hazardous substance(s) is not feasible for economic or technical reasons;

(B) The permit identifies which hazardous substances are intended to

be controlled by use of the limitation; and

(C) The fact sheet required by § 124.56 sets forth the basis for the limitation, including a finding that compliance with the limitations will result in BAT-level (or other appropriate level) control of the hazardous substances discharges identified in paragraph (g)(2)(ii)(B) of this section, and a finding that it would be economically or technically infeasible to directly limit the hazardous substance(s).

(iii) Hazardous substances which are also toxic pollutants are subject to paragraph (g)(1) of this section.

(3) The Director may not set a more stringent limit under the preceding paragraphs if the method of treatment required to comply with the limit differs from that which would be required if the toxic pollutant(s) or hazardous substance(s) controlled by the limit were limited directly.

(4) Toxic pollutants identified under paragraph (g)(1) of this section remain subject to the requirements of § 122.42(a)(1) (notification of increased discharges of toxic pollutants above levels reported in the application form). [125.3(g)(4) amended by 48 FR 14153, April 1, 1983]

Subpart B—Criteria for Issuance of Permits to Aquaculture Projects

§ 125.10 Purpose and scope.

(a) These regulations establish guidelines under sections 318 and 402 of the Act for approval of any discharge of pollutants associated with an aquaculture project.

(b) The regulations authorize, on a selective basis, controlled discharges which would otherwise be unlawful under the Act in order to determine the feasibility of using pollutants to grow aquatic organisms which can be harvested and used beneficially. EPA policy is to encourage such projects, while at the same time protecting other beneficial uses of the waters.

(c) Permits issued for discharges into aquaculture projects under this Subpart are NPDES permits and are subject to the applicable requirements of Parts 122, 123 and 124. Any permit shall include such conditions (including monitoring and reporting requirements) as are necessary to comply with those Parts.

Technology-based effluent limitations need not be applied to discharges into the approved project except with respect to toxic pollutants.

§ 125.11 Criteria.

(a) No NPDES permit shall be issued to an aquaculture project unless:

(1) The Director determines that the aquaculture project:

(i) Is intended by the project operator to produce a crop which has significant direct or indirect commercial value (or is intended to be operated for research into possible production of such a crop); and

(ii) Does not occupy a designated project area which is larger than can be economically operated for the crop under cultivation or than is necessary for research purposes.

(2) The applicant has demonstrated, to the satisfaction of the Director, that the use of the pollutant to be discharged to the aquaculture project will result in an increased harvest of organisms under culture over what would naturally occur in the area;

(3) The applicant has demonstrated, to the satisfaction of the Director, that if the species to be cultivated in the aquaculture project is not indigenous to the immediate geographical area, there will be minimal adverse effects on the flora and fauna indigenous to the area, and the total commercial value of the introduced species is at least equal to that of the displaced or affected indigenous flora and fauna;

(4) The Director determines that the crop will not have a significant potential for human health hazards resulting from its consumption;

(5) The Director determines that migration of pollutants from the designated project area to water outside of the aquaculture project will not cause or contribute to a violation of water quality standards or a violation of the applicable standards and limitations applicable to the supplier of the pollutant that would govern if the aquaculture project were itself a point source. The approval of an aquaculture project shall not result in the enlargement of a pre-existing mixing zone area beyond what had been designated by the State for the original discharge.

(b) No permit shall be issued for any aquaculture project in conflict with a plan or an amendment to a plan approved under section 208(b) of the Act.

(c) No permit shall be issued for any aquaculture project located in the territorial sea, the waters of the contiguous zone, or the oceans, except

in conformity with guidelines issued under section 403(c) of the Act.

(d) Designated project areas shall not include a portion of a body of water large enough to expose a substantial portion of the indigenous biota to the conditions within the designated project area. For example, the designated project area shall not include the entire width of a watercourse, since all organisms indigenous to that watercourse might be subjected to discharges of pollutants that would, except for the provisions of section 318 of the Act, violate section 301 of the Act.

(e) Any modifications caused by the construction or creation of a reef, barrier or containment structure shall not unduly alter the tidal regimen of an estuary or interfere with migrations of unconfined aquatic species.

[Comment: Any modifications described in this paragraph which result in the discharge of dredged or fill material into navigable waters may be subject to the permit requirements of section 404 of the Act.]

(f) Any pollutants not required by or beneficial to the aquaculture crop shall not exceed applicable standards and limitations when entering the designated project area.

Subpart C—Criteria for Extending Compliance Dates for Facilities Installing Innovative Technology Under Section 301(k) of the Act— [Reserved]

Subpart D—Criteria and Standards for Determining Fundamentally Different Factors Under Sections 301(b)(1)(A), 301(b)(2)(A) and (E), of the Act

§ 125.30 Purpose and scope.

[125.30 revised by 46 FR 9460, January 28, 1981, effective January 31, 1982]

(a) This subpart establishes the criteria and standards to be used in determining whether effluent limitations alternative to those required by promulgated EPA effluent limitations guidelines under sections 301 and 304 of the Act (hereinafter referred to as "national limits") should be imposed on a discharger because factors relating to the discharger's facilities, equipment, processes or other factors related to the discharger are fundamentally different from the factors considered by EPA in development of the national limits. This subpart applies to all national limitations promulgated under Sections 301 and 304 of the Act, except for the BPT limits contained in 40 CFR 423.12 (steam electric generating point source category).

[125.30(a) amended by 47 FR 52304, November 19, 1982]

(b) In establishing national limits, EPA takes into account all the information it can collect, develop and solicit regarding the factors listed in sections 304(b) and 304(g) of the Act. In some cases, however, data which could affect these national limits as they apply to a particular discharge may not be available or may not be considered during their development. As a result, it may be necessary on a case-by-case basis to adjust the national limits, and make them either more or less stringent as they apply to certain dischargers within an industrial category or subcategory. This will only be done if data specific to that discharger indicates it presents factors fundamentally different from those considered by EPA in developing the limit at issue. Any interested person believing that factors relating to a discharger's facilities, equipment, processes or other facilities related to the discharger are fundamentally different from the factors considered during development of the national limits may request a fundamentally different factors variance under §122.21(l)(1). In addition, such a variance may be proposed by the Director in the draft permit.

[125.30(b) amended by 48 FR 14153, April 1, 1983]

§ 125.31 Criteria.

(a) A request for the establishment of effluent limitations under this Subpart (fundamentally different factors variance) shall be approved only if:

(1) There is an applicable national limit which is applied in the permit and specifically controls the pollutant for which alternative effluent limitations or standards have been requested; and

(2) Factors relating to the discharge controlled by the permit are fundamentally different from those considered by EPA in establishing the national limits; and

(3) The request for alternative effluent limitations or standards is made in accordance with the procedural requirements of Part 124.

(b) A request for the establishment of effluent limitations less stringent than those required by national limits guidelines shall be approved only if:

(1) The alternative effluent limitation or standard requested is no less stringent than justified by the fundamental difference; and

(2) The alternative effluent limitation or standard will ensure compliance with sections 208(e) and 301(b)(1)(C) of the Act; and

(3) Compliance with the national limits (either by using the technologies upon which the national limits are based

or by other control alternatives) would result in:

(i) A removal cost wholly out of proportion to the removal cost considered during development of the national limits; or

(ii) A non-water quality environmental impact (including energy requirements) fundamentally more adverse than the impact considered during development of the national limits.

(c) A request for alternative limits more stringent than required by national limits shall be approved only if:

(1) The alternative effluent limitation or standard requested is no more stringent than justified by the fundamental difference; and

(2) Compliance with the alternative effluent limitation or standard would not result in:

(i) A removal cost wholly out of proportion to the removal cost considered during development of the national limits; or

(ii) A non-water quality environmental impact (including energy requirements) fundamentally more adverse than the impact considered during development of the national limits.

(d) Factors which may be considered fundamentally different are:

(1) The nature or quality of pollutants contained in the raw waste load of the applicant's process wastewater;

[*Comment:* (1) In determining whether factors concerning the discharger are fundamentally different, EPA will consider, where relevant, the applicable development document for the national limits, associated technical and economic data collected for use in developing each respective national limit, records of legal proceedings, and written and printed documentation including records of communication, etc., relevant to the development of respective national limits which are kept on public file by EPA. (2) Waste stream(s) associated with a discharger's process wastewater which were not considered in the development of the national limits will not ordinarily be treated as fundamentally different under paragraph (a). Instead, national limits should be applied to the other streams, and the unique stream(s) should be subject to limitations based on section 402(a)(1) of the Act. See § 125.2(c)(2).]

(2) The volume of the discharger's process wastewater and effluent discharged;

(3) Non-water quality environmental impact of control and treatment of the discharger's raw waste load;

(4) Energy requirements of the application of control and treatment technology;

(5) Age, size, land availability, and configuration as they relate to the

discharger's equipment or facilities; processes employed; process changes; and engineering aspects of the application of control technology;

(6) Cost of compliance with required control technology.

(e) A variance request or portion of such a request under this section shall not be granted on any of the following grounds:

(1) The infeasibility of installing the required waste treatment equipment within the time the Act allows.

[*Comment:* Under this section a variance request may be approved if it is based on factors which relate to the discharger's ability ultimately to achieve national limits but not if it is based on factors which merely affect the discharger's ability to meet the statutory deadlines of sections 301 and 307 of the Act such as labor difficulties, construction schedules, or unavailability of equipment.]

(2) The assertion that the national limits cannot be achieved with the appropriate waste treatment facilities installed, if such assertion is not based on factor(s) listed in paragraph (d) of this section;

[*Comment:* Review of the Administrator's action in promulgating national limits is available only through the judicial review procedures set forth in section 509(b) of the Act.]

(3) The discharger's ability to pay for the required waste treatment; or

(4) The impact of a discharge on local receiving water quality.

(f) Nothing in this section shall be construed to impair the right of any State or locality under section 510 of the Act to impose more stringent limitations than those required by Federal law.

§ 125.32 Method of application.

(a) A written request for a variance under this Subpart shall be submitted in duplicate to the Director in accordance with Part 124 Subpart F.

(b) The burden is on the person requesting the variance to explain that:

(1) Factor(s) listed in § 125.31(b) regarding the discharger's facility are fundamentally different from the factors EPA considered in establishing the national limits. The requester should refer to all relevant material and information, such as the published guideline regulations development document, all associated technical and economic data collected for use in developing each national limit, all records of legal proceedings, and all written and printed documentation including records of communication,

etc., relevant to the regulations which are kept on public file by the EPA;

(2) The alternative limitations requested are justified by the fundamental difference alleged in paragraph (b)(1) of this section; and

(3) The appropriate requirements of § 125.31 have been met.

Subpart E—Criteria for Granting Economic Variances from Best Available Technology Economically Achievable Under Section 301(c) of the Act—[Reserved]

Subpart F—Criteria for Granting Water Quality Related Variances Under Section 301(g) of the Act—[Reserved]

Subpart G—Criteria for Modifying the Secondary Treatment Requirements Under Section 301(h) of the Clean Water Act

[Subpart G revised by 47 FR 53675, November 26, 1982]

[*Editor's note:* EPA April 1, 1983 deconsolidated its consolidated permit regulations in 40 CFR 122 and 123, thereby affecting the cross references to these Parts throughout Subpart G of this regulation (48 FR 14153).

EPA amended the cross references in 125.59 and 125.67 to former Parts 122 and 123. However, the changes do not correspond with the references made in the aforementioned sections since Subpart G was revised by 47 FR 53675 on November 26, 1982.

EPA said it will issue the appropriate corrections soon.]

§ 125.56 Scope and purpose.

This Subpart establishes the criteria to be applied by EPA in acting on section 301(h) requests for modifications to the secondary treatment requirements. It also establishes special permit conditions which must be included in any permit incorporating a section 301(h) modification of the secondary treatment requirements. ("section 301(h) modified permit").

§ 125.57 Law governing issuance of a section 301(h) modified permit.

(a) Section 301(h) of the Clean Water Act provides that:

The Administrator, with the concurrence of the State, may issue a permit under section 402 which modifies the requirements of subsection (b)(1)(B) of this section with respect to the discharge of any pollutant from a publicly owned treatment works into marine waters, if the applicant demonstrates to the satisfaction of the Administrator that—

[Sec. 125.57(a)]

(1) there is an applicable water quality standard specific to the pollutant for which the modification is requested, which has been identified under section 304(a)(6) of this Act;

(2) such modified requirements will not interfere with the attainment or maintenance of that water quality which assures protection of public water supplies and the protection and propagation of a balanced, indigenous population of shellfish, fish and wildlife, and allows recreational activities, in and on the water;

(3) the applicant has established a system for monitoring the impact of such discharge on a representative sample of aquatic biota, to the extent practicable;

(4) such modified requirements will not result in any additional requirements on any other point or nonpoint source;

(5) all applicable pretreatment requirements for sources introducing waste into such treatment works will be enforced;

(6) to the extent practicable, the applicant has established a schedule of activities designed to eliminate the entrance of toxic pollutants from nonindustrial sources into such treatment works;

(7) there will be no new or substantially increased discharges from the point source of the pollutant to which the modification applies above that volume of discharge specified in the permit.

For the purposes of this subsection the phrase "the discharge of any pollutant into marine waters" refers to a discharge into deep waters of the territorial sea or the waters of the contiguous zone, or into saline estuarine waters where there is strong tidal movement and other hydrological and geological characteristics which the Administrator determines necessary to allow compliance with paragraph (2) of this subsection, and section 101(a)(2) of this Act. A municipality which applies secondary treatment shall be eligible to receive a permit pursuant to this subsection which modifies the requirements of subsection (b)(1)(B) of this section with respect to the discharge of any pollutant from any treatment works owned by such municipality into marine waters. No permit issued under this subsection shall authorize the discharge of sewage sludge into marine waters.

(b) Section 301(j)(1) of the Clean Water Act provides that:

Any application filed under this section for a modification of the provisions of—

(A) subsection (b)(1)(B) under subsection (h) of this section shall be filed not later than the 365th day which begins after the date of enactment of the Municipal Wastewater Treatment Construction Grant Amendments of 1981;

(c) Section 22(e) of the Municipal Wastewater Treatment Construction Grant Amendments of 1981, Pub. L. 97-117, provides that:

The amendments made by this section shall take effect on the date of enactment of

this Act, except that no applicant, other than the city of Avalon, California, who applies after the date of enactment of this Act for a permit pursuant to subsection (h) of section 301 of the Federal Water Pollution Control Act which modifies the requirements of subsection (b)(1)(B) of section 301 of such Act shall receive such permit during the one-year period which begins on the date of enactment of this Act.

§ 125.58 Definitions.

For the purpose of this subpart:

(a) "Administrator" means the EPA Administrator or a person designated by the EPA Administrator.

(b) "Altered discharge" means any discharge other than a current discharge or improved discharge, as defined in this regulation.

(c) "Applicant" means an applicant for a section 301(h) modified permit. Large applicants have populations contributing to their POTWs equal to or more than 50,000 people or average dry weather flows of 5.0 millions gallons per day (mgd) or more; small applicants have contributing populations of less than 50,000 people and average dry weather flows of less than 5.0 mgd. For the purposes of this definition the contributing population and flows shall be based on projections for the end of the five year permit term. Average dry weather flows shall be the average daily total discharge flows for the maximum month of the dry weather season.

(d) "Application" means a final application previously submitted in accordance with the June 15, 1979, section 301(h) regulations (44 FR 34784) or an application submitted between December 29, 1981 and December 29, 1982. It does not include a preliminary application submitted in accordance with the June 15, 1979, section 301(h) regulations.

(e) "Application questionnaire" means EPA's "Applicant Questionnaire for Modification of Secondary Treatment Requirements". Individual questionnaires for small applicants and for large applicants are published as Appendix A and Appendix B to this subpart, respectively.

(f) "Balanced, indigenous population" means an ecological community which:

(1) Exhibits characteristics similar to those of nearby, healthy communities existing under comparable but unpolluted environmental conditions; or

(2) May reasonably be expected to become re-established in the polluted water body segment from adjacent

waters if sources of pollution were removed.

(g) "Current discharge" means the volume, composition, and location of an applicant's discharge as of anytime between December 27, 1977, and December 29, 1982, as designated by the applicant.

(h) "Improved discharge" means the volume, composition and location of an applicant's discharge following:

(1) Construction of planned outfall improvements, including, without limitation, outfall relocation, outfall repair, or diffuser modification; or

(2) Construction of planned treatment system improvements to treatment levels or discharge characteristics; or

(3) Implementation of a planned program to improve operation and maintenance of an existing treatment system or to eliminate or control the introduction of pollutants into the applicant's treatment works.

(i) "Industrial source" means any source of nondomestic pollutants regulated under section 307 (b) or (c) of the Clean Water Act which discharges into a POTW.

(j) "Modified discharge" means the volume, composition and location of the discharge proposed by the applicant for which a modification under section 301(h) of the Act is requested. A modified discharge may be a current discharge, improved discharge, or altered discharge.

(k) "Nonindustrial source" means any source of pollutants which is not an industrial source.

(l) "Ocean waters" means those coastal waters landward of the baseline of the territorial seas, the deep waters of the territorial seas, or the waters of the contiguous zone.

(m) "Pesticides" means demeton, guthion, malathion, mirex, methoxychlor and parathion.

(n) "Public water supplies" means water distributed from a public water system.

(o) "Public water system" means a system for the provision to the public of piped water for human consumption, if such system has at least fifteen (15) service connections or regularly serves at least twenty-five (25) individuals. This term includes (1) any collection, treatment, storage, and distribution facilities under the control of the operator of the system and used

primarily in connection with the system, and (2) any collection or pretreatment storage facilities not under the control of the operator of the system which are used primarily in connection with the system.

(p) "Publicly owned treatment works" (POTW) means a treatment works, as defined in section 212(2) of the Act, which is owned by a State, municipality or intermunicipal or interstate agency.

(q) "Saline estuarine waters" means those semi-enclosed coastal waters which have a free connection to the territorial sea, undergo net seaward exchange with ocean waters, and have salinities comparable to those of the ocean. Generally, these waters are near the mouth of estuaries and have cross-sectional annual mean salinities greater than twenty-five (25) parts per thousand.

(r) "Secondary treatment" means the term as defined in 40 CFR Part 133.

(s) "Shellfish, fish and wildlife" means any biological population or community that might be adversely affected by the applicant's modified discharge.

(t) "Stressed waters" means those receiving environments in which an applicant can demonstrate to the satisfaction of the Administrator, that the absence of a balanced, indigenous population is caused solely by human perturbations other than the applicant's modified discharge.

(u) "Toxic pollutants" means those substances listed in 40 CFR 401.15.

(v) "Water quality standards" means applicable water quality standards which have been approved, left in effect, or promulgated under section 303 of the Clean Water Act.

(w) "Zone of initial dilution" (ZID) means the region of initial mixing surrounding or adjacent to the end of the outfall pipe or diffuser ports, provided that the ZID may not be larger than allowed by mixing zone restrictions in applicable water quality standards.

§ 125.59 General

(a) *Basis for application.* An application under this Subpart shall be based on a current, improved, or altered discharge into ocean waters or saline estuarine waters

(b) *Prohibitions.* No section 301(h) modified permit shall be issued:

(1) Where such issuance would not assure compliance with all applicable requirements of this Subpart and Part 122;

(2) For the discharge of sewage sludge; and

(3) where such issuance would conflict with applicable provisions of State, local, or other Federal laws or Executive Orders. This includes compliance with the Coastal Zone Management Act of 1972, as amended, 16 U.S.C. 1451 *et seq.*; the Endangered Species Act of 1973, as amended, 16 U.S.C. 1531 *et seq.*; and Title III of the Marine Protection, Research and Sanctuaries Act, as amended, 16 U.S.C. 1431 *et seq.*

(c) *Applications.* Each applicant for a modified permit under this Subpart shall submit an application to EPA signed in compliance with 40 CFR 122.6(a)(3) which shall contain:

(1) A signed, completed NPDES Application Standard form A, Parts I, II, III;

(2) A completed Application Questionnaire;

(3) The following certification:

I certify under penalty of law that I have personally examined and am familiar with the information submitted in the attached document(s) and, based on my inquiry of those individuals immediately responsible for obtaining the information, I am convinced that the information is true, accurate and correct. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment.

(d) *Revisions to applications.* (1) POTWs which submitted applications in accordance with the June 15, 1979, Regulations (44 FR 34784) may revise their applications one time following a tentative decision to propose changes to treatment levels and/or outfall and diffuser location and design in accordance with section 125.59(e)(2)(i); and

(2) Other applicants may revise their applications one time following a tentative decision to propose changes to treatment levels and/or outfall and diffuser location and design in accordance with § 125.59(e)(3)(i). Revisions by such applicants which propose downgrading treatment levels and/or outfall and diffuser location and design must be justified on the basis of substantial changes in circumstances beyond the applicant's control since the time of application submission.

(3) Applicants authorized or requested to submit additional information under § 125.59(f) may submit a revised application in accordance with § 125.59(e)(2)(ii) where such additional information supports changes in proposed treatment levels and/or outfall

location and diffuser design. The opportunity for such revision shall be in addition to the one-time revision allowed under § 125.59(d) (1) and (2).

(4) POTWs which revise their applications must:

(i) Modify their NPDES form and Application Questionnaire as needed to assure that the information filed with their application is correct and complete;

(ii) Provide additional analysis and data as needed to demonstrate compliance with this subpart;

(iii) Obtain new State determinations under §§ 125.60(b)(2) and 125.63(b); and

(iv) Provide the certification described in paragraph (c)(3) of this section.

(e) *Deadlines and distribution.*

(1) Applications. (i) The original and one copy of an application must be submitted to the appropriate EPA Regional Administrator no later than December 29, 1982, and one copy to the Office of Marine Discharge Evaluation, WH-546, U.S. Environmental Protection Agency, 401 M St. SW., Washington, D.C. 20460.

(ii) A copy of the application must be provided to the State and interstate agency(s) authorized to provide certification/concurrence under § 124.53-124.55 on or before the date of the application is submitted to EPA.

(2) Revisions to applications.

(i) Applicants desiring to revise their applications under § 125.59(d) (1) or (2) must:

(A) Submit to the appropriate Regional Administrator a letter of intent to revise their application and a copy to the Office of Marine Discharge Evaluation either within 45 days of the date of EPA's tentative decision on their original application, or within 45 days of promulgation of this provision if a tentative decision has already been made, whichever is later. Following receipt by EPA of a letter of intent, further EPA proceedings on the tentative decision under 40 CFR Part 124 will be stayed.

(B) Submit the revised application as described for new applications in § 125.59(e)(1) either within one year of the date of EPA's tentative decision on their original application or within one year of promulgation of this provision if a tentative decision has already been made, whichever is later.

(ii) Applicants desiring to revise their applications under § 125.59(d)(3) must submit the revised application as

described for new applications in § 125.59(e)(1) of this section concurrent with submission of the additional information under § 125.59(f).

(3) State determination deadline. State determinations, as required by § 125.60(b)(2) and § 125.63(b) shall be filed by the applicant with the appropriate Regional Administrator, no later than 90 days after submission of the application or revision to EPA. Extensions to this deadline may be provided by EPA upon request. However, EPA will not begin review of the application or revision until a favorable State determination is received by EPA.

(f)(1) The Administrator may authorize or request an applicant to submit additional information by a specified date not to exceed one year from the date of authorization or request.

(2) Applicants seeking authorization to submit additional information on current/modified discharge characteristics, water quality, biological conditions or oceanographic characteristics must:

(i) Demonstrate that they made a diligent effort to provide such information with their application and were unable to do so, and

(ii) Submit a plan of study, including a schedule, for data collection and submittal of the additional information. EPA will review the plan of study and may require revisions prior to authorizing submission of the additional information.

(g) Decisions on section 301(h) modifications. (1) The decision to grant or deny a section 301(h) modification shall be made by the Administrator and shall be based on the applicant's demonstration that it has met all the requirements of §§ 125.59 through 125.65.

(2) No section 301(h) modified permit shall be issued until the appropriate State certification/concurrence is granted or waived pursuant to § 124.54 or if the State denies certification/concurrence pursuant to § 124.54.

(3) In the case of a modification issued to an applicant in a State administering an approved permit program under 40 CFR Part 123, the State Director may:

(i) Revoke an existing permit as of the effective date of the EPA issued section 301(h) modified permit; and

(ii) Cosign the section 301(h) modified permit, if the Director has indicated an intent to do so in the written concurrence.

(4) Any section 301(h) modified permit shall:

(i) Be issued in accordance with the procedures set forth in 40 CFR Part 124, except that, because section 301(h) permits may only be issued by EPA, the terms "Administrator or a person designated by the Administrator" shall be substituted for the term "Director" as appropriate; and

(ii) Contain all applicable terms and conditions set forth in 40 CFR Part 122 and § 125.67.

(5) Appeals of section 301(h) determinations shall be governed by the procedures in 40 CFR Part 124.

(6) At the expiration of the section 301(h) modified permit, the POTW should be prepared to support the continuation of the modification based on studies and monitoring performed during the life of the permit. Upon a demonstration meeting the statutory criteria and requirements of this subpart, the permit may be renewed under the applicable procedures of 40 CFR Part 124.

§ 125.60 Existence of and compliance with applicable water quality standards.

(a) There must exist a water quality standard or standards applicable to the pollutant(s) for which a section 301(h) modified permit is requested, including:

(1) Water quality standards for biochemical oxygen demand or dissolved oxygen;

(2) Water quality standards for suspended solids, turbidity, light transmission, light scattering or maintenance of the euphotic-zone; and

(3) Water quality standards for pH.

(b) The applicant must:

(1) Demonstrate that the modified discharge will comply with the above water quality standard(s); and

(2) Provide a determination signed by the State or interstate agency(s) authorized to provide certification under §§ 124.53 and 124.54 that the proposed modified discharge will comply with applicable provisions of State law including applicable water quality standards. This determination shall include a discussion of the basis for the conclusion reached.

§ 125.61 Attainment or maintenance of water quality which assures protection of public water supplies, the protection and propagation of a balanced, indigenous population of shellfish, fish, and wildlife, and allows recreational activities.

(a) *Physical characteristics of discharge.* (1) The applicant's outfall and diffuser must be located and designed to provide adequate initial dilution, dispersion and transport of wastewater to meet all applicable water quality standards at and beyond the boundary of the zone of initial dilution:

(i) During periods of maximum stratification and

(ii) During other periods when discharge characteristics, water quality, biological seasons, or oceanographic conditions indicate more critical situations may exist.

(2) Following initial dilution, the partially diluted wastewater and particulates must be transported and dispersed so as not to affect water use areas adversely (including recreational and fishing areas) and areas of biological sensitivity.

(b) *Impact of discharge on public water supplies.* (1) The applicant's modified discharge must allow for the attainment or maintenance of water quality which assures protection of public water supplies.

(2) The applicant's modified discharge must not:

(i) Prevent a planned or existing public water supply from being used, or from continuing to be used, as a public water supply; or

(ii) Have the effect of requiring treatment over and above that which would be necessary in the absence of such discharge in order to comply with local, and EPA drinking water standards.

(c) *Biological impact of discharge.* (1) The applicant's modified discharge must allow for the attainment or maintenance of water quality which assures protection and propagation of a balanced indigenous population of shellfish, fish, and wildlife.

(2) A balanced, indigenous population of shellfish, fish and wildlife must exist:

(i) Immediately beyond the zone of initial dilution of the applicant's modified discharge and;

(ii) In all other areas beyond the zone of initial dilution where marine life is actually or potentially affected by the applicant's modified discharge.

(3) Conditions within the zone of initial dilution must not contribute to extreme adverse biological impacts, including, but not limited to, the destruction of distinctive habitats of limited distribution, the presence of disease epicenters, or the stimulation of phytoplankton blooms which have adverse effects beyond the zone of initial dilution.

(4) In addition, for modified discharges into saline estuarine water:

(i) Benthic populations within the zone of initial dilution must not differ substantially from the balanced, indigenous populations which exist immediately beyond the boundary of the zone of initial dilution;

(ii) The discharge must not interfere with estuarine migratory pathways within the zone of initial dilution; and

(iii) The discharge must not result in the accumulation of toxic pollutants or pesticides at levels which exert adverse effects on the biota within the zone of initial dilution.

(d) *Impact of discharge on recreational activities.* (1) The applicant's modified discharge must allow for the attainment or maintenance of water quality which allows for recreational activities beyond the zone of initial dilution, including, without limitation, swimming, diving, boating, fishing, and picnicking and sports activities along shorelines and beaches.

(2) There must be no Federal, State, or local restrictions on recreational activities within the vicinity of the applicant's modified outfall unless such restrictions are routinely imposed around sewage outfalls. This exception shall not apply where the restriction would be lifted or modified, in whole or in part, if the applicant were discharging a secondary treatment effluent.

(e) Additional requirements for applications based on improved or altered discharges. An application for a section 301(h) modified permit on the basis of an improved or altered discharge must include:

(1) A demonstration that such improvements or alterations have been thoroughly planned and studied and can be completed or implemented expeditiously;

(2) Detailed analyses projecting changes in average and maximum monthly flow rates and composition of the applicant's discharge which are expected to result from proposed improvements or alterations.

(3) The assessments required by paragraphs (a) through (d) of this section

based on its current discharge;

(4) A detailed analysis of how the applicant's planned improvements or alterations will comply with the requirements of paragraphs (a) through (d) of this section.

(f) Stressed waters. If an applicant believes that its failure to meet the requirements of paragraphs (a) through (e) of this section is attributable to conditions resulting from human perturbations other than its modified discharge (including, without limitation, other municipal or industrial discharges, nonpoint source runoff and the applicant's previous discharges), the applicant must demonstrate, to the satisfaction of the Administrator, that its modified discharge does not or will not:

(1) Contribute to, increase, or perpetuate such stressed conditions;

(2) Contribute to further degradation of the biota or water quality if the level of human perturbation from other sources increases; and

(3) Retard the recovery of the biota or water quality if the level of human perturbation from other sources decreases.

§ 125.62 Establishment of a monitoring program.

(a) *General requirements.* (1) The applicant must:

(i) Have a monitoring program designed to provide data to evaluate the impact of the modified discharge on the marine biota, demonstrate compliance with applicable water quality standards, and measure toxic substances in the discharge;

(ii) Describe the sampling techniques, schedules and locations (including appropriate control sites), analytical techniques, quality control and verification procedures to be used in the monitoring program;

(iii) Demonstrate that it has the resources necessary to implement the program upon issuance of the modified permit and to carry it out for the life of the modified permit; and

(iv) Determine the frequency and extent of the monitoring program taking into consideration the applicant's rate of discharge, quantities of toxic pollutants discharged, and potentially significant impacts on receiving water quality, marine biota, and designated water uses.

(2) The Administrator may require revision of the proposed monitoring program before issuing a modified

permit and during the term of any modified permit.

(b) *Biological monitoring program.* The biological monitoring program for both small and large applicants shall provide data adequate to evaluate the impact of the modified discharge on the marine biota.

(1) Biological monitoring shall include to the extent practicable:

(i) Periodic surveys of the biological communities and populations which are most likely affected by the discharge to enable comparisons with baseline conditions described in the application and verified by sampling at the control stations/reference sites during the periodic surveys;

(ii) Periodic determinations of the accumulation of toxic pollutants and pesticides in organisms and examination of adverse effects, such as disease, growth abnormalities, physiological stress or death;

(iii) Sampling of sediments in areas of solids deposition in the vicinity of the ZID, in other areas of expected impact, and at appropriate reference sites to support the water quality and biological surveys and to measure the accumulation of toxic pollutants and pesticides; and

(iv) Where the discharge would affect commercial or recreational fisheries, periodic assessments of the conditions and productivity of fisheries.

(2) Small applicants are not subject to the requirements of paragraph (b)(1)(ii)-(iv) of this section if they discharge at depths greater than 10 meters and can demonstrate through a suspended solids deposition analysis that there will be negligible seabed accumulation in the vicinity of the modified discharge.

(3) For applicants seeking a section 301(h) modified permit based on:

(i) A current discharge, biological monitoring shall be designed to demonstrate ongoing compliance with the requirements of § 125.61(c);

(ii) An improved discharge or altered discharge other than outfall relocation, biological monitoring shall provide baseline data on the current impact of the discharge and data which demonstrate, upon completion of improvements or alterations, that the requirements of § 125.61(c) are met; or

(iii) An improved or altered discharge involving outfall relocation, the biological monitoring shall:

(A) Include the current discharge site until such discharge ceases; and

[Sec. 125.62(b)(3)(iii)]

(B) Provide baseline data at the relocation site to demonstrate the impact of the discharge and to provide the basis for demonstrating that requirements of § 125.61(c) will be met.

(c) *Water quality monitoring program.* The water quality monitoring program shall to the extent practicable:

(1) Provide adequate data for evaluating compliance with applicable water quality standards;

(2) Measure the presence of toxic pollutants which have been identified or reasonably may be expected to be present in the discharge.

(d) *Effluent monitoring program.* In addition to the requirements of 40 CFR Part 122, to the extent practicable, monitoring of the POTW effluent shall provide quantitative and qualitative data which measure toxic substances and pesticides in the effluent and the effectiveness of the toxics control program.

§ 125.63 Effect of discharge on other point and nonpoint sources.

(a) No modified discharge may result in any additional pollution control requirements on any other point or nonpoint source.

(b) The applicant shall obtain a determination from the State or interstate agency(s) having authority to establish wasteload allocations indicating whether the applicant's discharge will result in an additional treatment, pollution control, or other requirement on any other point or nonpoint sources. The State determination shall include a discussion of the basis for its conclusion.

§ 125.64 Toxics control program.

(a) Chemical analysis. (1) The applicant shall submit at the time of application a chemical analysis of its current discharge for all toxic pollutants and pesticides as defined in § 125.58 (u) and (m). The analysis shall be performed on two 24 hour composite samples (one dry weather and one wet weather). Applicants may supplement or substitute chemical analyses if composition of the supplemental or substitute samples typifies that which occurs during dry and wet weather conditions.

(2) Unless required by the State, this requirement shall not apply to any small section 301(h) applicant which certifies that there are no known or suspected sources of toxic pollutants or pesticides and documents the certification with an industrial user survey as described by 40 CFR 403.8(f)(2).

(b) Identification of sources. The applicant shall submit at the time of application an analysis of the known or suspected sources of toxic pollutants or pesticides identified in § 125.64(a). The applicant shall to the extent practicable categorize the sources according to industrial and nonindustrial types.

(c) Industrial pretreatment requirements.

(1) An applicant which has known or suspected industrial sources of toxic pollutants shall have an approved pretreatment program, or shall develop an approved pretreatment program by July 1, 1983, or the date established in their NPDES permit, whichever is earlier. See, 40 CFR Part 403.

(2) This requirement shall not apply to any applicant which has no known or suspected industrial sources of toxic pollutants or pesticides and so certifies to the Administrator.

(3) The pretreatment program or proposed compliance schedule submitted by the applicant under this section shall be subject to revision as required by the Administrator prior to issuing any section 301(h) modified permit and during the term of any such permit.

(4) Implementation of all existing pretreatment requirements and authorities must be maintained through the period of development of any additional pretreatment requirements that may be necessary to comply with the requirements of this subpart.

(d) Nonindustrial source control program.

(1) The applicant shall submit a proposed public education program designed to minimize the entrance of nonindustrial toxic pollutants and pesticides into its POTW(s) which shall be implemented no later than 18 months after issuance of a 301(h) modified permit.

(2) The applicant shall also develop and implement additional nonindustrial source control programs on the earliest possible schedule. This requirement shall not apply to a small applicant which certifies that there are no known or suspected water quality, sediment accumulation, or biological problems related to toxic pollutants or pesticides in its discharge.

(3) The applicant's nonindustrial source control programs under paragraph (d)(2) of this section shall include the following schedules which are to be implemented no later than 18 months after issuance of a 301(h) modified permits:

(i) A schedule of activities for identifying nonindustrial sources of toxic pollutants and pesticides; and

(ii) A schedule for the development and implementation of control programs, to the extent practicable, for nonindustrial sources of toxic pollutants and pesticides.

(4) Each proposed nonindustrial source control program and/or schedule submitted by the applicant under this section shall be subject to revision as determined by the Administrator prior to issuing any section 301(h) modified permit and during the term of any such permit.

§ 125.65 Increase in effluent volume or amount of pollutants discharged.

(a) No modified discharge may result in any new or substantially increased discharges of the pollutant to which the modification applies above the discharge specified in the section 301(h) modified permit.

(b) Where pollutant discharges are attributable in part to combined sewer overflows, the applicant shall minimize existing overflows and prevent increases in the amount of pollutants discharged;

(c) The applicant shall provide projections of effluent volume and mass loadings for any pollutants to which the modification applies in 5 year increments for the design life of its facility.

§ 125.66 [Reserved]

§ 125.67 Special conditions for section 301(h) modified permits.

Each section 301(h) modified permit issued shall contain, in addition to all applicable terms and conditions required by 40 CFR Part 122, the following:

(a) Effluent limitations and mass loadings which will assure compliance with the requirements of this Subpart;

(b) A schedule or schedules of compliance for:

(1) Pretreatment program development required by § 125.64(c);

(2) Nonindustrial toxics control program required by § 125.64(d); and

(3) Control of combined sewer overflows required by § 125.65.

(c) Monitoring program requirements that include:

(1) Biomonitoring requirements of § 125.62(b);

(2) Water quality requirements of § 125.62(c);

(3) Effluent monitoring requirements of § 125.62(d).

(d) Reporting requirements that include the results of the monitoring programs required by paragraph (c) at such frequency as prescribed in the approved monitoring program.

Appendix A—Small Applicant Questionnaire for Modification of Secondary Treatment Requirements

I. Introduction

This questionnaire is to be used by small applicants for modification of secondary treatment requirements under section 301(h) of the Clean Water Act (CWA). A small applicant has a contributing population to its wastewater treatment facility of less than 50,000 and a projected average dry weather flow of less than 5.0 million gallons per day (mgd, 0.22m³/sec) [40 CFR 125.58(c)].

The questionnaire is in two sections, a general information and basic requirements section and a technical evaluation section. Satisfactory completion of this questionnaire is necessary to enable EPA to determine whether the applicant's modified discharge meets the criteria of section 301(h) and EPA regulations (40 CFR Part 125, Subpart G).

Where applicants diligently try but are unable to collect and submit all the information at the time of application, EPA requires that a plan of study for gathering and submitting the data be provided with the application. 40 CFR 125.59(f) states the procedures governing such post-application data collection activities.

Most small applicants should be able to complete the questionnaire using available information. However, small POTWs with low initial dilution discharging into shallow waters or waters with poor dispersion and transport characteristics, discharging near distinctive and susceptible biological habitats, or discharging substantial quantities of toxics should anticipate the need to collect additional information and/or conduct additional analyses to demonstrate compliance with section 301(h) criteria. Such small applicants are directed to the related sections in Parts II and III of the large applicant questionnaire and must answer the relevant questions of these sections. If there are questions in this regard, applicants should contact the appropriate EPA Regional Office for guidance.

Guidance for responding to this questionnaire is provided by the Revised Section 301(h) Technical Support Document. Where available information is incomplete and the applicant needs to collect additional data during the period it is preparing the application, EPA encourages the applicant to consult with EPA prior to data collection and submission of its application. Such consultation, particularly if the applicant provides a plan of study, will help assure that the proper data are gathered in the most efficient manner.

II. General Information and Basic Data Requirements

Applicants should answer all questions; where your response to a question is "yes", "no", or "not applicable" explain the basis for your response. Where your answer indicates that you cannot meet a regulatory or statutory criterion, discuss why you believe you qualify for a section 301(h) variance.

A. Treatment System Description: 1. Are you applying for a modification based on a current discharge, improved discharge, or altered discharge as defined in 40 CFR 125.58? [40 CFR 125.59(a)]

2. Description of the Treatment/Outfall System [40 CFR 125.61(a) and 125.61(e)]

a. Provide detailed descriptions and diagrams of the treatment system and outfall configuration which you propose to satisfy the requirements of section 301(h) and 40 CFR Part 125, Subpart G. What is the total discharge design flow upon which this application is based?

b. Provide a map showing the geographic location of the proposed outfall(s) (i.e., discharge). What is the latitude and longitude of the proposed outfall(s)?

c. For a modification based on an improved or altered discharge, provide a description and diagram of your current treatment system and outfall configuration. Include the current outfall's latitude and longitude if different from the proposed outfall.

3. Effluent Limitations and Characteristics [40 CFR 125.60(b) and 125.61(e)(2)]

a. Identify the final effluent limitations for five-day biochemical oxygen demand (BOD₅), suspended solids, and pH upon which your application for a modification is based:

BOD₅ — mg/l
Suspended solids — mg/l
pH — (range)

b. Provide available data on the following effluent characteristics for your current discharge as well as for the modified discharge if different from the current discharge:

- Flow (m³/sec): minimum; average dry weather; average wet weather; maximum; annual average.
- BOD₅ (mg/l) for the following plant flows: minimum; average dry weather; average wet weather; maximum; annual average.
- Suspended solids (mg/l) for the following plant flows: minimum; average dry weather; average wet weather; maximum; annual average.
- Toxic pollutants and pesticides (μg/l): list each identified toxic pollutant and pesticide.
- pH: minimum and maximum.
- Dissolved oxygen (mg/l, prior to chlorination) for the following plant flows: minimum; average dry weather; average wet weather; maximum; annual average.
- Immediate dissolved oxygen demand (mg/l).

4. Effluent Volume and Mass Emissions [40 CFR 125.61(e)(2) and 125.65]

a. Provide analyses showing projections of effluent volume (annual average, m³/sec) and

mass loadings (mt/year) of BOD₅ and suspended solids for the design life of your treatment facility in five-year increments. If the application is based upon an improved or altered discharge, the projections must be provided with and without the proposed improvements or alterations.

b. Provide projections for the end of your five year permit term for 1) the treatment facility contributing population and 2) the average daily total discharge flow for the maximum month of the dry weather season.

5. Average Daily Industrial Flow (m³/sec) [40 CFR 125.64] Provide or estimate the average daily industrial inflow to your treatment facility for the same time increments as in question II. A. 4. a. above.

6. Combined Sewer Overflows [40 CFR 125.65(b)]

a. Does (will) your collection and treatment system include combined sewer overflows?

b. If yes, provide a description of your plan for minimizing combined sewer overflows to the receiving water.

7. Outfall/Diffuser Design. Provide available data on the following for your current discharge as well as for the modified discharge, if different from the current discharge: [40 CFR 125.61(a)(1)]

- Diameter and length of the outfall(s) (meters)
- Diameter and length of the diffuser(s) (meters)
- Angle(s) of port orientations from horizontal (degrees)
- Port diameter(s) in meters and the orifice contraction coefficient(s), if known
- Vertical distance in meters from mean lower low water (or mean low water) surface and outfall port(s) centerline (meters)
- Number of ports
- Port spacing (meters)
- Design flow rate for each port, if multiple ports are used (m³/sec)

B. Receiving Water Description:

1. Are you applying for a modification based on a discharge to the ocean or to a saline estuary (40 CFR 125.58(q))? [40 CFR 125.59(a)]

2. Is your current discharge or modified discharge to stressed waters? If yes, what are the pollution sources contributing to the stress? [40 CFR 125.61(f)]

3. Provide a description and available data on the seasonal circulation patterns in the vicinity of your current and modified discharge(s). [40 CFR 125.61(a)]

4. Ambient Water Quality Conditions During the Period(s) of Maximum Stratification.

a. Provide available data on the following in the vicinity of the current discharge location and for the modified discharge location if different from the current discharge: [40 CFR 125.60(b)(1)]

- Dissolved oxygen (mg/l)
- Suspended solids (mg/l)
- pH
- Temperature (°C)

- Salinity (ppt)
- Transparency (turbidity, percent light transmittance)
- Other significant parameters (eg, nutrients, toxic pollutants and pesticides, fecal coliforms)

b. Are there other periods when receiving water quality conditions may be more critical than the period(s) of maximum stratification? If so, describe these other critical periods and provide the data requested in 4.a. for the other critical periods. [40 CFR 125.61(a)(1)]

C. Biological Conditions:

1. a. Are distinctive habitats of limited distribution (such as kelp beds or coral reefs) located in areas potentially affected by the modified discharge? [40 CFR 125.61(c)]

b. If yes, provide available information on types, extent, and location of habitats.

2. a. Are commercial or recreational fisheries located in areas potentially affected by the modified discharge? [40 CFR 125.61(c)]

b. If yes, provide available information on types, location, and value of fisheries.

D. State and Federal Laws [40 CFR 125.60]

1. Are there water quality standards applicable to the following pollutants for which a modification is requested:

- Biochemical oxygen demand or dissolved oxygen?
- Suspended solids, turbidity, light transmission, light scattering, or maintenance of the euphotic zone?
- pH of the receiving water?

2. If yes, what is the water use classification for your discharge area? What are the applicable standards for your discharge area for each of the parameters for which a modification is requested? Provide a copy of all applicable water quality standards or a citation to where they can be found.

3. Will the modified discharge [40 CFR 125.59(b)(3)]:

- Be consistent with applicable State coastal zone management program(s) approved under the Coastal Zone Management Act as amended, 16 U.S.C. 1451 *et seq.*? (See, 16 U.S.C. 1456(c)(3)(A))
- Be located in a Marine sanctuary designated under Title III of the marine Protection, Research and Sanctuaries Act (MPRSA) as amended, 16 U.S.C. 1431 *et seq.* or in an estuarine sanctuary designated under the Coastal Zone Management Act as amended, 16 U.S.C. 1461? If located in a marine sanctuary designated under Title III of the MPRSA, attach a copy of any certification or permit required under regulations governing such marine sanctuary (See, U.S.C. 1432(f)(2)).
- Be consistent with the Endangered Species Act as amended, 16 U.S.C. 1531 *et seq.*? Provide the names of any threatened or endangered species that inhabit or obtain nutrients from waters that may be affected by the modified discharge. Identify any critical habitat that may be affected by the modified discharge and evaluate whether

the modified discharge will affect threatened or endangered species or modify a critical habitat (See, 16 U.S.C. 1536(a)(2)).

4. Are you aware of any State or Federal Laws or regulations (other than the Clean Water Act or the three statutes identified in item 3 above) or an Executive Order which is applicable to your discharge? If yes, provide sufficient information to demonstrate that your modified discharge will comply with such law(s), regulation(s), or order(s). [40 CFR 125.59(b)(3)]

III. Technical Evaluation

Answers to the following questions will be used to assess the effects of the modified discharge. The responses will be used by the State agency(s) in their determination (as required by 40 CFR 125.60(b)(2) and 125.63(b)) and by EPA in preparing its decision on the applicant's request for a section 301(h) variance.

Your answers to the following questions must be supported by data and responses from Section II of this questionnaire. The analyses and calculations required below must show the input data for all calculations. Applicants should answer all questions; where your answer to a question is "yes", "no" or "not applicable" explain the basis for your response. Where your answer indicates that you cannot meet a regulatory or statutory criterion, discuss why you believe you qualify for a variance.

If EPA decides to check calculations in an application, the formulas and methods provided in the Revised Section 301(h) Technical Support Document may be used for that purpose. If applicants use methods other than those provided in the Technical Support Document, such methods must be described by the applicant.

A. Physical Characteristics of Discharge [40 CFR 125.61(a)].

1. What is the lowest initial dilution for your current and modified discharge(s) during 1) the period(s) of maximum stratification? and 2) any other critical period(s) of discharge volume/composition, water quality, biological seasons, or oceanographic conditions?

2. What are the dimensions of the zone of initial dilution for your modified discharge(s)?

3. Will there be significant sedimentation of suspended solids in the vicinity of the modified discharge?

B. Compliance with Applicable Water Quality Standards: [40 CFR 125.60(b) and 125.61(a)]

1. What is the concentration of dissolved oxygen immediately following initial dilution for the period(s) of maximum stratification and any other critical period(s) of discharge volume/composition, water quality, biological seasons, or oceanographic conditions?

2. What is the farfield dissolved oxygen depression and resulting concentration due to EOD exertion of the wastefield during the

period(s) of maximum stratification and any other critical period(s)?

3. What is the increase in receiving water suspended solids concentration immediately following initial dilution of the modified discharge(s)?

4. Does (will) the modified discharge comply with applicable water quality standards for:

- Dissolved oxygen?
- Suspended solids or surrogate standards?
- pH?

5. Provide the determination required by 40 CFR 125.60(b)(2) or, if the determination has not yet been received, a copy of a letter to the appropriate agency(s) requesting the required determination.

C. Impact on Public Water Supplies [40 CFR 125.61(b)]:

1. Is there a planned or existing public water supply (desalination facility) intake in the vicinity of the current or modified discharge?

2. If yes,

(a) What is the location of the intake(s) (latitude and longitude)?

(b) Will the modified discharge(s) prevent use of the intake(s) for public water supply?

(c) Will the modified discharge(s) cause increased treatment requirements for the public water supply(s) to meet local, State, and EPA drinking water standards?

D. Biological Impact of Discharge [40 CFR 125.61(c)]:

1. Does (will) a balanced indigenous population of shellfish, fish, and wildlife exist:

(a) Immediately beyond the ZID of the current and modified discharge(s)?

(b) In all other areas beyond the ZID where marine life is actually or potentially affected by the current and modified discharge(s)?

2. Have distinctive habitats of limited distribution been impacted adversely by the current discharge and will such habitats be impacted adversely by the modified discharge?

3. Have commercial or recreational fisheries been impacted adversely (e.g., warnings, restrictions, closures, or mass mortalities) by the current discharge and will they be impacted adversely by the modified discharge?

4. For discharges into saline estuarine waters: [40 CFR 125.61(c)(4)]

(a) Does or will the current or modified discharge cause substantial differences in the benthic population with the ZID and beyond the ZID?

(b) Does or will the current or modified discharge interfere with migratory pathways within the ZID?

(c) Does or will the current or modified discharge result in bioaccumulation of toxic pollutants or pesticides at levels which exert adverse effects on the biota within the ZID?

5. For improved discharges, will the proposed improved discharge(s) comply with the requirements of 40 CFR 125.61(a) through 125.61(d)? [40 CFR 125.61(e)].

6. For altered discharge(s), will the altered discharge(s) comply with the requirements of 40 CFR 125.61(a) through 125.61(d)? [40 CFR 125.61(e)]

7. If your current discharge is to stressed waters, does or will your current or modified discharge: [40 CFR 125.61(f)]

(a) Contribute to, increase, or perpetuate such stressed condition?

(b) Contribute to further degradation of the biota or water quality if the level of human perturbation from other sources increases?

(c) Retard the recovery of the biota or water quality if human perturbation from other sources decreases?

E. Impacts of Discharge on Recreational Activities: [40 CFR 125.61(d)]

1. Describe the existing or potential recreational activities likely to be affected by the modified discharge(s) beyond the zone of initial dilution.

2. What are the existing and potential impacts of the modified discharge(s) on recreational activities? Your answer should include, but not be limited to, a discussion of fecal coliforms.

3. Are there any Federal, State or local restrictions on recreational activities in the vicinity of the modified discharge(s)? If yes, describe the restrictions and provide citations to available references.

4. If recreational restrictions exist, would such restrictions be lifted or modified if you were discharging a secondary treatment effluent?

F. Establishment of a Monitoring Program [40 CFR 125.62]:

(1) Describe the biological, water quality, and effluent monitoring programs which you propose to meet the criteria of 40 CFR 125.62.

(2) Describe the sampling techniques, schedules, and locations, analytical techniques, quality control and verification procedures to be used.

(3) Describe the personnel and financial resources available to implement the monitoring programs upon issuance of a modified permit and to carry it out for the life of the modified permit.

G. Effect of Discharge on Other Point and Nonpoint Sources: (40 CFR 125.63).

1. Does (will) your modified discharge(s) cause additional treatment or control requirements for any other point or nonpoint pollution source(s)?

2. Provide the determination required by 40 CFR 125.63(b) or, if the determination has not yet been received, a copy of a letter to the appropriate agency(s) requesting the required determination.

H. Toxics Control Program [40 CFR 125.64]

1. a. Do you have any known or suspected industrial sources of toxic pollutants and pesticides?

b. If no, provide the certification required by 40 CFR 125.64(a)(2).

c. If yes, provide the results of wet and dry weather effluent analyses for toxic pollutants and pesticides.

d. Provide an analysis of known or suspected industrial sources of toxic pollutants and pesticides identified in (1)(c) above.

2. Do you have an approved industrial pretreatment program?

a. If yes, provide the date of EPA approval.

b. If no, and if required by 40 CFR Part 403 to have an industrial pretreatment program, provide a proposed schedule for development and implementation of your industrial pretreatment program to meet the requirements of 40 CFR Part 403.

3. Describe the public education program you propose to minimize the entrance of nonindustrial toxic pollutants and pesticides into your treatment system.

4. a. Are there any known or suspected water quality, sediment accumulation, or biological problems related to toxic pollutants or pesticides from your modified discharge(s)?

b. If no, provide the certification required by 40 CFR 125.64(d)(2) together with available supporting data.

c. If yes, provide a schedule for development and implementation of nonindustrial toxics control programs to meet the requirements of 40 CFR 125.64(d)(3).

Appendix B—Large Applicant Questionnaire for Modification of Secondary Treatment Requirements

I. Introduction

This questionnaire is to be used by large applicants for modification of secondary treatment requirements under section 301(h) of the Clean Water Act (CWA). A large applicant has a population contributing to its wastewater treatment facility of at least 50,000 or a projected average dry weather flow of its discharge of at least 5.0 million gallons per day (mgd, 0.22 m³/sec) [40 CFR 125.59(c)].

The questionnaire is in two sections, a general information and basic requirements section and a technical evaluation section. Satisfactory completion of this questionnaire is necessary to enable EPA to determine whether the applicant's modified discharge meets the criteria of section 301(h) and EPA regulations (40 CFR Part 125, Subpart G).

Where applicants diligently try but are unable to collect and submit all the information at the time of application, EPA requires that a plan of study for gathering and submitting the data be provided with the application. 40 CFR 125.55(f) states the procedures governing such post-application data collection activities.

Guidance for responding to the questions is provided by the Revised Section 301(h) Technical Support Document. Where available information is incomplete and the applicant needs to collect additional data during the period it is preparing the application, EPA encourages the applicant to consult with EPA prior to data collection and submission of its application. Such consultation, particularly if the applicant

provides a plan of study, will help assure that the proper data are gathered in the most efficient manner.

II. General Information and Basic Data Requirements

Applicants should answer all questions; where your response to a question is "yes", "no", or "not applicable" explain the basis for your response. Where your answer indicates that you cannot meet a regulatory or statutory criterion, discuss why you believe you qualify for a section 301(h) variance.

A. Treatment System Description: 1. Are you applying for a modification based on a current discharge, improved discharge, or altered discharge as defined in 40 CFR 125.58? [40 CFR 125.59(a)]

2. Description of the Treatment/Outfall System [40 CFR 125.61(a) and 125.61(e)]

a. Provide detailed descriptions and diagrams of the treatment system and outfall configuration which you propose to satisfy the requirements of section 301(h) and 40 CFR Part 125, Subpart G. What is the total discharge design flow upon which this application is based?

b. Provide a map showing the geographic location of the proposed outfall(s) (i.e., discharge). What is the latitude and longitude of the proposed outfall(s)?

c. For a modification based on an improved or altered discharge, provide a description and diagram of your current treatment system and outfall configuration. Include the current outfall's latitude and longitude, if different from the proposed outfall.

3. Effluent Limitations and Characteristics [40 CFR 125.60(b) and 125.61(e)(2)]

a. Identify the final effluent limitations for five-day biochemical oxygen demand (BOD₅), suspended solids, and pH upon which your application for a modification is based:

BOD₅ ——— mg/l

Suspended solids ——— mg/l

pH ——— (range)

b. Provide data on the following effluent characteristics for your current discharge as well as for the modified discharge if different from the current discharge:

Flow (m³/sec): minimum; average dry weather; average wet weather; annual average; maximum.

BOD₅ (mg/l) for the following plant flows: minimum; average dry weather; average wet weather; maximum; annual average.

Suspended solids (mg/l) for the following plant flows: minimum; average dry weather; average wet weather; maximum; annual average.

Toxic pollutants and pesticides (ug/l): list each identified toxic pollutant and pesticide, pH: minimum and maximum.

Dissolved oxygen (mg/l, prior to chlorination) for the following plant flows: minimum; average dry weather; average wet weather; maximum; annual average.

Immediate dissolved oxygen demand (mg/l)

4. Effluent Volume and Mass Emissions [40 CFR 125.61(e)(2) and 125.65]

a. Provide detailed analyses showing projections of effluent volume (annual average, m³/sec) and mass loadings (mt/year) of BOD₅ and suspended solids for the design life of your treatment facility in five-year increments. If the application is based upon an improved or altered discharge, the projections must be provided with and without the proposed improvements or alterations.

b. Provide projections for the end of your five year permit term for 1) the treatment facility contributing population and 2) the average daily total discharge flow for the maximum month of the dry weather season.

5. Average Daily Industrial Flow (m³/sec) [40 CFR 125.64] Provide or estimate the average daily industrial inflow to your treatment facility for the same time increments as in question II. A. 4. a. above.

6. Combined Sewer Overflows [40 CFR 125.65(b)]

a. Does (will) your collection and treatment system include combined sewer overflows?

b. If yes, provide a description of your plan for minimizing combined sewer overflows to the receiving water.

7. Outfall/Diffuser Design. Provide the following data for your current discharge as well as for the modified discharge, if different from the current discharge: [40 CFR 125.61(a)(1)]

Diameter and length of the outfall(s) (meters)

Diameter and length of the diffuser(s) (meters)

Angle(s) of port orientations from horizontal (degrees)

Port diameter(s) in meters and the orifice contraction coefficient(s), if known.

Vertical distance in meters from mean lower low water (or mean low water) surface and outfall port(s) centerline (meters)

Number of ports

Port spacing (meters)

Design flow rate for each port, if multiple ports are used (m³/sec)

B. Receiving Water Description: 1. Are you applying for a modification based on a discharge to the ocean or to a saline estuary [40 CFR 125.58(g)]? [40 CFR 125.59(a)]

2. Is your current discharge or modified discharge to stressed waters? If yes, what are the pollution sources contributing to the stress? [40 CFR 125.61(f)]

3. Provide a description and data on the seasonal circulation patterns in the vicinity of your current and modified discharge(s). [40 CFR 125.61(a)]

4. Oceanographic Conditions in the Vicinity of the Current and Proposed Modified Discharge(s).

Provide data on the following: [40 CFR 125.61(a)]

Lowest ten percentile current speed (m/sec)

Predominant current speed (m/sec) and direction (true) during the four seasons

Period(s) of maximum stratification (month(s))

Period(s) of natural upwelling events (duration and frequency, month(s))

Density profiles during period(s) of maximum stratification

5. Ambient Water Quality Conditions During the Period(s) of Maximum Stratification: at the zone of initial dilution (ZID) boundary, at other areas of potential impact, and at control stations: [40 CFR 125.61(a)(2)]

a. Provide profiles (with depth) on the following for the current discharge location and for the modified discharge location, if different from the current discharge:

BOD₅ (mg/l)

Dissolved oxygen (mg/l)

Suspended solids (mg/l)

pH

Temperature (°C)

Salinity (ppt)

Transparency (turbidity, percent light transmittance)

Other significant parameters (e.g., nutrients, toxic pollutants and pesticides, fecal coliforms)

b. Are there other periods when receiving water quality conditions may be more critical than the period(s) of maximum stratification? If so, describe these other critical periods and provide the data requested in 5.a. for the other critical period(s). [40 CFR 125.61(a)(1)]

6. Provide data on steady state sediment dissolved oxygen demand and dissolved oxygen demand due to resuspension of sediments in the vicinity of your current and modified discharge(s) (mg/l/day).

C. Biological Conditions: 1. Provide a detailed description of representative biological community (eg, plankton, macrobenthos, demersal fish, etc.) in the vicinity of your current and modified discharge(s): within the ZID, at the ZID boundary, at other areas of potential, discharge-related impact, and at reference (control) sites. Community characteristics to be described shall include (but not be limited to) species composition; abundance; dominance and diversity; spatial/temporal distribution; growth and reproduction; disease frequency; trophic structure and productivity patterns; presence of opportunistic species; bioaccumulation of toxic materials; and the occurrence of mass mortalities.

2. a. Are distinctive habitats of limited distribution (such as kelp beds or coral reefs) located in areas potentially affected by the modified discharge? [40 CFR 125.61(c)]

b. If yes, provide information on type, extent, and location of habitats.

3. a. Are commercial or recreational fisheries located in areas potentially affected by the discharge? [40 CFR 125.61(c)]

b. If yes, provide information on types, location, and value of fisheries.

D. State and Federal Laws [40 CFR 125.60]

1. Are there water quality standards applicable to the following pollutants for which a modification is requested:

Biochemical oxygen demand or dissolved oxygen?

Suspended solids, turbidity, light transmission, light scattering, or maintenance of the euphotic zone?

pH of the receiving water?

2. If yes, what is the water use classification for your discharge area? What are the applicable standards for your discharge area for each of the parameters for which a modification is requested? Provide a copy of all applicable water quality standards or a citation to where they can be found.

3. Will the modified discharge: [40 CFR 125.59(b)(3)]

Be consistent with applicable State coastal zone management program(s) approved under the Coastal Zone Management Act as amended, 16 U.S.C. 1451 *et seq.*? (See, 16 U.S.C. 1456(c)(3)(A))

Be located in a marine sanctuary designated under Title III of the Marine Protection, Research and Sanctuaries Act (MPRSA) as amended, 16 U.S.C. 1431 *et seq.* or in an estuarine sanctuary designated under the Coastal Zone Management Act as amended, 16 U.S.C. 1461? If located in a marine sanctuary designated under Title III of the MPRSA, attach a copy of any certification or permit required under regulations governing such marine sanctuary (See, 16 U.S.C. 1432(f)(2)).

Be consistent with the Endangered Species Act as amended, 16 U.S.C. 1531 *et seq.*? Provide the names of any threatened or endangered species that inhabit or obtain nutrients from waters that may be affected by the modified discharge. Identify any critical habitat that may be affected by the modified discharge and evaluate whether the modified discharge will affect threatened or endangered species or modify a critical habitat (See, 16 U.S.C. 1536(a)(2)).

4. Are you aware of any State or Federal Laws or regulations (other than the Clean Water Act or the three statutes identified in item 3 above) or an Executive Order which is applicable to your discharge? If yes, provide sufficient information to demonstrate that your modified discharge will comply with such law(s), regulations, or order(s). [40 CFR 125.59(b)(3)]

III. Technical Evaluation

Answers to the following questions will be used to assess the effects of the modified discharge. The responses will be used by the State agency(s) in their determination (as required by 40 CFR 125.60(b)(2) and

125.63(b)), and by EPA in preparing its decision on the applicant's request for a section 301(h) variance.

Your answers to the following questions must be supported by data and responses from Section II of this questionnaire. The analyses and calculations required below must show the input data for all calculations. Applicants should answer all questions; where your answer to a question is "yes", "no", or "not applicable", explain the basis for your response. Where your answer indicates that you cannot meet a regulatory or statutory criterion, discuss why you believe you qualify for a variance.

If EPA decides to check calculations in an application, the formulas and methods provided in the Revised Section 301(h) Technical Support Document may be used for that purpose. If applicants use methods other than those provided in the Technical Support Document, such methods must be described by the applicant.

A. Physical Characteristics of Discharge [40 CFR 125.61(a)]: 1. What is the critical initial dilution for your current and modified discharge(s) during 1) the period(s) of maximum stratification? and 2) any other critical period(s) of discharge volume/composition, water quality, biological seasons, or oceanographic conditions?

2. What are the dimensions of the zone of initial dilution for your modified discharge(s)?

3. What are the effects of ambient currents and stratification on dispersion and transport of the discharge plume/wastefield?

4. Sedimentation of suspended solids.

a. What fraction of the modified discharge's suspended solids will accumulate within the vicinity of the modified discharge?

b. What are the calculated area(s) and rate(s) of sediment accumulation within the vicinity of the modified discharge(s) (g/m²/yr)?

c. What is the fate of settleable solids transported beyond the calculated sediment accumulation area?

B. Compliance with Applicable Water Quality Standards [40 CFR 125.60(b) and 125.61(a)]:

1. What is the concentration of dissolved oxygen immediately following initial dilution for the period(s) of maximum stratification and any other critical period(s) of discharge volume/composition, water quality, biological seasons, or oceanographic conditions?

2. What is the farfield dissolved oxygen depression and resulting concentration due to BOD exertion of the wastefield during the period(s) of maximum stratification and any other critical period(s)?

3. What are the dissolved oxygen depressions and concentrations due to steady sediment demand and resuspension of sediments?

4. What is the increase in receiving water suspended solids concentration immediately following initial dilution of the modified discharge(s)?

5. What is the change in receiving water pH immediately following initial dilution of the modified discharge(s)?

6. Does (will) the modified discharge comply with applicable water quality standards for:

Dissolved oxygen?

Suspended solids or surrogate standards? pH?

7. Provide the determination required by 40 CFR 125.60(b)(2) or, if the determination has not yet been received, a copy of a letter to the appropriate agency(s) requesting the required determination.

C. Impact on Public Water Supplies [40 CFR 125.61(b)]:

1. Is there a planned or existing public water supply (desalinization facility) intake in the vicinity of the current or modified discharge?

2. If yes,

a. What is the location of the intake(s) (latitude and longitude)?

b. Will the modified discharge(s) prevent use of the intake(s) for public water supply?

c. Will the modified discharge(s) cause increased treatment requirements for the public water supply(s) to meet local, State, and EPA drinking water standards?

D. Biological Impact of Discharge [40 CFR 125.61(c)]:

1. Does (will) a balanced indigenous population of shellfish, fish, and wildlife exist:

a. Immediately beyond the ZID of the current and modified discharge(s)?

b. In all other areas beyond the ZID where marine life is actually or potentially affected by the current and modified discharge(s)?

2. Have distinctive habitats of limited distribution been impacted adversely by the current discharge and will such habitats be impacted adversely by the modified discharge?

3. Have commercial or recreational fisheries been impacted adversely by the current discharge (e.g., warnings, restrictions, closures, or mass mortalities) or will they be impacted adversely by the modified discharge?

4. Does the current or modified discharge cause the following within or beyond the ZID: [40 CFR 125.61(c)(3)]

a. Mass mortality of fishes or invertebrates due to oxygen depletion, high concentrations of toxics or other conditions?

b. An increased incidence of disease in marine organisms?

c. An abnormal body burden of any toxic material in marine organisms?

d. Any other extreme, adverse biological impacts?

5. For discharges into saline estuarine waters: [40 CFR 125.61(c)(4)]

a. Does or will the current or modified discharge cause substantial differences in the benthic population within the ZID and beyond the ZID?

b. Does or will the current or modified discharge interfere with migratory pathways within the ZID?

c. Does or will the current or modified discharge result in bioaccumulation of toxic pollutants or pesticides at levels which exert adverse effects on the biota within the ZID?

6. For improved discharges, will the proposed improved discharge(s) comply with the requirements of 40 CFR 125.61(a) through 125.61(d)? [40 CFR 125.61(e)]

7. For altered discharge(s), will the altered discharge(s) comply with the requirements of 40 CFR 125.61(a) through 125.61(d)? [40 CFR 125.61(e)]

8. If your current discharge is to stressed waters, does or will your current or modified discharges: [40 CFR 125.61(f)]

a. Contribute to, increase, or perpetuate such stressed condition?

b. Contribute to further degradation of the biota or water quality if the level of human perturbation from other sources increases?

c. Retard the recovery of the biota or water quality if human perturbation from other sources decreases?

E. Impacts of Discharge on Recreational Activities [40 CFR 125.61(d)]:

1. Describe the existing or potential recreational activities likely to be affected by the modified discharge(s) beyond the zone of initial dilution.

2. What are the existing and potential impacts of the modified discharge(s) on recreational activities? Your answer should include, but not be limited to, a discussion of fecal coliforms.

3. Are there any Federal, State or local restrictions on recreational activities in the vicinity of the modified discharge(s)? If yes, describe the restrictions and provide citations to available references.

4. If recreational restrictions exist, would such restrictions be lifted or modified if you were discharging a secondary treatment effluent?

F. Establishment of a Monitoring Program [40 CFR 125.62]:

1. Describe the biological, water quality, and effluent monitoring programs which you propose to meet the criteria of 40 CFR 125.62.

2. Describe the sampling techniques, schedules, and locations, analytical techniques, quality control and verification procedures to be used.

3. Describe the personnel and financial resources available to implement the monitoring programs upon issuance of a modified permit and to carry it out for the life of the modified permit.

G. Effect of Discharge on Other Point and Nonpoint Sources [40 CFR 125.63]:

1. Does (will) your modified discharge(s) cause additional treatment or control requirements for any other point or nonpoint pollution source(s)?

2. Provide the determination required by 40 CFR 125.63(b) or, if the determination has not yet been received, a copy of a letter to the appropriate agency(s) requesting the required determination.

H. Toxics Control Program (40 CFR 125.64):

1. a. Do you have any known or suspected industrial sources of toxic pollutants or pesticides?
- b. If no, provide the certification required by 40 CFR 125.64(c)(2).
2. Provide the results of wet and dry weather effluent analyses for toxic pollutants and pesticides as required by 40 CFR 125.64(a)(1).
3. Analyze any known or suspected industrial sources of toxic pollutants and pesticides identified in 2. above.
4. Do you have an approved industrial pretreatment program?
 - a. If yes, provide the date of EPA approval.
 - b. If no, and if required by 40 CFR Part 403 to have an industrial pretreatment program, provide a proposed schedule for development and implementation of your industrial pretreatment program to meet the requirements of 40 CFR Part 403.
5. Describe the public education program you propose to minimize the entrance of nonindustrial toxic pollutants and pesticides into your treatment system.
6. Provide a schedule for development and implementation of a nonindustrial toxics control program to meet the requirements of 40 CFR 125.64(d)(3).

(Approved by the Office of Management and Budget under control number 2000-0427)

[125.67(d) (Appendices A and B) amended by 48 FR 31404, July 8, 1983]

Subpart H—Criteria for Determining Alternative Effluent Limitations Under Section 316(a) of the Act

§ 125.70 Purpose and scope.

Section 316(a) of the Act provides that:

"With respect to any point source otherwise subject to the provisions of section 301 or section 306 of this Act, whenever the

owner or operator of any such source, after opportunity for public hearing, can demonstrate to the satisfaction of the Administrator (or, if appropriate, the State) that any effluent limitation proposed for the control of the thermal component of any discharge from such source will require effluent limitations more stringent than necessary to assure the protection [sic] and propagation of a balanced, indigenous population of shellfish, fish and wildlife in and on the body of water into which the discharge is to be made, the Administrator (or, if appropriate, the State) may impose an effluent limitation under such sections on such plant, with respect to the thermal component of such discharge (taking into account the interaction of such thermal component with other pollutants), that will assure the protection and propagation of a balanced indigenous population of shellfish, fish and wildlife in and on that body of water."

This Subpart describes the factors, criteria and standards for the establishment of alternative thermal effluent limitations under section 316(a) of the Act in permits issued under section 402(a) of the Act.

§ 125.71 Definitions.

For the purpose of this Subpart:

(a) "Alternative effluent limitations" means all effluent limitations or standards of performance for the control of the thermal component of any discharge which are established under section 316(a) and this Subpart.

(b) "Representative important species" means species which are representative, in terms of their biological needs, of a balanced, indigenous community of shellfish, fish and wildlife in the body of water into which a discharge of heat is made.

(c) The term "balanced, indigenous community" is synonymous with the term "balanced, indigenous population"

in the Act and means a biotic community typically characterized by diversity, the capacity to sustain itself through cyclic seasonal changes, presence of necessary food chain species and by a lack of domination by pollution tolerant species. Such a community may include historically non-native species introduced in connection with a program of wildlife management and species whose presence or abundance results from substantial, irreversible environmental modifications. Normally, however, such a community will not include species whose presence or abundance is attributable to the introduction of pollutants that will be eliminated by compliance by all sources with section 301(b)(2) of the Act; and may not include species whose presence or abundance is attributable to alternative effluent limitations imposed pursuant to section 316(a).

§ 125.72 Early screening of applications for section 316(a) variances.

(a) Any initial application for a section 316(a) variance shall include the following early screening information:

(1) A description of the alternative effluent limitation requested;

(2) A general description of the method by which the discharger proposes to demonstrate that the otherwise applicable thermal discharge effluent limitations are more stringent than necessary;

(3) A general description of the type of data, studies, experiments and other information which the discharger intends to submit for the demonstration; and

(4) Such data and information as may be available to assist the Director in

selecting the appropriate representative important species.

(b) After submitting the early screening information under paragraph (a), the discharger shall consult with the Director at the earliest practicable time (but not later than 30 days after the application is filed) to discuss the discharger's early screening information. Within 60 days after the application is filed, the discharger shall submit for the Director's approval a detailed plan of study which the discharger will undertake to support its section 316(a) demonstration. The discharger shall specify the nature and extent of the following type of information to be included in the plan of study: biological, hydrographical and meteorological data; physical monitoring data; engineering or diffusion models; laboratory studies; representative important species; and other relevant information. In selecting representative important species, special consideration shall be given to species mentioned in applicable water quality standards. After the discharger submits its detailed plan of study, the Director shall either approve the plan or specify any necessary revisions to the plan. The discharger shall provide any additional information or studies which the Director subsequently determines necessary to support the demonstration, including such studies or inspections as may be necessary to select representative important species. The discharger may provide any additional information or studies which the discharger feels are appropriate to support the demonstration.

(c) Any application for the renewal of a section 316(a) variance shall include only such information described in paragraphs (a) and (b) of this section and § 124.73(c)(1) as the Director requests within 60 days after receipt of the permit application.

(d) The Director shall promptly notify the Secretary of Commerce and the Secretary of the Interior, and any affected State of the filing of the request and shall consider any timely recommendations they submit.

(e) In making the demonstration the discharger shall consider any information or guidance published by EPA to assist in making such demonstrations.

(f) If an applicant desires a ruling on a section 316(a) application before the ruling on any other necessary permit terms and conditions, (as provided by § 124.65), it shall so request upon filing its application under paragraph (a) of this section. This request shall be granted or denied at the discretion of the Director.

[Note.—At the expiration of the permit, any discharger holding a section 316(a) variance should be prepared to support the continuation of the variance with studies based on the discharger's actual operation experience.]

§ 125.73 Criteria and standards for the determination of alternative effluent limitations under section 316(a).

(a) Thermal discharge effluent limitations or standards established in permits may be less stringent than those required by applicable standards and limitations if the discharger demonstrates to the satisfaction of the director that such effluent limitations are more stringent than necessary to assure the protection and propagation of a balanced, indigenous community of shellfish, fish and wildlife in and on the body of water into which the discharge is made. This demonstration must show that the alternative effluent limitation desired by the discharger, considering the cumulative impact of its thermal discharge together with all other significant impacts on the species affected, will assure the protection and propagation of a balanced indigenous community of shellfish, fish and wildlife in and on the body of water into which the discharge is to be made.

(b) In determining whether or not the protection and propagation of the affected species will be assured, the Director may consider any information contained or referenced in any applicable thermal water quality criteria and thermal water quality information published by the Administrator under section 304(a) of the Act, or any other information he deems relevant.

(c)(1) Existing dischargers may base their demonstration upon the absence of prior appreciable harm in lieu of predictive studies. Any such demonstrations shall show:

(i) That no appreciable harm has resulted from the normal component of the discharge (taking into account the interaction of such thermal component with other pollutants and the additive effect of other thermal sources to a balanced, indigenous community of shellfish, fish and wildlife in and on the body of water into which the discharge has been made: or

(ii) That despite the occurrence of such previous harm, the desired alternative effluent limitations (or appropriate modifications thereof) will nevertheless assure the protection and propagation of a balanced, indigenous community of shellfish, fish and wildlife in and on the body of water into which the discharge is made.

(2) In determining whether or not prior appreciable harm has occurred, the Director shall consider the length of time in which the applicant has been discharging and the nature of the discharge.

Subpart I—Criteria Applicable to Cooling Water Intake Structures Under Section 316(b) of the Act [Reserved]

Subpart J—Criteria for Extending Compliance Dates Under Section 301(i) of the Act

§ 125.90 Purpose and scope.

Under sections 301(i)(1) and (2) of the Act, extensions of the 1977 statutory deadline for compliance with certain treatment requirements may be granted by the Director through permit issuance or modification. This Subpart establishes criteria for granting these extensions and the method for incorporating these extensions into permits issued under section 402(a) of the Act.

§ 125.91 Definition.

For purposes of this Subpart, "construction" includes any one of the following preliminary planning to determine the feasibility of treatment works; engineering, architectural, legal fiscal, or economic investigations or studies, surveys, designs, plans, working drawings, specifications, procedures, or other necessary actions, erection, building, acquisition, alteration, remodeling, improvement, or extension of treatment works, or the inspection or supervision of any of the foregoing items provided that completion of the facility and attainment of operational level by no later than July 1, 1983, is a reasonable expectation.

§ 125.92 Requests for permit modification and issuance under section 301(i)(1) of the Act.

Any owner or operator of a publicly owned treatment works (POTW) that requires construction to achieve limitations under sections 301(b)(1)(B) or 301(b)(1)(C) of the Act may request modification or issuance of a permit extending the date for compliance with these limitations in accordance with the provisions of § 122.21(m).
[125.92 amended by 48 FR 14153, April 1, 1983]

§ 125.93 Criteria for permit modification and issuance under section 301(i)(1) of the Act.

No request for a permit modification or issuance under section 301(i)(1) shall be granted unless the Director finds that the POTW requires construction to achieve limitations under sections 301(b)(1)(B) or 301(b)(1)(C) of the Act and did not complete construction for either of the following reasons:

(a) The issuance of a notice to proceed under a construction contract for any segment of Step 3 project work (or if notice to proceed is not required, the execution of the construction contract) occurred before July 1, 1977, but construction could not physically be completed by July 1, 1977, despite all expeditious efforts of the POTW (see initiation of construction as defined in 40 CFR § 35.905 for Step 3); or

(b) Federal financial assistance was not available, or was not available in time for construction required to achieve these limitations, and the POTW did not in any significant way contribute to this unavailability or delay.

§ 125.94 Permit terms and conditions under section 301(i)(1) of the Act.

(a) All permits modified or issued by the Director under section 301(i)(1) of the Act shall contain at a minimum the following permit terms and conditions:

(1) The shortest reasonable schedule of compliance for achievement of limitations under sections 301(b)(1)(B) and (C) but in no event later than July 1, 1983. This schedule shall be based upon the earliest date that Federal financial assistance will be available and construction can be completed and on any additional information submitted by the POTW or otherwise available.

(i) When a facility plan has been approved in accordance with 40 CFR 35, Subpart E, this schedule shall contain dates certain for the completion of actions leading toward the attainment of statutory treatment limitations.

(ii) When the POTW has not completed Step 1 of the construction grants process in accordance with 40 CFR 35, Subpart E, this schedule shall contain a date certain for the submission of a facility plan (completion of Step 1) upon which date the permit should be set to expire. In this case, in order to assure compliance by the POTW by July 1, 1983, the following requirements must be met:

(A) Certification by the State, based on its one or five year project priority list developed pursuant to 40 CFR 35.915(c), that funding will be available in time to ensure compliance by July 1, 1983; and

(B) Reporting once a year (if necessary) by the POTW as to its

progress in obtaining Federal funding.

[*Comment:* EPA recognizes that the date for submission of the facility plan may not take into account all the uncertainties of the Step 1 planning process. Because of the uncertainties inherent in the Step 1 planning process, EPA recommends that section 301(i)(1) requests (and permit issuance) for projects that are presently in Step 2 or 3 should be acted on *before* requests from projects in Step 1. When Federal funding in the form of a Step 2 construction grant award is made available, and the Step 1 permit has expired, the permit is to be reissued containing a date certain schedule derived from the facility plan and coordinated with the State Project Priority List.]

(2) A statement ensuring compliance with requirements under sections 201 (b) through (g) of the Act consistent with the terms of the POTW's construction grant.

(3) Abatement practices and interim effluent limitations reflecting optimum operation and maintenance of the existing facilities. These shall include:

(i) Adequate operator staffing and training;

(ii) Adequate laboratory and process controls; and

(iii) Effluent limitations derived from reports of operation and maintenance inspections conducted by EPA or the State, or other guidance.

[*Comment:* Only in exceptional circumstances should in-depth plant evaluations be conducted, e.g., when existing information does not represent the true capabilities of the plant.]

(4) Interim effluent limitations reflecting other non-capital intensive measures for increased pollution control. This shall include any possible minor facility modifications such as piping changes, additional metering and instrumentation or the use of skimming and vacuuming equipment. When an existing POTW is currently violating limitations imposed under section 301(b)(1)(C) of the Act, interim effluent limitations shall be established to minimize adverse water quality impact; these limitations shall not be made less stringent or allow more pollutants to be discharged than are currently being discharged during the term of an extension granted under section 301(i)(1) of the Act.

(b) If a POTW has industrial users, any permit issued or modified by the Director under section 301(i)(1) shall contain any terms and conditions necessary to ensure compliance with 40 CFR 403.

§ 125.95 Requests for permit modification or issuance under section 301(i)(2) of the Act.

Any owner or operator of a point source other than a POTW that will not

achieve the requirements of sections 301(b)(1)(A) and 301(b)(1)(C) of the Act because it was scheduled to discharge into a POTW that is presently unable to accept the discharge without construction, may request modification or issuance of a permit extending the date of compliance with these limitations in accordance with the provisions of § 122.21(l).

[125.95 amended by 48 FR 14153, April 1, 1983]

§ 125.96 Criteria for permit modification or issuance under section 301(i)(2) of the Act.

No request for a permit modification or issuance under section 301(i)(2) of the Act shall be granted unless the Director finds that the discharger has failed to achieve the requirements of sections 301(b)(1)(A) and 301(b)(1)(C) of the Act because it was scheduled to discharge into a POTW that is presently unable to accept the discharge without construction, and:

(a) The discharger has indicated an intent to discharge into the POTW before July 1, 1977, in one of the following ways:

(1) The discharger was issued a permit before July 1, 1977, based upon a discharge into a POTW;

(2) The discharger had a binding contractual obligation before July 1, 1977, (enforceable against the discharger) to discharge into a POTW. Contracts which can be terminated or modified without substantial loss and contracts for feasibility, engineering and design studies do not constitute a contractual obligation under this paragraph.

(3) A construction grant application made by the POTW before July 1, 1977, clearly demonstrated that the discharger was to discharge into the POTW; or

(4) Engineering plans, architectural plans or working drawings prepared for the POTW before July 1, 1977, clearly demonstrated the discharger was to discharge into the POTW. Plans and drawings, such as those accompanying a bona fide application for a Federal construction grant, are sufficient only to the extent that they were truly representative of the intent of the discharger and the POTW;

(b) The Director finds that the discharger has acted in good faith in its efforts to effectuate discharge into the POTW and to minimize or abate pollution prior to discharge into the POTW. This shall include the following findings:

(i) Failure of the discharger to meet the July 1, 1977, deadline was for reasons beyond its control;

[Sec. 125.96(b)(i)]

(ii) A history of a high degree of commitment to meet the requirements of the Act as manifested by cooperation with the State or EPA in attempting to resolve disputed issues;

(iii) No history of unjustified delay;

(iv) No past serious or intentional violations of the Act; and

(v) All reasonable measures are being taken to expedite compliance.

[*Comment:* The Director may also consider whether the discharger has operated its facilities competently and responsibly and the extent to which the discharger has completed the necessary prerequisites to having its waste treated by the POTW.]

(c) The POTW will be in operation and available to the discharger July 1, 1983;

(d) The POTW will be able to meet secondary treatment and water quality standard effluent limitations by July 1, 1983, after receiving the waste from the discharger;

(e) The discharger and the POTW have entered into an enforceable contract providing that:

(i) The discharger agrees to discharge its waste to the POTW;

(ii) The POTW agrees to accept and treat that waste by a date certain; and

(iii) The discharger agrees to pay all user charges and industrial cost recovery charges required under section 204 of the Act; and

(f) In the case of a discharge into an existing POTW, such POTW has been granted an extension under section 301(i)(1) of the Act.

§ 125.97 Permit terms and conditions under section 301(i)(2) of the Act.

All permits modified or issued by the Director under section 301(i)(2) of the Act shall contain at a minimum the following permit terms and conditions:

(a) The shortest reasonable schedule of compliance leading to discharge into the POTW, not to extend beyond the earliest date practicable for compliance, or beyond the final compliance date of any extension granted to the appropriate POTW under section 301(i)(1) of the Act, but in no event later than July 1, 1983. This schedule shall be based upon the earliest date by which the appropriate POTW can receive the waste from the discharger and the discharger can complete the necessary prerequisites to having its waste treated by that POTW.

(b) Achievement of effluent limitations and standards under sections 301(b)(1)(A) and 301(b)(1)(C) of the Act by the same final date in the schedule established in paragraph (a) of this section in the event that the permittee does not discharge its wastes to the POTW by the date established under paragraph (a) of this section.

(c) Abatement practices and interim effluent limitations reflecting optimum operation and maintenance of the discharger's existing facilities. These shall include:

(1) Effective performance of facility design removals;

(2) Adequate operator staffing and training; and

(3) Adequate laboratory and process control.

(d) Interim effluent limitations reflecting other non-capital intensive measures for increased pollution control.

(e) Requirements to meet applicable toxic effluent standards and prohibitions after they are promulgated under section 307(a) of the Act.

(f) Requirements to ensure compliance with:

(1) Pretreatment requirements imposed by the POTW pursuant to any extension granted to the POTW under section 301(i)(1);

(2) Any State or local pretreatment requirements; and

(3) Pretreatment standards as promulgated under section 307(b) of the Act.

[*Comment:* The legislative history cites the following example: "[I]f an industry is planning on participating in a municipal system which will not be available until January 1983, that industry would still have to install and operate pretreatment facilities within the time specified for compliance at the time the applicable pretreatment standard was promulgated and in no event later than three years from the date of said promulgation. Thus, if the pretreatment regulations are promulgated March 1, 1979, and require compliance within two years, that industry would be required to comply by March 1, 1981." H.R. Rep. No. 95-830, 95th Cong., 1st Sess., 12712 (daily ed. Dec. 6, 1977).]

(g) Any water conservation requirements necessary to carry out the provisions of the Act or imposed by the POTW pursuant to the contract executed between the discharger and the POTW.

[*Comment:* The existence of such a contract is a prerequisite to granting an extension under section 301(i)(2)(B) of the Act and § 125.96(e).]

Subpart K—Criteria and Standards for Best Management Practices Authorized Under Section 304(e) of the Act

§ 125.100 Purpose and scope.

This Subpart describes how best management practices (BMPs) for ancillary industrial activities under section 304(e) of the Act shall be reflected in permits, including best

management practices promulgated in effluent limitations under section 304 and established on a case-by-case basis in permits under section 402(a)(1) of the Act. Best management practices authorized by section 304(e) are included in permits as requirements for the purposes of sections 301, 302, 306, 307, or 403 of the Act, as the case may be.

§ 125.101 Definition.

"Manufacture" means to produce as an intermediate or final product, or by-product.

§ 125.102 Applicability of best management practices.

Dischargers who use, manufacture, store, handle or discharge any pollutant listed as toxic under section 307(a)(1) of the Act or any pollutant listed as hazardous under section 311 of the Act are subject to the requirements of this Subpart for all activities which may result in significant amounts of those pollutants reaching waters of the United States. These activities are ancillary manufacturing operations including: materials storage areas; in-plant transfer, process and material handling areas; loading and unloading operations; plant site runoff; and sludge and waste disposal areas.

§ 125.103 Permit terms and conditions.

(a) Best management practices shall be expressly incorporated into a permit where required by an applicable EPA promulgated effluent limitations guideline under section 304(e);

(b) Best management practices may be expressly incorporated into a permit on a case-by-case basis where determined necessary to carry out the provisions of the Act under section 402(a)(1). In issuing a permit containing BMP requirements, the Director shall consider the following factors:

(1) Toxicity of the pollutant(s);

(2) Quantity of the pollutant(s) used, produced, or discharged;

(3) History of NPDES permit violations;

(4) History of significant leaks or spills of toxic or hazardous pollutants;

(5) Potential for adverse impact on public health (e.g., proximity to a public water supply) or the environment (e.g., proximity to a sport or commercial fishery); and

(6) Any other factors determined to be relevant to the control of toxic or hazardous pollutants.

(c) Best management practices may be established in permits under paragraph

[Sec. 125.103(c)]

(b) of this section alone or in combination with those required under paragraph (a) of this section.

(d) In addition to the requirements of paragraphs (a) and (b) of this section, dischargers covered under § 125.102 shall develop and implement a best management practices program in accordance with § 125.104 which prevents, or minimizes the potential for, the release of toxic or hazardous pollutants from ancillary activities to waters of the United States.

§ 125.104 Best management practices programs.

(a) BMP programs shall be developed in accordance with good engineering practices and with the provisions of this Subpart.

(b) The BMP program shall:

(1) Be documented in narrative form, and shall include any necessary plot plans, drawings or maps;

(2) Establish specific objectives for the control of toxic and hazardous pollutants.

(i) Each facility component or system shall be examined for its potential for causing a release of significant amounts of toxic or hazardous pollutants to waters of the United States due to equipment failure, improper operation, natural phenomena such as rain or snowfall, etc.

(ii) Where experience indicates a reasonable potential for equipment failure (e.g., a tank overflow or leakage), natural condition (e.g., precipitation), or other circumstances to result in significant amounts of toxic or hazardous pollutants reaching surface waters, the program should include a prediction of the direction, rate of flow and total quantity of toxic or hazardous pollutants which could be discharged from the facility as a result of each condition or circumstance;

(3) Establish specific best management practices to meet the objectives identified under paragraph (b)(2) of this section, addressing each component or system capable of causing a release of significant amounts of toxic or hazardous pollutants to the waters of the United States;

(4) The BMP program:

(i) May reflect requirements for Spill Prevention Control and Countermeasure (SPCC) plans under section 311 of the Act and 40 CFR Part 151, and may incorporate any part of such plans into the BMP program by reference;

[Comment: EPA has proposed section 311(j)(1)(c) regulations (43 FR 39276) which require facilities subject to NPDES to develop

and implement SPCC plans to prevent discharges of reportable quantities of designated hazardous substances. While Subpart K requires only procedural activities and minor construction, the proposed 40 CFR 151 (SPCC regulations) are more stringent and comprehensive with respect to their requirements for spill prevention. In developing BMP programs in accordance with Subpart K, owners or operators should also consider the requirements of proposed 40 CFR 151 which may address many of the same areas of the facility covered by this Subpart.]

(ii) Shall assure the proper management of solid and hazardous waste in accordance with regulations promulgated under the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act of 1976 (RCRA) (40 U.S.C. 6901 *et seq.*). Management practices required under RCRA regulations shall be expressly incorporated into the BMP program; and

(iii) Shall address the following points for the ancillary activities in § 125.102:

- (A) Statement of Policy;
- (B) Spill Control Committee;
- (C) Material Inventory;
- (D) Material Compatibility;
- (E) Employee Training;
- (F) Reporting and Notification Procedures;
- (G) Visual Inspections;
- (H) Preventive Maintenance;
- (I) Housekeeping; and
- (J) Security.

[Comment: Additional technical information on BMPs and the elements of a BMP program is contained in a publication entitled "NPDES Best Management Practices Guidance Document." Copies may be obtained by written request to Edward A. Kramer (EN-336), Office of Water Enforcement, Environmental Protection Agency, Washington, D.C. 20460.]

(c)(1) The BMP program must be clearly described and submitted as part of the permit application. An application which does not contain a BMP program shall be considered incomplete. Upon receipt of the application, the Director shall approve or modify the program in accordance with the requirements of this Subpart. The BMP program as approved or modified shall be included in the draft permit (§ 124.6). The BMP program shall be subject to the applicable permit issuance requirements of Part 124, resulting in the incorporation of the program (including any modifications of the program resulting from the permit issuance procedures) into the final permit.

(2) Proposed modifications to the BMP program which affect the discharger's

permit obligations shall be submitted to the Director for approval. If the Director approves the proposed BMP program modification, the permit shall be modified in accordance with § 122.62, provided that the Director may waive the requirements for public notice and opportunity for hearing on such modification if he or she determines that the modification is not significant. The BMP program, or modification thereof, shall be fully implemented as soon as possible but not later than one year after permit issuance, modification, or revocation and reissuance unless the Director specifies a later date in the permit.

[125.104(c)(2) amended by 48 FR 14153, April 1, 1983]

[Note.—A later date may be specified in the permit, for example, to enable coordinated preparation of the BMP program required under these regulations and the SPCC plan required under 40 CFR Part 151 or to allow for the completion of construction projects related to the facility's BMP or SPCC program.]

(d) The discharger shall maintain a description of the BMP program at the facility and shall make the description available to the Director upon request.

(e) The owner or operator of a facility subject to this Subpart shall amend the BMP program in accordance with the provisions of this Subpart whenever there is a change in facility design, construction, operation, or maintenance which materially affects the facility's potential for discharge of significant amounts of hazardous or toxic pollutants into the waters of the United States.

(f) If the BMP program proves to be ineffective in achieving the general objective of preventing the release of significant amounts of toxic or hazardous pollutants to those waters and the specific objectives and requirements under paragraph (b) of this section, the permit and/or the BMP program shall be subject to modification to incorporate revised BMP requirements.

Subpart L—Criteria and Standards for Imposing Conditions for the Disposal of Sewage Sludge Under Section 405 of the Act [Reserved]

Subpart M—Ocean Dumping Criteria Under Section 403 of the Act

[Subpart M added by 45 FR 65953, October 3, 1980]

[Sec. 125.104(f)]

§ 125.120 Scope and purpose.

This subpart establishes guidelines for issuance of National Pollutant Discharge Elimination System (NPDES) permits for the discharge of pollutants from a point source into the territorial seas, the contiguous zone, and the oceans.

§ 125.121 Definitions.

(a) "Irreparable harm" means significant undesirable effects occurring after the date of permit issuance which will not be reversed after cessation or modification of the discharge.

(b) "Marine environment" means that territorial seas, the contiguous zone and the oceans.

(c) "Mixing zone" means the zone extending from the sea's surface to seabed and extending laterally to a distance of 100 meters in all directions from the discharge point(s) or to the boundary of the zone of initial dilution as calculated by a plume model approved by the director, whichever is greater, unless the director determines that the more restrictive mixing zone or another definition of the mixing zone is more appropriate for a specific discharge.

(d) "No reasonable alternatives" means: (1) No land-based disposal sites, discharge point(s) within internal waters; or approved ocean dumping sites within a reasonable distance of the site of the proposed discharge the use of which would not cause unwarranted economic impacts on the discharger, or, notwithstanding the availability of such sites,

(2) On-site disposal is environmentally preferable to other alternative means of disposal after consideration of: (i) The relative environmental harm of disposal on-site, in disposal sites located on land, from discharge point(s) within internal waters, or in approved ocean dumping sites, and

(ii) The risk to the environment and human safety posed by the transportation of the pollutants.

(e) "Unreasonable degradation of the marine environment" means: (1) Significant adverse changes in ecosystem diversity, productivity and stability of the biological community within the area of discharge and surrounding biological communities,

(2) Threat to human health through direct exposure to pollutants or through consumption of exposed aquatic organisms, or

(3) Loss of esthetic, recreational, scientific or economic values which is unreasonable in relation to the benefit derived from the discharge.

§ 125.122 Determination of unreasonable degradation of the marine environment.

(a) The director shall determine whether a discharge will cause unreasonable degradation of the marine environment based on consideration of:

(1) The quantities, composition and potential for bioaccumulation or persistence of the pollutants to be discharged;

(2) The potential transport of such pollutants by biological, physical or chemical processes;

(3) The composition and vulnerability of the biological communities which may be exposed to such pollutants, including the presence of unique species or communities of species, the presence of species identified as endangered or threatened pursuant to the Endangered Species Act, or the presence of those species critical to the structure or function of the ecosystem, such as those important for the food chain;

(4) The importance of the receiving water area to the surrounding biological community, including the presence of spawning sites, nursery/forage areas, migratory pathways, or areas necessary for other functions or critical stages in the life cycle of an organism.

(5) The existence of special aquatic sites including, but not limited to marine sanctuaries and refuges, parks, national and historic monuments, national seashores, wilderness areas and coral reefs;

(6) The potential impacts on human health through direct and indirect pathways;

(7) Existing or potential recreational and commercial fishing, including finfishing and shellfishing;

(8) Any applicable requirements of an approved Coastal Zone Management plan;

(9) Such other factors relating to the effects of the discharge as may be appropriate;

(10) Marine water quality criteria developed pursuant to section 304(a)(1).

(b) Discharges in compliance with sections 301(g), 301(h), or 316(a) variance requirements or State water quality standards shall be presumed not to cause unreasonable degradation of the marine environment, for any specific pollutants or conditions specified in the variance or the standard.

§ 125.123 Permit requirements.

(a) If the director on the basis of available information including that supplied by the applicant pursuant to § 125.124 determines prior to permit issuance that the discharge will not cause unreasonable degradation of the

marine environment after application of any necessary conditions specified in § 125.123(d), he may issue an NPDES permit containing such conditions.

(b) If the director, on the basis of available information including that supplied by the applicant pursuant to § 125.124 determines prior to permit issuance that the discharge will cause unreasonable degradation of the marine environment after application of all possible permit conditions specified in § 125.123(d), he may not issue an NPDES permit which authorizes the discharge of pollutants.

(c) If the director has insufficient information to determine prior to permit issuance that there will be no unreasonable degradation of the marine environment pursuant to § 125.122, there shall be no discharge of pollutants into the marine environment unless the director on the basis of available information, including that supplied by the applicant pursuant to § 125.124 determines that: (1) Such discharge will not cause irreparable harm to the marine environment during the period in which monitoring is undertaken, and

(2) There are no reasonable alternatives to the on-site disposal of these materials, and

(3) The discharge will be in compliance with all permit conditions established pursuant to paragraph (d) of this section.

(d) All permits which authorize the discharge of pollutants pursuant to paragraph (c) of this section shall: (1) Require that a discharge of pollutants will: (A) following dilution as measured at the boundary of the mixing zone not exceed the limiting permissible concentration for the liquid and suspended particulate phases of the waste material as described in section 227.27(a) (2) and (3), section 227.27(b), and section 227.27(c) of the Ocean Dumping Criteria; and (B) not exceed the limiting permissible concentration for the solid phase of the waste material or cause an accumulation of toxic materials in the human food chain as described in sections 227.27 (b) and (d) of the Ocean Dumping Criteria;

(2) Specify a monitoring program, which is sufficient to assess the impact of the discharge on water, sediment, and biological quality including, where appropriate, analysis of the bioaccumulative and/or persistent impact on aquatic life of the discharge;

(3) Contain any other conditions, such as performance of liquid or suspended particulate phase bioaccumulation tests, seasonal restrictions on discharge,

[Sec. 125.123(d)(3)]

process modifications, dispersion of pollutants, or schedule of compliance for existing discharges, which are determined to be necessary because of local environmental conditions, and

(4) Contain the following clause: In addition to any other grounds specified herein, this permit shall be modified or revoked at any time if, on the basis of any new data, the director determines that continued discharges may cause unreasonable degradation of the marine environment.

§ 125.124 Information required to be submitted by applicant.

The applicant is responsible for providing information which the director may request to make the determination required by this subpart. The director may require the following information as well as any other pertinent information:

- (a) An analysis of the chemical constituents of any discharge;
- (b) Appropriate bioassays necessary to determine the limiting permissible concentrations for the discharge;
- (c) An analysis of initial dilution;

(d) Available process modifications which will reduce the quantities of pollutants which will be discharged;

(e) Analysis of the location where pollutants are sought to be discharged, including the biological community and the physical description of the discharge facility;

(f) Evaluation of available alternatives to the discharge of the pollutants including an evaluation of the possibility of land-based disposal or disposal in an approved ocean dumping site.

**ENVIRONMENTAL PROTECTION AGENCY REGULATIONS
ON CRITERIA AND STANDARDS FOR THE NATIONAL POLLUTANT
DISCHARGE ELIMINATION SYSTEM**

(40 CFR 125; 38 FR 13527, May 22, 1973; as amended by Code of Federal Regulations, Volume 40, Revised as of July 1, 1975; 40 FR 29848, July 16, 1975; 41 FR 11303 and 11458, March 18, 1976; 41 FR 24709, June 18, 1976; 41 FR 24893, July 12, 1976; 41 FR 36918, September 1, 1976; 43 FR 22160, May 23, 1978; 44 FR 32854, June 7, 1979; Effective August 13, 1979; 44 FR 34816, June 15, 1979; 45 FR 33512, May 19, 1980; 45 FR 65953, October 3, 1980; 46 FR 9460, January 28, 1981, Effective January 31, 1982; 47 FR 24919, June 8, 1982; 47 FR 52304, November 19, 1982; 47 FR 53675, November 26, 1982)

[Editor's note: In a notice published at 44 FR 47063, August 10, 1979, EPA deferred the effective date of the best management practices requirements (Subpart K) that were to be effective August 13. The requirements will become effective 60 days after EPA publishes notice that relevant technical information is available.]

Authority: (Clean Water Act, Secs. 301, 304, 501, Pub. L. 92-500, 86 Stat. 816, as amended by Pub. L. 95-217, 91 Stat. 1566, as amended by Pub. L. 97-117, 95 Stat. 1523 (33 U.S.C. 1211, 1314, 1361).

[Authority citation revised by 47 FR 24919, June 8, 1982; amended by 47 FR 53675, November 26, 1982]

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

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Subpart M—Ocean Dumping Criteria Under Section 403 of the Act

- Sec.
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 125.121 Definitions.
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 125.123 Permit requirements.
 125.124 Information required to be submitted by applicant.

Authority: Clean Water Act, as amended by the Clean Water Act of 1977, 33 U.S.C. 1251 et seq.

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

§ 125.1 Purpose and scope.

This Subpart establishes criteria and standards for the imposition of technology-based treatment requirements in permits under section 301(b) of the Act, including the application of EPA promulgated effluent limitations and case-by-case determinations of effluent limitations under section 402(a)(1) of the Act.

§ 125.2 Definitions.

For the purposes of this Part, any reference to "the Act" shall mean the Clean Water Act of 1977 (CWA). Unless otherwise noted, the definitions in Parts 122, 123 and 124 apply to this Part.

[125.2 revised by 45 FR 33512, May 19, 1980]

§ 125.3 Technology-based treatment requirements in permits.

(a) *General.* Technology-based treatment requirements under section 301(b) of the Act represent the minimum level of control that must be imposed in a permit issued under section 402 of the Act. (See §§ 122.60, 122.61 and 122.62 for a discussion of additional or more stringent effluent limitations and conditions.) Permits shall contain the following technology-based treatment requirements in accordance with the following statutory deadlines:

[125.3(a) amended by 45 FR 33512, May 19, 1980]

(1) For POTW's, effluent limitations based upon:

(i) Secondary treatment—from date of permit issuance; and

(ii) The best practicable waste treatment technology—not later than July 1, 1983; and

(2) For dischargers other than POTW's except as provided in §122.67(d), effluent limitations requiring:

[125.3(a)(2) amended by 45 FR 33512, May 19, 1980]

(i) The best practicable control technology currently available (BPT)—from date of permit issuance;

(ii) For conventional pollutants, the best conventional pollutant control technology (BCT)—not later than July 1, 1984;

(iii) For all toxic pollutants referred to in Committee Print No. 95-30, House Committee on Public Works and Transportation, the best available technology economically achievable (BAT)—not later than July 1, 1984;

(iv) For all toxic pollutants other than those listed in Committee Print No. 95-30, effluent limitations based on the BAT not later than three years after the date such effluent limitations are incorporated into an NPDES permit; and

(v) For all pollutants which are neither toxic nor conventional pollutants, effluent limitations based on BAT not later than three years after the date such effluent limitations are incorporated into an NPDES permit, or July 1, 1984, whichever is later, but in no case later than July 1, 1987.

(b) *Statutory variances and extensions.* (1) The following variances from technology-based treatment requirements are authorized by the Act and may be applied for under §122.53; [125.3(b)(1) amended by 45 FR 33512, May 19, 1980]

(i) For POTW's, a section 301(h) marine discharge variance from secondary treatment (Subpart G);

(ii) For dischargers other than POTW's;

(A) A section 301(c) economic variance from BAT (Subpart E);

(B) A section 301(g) water quality related variance from BAT (Subpart F); and

(C) A section 316(a) thermal variance from BPT, BCT and BAT (Subpart H).

(2) The following extensions of deadlines for compliance with technology-based treatment requirements are authorized by the Act and may be applied for under §122.53; [125.3(b)(2) amended by 45 FR 33512, May 19, 1980]

(i) For POTW's a section 301(i) extension of the secondary treatment deadline (Subpart J);

(ii) For dischargers other than POTW's:

(A) A section 301(i) extension of the BPT deadline (Subpart J); and

(B) A section 301(k) extension of the BAT deadline (Subpart C).

(c) *Methods of imposing technology-based treatment requirements in permits.* Technology-based treatment requirements may be imposed through one of the following three methods:

(1) Application of EPA-promulgated effluent limitations developed under section 304 of the Act to dischargers by category or subcategory. These effluent limitations are not applicable to the extent that they have been remanded or withdrawn. However, in the case of a court remand, determinations underlying effluent limitations shall be binding in permit issuance proceedings where those determinations are not required to be reexamined by a court remanding the regulations. In addition, dischargers may seek fundamentally different factors variances from these effluent limitations under §122.53 and Subpart D of this Part.

[125.3(c)(1) amended by 45 FR 33512, May 19, 1980]

(2) On a case-by-case basis under section 402(a)(1) of the Act, to the extent that EPA-promulgated effluent limitations are inapplicable. The permit writer shall apply the appropriate factors listed in section 304 of the Act, and shall consider:

DISCHARGE ELIMINATION SYSTEM

(i) The appropriate technology for the category or class of point sources of which the applicant is a member, based upon all available information (including EPA draft or proposed development documents or guidance); and

(ii) Any unique factors relating to the applicant.

[*Comment:* These factors must be considered in all cases, regardless of whether the permit is being issued by EPA or an approved State.]

(3) Through a combination of the methods in paragraphs (c) (1) and (2) of this section. Where promulgated effluent limitations guidelines only apply to certain aspects of the discharger's operation, or to certain pollutants, other aspects or activities are subject to regulation on a case-by-case basis in order to carry out the provisions of the Act.

(4) Limitations developed under paragraph (c)(2) of this section may be expressed, where appropriate, in terms of toxicity (e.g., "The LC 50 for fat head minnow of the effluent from outfall 001 shall be greater than 25%"), provided that is shown that the limits reflect the appropriate requirements (for example, technology-based or water-quality-based standards) of the Act.

[125.3(c)(4) added by 45 FR 33512, May 19, 1980]

(d) Technology-based treatment requirements are applied prior to or at the point of discharge.

(e) Technology-based treatment requirements cannot be satisfied through the use of "non-treatment" techniques such as flow augmentation and in-stream mechanical aerators. However, these techniques may be considered as a method of achieving water quality standards on a case-by-case basis when:

(1) The technology-based treatment requirements applicable to the discharge are not sufficient to achieve the standards;

(2) The discharger agrees to waive any opportunity to request a variance under sections 301 (c), (g) or (h) of the Act; and

(3) The discharger demonstrates that such a technique is the preferred environmental and economic method to achieve the standards after consideration of alternatives such as

advanced waste treatment, recycle and reuse, land disposal, changes in operating methods, and other available methods.

(f) Technology-based effluent limitations shall be established under this Subpart for solids, sludges, filter backwash, and other pollutants removed in the course of treatment or control of wastewaters in the same manner as for other pollutants.

[125.3(g) added by 45 FR 33512, May 19, 1980]

(g)(1) The Director may set a permit limit for a conventional pollutant at a level more stringent than the best conventional pollution control technology (BCT), or a limit for a nonconventional pollutant which shall not be subject to modification under section 301 (c) or (g) of the Act where:

(i) Effluent limitations guidelines specify the pollutant as an indicator for a toxic pollutant, or

(ii)(A) The limitation reflects BAT-level control of discharges of one or more toxic pollutants which are present in the waste stream, and a specific BAT limitation upon the toxic pollutant(s) is not feasible for economic or technical reasons;

(B) The permit identifies which toxic pollutants are intended to be controlled by use of the limitation; and

(C) The fact sheet required by § 124.56 sets forth the basis for the limitation, including a finding that compliance with the limitation will result in BAT-level control of the toxic pollutant discharges identified in paragraph (g)(1)(ii)(B) of this section, and a finding that it would be economically or technically infeasible to directly limit the toxic pollutant(s).

(2) The Director may set a permit limit for a conventional pollutant at a level more stringent than BCT when:

(i) Effluent limitations guidelines specify the pollutant as an indicator for a hazardous substance, or

(ii)(A) The limitation reflects BAT-level control of discharges (or an appropriate level determined under section 301(c) or (g) of the Act) of one or more hazardous substance(s) which are present in the waste stream, and a specific BAT (or other appropriate) limitation upon the hazardous substance(s) is not feasible for economic or technical reasons;

(B) The permit identifies which hazardous substances are intended to be controlled by use of the limitation; and

(C) The fact sheet required by § 124.56 sets forth the basis for the limitation, including a finding that compliance with the limitations will result in BAT-level (or other appropriate level) control of the hazardous substances discharges identified in paragraph (g)(2)(ii)(B) of this section, and a finding that it would be economically or technically infeasible to directly limit the hazardous substance(s).

(iii) Hazardous substances which are also toxic pollutants are subject to paragraph (g)(1) of this section.

(3) The Director may not set a more stringent limit under the preceding paragraphs if the method of treatment required to comply with the limit differs from that which would be required if the toxic pollutant(s) or hazardous substance(s) controlled by the limit were limited directly.

(4) Toxic pollutants identified under paragraph (g)(1) of this section remain subject to the requirements of § 122.61(a)(1) (notification of increased discharges of toxic pollutants above levels reported in the application form).

Subpart B—Criteria for Issuance of Permits to Aquaculture Projects

§ 125.10 Purpose and scope.

(a) These regulations establish guidelines under sections 318 and 402 of the Act for approval of any discharge of pollutants associated with an aquaculture project.

(b) The regulations authorize, on a selective basis, controlled discharges which would otherwise be unlawful under the Act in order to determine the feasibility of using pollutants to grow aquatic organisms which can be harvested and used beneficially. EPA policy is to encourage such projects, while at the same time protecting other beneficial uses of the waters.

(c) Permits issued for discharges into aquaculture projects under this Subpart are NPDES permits and are subject to the applicable requirements of Parts 122, 123 and 124. Any permit shall include such conditions (including monitoring and reporting requirements) as are necessary to comply with those Parts.

[Sec. 125.10(c)]

Appendix C

Other Toxic Pollutants: Metals, Cyanide, and Total Phenols

Antimony, Total	Nickel, Total
Arsenic, Total	Selenium, Total
Beryllium, Total	Silver, Total
Cadmium, Total	Thallium, Total
Chromium, Total	Zinc, Total
Copper, Total	Cyanide, Total
Lead, Total	Phenols, Total
Mercury, Total	

Appendix D

Organic Toxic Pollutants in Each of Four Fractions in Analysis by Gas Chromatography/Mass Spectroscopy (GC/MS).

I. Volatiles

1V	acrolein	17V	1,2-dichloropropane
2V	acrylonitrile	18V	1,2-dichloropropylene
3V	benzene	19V	ethylebenzene
5V	bromoform	20V	methyl bromide
6V	carbon tetrachloride	21V	methyl chloride
7V	chlorobenzene	22V	methylene chloride
8V	chlorodibromomethane	23V	1,1,2-2tetrachloroethane
9V	chloroethane	24V	tetrachloroethylene
10V	2-chloroethylvinyl ether	25V	toluene
11V	chloroform	26V	1,2-trans-dichloroethylene
12V	dichlorobromomethane	27V	1,1,1-trichloroethane
14V	1,1-dichloroethane	28V	1,1,2-trichloroethane
15V	1,2-dichloroethane	29V	trichloroethylne
16V	1,1-dichlorethylene	31V	vinyl chloride

II. Acid Compounds

1A	2-chlorophenol	6A	2-nitrophenol
2A	2,4-dichlorophenol	7A	4-nitrophenol
3A	2,4-dimethylphenol	8A	p-chloro-m-cresol
4A	4,6-dinitro-o-cresol	9A	pentachlorophenol
5A	2,4-dinitropheol	10A	phenol
		11A	2,4,6-trichlorophenol

Appendix D Cont.

III. Base/Neutral

1B	acenaphthene	24B	diethyl phthalate
2B	acenaphtylene	25B	dimethyl phthalate
3B	anthracene	26B	di-n-butyl phthalate
4B	benzidine	27B	2,4-dinitrotoluene
5B	benzo(a)anthracene	28B	2,6-dinitrotoluene
6B	benzo(a)pyrene	29B	di-n-octyl phthalate
7B	3,4-benzofluoranthene	30B	1,2-diphenylhydrazine (as azobenzene)
8B	benzo(ghi)perylene	31B	fluoranthene
9B	benzo(k)fluoranthene	32B	fluorene
10B	bis(2-chloroethoxy)methane	33B	hexachlorobenzene
11B	bis(2-chloroethyl)ether	34B	hexachlorobutadiene
12B	bis(2-chloroisopropyl)ether	35B	hexachlorocyclopentadiene
13B	bis(2-ethylhexyl)phthalate	36B	hexachloroethane
14B	4-bromophenyl phenyl ether	37B	indeno(1,2,3-cd)pyrene
15B	butylbenzyl phthalate	38B	isophorone
16B	2-chloronaphthalene	39B	naphthalene
17B	4-chlorophenyl phenyl ether	40B	nitrobenzene
18B	chrysene	41B	N-nitrosodimethylamine
19B	dibenzo(a,h)anthracene	42B	N-nitrosodi-n-propylamine
20B	1,2-dichlorobenzene	43B	N-nitrosodiphenylamine
21B	1,3-dichlorobenzene	44B	phenanthrene
22B	1,4-dichlorobenzene	45B	pyrene
23B	3,3'-dichlorobenzidine	46B	1,2,4-trichlorobenzene

IV. Pesticides

1P	aldrin	13P	endosulfan sulfatate
2P	a-BHC	14P	endrin
3P	B-BHC	15P	endrin aldehyde
4P	y-BHC	16P	heptachlor
5P	d-BHC	17P	heptachlor epoxide
6P	chlordane	18P	PCB-1242
7P	4,4'-DDT	19P	PCB-1254
8P	4,4'-DDE	20P	PCB-1221
9P	4,4'-DDD	21P	PCB-1232
10P	dieldrin	22P	PCB-1248
11P	a-endosulfan	23P	PCB-1260
12P	B-endosulfan	24P	PCB-1016
		25P	toxaphene

Appendix E

Conventional and Nonconventional Pollutants Required to be Tested by Existing Dischargers if Expected to be Present

Bromide	Sulfite
Chloride	Surfactants
Chloride, Total Residual	Aluminum, Total
Color	Barium, Total
Fecal Coliform	Boron, Total
Fluoride	Cobalt, Total
Nitrate-Nitrite	Iron, Total
Nitrogen, Total Organic	Magnesium, Total
Oil and Grease	Molybdenum, Total
Phosphorus, Total	Manganese, Total
Radioactivity	Tin, Total
Sulfate	Titanium, Total
Sulfide	

Appendix F

Toxic Pollutants and Hazardous Substances Required to be Identified by Existing Dischargers if Expected to be Present

I. Toxic Pollutants

Asbestos

II. Hazardous Substances

Acetaldehyde	Carbofuran
Allyl alcohol	Carbon disulfide
Allyl chloride	Chlorpyrifos
Amyl acetate	Coumaphos
Aniline	Cresol
Benzonitrile	Crotonaldehyde
Benzyl chloride	Cyclohexane
Butyl acetate	2,4-D(2,4-Dichlorophenoxy acetic acid)
Butylamine	Diazinon
Captan	Dicamba
Carbaryl	Dichlobenil

Appendix F Cont.

Dichlone	Monomethyl amine
2,2-Dichloropropionic acid	Naled
Dichlorvos	Napthenic acid
Diethyl amine	Nitrotoluene
Dimethyl amine	Parathion
Dinitrobenzene	Phenolsulfanate
Diquat	Phosgene
Disulfoton	Propargite
Diuron	Propylene oxide
Epichlorohydrin	Pyrethrins
Ethanolamine	Quinoline
Ethion	Resorcinol
Ethylene diamine	Strontium
Ethylene dibromide	Strychnine
Formaldehyde	Styrene
Furfural	2,4,5-T(2,4,5-Trichlorophenoxy acetic acid)
Guthion	TDE (Tetrachlorodiphenylethan)
Isoprene	2,4,5-TP[2-(2,4,5-Trichlorophenoxy) propanoic acid]
Isopropalamine	Trichlorofon
Kelthane	Triethylamine
Kepone	Trimethylamine
Malathion	Uranium
Mercaptodimethur	Vanadium
Methoxychlor	Vinyl Acetate
Methyl mercaptan	Xylene
Methyl methacrylate	Xylenol
Methyl parathion	Zirconium
Mevinphos	
Mexacarbate	
Monoethyl amine	

SENATE BILL NO. 416

(By Mr. R. Williams

[Introduced March 6, 1985

referred to the Committee on Natural Resources; then to the
Committee on the Judiciary]

10 A BILL to amend article two, chapter sixty-four of the code
11 of West Virginia, one thousand nine hundred thirty-one,
12 as amended, by adding thereto a new section, designated
13 section twenty (six) (forty-three), relating to
14 authorizing the department of natural resources to
15 promulgate legislative rules relating to transfer of the
16 state national pollutant discharge elimination system
17 program.

18 Be it enacted by the Legislature of West Virginia:

19 That article two, chapter sixty-four of the code of West
20 Virginia, one thousand nine hundred thirty-one, as amended,
21 be amended by adding thereto a new section, designated
22 section twenty (six) (forty-three), to read as follows:

23 ARTICLE 2. EXECUTIVE AGENCY AUTHORIZATION TO PROMULGATE
24 LEGISLATIVE RULES.

25 §64-2-20(6)(43). Department of natural resources.

26 The legislative rules filed in the state register on the

1 ninth day of November, one thousand nine hundred
2 eighty-four relating to the department of natural
3 resources (transfer of the state national pollutant
4 discharge elimination system (NPDES) program), are
5 authorized.

6

7 NOTE: The purpose of this bill is to authorize the
8 department of natural resources to promulgate legislative
9 rules relating to the transfer of the WV/NPDES program.

10 This section is new; therefore, strike-throughs and
11 underscoring have been omitted.

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H. B. 1641

(By Delegate Casey)
(Introduced March 6, 1985; referred to the
Committee on Agriculture and Natural Resources with
the direction that it later be referred
to the Committee on the Judiciary.)

10 A BILL to amend article two, chapter sixty-four of the code
11 of West Virginia, one thousand nine hundred thirty-one,
12 as amended, by adding thereto a new section, designated
13 section twenty (six) (forty-three), relating to
14 authorizing the department of natural resources to
15 promulgate legislative rules relating to transfer of the
16 state national pollutant discharge elimination system
17 program.

18 Be it enacted by the Legislature of West Virginia:

19 That article two, chapter sixty-four of the code of West
20 Virginia, one thousand nine hundred thirty-one, as amended,
21 be amended by adding thereto a new section, designated
22 section twenty (six) (forty-three), to read as follows:

23 ARTICLE 2. EXECUTIVE AGENCY AUTHORIZATION TO PROMULGATE
24 LEGISLATIVE RULES.

25 §64-2-20(6)(43). Department of natural resources.

26 The legislative rules filed in the state register on the

1641

1 ninth day of November, one thousand nine hundred
2 eighty-four relating to the department of natural
3 resources (transfer of the state national pollutant
4 discharge elimination system (NPDES) program), are
5 authorized.

6

7 NOTE: The purpose of this bill is to authorize the
8 department of natural resources to promulgate legislative
9 rules relating to the transfer of the WV/NPDES program.

10 This section is new; therefore, strike-throughs and
11 underscoring have been omitted.