CHAPTER 11. NPDES Permit Administration

Previous discussions in this manual focused on the process of developing National Pollutant Discharge Elimination System (NPDES) permit conditions and effluent limitations. This chapter describes the administrative process associated with the issuance of an NPDES permit including a discussion of the other federal laws that might affect the development or issuance of NPDES permits.

11.1 Other Federal Laws Applicable to NPDES Permits

This section addresses other federal laws, besides the Clean Water Act (CWA), that permit writers should consider when drafting an NPDES permit. The requirements imposed under these statutes only apply to federal actions (i.e., U.S. Environmental Protection Agency [EPA] issuance of permits). Permits issued by states authorized to administer the NPDES program are not subject to the requirements of these statutes. However, many states may have enacted state legislation that is modeled on federal law and, therefore, it is prudent to review state law in these areas before preparing an NPDES permit.

The following sections briefly discuss the other federal laws and contain links to other websites for more information. Because these laws are implemented by other federal agencies, many of the links provided below are to websites outside EPA, and EPA is not responsible for the information provided on those websites. The NPDES regulations at Title 40 of the *Code of Federal Regulations* (CFR) 122.49 also include a discussion of how some of the laws relate to the federal NPDES program. Exhibit 11-1 presents the other federal laws that are applicable to NPDES permits and includes the legislative citations from the *United States Code* (U.S.C.) and the implementing regulations in the CFR.

Exhibit 11-1 Other federal laws applicable to NPDES permits

Federal law	Year	Federal agency	Legislative citations	Implementing regulations
Endangered Species Act (ESA)	1973	FWS, NMFS	16 U.S.C. 1531 et seq.	50 CFR Part 402
National Environmental Policy Act (NEPA)	1969	CEQ	42 U.S.C. 4321 et seq.	40 CFR Part 6
National Historic Preservation Act (NHPA)	1992	ACHP	16 U.S.C. 470 et seq.	36 CFR Part 800
Coastal Zone Management Act (CZMA)	1972	NOAA	16 U.S.C. 1451 et seq.	15 CFR Part 930
Wild and Scenic Rivers Act	1968	Various	16 U.S.C. 1271 et seq.	36 CFR Part 297
Fish and Wildlife Coordination Act (FWCA)	1934	FWS	16 U.S.C. 661 et seq.	--
Essential Fish Habitat Provisions (EFH)	1996	NOAA	16 U.S.C. 1855(b)(2)	50 CFR Part 600

11.1.1 Endangered Species Act

This section discusses procedures intended to protect endangered species that apply only to permits issued by EPA. The 1973 Endangered Species Act (ESA) <www.fws.gov/endangered/esa-library/pdf/ESAall.pdf>, 16 U.S.C. 1531 *et seq.*, was enacted to protect and conserve endangered and threatened species and critical habitat. The Fish and Wildlife Service (FWS) <www.fws.gov/endangered/> of the Department of the Interior and the National Marine Fisheries Service (NMFS) <www.nmfs.noaa.gov/pr/> of the National

Oceanic and Atmospheric Administration (NOAA) within the Department of Commerce (collectively *the Services*) share primary responsibility for administration of the ESA.

ESA section 7 requires that federal agencies consult with the Services to ensure that any action authorized, funded, or carried out by the agencies that could affect a listed species or critical habitat and to ensure that their actions are not likely to jeopardize the continued existence of any endangered species or threatened species, or result in the destruction or adverse modification of critical habitat of such species. The ESA section 7 regulations are in 50 CFR Part 402. FWS/NMFS published the ESA Section 7 Consultation Handbook <www.fws.gov/endangered/esa-library/pdf/TOC-GLOS.PDF> to address the major consultation processes pursuant to ESA section 7.

Consultation may be either informal or formal. An informal consultation determines if an action is or is not likely to adversely affect the species. A formal consultation is required if the findings from the informal consultation show that there is a likelihood for adverse impacts and evaluates whether the proposed action is likely to jeopardize the continued existence of the species. It is EPA's responsibility to ensure that consultation occurs; however, a nonfederal representative (i.e., the discharger) may be designated for the informal consultation.

On February 22, 2001, EPA entered into a National Memorandum of Agreement (*National MOA*) <www.epa.gov/fedrgstr/EPA-SPECIES/2001/February/Day-22/e2170.pdf> with the Services that outlines the process for consulting on federally issued NPDES permits. In addition, because consultation is not required for state-issued permits, the National MOA includes a process for coordinating with the Services on state-issued permits. EPA permit writers should review the ESA consultation regulations and the ESA section 7 Consultation Handbook, and coordinate with the Region's ESA coordinator (if such a position has been established in a Region) and the Service office(s) nearest to the site.

11.1.2 National Environmental Policy Act

This section discusses environmental review procedures that apply only when EPA issues permits to *new sources* (dischargers subject to New Source Performance Standards). The 1969 National Environmental Policy Act (NEPA) <www.epa.gov/compliance/basics/nepa.html>, 42 U.S.C. 4321 *et seq*., requires that agencies perform environmental impact reviews and prepare an *Environmental Impact Statement* (EIS) for major federal actions significantly affecting the quality of the human environment (see section 102(2)(C)). The President's Council on Environmental Quality (CEQ) <www.whitehouse.gov/ceq/> coordinates federal environmental efforts to comply with NEPA.

Within EPA, the Office of Federal Activities under the Office of Enforcement and Compliance Assurance (OECA) is responsible for EPA's implementation of NEPA <www.epa.gov/compliance/nepa/>. EPA's NEPA regulations are at 40 CFR Part 6. With respect to NPDES permits, CWA section 511 establishes that only EPA-issued permits to new sources are subject to NEPA's environmental review procedures before permit issuance. States may have their own state law versions of NEPA. Federal permit writers should coordinate efforts with the Office of Federal Activities and document all NEPA activities in the permit file and fact sheet.

11.1.3 National Historic Preservation Act Amendments

Section 106 of the 1992 National Historic Preservation Act (NHPA) <www.achp.gov/nhpa.html>, 16 U.S.C. 470 *et seq.*, as amended, and implementing regulations 36 CFR Part 800 require the Regional Administrator, before issuing a license (permit), to identify the area of potential effect of a permitted discharge and, if historic or cultural resources within that area would be adversely affected by the discharge, to adopt measures when feasible to mitigate potential adverse effects of the licensed activity and properties listed or eligible for listing in the National Register of Historic Places.

The Act's requirements are to be implemented in cooperation with State Historic Preservation Officers <www.achp.gov/shpo.html>, and upon notice to, and when appropriate, in consultation with the Advisory Council on Historic Preservation <www.achp.gov/>, which provides national oversight for the NHPA. A decision by the D.C. Circuit in 2003 concluded that NHPA consultation is not required for state-issued permits (*National Mining Ass'n v. Fowler*, 324 F.3d 752 (D.C. Cir. 2003) <caselaw.findlaw.com/us-dc-circuit/1169695.html>).

Federal permit writers should evaluate potential effects of NHPA and submit written documentation of the evaluation to the State Historic Preservation Office and to the permit file.

11.1.4 Coastal Zone Management Act

The 1972 Coastal Zone Management Act (CZMA) <www.coastalmanagement.noaa.gov/czm/czm_act.html>, 16 U.S.C. 1451 *et seq.*, was enacted to manage the nation's coastal zone and is implemented through a state-federal partnership. Section 307 of the CZMA (16 U.S.C. 1456 and 15 CFR Part 930) prohibits the issuance of federal NPDES permits for activities affecting land or water use in coastal zones unless the permit applicant certifies that the proposed activity complies with the state Coastal Zone Management Program and the relevant state either concurs with the applicant's certification or the state's concurrence is conclusively presumed as a result of the state's failure to concur or non-concur. *Coastal States*, according to the CZMA, include those states and territories adjacent to the Atlantic, Pacific, or Arctic oceans; the Gulf of Mexico; or one or more of the Great Lakes. Any of those states that have completed the development of its management program is required, as a condition of receipt of federal grant money under the CZMA, to adopt coastal management plans, which designate boundaries, identify areas of particular concern, and establish inventories of permitted uses and enforcement policies. Beach access, emergency planning, and erosion control also must be addressed in such plans.

The Office of Ocean and Coastal Resource Management <www.coastalmanagement.noaa.gov/>, which is part of NOAA within the Department of Commerce, oversees the CZMA. The CZMA implementing regulations are at 15 CFR Part 930. EPA and other federal agencies must coordinate their activities on coastal lands with state CZMA plans. Federal permit writers should document all activities relating to CZMA in the permit file.

11.1.5 Wild and Scenic Rivers Act

The 1968 Wild and Scenic Rivers Act (WSRA) <www.rivers.gov/publications/wsr-act.pdf>, 16 U.S.C. 1271 *et seq.*, established a National Wild and Scenic Rivers System (System) and prescribed the process by which additional rivers may be added to this System. Rivers may be added by act of Congress [WSRA section 2(a)(i)] or by the Secretary of the Interior at the initiative of a state governor [WSRA section 2(a)(ii)]. Under WSRA section 7(a), EPA is prohibited from assisting, by license or otherwise, in the construction

of any water resources project that would have a direct and adverse effect on the values for which a national wild and scenic river was established. The WSRA regulations are codified at 36 CFR Part 297.

Federal permit writers should verify whether the receiving water is part of the System and document all activities related to the Act in the permit file and fact sheet. For detailed explanation of WSRA section 7, refer to Wild and Scenic Rivers Act: Section 7 <www.rivers.gov/publications/section-7.pdf>, a technical report of the Interagency Wild and Scenic Rivers Coordinating Council. Permit writers may also refer to Water Quantity and Quality as Related to the Management of Wild and Scenic Rivers <www.rivers.gov/publications/water.pdf>, a technical report of the Interagency Wild and Scenic Rivers Coordinating Council.

11.1.6 Fish and Wildlife Coordination Act

The 1934 Fish and Wildlife Coordination Act (FWCA) <www.fws.gov/habitatconservation/fwca.html>, 16 U.S.C. 661 *et seq.*, requires mitigation for the loss of wildlife habitat due to the construction of federal water resources projects. The FWCA requires designers of federal dams, reservoirs, and irrigation works to include the costs and benefits to fish and wildlife when determining the benefit/cost ratio of a project and requires that EPA and other federal agencies consult with state and federal wildlife and fisheries agencies to minimize the impacts of the activity on fish and wildlife. The FWCA specifically calls for ongoing studies by the U.S. Department of the Interior on the effects of domestic sewage and industrial wastes on fish and wildlife (16 U.S.C. 665).

No implementing regulations directly related to the FWCA and NPDES permits exist. However, the FWCA describes actions taken or compelled by the affected federal agencies. The Water Resources Development under the Fish and Wildlife Coordination Act manual <www.fws.gov/habitatconservation/fwca.pdf> provides the FWS guidance on implementing the FWCA. Federal permit writers should note any FWCA consultation activities in the permit file.

11.1.7 Essential Fish Habitat Provisions

The 1996 Essential Fish Habitat (EFH) provisions of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act or MSA) promote the protection of essential fish habitat in any federal action authorized, funded, or undertaken, or proposed to be authorized, funded, or undertaken, by such agency that might adversely affect such habitat identified under the MSA [16 U.S.C. 1855(b)(2)]. The MSA requires that federal agencies, such as EPA, consult with the NMFS for any EPA-issued permits that might adversely affect essential fish habitat identified under the MSA. The regulations applicable to federal agencies' coordination and consultation under the MSA are codified at 50 CFR 600.905 through 600.930, and other EFH information can be found on the NMFS EFH Website <www.habitat.noaa.gov/protection/efh/index.html>. Federal permit writers should note any EFH determinations and consultation activities in the permit file.

11.2 Documentation for Development of the Draft Permit

EPA regulations at 40 CFR 124.2 define a draft permit as a document that indicates the Director's tentative decision to issue or deny, modify, revoke and reissue, terminate, or reissue a permit. After the permit is issued, the fact sheet and supporting documentation (administrative record) are the primary support for defending the permit in the administrative appeals process. Documenting the permit requires

the permit writer to be organized and logical throughout the permit development process. Some of the content of the fact sheet and administrative record is specified by federal and state regulation, and the remainder is dictated by good project management. Permit writers should recognize the importance of

- Developing a thorough permit in a logical fashion.
- Meeting legal requirements for preparation of an administrative record, fact sheet, and statement of basis.
- Substantiating permit decisions and providing a sound basis for the derivation of permit terms, conditions, and limitations if challenges are made.
- Establishing a permanent record of the basis of the permit for use in future permit actions.

Exhibit 11-2 presents reasons for good documentation in the permit file and fact sheet.

Exhibit 11-2 Reasons for good documentation

- Streamlines the permit reissuance/ compliance monitoring process.
- Establishes a permanent record of the basis for the permit.
- Explains the legal and technical basis of the permit.
- Provides a sound basis for future modifications and permits.
- Requires the permit writer to be organized and logical throughout permit development process.

Exhibits 11-3 and 11-4 provide flow diagrams of the NPDES permit administrative process. In general, the administrative process includes the following:

- Documenting all permit decisions.
- Coordinating EPA and state review of the draft (or proposed) permit.
- Providing public notice, conducting hearings (if appropriate), and responding to public comments.
- Defending the permit and modifying it (if necessary) after issuance.

Note that Exhibit 11-3 provides the general framework for the administrative process where EPA is the NPDES permitting authority and Exhibit 11-4 provides a typical framework for the administrative process where a state is the permitting authority. State requirements need not be identical to federal regulatory requirements, provided they are at least as stringent. Some authorized states have slightly different processes for developing and issuing NPDES permits. The same holds true for the appeal process. This manual presents EPA's procedure; state procedures for NPDES permit hearings and appeals vary according to state law.

Exhibit 11-3 Administrative process for EPA-issued NPDES permits

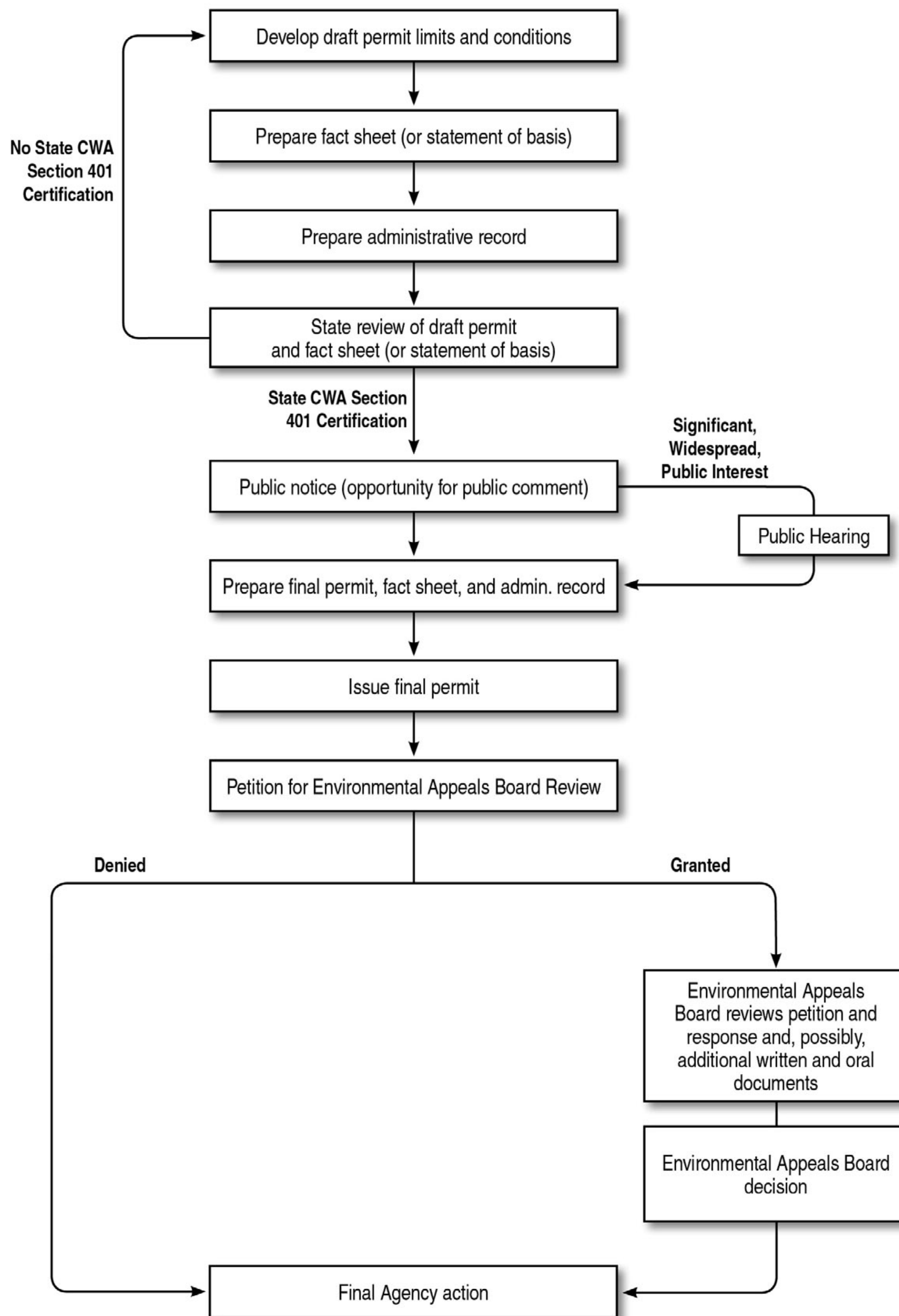
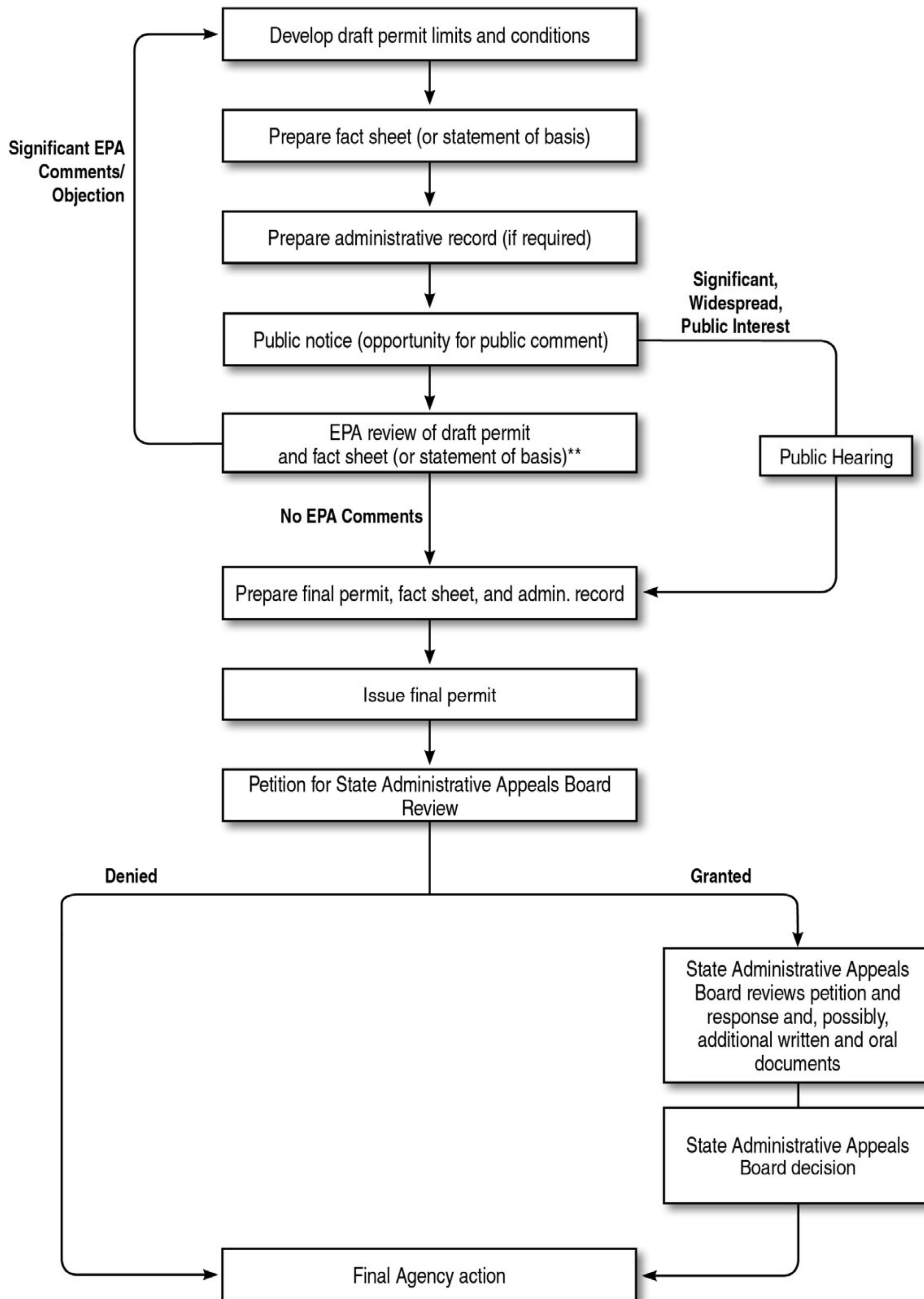


Exhibit 11-4 Typical administrative process for state-issued NPDES permits*



* State statutes and regulations govern the specific steps of the state administrative process, which may differ from the process outlined in this exhibit.

** Under State/EPA MOA, EPA may review draft or proposed permit.

11.2.1 Administrative Record

The administrative record should be considered the foundation that supports the NPDES permit. If EPA issues the permit, the contents of the administrative record are prescribed by regulation, with § 124.9 identifying the required content of the administrative record for a draft permit and § 124.18 describing the requirements for final permits. Regardless of whether a state or EPA issues the permit, all supporting materials must be made available to the public at any time and may be examined during the public comment period and any subsequent public hearing. The importance of maintaining the permit records in a neat, orderly, complete, and retrievable form cannot be over emphasized. The record allows personnel from the permitting agency to reconstruct the justification for a given permit and defend the permit during any legal proceedings regarding the permit.

The administrative record for a draft permit consists, at a minimum, of the specific documents shown in Exhibit 11-5. Materials that are readily available in the permit issuing office or published material that is generally available do not need to be physically included with the record as long as they are specifically referred to in the fact sheet or statement of basis. If EPA issues a draft permit for a new source, the administrative record should include any EISs or *Environmental Assessments* (EAs) performed in accordance with § 122.29(c).

Exhibit 11-5 Elements of the administrative records for a draft permit

- Permit application and supporting data.
- Draft permit.
- Statement of basis or fact sheet.
- All items cited in the statement of basis or fact sheet, including calculations used to derive the permit limitations.
- Meeting reports.
- Correspondence with the applicant and regulatory personnel.
- All other items in the supporting file.
- For new sources, any EA, draft/final EIS, or other such background information, such as a Finding of No Significant Impact (only applies if EPA issues the permit).

The administrative record should include all meeting reports and correspondence with the applicant and other regulatory agency personnel, trip reports, and records of telephone conversations. All correspondence, notes, and calculations should be dated and indicate the name of the writer and all other persons involved. Because correspondence is subject to public scrutiny, references or comments that do not serve an objective purpose should be avoided. Finally, the presentation of calculations and documentation of decisions should be organized in such a way that they can be reconstructed and the logic supporting the calculation or decisions can easily be found.

11.2.2 Fact Sheets and Statements of Basis

A fact sheet is a document that briefly sets forth the principal facts and the significant factual, legal, methodological, and policy questions considered in preparing the draft permit. When the permit is in the draft stage, the fact sheet and supporting documentation serve to explain the rationale and assumptions used in deriving the limitations to the discharger, the public, and other interested parties.

The NPDES regulations at § 124.8(a) stipulate that every EPA and state-issued permit must be accompanied by a fact sheet if the permit

- Involves a major facility or activity.
- Incorporates a variance or requires an explanation under § 124.56(b) (toxic pollutants, internal waste stream, and indicator pollutants and for privately owned waste treatment facilities).
- Is an NPDES general permit.
- Is subject to widespread public interest.
- Is a Class I sludge management facility.
- Includes a sewage sludge land application plan.

A well-documented rationale for all permit decisions reduces the work necessary to reissue a permit by eliminating conjecture concerning the development of those permit conditions that are being carried forward to the next permit. That is also true if a modification is initiated during the life of the permit. The required contents of a fact sheet, as specified in §§ 124.8 and 124.56, are listed in Exhibit 11-6.

Exhibit 11-6 Required elements of a fact sheet

Required element	Regulatory citation (40 CFR)
General facility information • Description of the facility or activity. • Sketches or a detailed description of the discharge location. • Type and quantity of waste/pollutants discharged.	§ 124.8 § 124.56 § 124.8
Summary rationale of permit conditions • Summary of the basis for the draft permit conditions. • References to the applicable statutory or regulatory provisions. • References to the administrative record.	§ 124.8
Detailed rationale of permit conditions • Explanation and calculation of effluent limitations and conditions. • Specific explanations of − Toxic pollutant limitations. − Limitations on internal wastestreams. − Limitations on indicator pollutants. − Case-by-case requirements. − Decisions to regulate non-publicly owned treatment works (POTWs) under a separate permit. • For EPA-issued permits, the requirements of any state certification. • For permits with a sewage sludge land application plan, a description of how all required elements of the land application plan are addressed in the permit. • Reasons why any requested variances do not appear justified, if applicable.	§ 124.56 § 124.8
Administrative Requirements • A description of the procedures for reaching a final decision on the draft permit, including − Public comment period beginning and ending dates. − Procedures for requesting a hearing. − Other procedures for public participation. • Name and telephone number of the person to contact for additional information.	§ 124.8

The fact sheet should include detailed discussions of the development of permit limitations for each pollutant, including the following:

- Calculations and assumptions related to production and flow.
- Type of limitations (i.e., limitations based on secondary treatment standards, effluent limitations guidelines and standards (effluent guidelines), case-by-case determinations, or water quality standards).
- Whether the effluent guidelines used were Best Practicable Control Technology Currently Available (BPT), Best Available Technology Economically Achievable (BAT), Best Conventional Pollutant Control Technology (BCT), or New Source Performance Standards (NSPS).
- The water quality standards or criteria used.
- Whether any parameters were used as indicators for other pollutants.
- Citations to appropriate wasteload allocation or total maximum daily load studies, guidance documents, other references.

Often, decisions to include certain requirements lead to a decision to exclude other requirements. It is just as important to keep a thorough record of items that were not included in the draft permit as it is to keep a record of included items. Such records might include the following:

- Why were secondary treatment standards, case-by-case determinations, or effluent guidelines used as the basis for final effluent limitations rather than water quality standards (i.e., demonstrate that the limitations checked to see that water quality standards would be attained).
- Why was biomonitoring not included.
- Why were pollutants that were reported as present in the permit application not specifically limited in the permit.
- Why is a previously limited pollutant no longer limited in the draft permit?

Finally, the fact sheet should address the logistics of the permit issuance process, including the beginning and ending dates of the public comment period, procedures for requesting a hearing, and other means of public involvement in the final decision.

A statement of basis, as described in § 124.7, is required for EPA-issued permits that are not required to have a fact sheet. A statement of basis describes the derivation of the effluent limitations and the reasons for special conditions. However, a prudent permit writer will develop the detailed rationale required in a fact sheet for any permit that includes complex calculations or special conditions (e.g., case-by-case effluent limitations based on best professional judgment [BPJ]) even if a fact sheet is not required by regulation.

11.3 Items to Address before Issuing a Final Permit

This section describes the public participation activities that must be conducted in the permit issuance process. These include providing public notices, collecting and responding to public comments, and holding public hearings as necessary.

11.3.1 Public Notice

The public notice is the vehicle for informing all interested parties and members of the general public of the contents of a draft NPDES permit or other significant actions with respect to an NPDES permit or permit application. The basic intent of this requirement is to ensure that all interested parties have an opportunity to comment on significant actions of the permitting agency with respect to NPDES permits. The exact scope, required contents, and methods for effecting public notices are found in § 124.10. The NPDES permit-related actions for which public notice is required are shown in Exhibit 11-7.

Exhibit 11-7 Actions for which public notice is required

- Tentative denial of an NPDES permit application (not necessarily applicable to state programs).
- Preparation of a draft NPDES permit, including a proposal to terminate a permit.
- Scheduling of a public hearing.
- An appeal has been granted by the Environmental Appeals Board.
- Major permit modifications (after permit issuance).
- New Source determinations (EPA only).

The permit writer should be particularly concerned with the first three items in Exhibit 11-7. It is important to note that no public notice is required when a request for a permit modification, revocation, reissuance, or termination is denied.

Public notice of NPDES permit-related activities should be provided using the following methods:

- For major permits, publication of a notice in daily or weekly newspaper within the area affected by the facility or activity.
- For general permits issued by EPA, publication in the FR.
- For all permits, direct mailing to various interested parties. This mailing list should include the following:
  - The applicant.
  - Any interested parties on the mailing list.
  - Any other agency that has issued or is required to issue a Resource Conservation and Recovery Act (RCRA), Underground Injection Control (UIC), Prevention of Significant Deterioration (PSD) (or other permit under the Clean Air Act), NPDES, CWA section 404, sludge management, or ocean dumping permit under the Marine Research Protection and Sanctuaries Act for the same facility or activity.
  - Federal and state agencies with jurisdiction over fish, shellfish, and wildlife resources and over coastal zone management plans, the Advisory Council on Historic Preservation, State Historic Preservation Officers, including any affected states and tribes.
  - State agencies conducting area-wide and continuing planning under CWA sections 208(b)(2), 208(b)(4) or 303(e) and the FWS, NMFS, and the U.S. Army Corps of Engineers.
  - Users identified in the permit application of a privately owned treatment work.
  - Persons on any mailing lists developed by including those who request inclusion in writing and persons solicited for *area lists* from participants in past permit proceedings in the area.
  - Any local government having jurisdiction over the locality of the facility.

A public notice must contain the information shown in Exhibit 11-8.

Exhibit 11-8 Contents of the public notice

- Name and address of the office processing the permit action.
- Name and address of the permittee or applicant and, if different, of the facility or activity regulated by the permit.
- A brief description of the business conducted at the facility or activity described in the permit.
- Name, address, and telephone number of a contact from whom interested persons can obtain additional information.
- A brief description of the comment procedures required, the time and place of any hearing to be held including procedures to request a hearing.
- For EPA-issued permits, the location and availability of the administrative record and the times at which the record will be open for public inspection and a statement that all data submitted by the applicant is available as part of the administrative record.
- A description of the location of each existing or proposed discharge point and the name of the receiving water and the sludge use and disposal practice(s) and the location of each sludge treatment works treating domestic sewage and use or disposal sites known at the time of permit application.
- Requirements applicable to a thermal variance under CWA section 316(a).
- Requirements applicable to cooling water intake structures under CWA section 316(b).
- Any additional information considered necessary.

The regulatory agency preparing the permit must provide public notice of the draft permit (including a notice of intent to deny a permit application), and it must provide at least 30 days for public comment. The draft permit is usually submitted for public notice after it has undergone internal review by the regulatory agency that is issuing the permit. State-issued permits typically undergo public notice after EPA has reviewed and commented on the draft permit. In the special case of those EPA-issued permits that require an EIS, public notice is not given until after a draft EIS is issued.

11.3.2 Public Comments

Public notice of a draft permit might elicit comments from concerned individuals or agencies. Frequently, such comments are simply requests for additional information. However, some comments are of a substantive nature and suggest modifications to the draft permit or indicate that the draft permit is inappropriate for various reasons. In such cases, commenters must submit all reasonable arguments and factual material in support of their positions and comments by the close of the public comment period, and the permitting authority must consider those comments in making final decisions. If the approach is technically correct and clearly stated in the fact sheet, it will be difficult for commenters to find fault with the permit. Commenters can always suggest alternatives, however. In addition, an interested party may also request a public hearing.

To the extent possible, it is desirable to respond to all public comments as quickly as possible. In some cases, it might be possible to diffuse a potentially controversial situation by providing further explanation of permit terms and conditions. Additionally, permit writers should also consider notifying commenters that their comments have been received and are being considered.

The permitting agency must respond to all significant comments, in accordance with § 124.17, at the time a final permit decision is reached (in the case of EPA-issued permits) or at the same time a final permit is

actually issued (in the case of state-issued permits). The response should incorporate the following elements:

- Changes in any of the provisions of the draft permit and the reasons for the changes.
- Description and response to all significant comments on the draft permit or the permit application raised during the public comment period or during any hearing.

If any information is submitted during the public comment period raises substantial new questions about the draft permit, one of the following actions can occur:

- A new draft permit with a revised fact sheet or statement of basis is prepared.
- A revised statement of basis, a fact sheet, or revised fact sheet is prepared, and the comment period is reopened.
- The comment period is reopened but is limited to new findings only.

If any of those actions is taken, a new public notice, as described earlier, must be given.

For EPA-issued permits, any documents cited in the response to comments must be included in the administrative record. If new points are raised or new material is supplied during the public comment period, EPA may document its response to these new materials by adding new materials to the administrative record.

11.3.3 Public Hearings

Any interested party may request a public hearing. The request should be in writing and should state the nature of the issues proposed to be raised during the hearing. However, a request for a hearing does not automatically necessitate that a hearing be held. A public hearing should be held when there is a significant amount of interest expressed during the public comment period or when it is necessary to clarify the issues involved in the permit decision.

Thus, the decision of whether to hold a public hearing is actually a judgment call. Such decisions are usually made by someone other than the permit writer. However, the permit writer will be responsible for ensuring that all the factual information in support of the draft permit is well documented.

Public notice of a public hearing must be given at least 30 days before the public meeting. 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. The public notice of the hearing should contain the following information:

- Brief description of the nature and purpose of the hearing, including the applicable rules and procedures.
- Reference to the dates of any other public notices relating to the permit.
- Date, time, and place of the hearing.

Scheduling a hearing automatically extends the comment period until at least the close of the hearing [§ 124.12(c)] and the public comment period may be extended by request during the hearing. Anyone may submit written or oral comments concerning the draft permit at the hearing. A presiding officer is responsible for scheduling the hearing and maintaining orderly conduct, including setting reasonable time

limitations for oral statements. Note that a transcript or recording of the hearing must be available to interested persons.

11.3.4 Environmental Justice Considerations

Environmental justice (EJ) is the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies. EPA has this goal for all communities and persons across U.S. It will be achieved when everyone enjoys the same degree of protection from environmental and health hazards and equal access to the decision-making process to have a healthy environment in which to live, learn, and work.

In NPDES permits, the public participation process provides opportunities to address EJ concerns by providing appropriate avenues for public participation, seeking out and facilitating involvement of those potentially affected, and including public notices in more than one language where appropriate.

11.3.5 EPA and State/Tribal Roles in Reviewing Draft Permits

The CWA and the NPDES regulations include review roles for EPA and for states, tribes, and territories (states) depending on whether EPA or a state is issuing an NPDES permit.

11.3.5.1 State-issued Permits

Each authorized state administering an NPDES program must transmit to the EPA Region copies of permit applications received and copies of draft or proposed permits [§ 123.43(a)]. The state and the EPA Region execute a Memorandum of Agreement (MOA) under § 123.24 that addresses administration and enforcement of the state's regulatory program. The MOA may specify that EPA will review draft permits rather than proposed permits [§ 123.44(j)] and specify the classes or categories of permit applications and draft or proposed permits that the state will send to the EPA Region for review, comment, and, where applicable, objection. In addition, the MOA specifies classes or categories of permits for which EPA will waive its right to review the draft or proposed permit. EPA cannot waive its right to review classes or categories of permits for the following:

- Discharges into the territorial seas.
- Discharges that could affect waters of a state other than the one in which the discharge originates.
- Discharges proposed to be regulated by general permits.
- Discharges from a POTW with a daily average discharge exceeding 1 million gallons per day.
- Discharges of uncontaminated cooling water with a daily average discharge exceeding 500 million gallons per day.
- Discharges from any major discharger or from any NPDES primary industry category.
- Discharges from other sources with a daily average discharge exceeding 500,000 gallons per day (however, EPA may waive review for non-process wastewater).

The MOA provides a period up to 90 days from receipt of a permit during which the EPA Region can make general comments on, objections to, or recommendations with respect to the permit. If the EPA

Region objects to a permit, within 90 days of receiving the permit it must transmit to the state a statement of the reasons for the objection and the actions that the state must take to eliminate the objection [§ 123.44(a)-(b)]. Specific causes for objection are outlined in the regulations at § 123.44(c). Any interested party can request a public hearing on an objection by the EPA Region. After such a hearing, the Region can affirm the objection, modify the terms of the objection, or withdraw the objection and notify the state of that decision. If the EPA Region does not withdraw the objection, the state then has 30 days to resubmit a permit revised to meet the objection. If the state does not do so, exclusive authority to issue the permit passes to the EPA Region. If no public hearing on the objection is held, the time frame for the state to resubmit a revised permit is 90 days from receipt of the objection.

11.3.5.2 EPA-issued Permits

Permits issued by EPA require an opportunity for state review and certification under CWA section 401. The state in which a discharge originates or will originate is provided the opportunity to review an application or a draft permit and certify that the discharge will comply with the applicable water quality standards. This process also has the benefits of ensuring that state initiatives or policies are addressed in EPA-issued NPDES permits and promoting consistency between state-issued and EPA-issued permits where not all permits within the state are issued by the same agency.

Regulations at §§ 124.53 (State Certification) and 124.54 (Special provisions for state certification and concurrence on applications for CWA section 301(h) variances) describe procedures an EPA permit writer should follow to obtain state certification. Under CWA section 401(a)(1), EPA may not issue a permit until a certification is granted or waived. If EPA is preparing the draft permit, state certification can be accomplished by allowing states to review and certify the application before draft permit preparation. Under § 124.53, if EPA has not received a state certification by the time the draft permit is prepared, EPA must send the state a copy of the draft permit along with a notice requesting state certification.

If the state does not respond within a specified reasonable time, which cannot exceed 60 days, it is deemed to have waived its right to certify. If the state chooses to certify the draft permit, it may include any conditions more stringent than those in the draft permit necessary to ensure compliance with the applicable provisions of the CWA or state law, and must cite the CWA or state law references that support the changes. In addition, the state is required to include a statement of the extent to which each condition of the draft permit can be made less stringent without violating the requirements of state law, including water quality standards. Failure to provide this statement for any condition waives the right to certify or object to any less stringent condition that might be established during the EPA permit issuance process. When a permit applicant requests a CWA section 301(h) variance (§ 124.54), the state certification process is very similar to the process described above. For more on CWA section 301(h) variances, see section 5.1.3.6 of this manual.

11.3.6 Schedule for Final Permit Issuance

The final permit may be issued after the close of the public notice period and after state certification has been received (for permits issued by EPA). The public notice period consists of the following:

- A 30-day period that gives notice of intent to issue or deny the permit.
- A 30-day period advertising a public hearing (if applicable).
- Any extensions or reopening of the comment period.

Final EPA permit decisions are effective immediately upon issuance unless comment were received on the draft permit, in which case, the effective date of the permit is 30 days after issuance (or a later date if specified in the permit). In addition, permit decisions will not be immediately effective if review is requested on the permit under § 124.19. As discussed earlier, any comments that are received must be answered at the time of final permit issuance (in the case of NPDES states or tribes) or after a final decision is reached (in the case of EPA). The administrative record for the final permit consists of the items in Exhibit 11-9.

Exhibit 11-9 Elements of the administrative records for a final permit

- All elements for the draft permit administrative record (see Exhibit 11-5).
- All comments received during the comment period.
- The tape or transcript of any public hearing.
- Any materials submitted at a hearing.
- Responses to comments.
- For NPDES new source permits, the draft or final EIS.
- The final permit.

11.4 Administrative Actions after Final Permit Issuance

Once the final permit has been issued, the issuing authority should enter the permit limitations and any special conditions into the Integrated Compliance Information System for the NPDES program (ICIS-NPDES) (for more on ICIS-NPDES, see the introduction to this manual and section 11.5.1.1 below). Entering permit information into ICIS-NPDES will ensure that the facility's performance will be tracked and the permitting agency will be alerted to the need for corrective action if violations of permit limitations, terms, or conditions occur.

After final permit issuance, interested parties have opportunities to change the permit through permit appeals, major/minor permit modifications, termination and revocation, or transfer. Those administrative procedures are described below.

11.4.1 Permit Appeals

Throughout the process of developing a permit and during the public notice period, the permit writer should carefully consider all legitimate concerns of the applicant/permittee and any other interested party. Nevertheless, there will inevitably be situations in which a permit is issued in spite of the objections of the permittee or a third party. In such instances, the permittee or interested party can choose to legally contest or appeal the NPDES permit, as provided in § 124.19. Permit appeals are the process by which any person that filed comments on the draft permit may contest the final limitations and conditions in a permit.

Appeals of EPA-issued permits consist of petitioning the Environmental Appeals Board (EAB) for review. Such review must be requested within 30 days of issuance of the final permit, and challenges must be limited to issues raised during the draft permit's public comment or hearing processes, although persons not participating in these processes may seek review of changes in the permit from draft to final permit. During the appeals process, only those conditions of an existing permit that are being contested

are stayed. Within a reasonable time following the filing of the petition for review, the EAB must grant or deny the petition. Only individual permits may be appealed to the EAB; general permits may be challenged in court or an individual permit may be sought and appealed.

Many states have similar administrative appeal procedures designed to resolve challenges to the conditions of a permit. For the sake of convenience, such procedures, which could be known by different names (e.g., evidentiary hearing, administrative appeal), are hereafter *permit appeals*. Permit writers will, from time to time, be involved in permit appeals and will need to address the types of issues discussed below.

Aside from preparing the administrative record and notices, the permit writer might not be involved in the procedural matters relating to permit appeals. All requests for permit appeals are coordinated through the office of the EPA Regional Counsel or the appropriate state legal counsel. The permit writer's first involvement with the appeals process will likely come as a result of designation of the appeals staff, and his or her role will be limited to that of a technical advisor to legal counsel and, where a state uses an evidentiary hearing procedure, possibly a witness.

11.4.1.1 Deposition and Testimony

In a state hearing procedure, a permit writer might be required to give a deposition during which the appellant attorney conducts the questioning that would otherwise occur in the hearing. The deposition is transcribed and presented as evidence. The appellant attorney may ask some of the same questions at the hearing.

To prepare for a deposition and testimony, the permit writer should first consult with his or her general counsel to become familiar with laws, regulations, and policies that could affect the permit. The permit writer should also be thoroughly familiar with the technical basis for the permit conditions. For example, if final effluent limitations are based on water quality standards, the permit writer should thoroughly study the applicable water quality standards, water quality models, and procedures used to develop the effluent limitations and be prepared to defend all assumptions and decisions made in the effluent limitation calculations. For case-by-case limitations based on BPJ, the permit writer should carefully review all applicable data and procedures used to calculate the effluent limitations and should be sure that the information on which case-by-case limitations are based is unimpeachable, the limitations were derived from the data in a logical manner in accordance with established procedures, and the limitations are technically sound and meet applicable standards for economic reasonableness.

A permit appeal before the EAB relies on the information presented in the petitions and briefs, and possibly includes oral argument, but typically does not use depositions and direct testimony.

11.4.1.2 The Permit Writer's Role in the Appeals Process

As technical advisor to legal counsel, the permit writer's most important function is to develop support for contested permit conditions. A permit writer should not attempt to support technically indefensible conditions. Contested permit conditions that are not technically defensible and are not based on any legal requirement should be brought to counsel's attention, with advice that EPA or the state withdraw those conditions.

The second most important advisory function of the permit writer is assisting counsel in identifying weaknesses in the appellant's arguments. That process could include developing questions for cross-examination of opposing witnesses in a state permit appeal that involves a hearing. Questions should be restricted to the subject material covered by the witness' direct testimony and should be designed to elicit an affirmative or negative response, rather than an essay-type response.

Finally, the permit writer should remember that when a person petitions for EAB review or requests a hearing for a state-issued permit, the permit writer should refrain from any discussion about the case without first consulting with legal counsel.

In the role of technical advisor or witness, the permit writer should do the following:

- Cultivate credibility.
- Never imply or admit weakness in his or her area of expertise.
- Never attempt to testify about subjects outside his or her area of expertise.
- Always maintain good communication with counsel.

The EAB generally will attempt to resolve permit appeals in the initial stage of granting review. If that is not possible, the EAB conducts formal review of the contested conditions and publishes a written opinion (an Environmental Administrative Decision). The result of an EAB or state permit appeal might be relief from certain permit conditions, validation or strengthening of contested permit conditions, or a combination of these two outcomes. Under certain circumstances, decisions of the EAB can be appealed in federal court. Authorized state's permit appeal procedures typically provide for further appeal of administrative decisions regarding contested permit conditions in state court when all administrative steps have been fulfilled.

11.4.2 Modification or Revocation and Reissuance of Permits

In most cases, a permit will not need to be modified (or revoked and reissued) during the term of the permit if the facility can fully comply with permit conditions. However, under certain circumstances, it might be necessary to modify the permit before its expiration date. A permit modification could be triggered in several ways. For example, a representative of the regulatory agency might inspect the facility and identify a need for the modification (i.e., the improper classification of an industry), or information submitted by the permittee might suggest the need for a change. Of course, any interested person may make a request for a permit modification.

Modifications differ from revocations and reissuance. In a permit modification, only the conditions subject to change are reconsidered while all other permit conditions remain in effect. Conversely, the entire permit could be reconsidered when it is revoked and reissued.

Except where the permittee requests or agrees, permit modifications are limited to specific *causes* identified in §§ 122.62(a) and 122.62(b) and summarized in Exhibit 11-10. Most NPDES permit modifications require EPA or the state to conduct the public notice and participation activities of Part 124, similar to the issuance or reissuance of the permit; however, only those specific conditions being modified are open to review and comment. The permitting authority may revoke and reissue a permit during its term for the causes identified in § 122.62(b) (i.e., the final two bulleted items in Exhibit 11-10)

Exhibit 11-10 Causes for permit modification

- **Alterations**: When there are material and substantial alterations or changes to the permitted facility or activity occur that justify new conditions that are different from the existing permit.
- **New information**: When information is received that was not available at the time of permit issuance.
- **New regulations**: Under limited circumstances, when standards or regulations on which the permit was based have been changed by the modification, withdrawal or promulgation of amended standards or regulations or by judicial decision.
- **Compliance schedules**: To modify the compliance schedule when good cause exists, such as an act of God, strike, or flood.
- **Variance requests**: When requests for variances or fundamentally different factors are filed within the specified time but not granted until after permit issuance.
- **Toxics**: To insert CWA section 307(a) toxic effluent standard or prohibition.
- **Reopener**: Conditions in the permit that require it to be reopened under certain circumstances.
- **Net limits**: Upon request of a permittee who qualifies for effluent limitations on a net basis under § 122.45(g) or when a permittee is no longer eligible for net limitations, as provided in § 122.45(g)(1)(ii).
- **Pretreatment**: As necessary under § 403.8 (e) to put a compliance schedule in place for the development of a pretreatment program or to change the schedule for program development.
- **Failure to notify**: Upon failure of an approved state to notify another state whose waters may be affected by a discharge from the approved state.
- **Non-limited pollutants**: When the level of any pollutant that is not limited in the permit exceeds the level that can be achieved by the technology-based treatment requirements appropriate to the permit.
- **Notification levels**: To establish notification levels for toxic pollutants as provided in §122.44(f).
- **Compliance schedules for innovative or alternative facilities**: To modify the compliance schedule in light of the additional time that might be required to construct such a facility.
- **Small municipal separate storm sewer system (MS4) minimum control measures**: For a small MS4 to include required minimum control measures when the permit does not include such measure(s) based on the determination that another entity was responsible for implementation and the other entity fails to fulfill its responsibility to implement such measure(s).
- **Technical mistakes**: To correct technical mistakes or mistaken interpretations of law made in developing the permit conditions.
- **Failed BPJ compliance**: When BPJ technology is installed and properly operated and maintained but the permittee is unable to meet its limitations, the limitations may be reduced to reflect actual removal; however, they may not be less than the limitations in the effluent guidelines. If BPJ operation and maintenance costs are extremely disproportionate to the costs considered in a subsequent effluent guideline, the permittee may be allowed to backslide to the limitations in the effluent guideline.
- **Land application plans**: When required by a permit condition to incorporate a land application plan for beneficial reuse of sewage sludge, to revise an existing land application plan, or to add a land application plan.
- **Cause exists for termination**: Cause exists under § 122.64, and the Director determines that modification is appropriate
- **Notification of proposed transfer**: Director may modify the permit upon receipt of ownership transfer notification.

There are certain minor modifications that, upon consent of the permittee, may be processed by the permitting authority without following the procedures for public notice in Part 124. Minor modifications are generally non-substantive changes (e.g., typographical errors) and are exempt from the administrative procedures; that is, a draft permit and public review are not required. The specific permit changes that can be processed as minor modifications, described in § 122.63, are to

- Correct typographical errors.
- Incorporate more frequent monitoring or reporting.
- Revise an interim compliance date in the schedule of compliance, provided the new date is not more than 120 days after the date specified in the permit and does not interfere with attainment of the final compliance date requirement.
- Allow for a change of ownership, provided no other change is necessary (see section 11.4.4 below).
- Change the construction schedule for a new source discharger.
- Delete a point source outfall when that outfall is terminated and does not result in discharge of pollutants from other outfalls except in accordance with permit limits.
- Incorporate an approved local pretreatment program.

11.4.3 Permit Termination

Situations could arise during the life of the permit that are causes for termination of the permit. Such circumstances, described in § 122.64(a), include the following:

- Noncompliance by the permittee with any condition of the permit.
- Misrepresentation or omission of relevant facts by the permittee.
- Determination that the permitted activity endangers human health or the environment, and can be regulated to acceptable levels only by permit modification or termination.
- A change in any condition that requires either a temporary or permanent reduction or elimination of a discharge (e.g., plant closure).

Terminations are used to retract a permittee's privileges to discharge during the permit term. A notice of intent to terminate a permit is a type of draft permit that follows the same procedures as any draft permit prepared under § 124.6. Administrative procedures, such as public notice, must be followed in permit termination proceedings. If a facility with a terminated permit wishes to obtain permit coverage, it would have to submit an application and apply for a new permit.

The regulations at § 122.64(b) do provide one exception to the more formal permit termination process described above. Where the entire discharge is permanently terminated by elimination of the flow or by connection to a POTW (but not by land application or disposal into a well) the permit can be terminated by notice to the permittee, and the Part 124 administrative process is not required. However, if the permittee objects to such an expedited termination, the Permitting Authority must then proceed in accordance with the administrative procedures described above.

11.4.4 Permit Transfer

Regulatory agencies occasionally receive notification of a change in ownership of a facility covered by an NPDES permit. Such changes require that a permit be transferred by one of two provisions:

- **Transfer by modification or revocation**: The transfer may be made during the process of a major or minor permit modification. It may also be addressed by revoking and subsequently reissuing the permit.
- **Automatic transfer**: A permit may automatically be transferred to a new permittee if three conditions are met:
  - The current permittee notifies the Director 30 days in advance of the transfer date.
  - The notice includes a written agreement between the old and new owner that contains the specific date for transfer of permit responsibility, coverage, and liability between them.
  - The Director of the regulatory agency does not notify the old permittee and the proposed new permittee that the subject permit will be modified or revoked and reissued.

11.5 Permit Compliance and Enforcement

EPA's OECA is responsible for nationally managing EPA's compliance and enforcement programs for all media including the CWA and NPDES. EPA uses a mix of tools including compliance assistance, incentives, and monitoring and enforcement. EPA and state environmental agencies authorized to administer the NPDES program seek to achieve and maintain a high level of compliance with environmental laws and regulations. Enforcement provides a powerful incentive for NPDES permittees to comply, and the way in which an NPDES permit is written directly affects its enforceability. Each permit must be written clearly and unambiguously so that compliance can be tracked effectively and the permit can be enforced if violations occur.

The permit writer could become actively involved with the compliance monitoring and enforcement of the terms and conditions of the NPDES permits that he or she has written. The extent of the permit writer's involvement will usually depend on the organizational structure of the regulatory agency. Larger, centrally organized agencies typically have separate personnel responsible for enforcing the terms of NPDES permits. In other organizations, the individual who writes the permit will also be responsible for such enforcement activities as discharge monitoring report (DMR) tracking, facility inspections, and enforcement recommendations. If a civil judicial enforcement action occurs, the permit writer might be called on to testify regarding the specific requirements of the permit or its basis.

Regardless of a regulatory agency's organizational structure, the permit writer should have an appreciation for the various aspects of a meaningful NPDES compliance enforcement program. The following sections address compliance monitoring reviews and inspections and data in the national ICIS-NPDES (formerly the Permit Compliance System or PCS) database, which provides the basis for evaluating compliance. This section concludes with a brief description of the enforcement actions available to facilitate permit compliance. For more information about CWA enforcement, see OECA's Clean Water Act Enforcement Website <www.epa.gov/compliance/civil/cwa/index.html>.

11.5.1 Compliance Monitoring

Compliance monitoring is a broad term that includes all activities that federal or state regulatory agencies take to ascertain a permittee's compliance with the conditions specified in an NPDES permit. Compliance monitoring data collected as part of the NPDES program are used to evaluate compliance and support enforcement actions. The process includes receiving, reviewing, and entering data into the ICIS-NPDES database, conducting on-site inspections, identifying violators, and determining an appropriate response.

A primary function of the compliance monitoring program is to verify compliance with permit conditions, including effluent limitations and compliance schedules. Compliance verification is achieved through

- **Compliance review**: A review of all written reports and other material relating to the status of a permittee's compliance.
- **Compliance inspections**: Field-related regulatory activities (i.e., facility inspections, effluent sampling) to determine compliance.

11.5.1.1 Compliance Review

Compliance and enforcement personnel use two primary sources of information to carry out compliance reviews:

- Permit/compliance files.
- The ICIS-NPDES database.

Permit/Compliance files include the permit, application, fact sheet, compliance schedule reports, compliance inspection reports, DMRs, enforcement actions, and correspondence (e.g., summaries of telephone calls, copies of warning letters). Compliance personnel periodically review that information and use it to determine if enforcement is necessary and, if so, what level of enforcement is appropriate.

The ICIS-NPDES database <https://icis.epa.gov/icis> is the national database for tracking compliance with NPDES requirements and is discussed further in this manual's introduction. Information in ICIS-NPDES includes facility and discharge characteristics, self-monitoring data, compliance schedules, permit conditions, inspections, and enforcement actions. Permittees are required to submit effluent monitoring data, and compliance and status information, via Compliance Schedule Reports and DMRs. EPA Regions and NPDES states enter such information into ICIS-NPDES and evaluate permittees on compliance with NPDES permit requirements. Inspection and enforcement information is collected and entered by Regions or authorized states or both. Quarterly, EPA reviews the ICIS-NPDES system data and generates a *quarterly noncompliance report* (QNCR) for all major facilities following the requirements of § 123.45.

ICIS-NPDES supports compliance and enforcement actions and assists EPA staff in evaluation and oversight of the NPDES program. The database also promotes national consistency and uniformity in permit and compliance evaluations. NPDES permits must be written so that compliance can be tracked using ICIS-NPDES. Situations might arise in which permit limitations and monitoring conditions are not initially compatible with ICIS-NPDES entry and tracking. In such cases, the permit writer should alert the state or EPA Regional staff responsible for entering ICIS-NPDES codes and work with them to resolve any coding issues. To assist ICIS-NPDES coders in accurately interpreting and entering the permit into ICIS-NPDES and to assist enforcement personnel in reviewing permittee's self-monitoring data and

reports in a timely manner, permit writers should follow the compliance inspection procedures discussed in the next section.

11.5.1.2 Compliance Inspections

Compliance inspections refer to all field-related regulatory activities conducted to determine permit compliance. Such field activities can include compliance evaluation inspections (non-sampling), sampling inspections, other specialized inspections, and remote sensing. Certain inspections, such as diagnostic inspections and performance audit inspections, aid the regulatory agency in evaluating the facility's problems in addition to providing information to support enforcement action. Biomonitoring inspections are specifically targeted at facilities with effluent suspected or identified as causing toxicity problems that threaten the ecological balance of the receiving waters.

Compliance inspections are undertaken to fulfill one or more of the following purposes:

- Establish a regulatory presence to deter noncompliance.
- Ensure that permit requirements are being met or determine if permit conditions are adequate.
- Check the completeness and accuracy of a permittee's performance and compliance records.
- Assess the adequacy of the permittee's self-monitoring and reporting program including on-site laboratory functions.
- Determine the progress or completion of corrective action.
- Obtain independent compliance data on a facility's discharge.
- Evaluate the permittee's operation and maintenance activities.
- Observe the status of construction required by the permit.

11.5.2 Quarterly Noncompliance Reports

EPA Regional offices and NPDES states are required by the regulations at § 123.45 to report quarterly on major facilities that are not in compliance with the terms and conditions of their permit or enforcement order (i.e., that meet the criteria for *reportable noncompliance* [RNC] for effluent limitation, schedules, and reporting violations).

The regulations in § 123.45 establish requirements for listing facility violations and resulting regulatory enforcement action on QNCRs. The regulation establishes reporting requirements for violations that meet specific, quantifiable reporting criteria, as well as for violations that are more difficult to quantify but are of sufficient concern to be considered reportable. The regulation also specifies the format that the reports must follow and the schedule for their submission.

Only major facilities that meet RNC criteria must be reported on the QNCR. RNC consists of several general types of violations as established in § 123.45:

- Effluent limitations
  - Monthly average effluent limitations (see below for more).
  - Other effluent limitations with water quality or health impacts.

- Schedule: Violations of compliance schedule milestones by 90 days or more.
- Reporting: Reports late by 30 days or more.

A violation of any monthly average limitation should be evaluated for magnitude by comparing the measured amount in the DMR to the product of the monthly average limitation times the Technical Review Criteria (TRC) for that pollutant or parameter. The TRC is 1.4 for Group I (conventional) pollutants and 1.2 for Group II (generally toxic) pollutants. Appendix A to Part 123 contains a list of pollutants in each Group. RNC includes violations of a given Group I or Group II pollutant or parameter that equals or exceeds the product of the TRC times the monthly average limitation for any 2 or more months during a 6-month reporting period. RNC also includes violations of a Group I or Group II parameter by any amount (not necessarily TRC times the limitation or greater) for 4 months during the 6-month reporting period.

A subset of instances of RNC that appear on the QNCR could be noted as *significant noncompliance* (SNC). This distinction is used solely for management accountability purposes as a means of tracking trends in compliance and evaluating the relative timeliness of enforcement response toward priority violations.

The definition of SNC is not regulatory and can change as the NPDES program evolves to encompass new enforcement priorities. For example, in September 1995, EPA revised the definition of SNC to include violations of non-monthly average permit limitations by major facilities. Many permits for NPDES major facilities lacked required monthly average limitations and, thus, were not evaluated for SNC violations and follow-up formal enforcement action. The new definition became effective as of October 1, 1996. EPA's SNC policy is described in the memorandum Revision of NPDES Significant Noncompliance (SNC) Criteria to Address Violations of Non-Monthly Average Limits[1] <www.epa.gov/compliance/resources/policies/civil/cwa/revisedsncmemo.pdf>.

Generally, the designation of SNC indicates a violation is of sufficient magnitude or duration or both to be considered among EPA's priorities for regulatory review or response. The categories of SNC are

- Effluent limitations: The effluent limitation SNC criteria are the same as for QNCR discussed above.
- Schedule: The schedule SNC criteria are the same as for QNCR discussed above.
- Reporting: The reporting SNC criteria are the same as for QNCR discussed above.
- Order requirements: Violation of requirements in administrative or judicial orders.

The instance of SNC is considered resolved when the SNC criteria are no longer met during the review period, or when the permittee formerly in SNC exhibits compliance for all 3 months of the most recent 3-month reporting period. A permittee with SNC violations under a compliance schedule that is meeting its deadlines for corrective actions is in *resolved pending* status.

Any major permittee that is listed on the QNCR for two consecutive 3-month reporting periods for the same instance of SNC (e.g., same outfall point, same parameter, same category of violation) is expected to return to compliance or to be addressed with an appropriate enforcement action before the reporting deadline for the second QNCR. If the facility is in SNC after the second QNCR, and no enforcement

action has been taken, the facility is placed on the Watch List. The Watch List is a management tool that identifies and tracks facilities with serious violations and no apparent formal enforcement response.

11.5.3 Enforcement

EPA's NPDES compliance and enforcement principles and recommendations are described in the NPDES Enforcement Management System (EMS)[2] <www.epa.gov/compliance/resources/policies/civil/cwa/emscwa-jensen-rpt.pdf>. By choosing an appropriate enforcement response to CWA violations, EPA tries to achieve several goals:

- Correction of the violation as soon as possible.
- Deterrence of future violations by the same permittee or other permittees.
- Equal treatment of the regulated community through use of a uniform approach to selecting enforcement responses (i.e., similar violations are treated similarly).
- Assessment of an appropriate penalty.
- Protection of human health and the environment.

Once a facility has been identified as having potential CWA violations, EPA or the NPDES state reviews the facility's compliance history. The review includes an assessment of the magnitude, frequency, and duration of violations. The permitting authority identifies significant violations and makes a determination of the appropriate enforcement response. CWA section 309 authorizes the Agency to bring civil or criminal action against facilities that discharge pollutants without a permit or discharge in violation of NPDES permit conditions and judicial penalties up to $32,500 per day per violation.

EPA Regions and authorized states have specific procedures for reviewing self-monitoring and inspection data and for deciding what type of enforcement action is warranted. EPA recommends an escalating response to continuing noncompliance. The range of enforcement responses includes the following:

- Informal action (e.g., *notice of violation* [NOV]).
- Formal action.
- Administrative compliance order.
- Administrative order with or without an administrative penalty order (up to $157,500).
- Civil judicial action that imposes injunctive relief seeking compliance or penalty or both.
- Criminal prosecution.

Considerations when making determinations on the level of the enforcement response include the following:

- The duration of the violation.
- The severity of the violation.
- The degree of economic benefit obtained through the violation.
- Compliance history and previous enforcement actions taken against the violator.
- The degree of culpability.
- The deterrent effect of the response on similarly situated permittees.

Equally important considerations may include fairness and equity, national consistency, and the integrity of the NPDES program.

Citizens can participate in the enforcement process in a number of ways. Under the Freedom of Information Act, citizens have the right to request certain facility-specific compliance information from EPA's ICIS-NPDES database. In addition, under NPDES regulations, interested citizens can intervene in any federal civil judicial action to enjoin any threatened or continuing violation of program requirements or permit conditions, and to recover civil penalties in court. Citizens also have the opportunity to review and comment on any proposed consent decree to resolve a state or federal civil judicial enforcement action.

CWA section 505 allows any citizen to begin a civil judicial enforcement action on his or her own behalf. In certain circumstances, citizens may not begin suit if EPA or the state is diligently prosecuting a civil or criminal judicial action or an administrative action to obtain a penalty under CWA section 309(g) or a comparable provision of state law. Citizens must also give EPA, the state, and the alleged violator 60 days' notice of the alleged violation before beginning a citizen suit.

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[1] Herman, S.A. 1995. *Revision of NPDES Significant Noncompliance (SNC) Criteria to Address Violations of Non-Monthly Average Limits*. U.S. Environmental Protection Agency, Office of Enforcement and Compliance Assurance. Memorandum, September 21, 1995. <www.epa.gov/compliance/resources/policies/civil/cwa/revisedsncmemo.pdf>.

[2] U.S. Environmental Protection Agency. 1989. *The Enforcement Management System: National Pollutant Discharge Elimination System (Clean Water Act)*. EC-G-1998-11b. U.S. Environmental Protection Agency, Office of Water, Washington, DC. <www.epa.gov/compliance/resources/policies/civil/cwa/emscwa-jensen-rpt.pdf>.