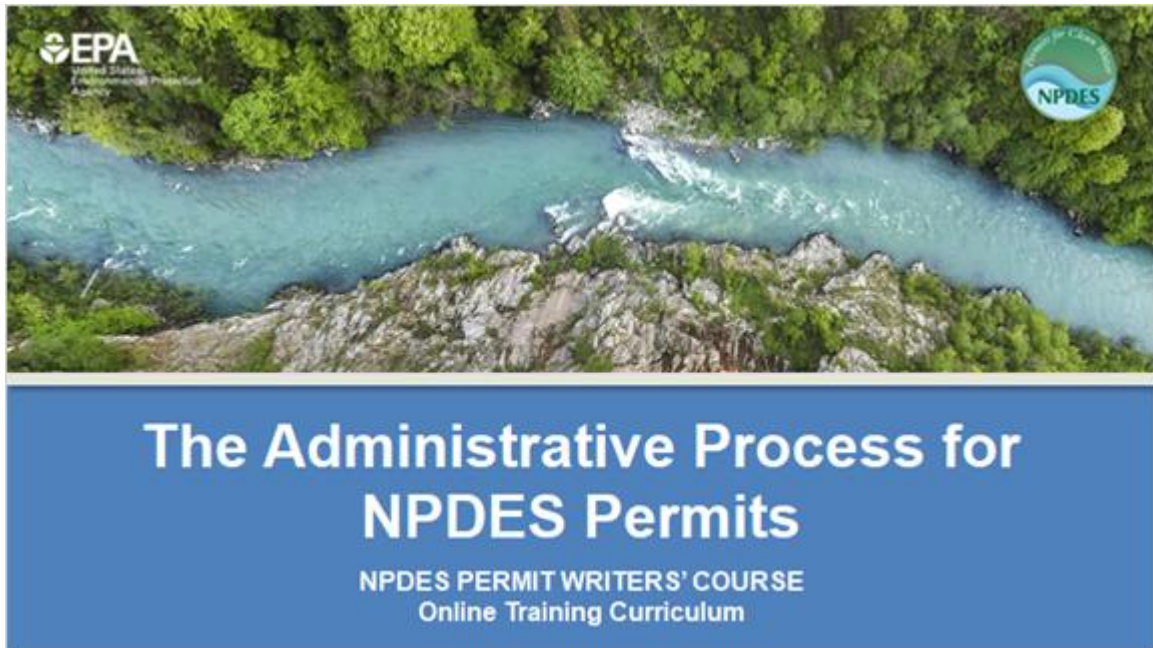


# The Administrative Process for NPDES Permits

## 1. NPDES Permit Writers' Course Online Training Curriculum

### 1.1 *The Administrative Process for*

### *NPDES Permits*



#### **Notes:**

Hello, and welcome to this presentation on the administrative process for National Pollutant Discharge Elimination System, or NPDES, permits.

This presentation is part of an online training curriculum on the NPDES program sponsored by the U.S. Environmental Protection Agency's Water Permits Division.

It's been noted before that the work of issuing a permit is about 20 percent technical and 80 percent administrative. Well, this presentation covers that 80 percent.

Before we get started, I want to introduce our speakers and I need to address one housekeeping item.

## 1.2 Presenters



### Presenters

- **David Hair**  
Environmental Engineer  
US Environmental Protection Agency  
Washington, DC
- **Greg Currey**  
Environmental Engineer  
Tetra Tech, Incorporated  
Fairfax, Virginia



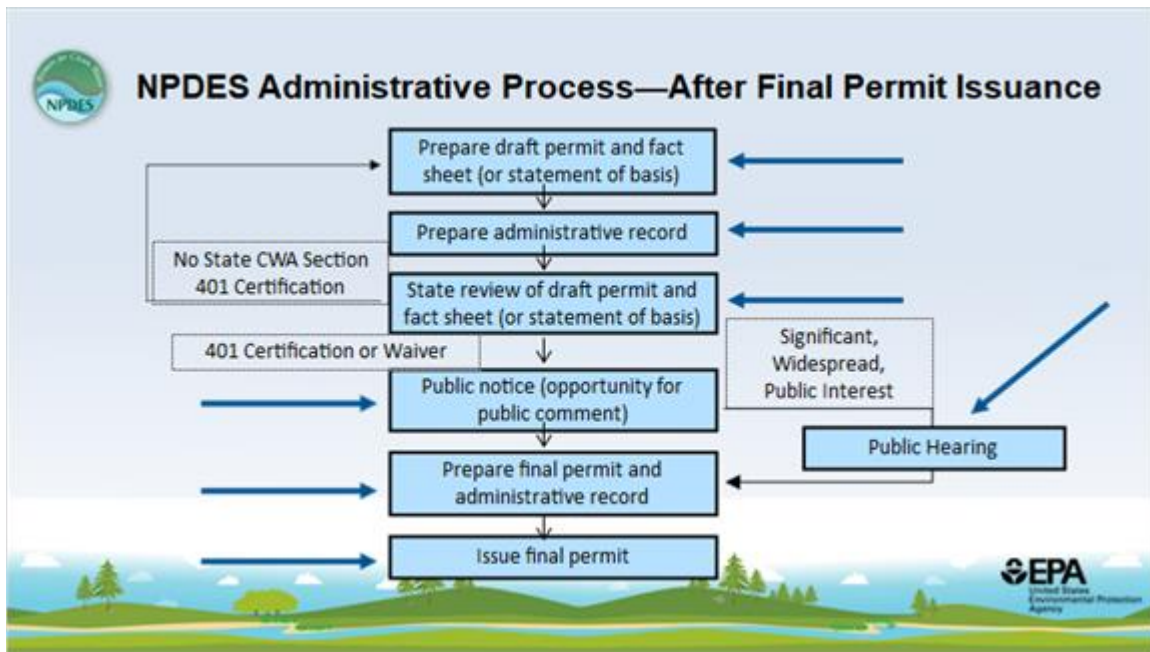
### Notes:

Your speakers for this presentation are David Hair, an environmental engineer with the Water Permits Division of USEPA in Washington, DC, and me, Greg Currey, an environmental engineer with Tetra Tech, Incorporated in Fairfax, Virginia.

Now for that housekeeping item. I need to tell you that all the materials used in this presentation have been reviewed by USEPA staff for technical accuracy; however, the views of the speakers are their own and do not necessarily reflect those of USEPA. NPDES permitting is governed by the existing requirements of the Clean Water Act and USEPA's NPDES implementing regulations. These statutory and regulatory provisions contain legally binding requirements. The information in this presentation is not binding. Furthermore, it supplements, and does not modify, existing USEPA policy, guidance, and training on NPDES permitting. USEPA may change the contents of this presentation in the future.

All right. Let's take a look at some flow charts that illustrate the steps in the administrative process.

### 1.3 NPDES Administrative Process—After Final Permit Issuance



#### Notes:

An important thing to keep in mind as you look at this chart is that it outlines the permit issuance process for an EPA-issued permit. We'll look at the process for a state-issued permit, which is very similar, in a few moments.

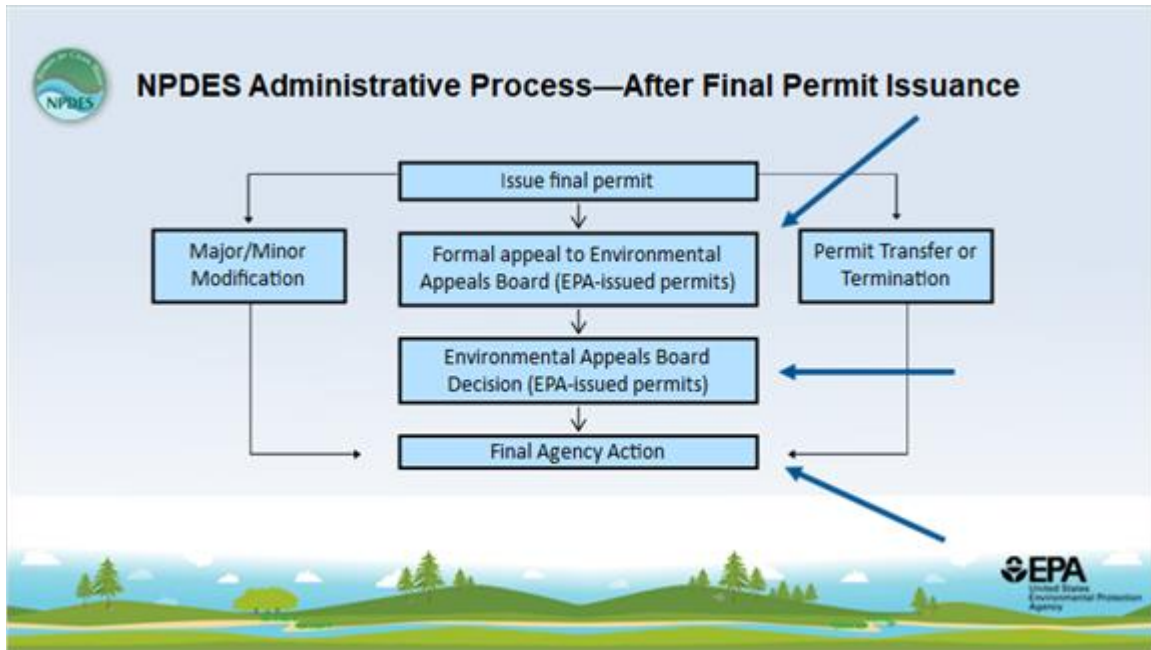
At this point, we'll assume that the permit writer has prepared the draft permit, including all of the required conditions, and the fact sheet or statement of basis that documents the decision making process behind those conditions. We'll talk about the differences between a fact sheet and a statement of basis and the kinds of information contained in each later in the presentation. For now, we'll just note that a fact sheet or statement of basis is generally part of a larger administrative record for the permit that includes other supporting documents.

If EPA is the permitting authority, the state, territory, or tribe (which from here on out we'll refer to as a state) reviews the permit and documentation to determine whether to grant a Clean Water Act section 401 certification, which is another process we'll discuss in more detail later.

Following the 401 certification process, the permit is made available for public comment and can be the subject of a public hearing. EPA would respond to any significant public comments prior to preparing the final permit and administrative record and issuing the final permit.

It's also important to remember that if state or public review of the permit results in changes to the draft permit, a second round of review or public notice and comment might be needed.

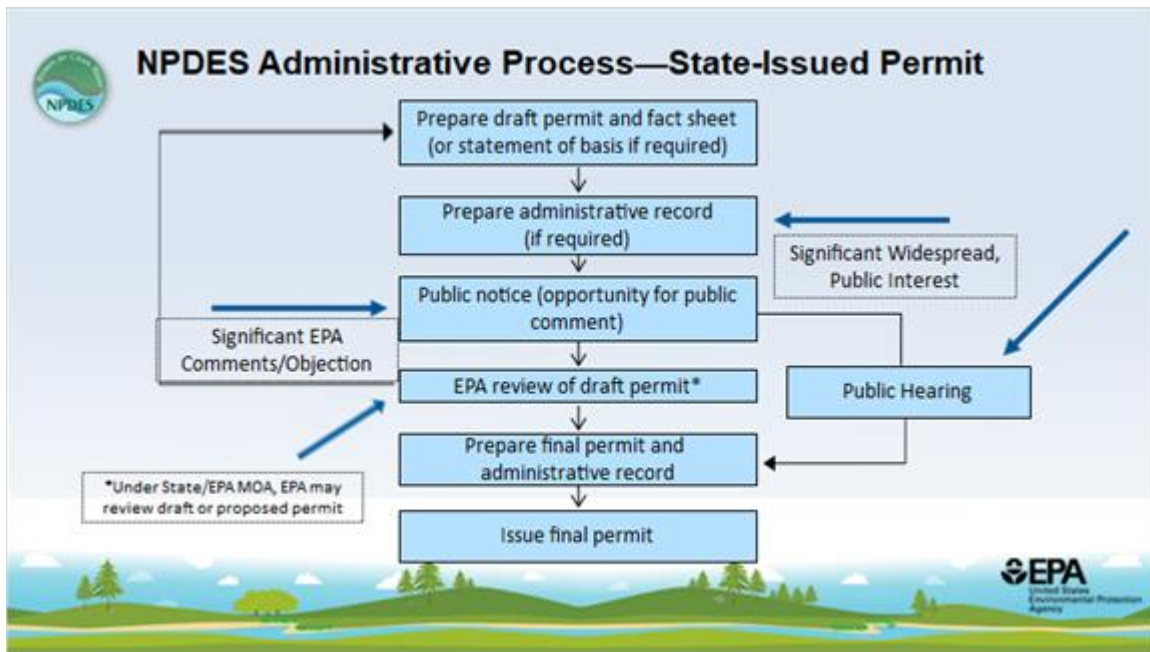
## 1.4 NPDES Administrative Process—After Final Permit Issuance



### Notes:

After final permit issuance, for EPA-issued permits, there is an opportunity for an administrative appeal to EPA's Environmental Appeals Board, or EAB. After the EAB makes its final decision on the appeal, it is considered a final agency action and the route for further appeal is through the judicial system.

## 1.5 NPDES Administrative Process—State-Issued Permit



### Notes:

For most NPDES permits, an authorized state is the permit issuing authority. As you can see, much of the process is similar to the process followed when EPA issues the permit.

As with an EPA-issued permit, the state permitting authority develops documentation for the draft permit and provides public notice and an opportunity for comment, sometimes including a public hearing.

EPA then has the opportunity to review and comment on the draft or proposed version of a state-issued permit and, if necessary, file an objection. We'll discuss EPA's review process later in the presentation. For now, we will just note that the permitting authority would need to address EPA's objections or EPA could assume authority for issuing the permit.

Changes made during the review process could lead to another round of review or public notice and comment.

For state-issued permits, there is often a state board or administrative law judge that serves the same function that the Environmental Appeals Board serves for EPA.

## 1.6 NPDES Administrative Process




The slide features a light blue background with a white box containing text and a list. In the top left corner of the slide is the NPDES logo. In the top right corner is a cartoon illustration of a woman with curly brown hair sitting at a desk with a computer. At the bottom of the slide is a decorative border with a green landscape, a blue sky, and the EPA logo on the right.

 **NPDES Administrative Process**

The administrative process of developing and issuing a permit involves:

- documenting all permit decisions
- coordinating EPA and state, territorial, or tribal review of the draft permit
- providing public notice, conducting hearings (if appropriate), and responding to comments
- defending the permit and modifying after issuance (if required)



### Notes:

So, as we saw from our flow charts, the administrative process for an NPDES permit consists of documenting all permit decisions, coordinating agency review of the draft or proposed permit, providing public notice, and possibly a public hearing, and responding to public comments. After final permit issuance, the permit writer might be called upon to help defend the permit in the event of an appeal and might need to modify the permit at some point during the permit term.

For the rest of this presentation, we're going to take a closer look at each of these aspects of the administrative process, and Dave will begin with documentation.

## 1.7 Reasons for Good Documentation



### Reasons for Good Documentation

- Establishes permanent record of the basis for the permit
- Explains legal basis of permit
- Provides sound basis for future modifications and permits
- Helps permit writer to be organized and logical throughout permit development process



### Notes:

Thanks, Greg.

The next few slides cover the topic of why and how permit writers should document all of the hard work that goes into developing an NPDES permit.

It can sometimes be a tough sell convincing permit writers about the importance of documentation, but the work put in up front can really pay dividends if there are any questions regarding the basis of permit requirements. Good documentation also provides for transparency in the decision making process and can help develop trust among stakeholders that the permitting process is open and fair.

By committing to complete and thorough documentation, permit writers ensure that there is a good permanent record for the permit that can answer questions like:

- What were you thinking when you came up with this requirement?
- What data, calculations and assumptions were used to come up with the permit limits? and
- What's the legal basis for including a limit or other permit condition?

Good documentation also provides a sound basis for future permit modifications and permit reissuance. For example, in establishing the cause for a new or revised permit requirement, the record for the existing permit provides the baseline from which the change will be measured or explained to support the need for or the appropriateness of the new condition.

The permit documentation also helps the permit writer stay organized and logical throughout the permit development process. Or, looking at it another way, if the rationale and record are compiled in an organized manner as you work through the permit development, good documentation really shouldn't take that much extra time and can really pay off in the long run.

One last note: if the permit is appealed following issuance, most federal and state appeal processes require the permitting authority to support and defend its decisions based on information contained in the existing administrative record.

## **1.8 Contents of Administrative Record Draft Permit – § 124.9**



The slide features a light blue background with a white border. In the top left corner is the NPDES logo. The title 'Contents of Administrative Record Draft Permit – § 124.9' is centered at the top. To the right of the title is a 3D illustration of a yellow folder with a blue document sticking out. Below the title is a bulleted list of items. At the bottom of the slide is a decorative banner with a green landscape, a blue sky, and the EPA logo on the right.

- What is it?
- What is in it?
  - application and supporting data
  - draft permit
  - statement of basis or fact sheet
  - documents or other items cited in statement of basis or fact sheet
  - other items supporting permit development
  - Environmental Impact Statement (EIS) for new source draft permits

### **Notes:**

An administrative record for the draft and final permit is required by the federal regulations for EPA-issued permits, and most state NPDES permitting authorities establish similar requirements.

The purpose of the administrative record is to identify all of the critical supporting documents used or developed during the permitting process and preserve this set of documents for future reference.

As previously noted, in many instances, challenges to the permit can only be defended on the basis of what is in the administrative record. In other words, if it's not in the administrative record, it's not available to support your case.

For EPA-issued NPDES permits, the regulations require development of an administrative record for both the draft and final NPDES permit. I like to think of the administrative record as an accordion folder in which all of the documents pertinent to the development of the permit are stored. The record, or folder, for the draft permit must



include:

- the permit application and any other data used by the permitting authority to support permit development;
- the draft permit itself and fact sheet or statement of basis (which we'll discuss in just a moment); and
- any other documents or information cited in the fact sheet or statement of basis or used to support permit development, except for widely available documents that can be readily accessed, such as published state or federal guidance manuals and text books.

We should also note that some EPA-issued permits require development of an Environmental Impact Statement. If an EIS is required, this must also be included in the administrative record for the draft permit.

## 1.9 Fact Sheet vs. Statement of Basis

The slide features a light blue background with a decorative landscape at the bottom showing green hills, trees, and a blue river. In the top left corner is the NPDES logo. The title 'Fact Sheet vs. Statement of Basis' is centered at the top. Below the title are two columns of information, each with a blue header. The left column is for 'Fact Sheet [§§ 124.8, 124.56]' and the right column is for 'Statement of Basis [§ 124.7]'. The EPA logo is in the bottom right corner.

Fact Sheet [§§ 124.8, 124.56]	Statement of Basis [§ 124.7]
<ul style="list-style-type: none"><li>• Required for draft permits:<ul style="list-style-type: none"><li>• for major facilities</li><li>• for Class I sludge management facilities</li><li>• that incorporate a variance</li><li>• that are NPDES general permits</li><li>• that include a sewage sludge land application plan</li><li>• that are subject to widespread public interest</li></ul></li><li>• Minimum elements of a fact sheet specified in regulations</li></ul>	<ul style="list-style-type: none"><li>• Used when fact sheet not required</li><li>• Regulations require that a statement of basis include:<ul style="list-style-type: none"><li>• description of the conditions of the draft permit</li><li>• reasons for the conditions</li></ul></li></ul>

### Notes:

One of most important components of the administrative record is the permit fact sheet or statement of basis.

The NPDES regulations at 40 CFR 124.8 require both state and EPA permitting authorities to prepare a fact sheet for draft permits for certain types of regulated facilities, as listed in the first column on this slide. Note that fact sheets must be prepared to accompany the draft permits for all major NPDES facilities and where there is widespread public interest.

The requirements for the content of the fact sheet are established in 40 CFR 124.8 and 124.56. We'll review the required elements of a fact sheet on the next few slides.

A statement of basis is required for EPA-issued permits where a fact sheet is not required.

There are two basic requirements for what must be included in the statement of basis

- a description of the conditions of the draft permit, and
- the reasons for those conditions.

In practice, a fact sheet and a statement of basis often look very similar, and in many states the permitting authority uses the same template or format to document permitting decisions for all of its NPDES permits.

We should also note that states sometimes call fact sheets or statement of basis by another name, such as a "permit rationale." Regardless of the name, however, the required contents must be included.

Now let's take a closer look at the required elements of a fact sheet.

### **1.10 Minimum Elements of a Fact Sheet – §§ 124.8, 124.56**

The infographic features a light blue background with a white border. At the top left is the NPDES logo. The title is in bold black text. Below the title are two main bullet points. The first bullet point, 'General facility information', has three sub-bullets: 'description of facility or activity', 'sketch or description of location', and 'type and quantity of waste/pollutants discharged'. To the right of these sub-bullets is an illustration of a red building with a white roof. The second main bullet point, 'Summary rationale of permit conditions', has two sub-bullets: 'applicable statutory and regulatory citations' and 'references to administrative record'. To the left of these sub-bullets is an illustration of a grid with a black dot. At the bottom of the infographic is a landscape illustration with green hills, trees, and a blue sky. The EPA logo is in the bottom right corner.

**Minimum Elements of a Fact Sheet – §§ 124.8, 124.56**

- General facility information
  - description of facility or activity
  - sketch or description of location
  - type and quantity of waste/pollutants discharged
- Summary rationale of permit conditions
  - applicable statutory and regulatory citations
  - references to administrative record

**EPA**  
United States  
Environmental Protection  
Agency

#### **Notes:**

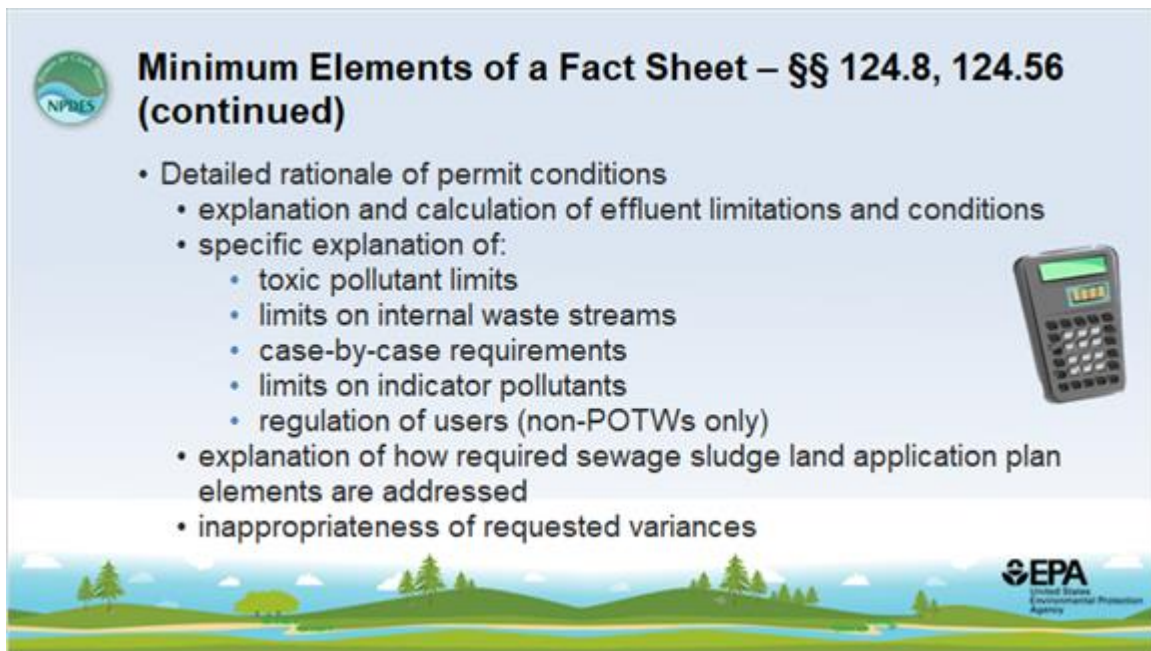
As I just mentioned, the required minimum elements of a fact sheet are specified in 40 CFR 124.8 and 124.56. The regulations at 124.8 address fact sheet requirements for permits developed under a variety of federal environmental statutes, including the Clean Water Act, the Safe Drinking Water Act, and the Resource Conservation and Recovery Act; while regulations at 124.56 are specific to NPDES permits.


For this presentation, we've combined and reorganized the requirements from the two regulatory provisions to provide an outline that flows a little better. Let's take a look.

The first required element of a fact sheet is the general facility information. The regulations require that the fact sheet include basic information about the facility, including a description of the facility or activity, the types and quantities of wastes discharged, and, where appropriate, a sketch or description of the location of the discharge.




A second required component of the fact sheet is a summary of the bases of permit conditions. This summary must include references to applicable statutory and regulatory provisions upon which permit requirements are established and, for EPA-issued permits, references to the administrative record.

### **1.11 Minimum Elements of a Fact Sheet – §§ 124.8, 124.56 (continued)**



 **Minimum Elements of a Fact Sheet – §§ 124.8, 124.56 (continued)**

- Detailed rationale of permit conditions
  - explanation and calculation of effluent limitations and conditions
  - specific explanation of:
    - toxic pollutant limits
    - limits on internal waste streams
    - case-by-case requirements
    - limits on indicator pollutants
    - regulation of users (non-POTWs only)
  - explanation of how required sewage sludge land application plan elements are addressed
  - inappropriateness of requested variances



#### **Notes:**

The next required element of the fact sheet is a detailed rationale explaining the basis of certain types of permit conditions.

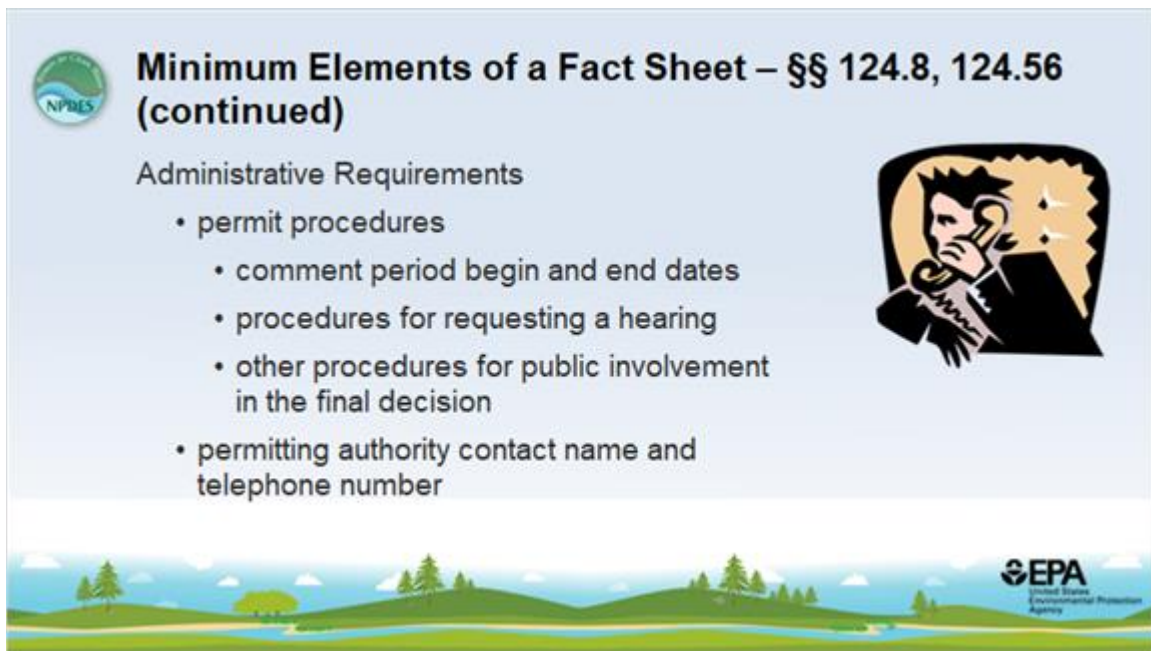
Of particular note, 40 CFR 124.56(a) requires that the fact sheet contain "...any calculations or other necessary explanation of the derivation of specific effluent limitations...required by 40 CFR 122.44 and reasons why they are applicable or an explanation of how the alternate effluent limitations were developed."


EPA's review of NPDES permits, conducted over the past several years as part of the national Permit Quality Review, has found that this required information is frequently incomplete or absent from NPDES permit fact sheets. Much too often, fact sheets omit the calculations or simply note that the limit has been carried forward from the previous

permit. While this might sound like a reasonable time saver for the permit writer, the fact sheet for the previous permit might also lack this information, and the permittee and other stakeholders would have no basis to assess whether the proposed limit is still appropriate and protective.

As noted on this slide, there are many other specific types of conditions for which the rationale must be provided, but they're fairly case-specific, so we won't cover them in detail in this overview presentation.



## **1.12 Minimum Elements of a Fact Sheet – §§ 124.8, 124.56 (continued)**



 **Minimum Elements of a Fact Sheet – §§ 124.8, 124.56 (continued)**

**Administrative Requirements**

- permit procedures
  - comment period begin and end dates
  - procedures for requesting a hearing
  - other procedures for public involvement in the final decision
- permitting authority contact name and telephone number




### **Notes:**

The last elements of the fact sheet that we'll cover are the administrative requirements. These required fact sheet elements include information related to public participation, and they must identify the applicable comment period begin and end dates, procedural requirements for providing comments or requesting a hearing, other procedures for public involvement in the final decision, and permitting authority contact information.

I'm sure this seems like a lot of up-front work, but as we've said before, if anyone challenges your permitting decisions, you'll be really happy you took the time to do this right.


OK, Greg! We beat the documentation drum hard enough. How about taking us through the procedural steps of the permit issuance process?

## 1.13 State Review of EPA Permits – § 124.53



### State Review of EPA Permits – § 124.53

- EPA permit may not be issued until a certification is granted or waived in accordance with CWA section 401
- State certification must include:
  - conditions necessary to assure compliance with CWA and appropriate requirements of state law
  - specific citation to CWA or state law upon which conditions more stringent than those in the draft permit are based
  - statement indicating the extent to which each condition of the draft permit can be made less stringent without violating requirements of state law



### Notes:

Sure, Dave.

If you remember the flow charts at the beginning of the presentation, you might recall that, depending on who is issuing an NPDES permit, either EPA or a state has an opportunity to review the permit before it becomes final.

When EPA is issuing a permit, 40 CFR 124.53 gives the state in which the discharge originates 60 days to review the EPA permit. This time period can be extended, but not beyond one year.

The purpose of this state review is to allow the state to grant or deny Clean Water Act section 401 certification. By granting 401 certification the state is indicating that the permit will achieve the applicable state water quality standards. If the state does not respond within the specified time frame, it's considered a waiver of its right to certify.

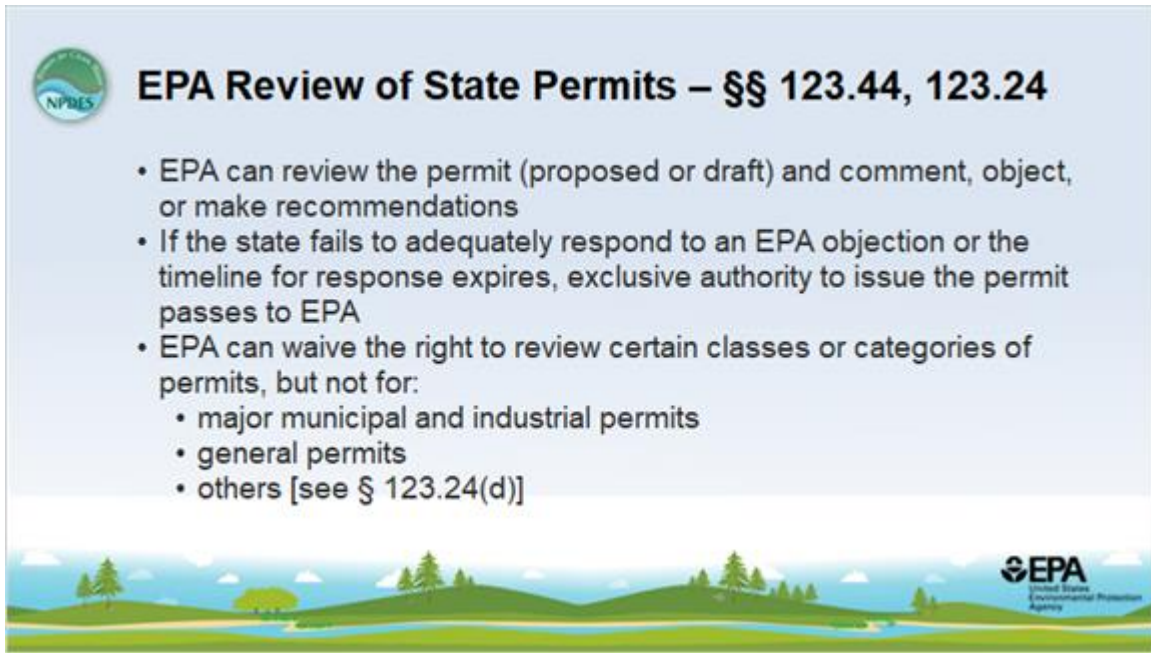
Once a state grants or waives 401 certification, EPA proceeds through the public comment process and then issues the permit.

On the other hand, EPA cannot issue a permit if the state has denied 401 certification or if the permit does not include conditions that the state, in its certification, indicates are required to achieve its water quality standards. If the state does identify such conditions, the certification must also include a citation to the provisions of the Clean Water Act or state law that are the basis for those additional conditions.

The certification must also include a statement indicating the extent to which each condition in the draft permit can

be made less stringent without violating the requirements of state law.

### **1.14 EPA Review of State Permits – §§ 123.44, 123.24**



The slide features a light blue background with a decorative landscape at the bottom showing green hills, trees, and a blue sky. In the top left corner is the NPDES logo. The title 'EPA Review of State Permits – §§ 123.44, 123.24' is prominently displayed. Below the title is a bulleted list of key points regarding EPA's review process. The EPA logo is visible in the bottom right corner of the slide.

- EPA can review the permit (proposed or draft) and comment, object, or make recommendations
- If the state fails to adequately respond to an EPA objection or the timeline for response expires, exclusive authority to issue the permit passes to EPA
- EPA can waive the right to review certain classes or categories of permits, but not for:
  - major municipal and industrial permits
  - general permits
  - others [see § 123.24(d)]

#### **Notes:**

If a state is issuing a permit, formal EPA review occurs either during the public comment period, if EPA has agreed to review draft permits, or after the close of the public comment period, if EPA is reviewing proposed permits.

The regulations state that a Memorandum of Agreement between the permitting authority and EPA shall provide EPA a period of time of up to 90 days to review and make general comments on, objections to, or recommendations with respect to permits.

The regulations then spell out the back-and-forth process for EPA to lay out specific grounds for an objection and for the state to respond. If the state does not take the action needed to resolve an objection within a specified time frame, then exclusive authority to issue the permit passes to EPA.

Again, I want to note that the regulations allow EPA to agree to review a draft permit, which is the permit out for review during the public comment period, rather than a proposed permit, which is the version of the permit prepared by the state after the close of the public comment period. By reviewing draft permits, EPA gets involved in the process earlier and is not providing comments on or objections to permits that have already gone through the public comment process.

One final note of importance is that the Memorandum of Agreement between EPA and the permitting authority must also specify the extent to which EPA will waive its right to review, object to, or comment upon certain classes

or categories of state-issued permits. For example, EPA could decide that it will not review permits for discharges composed solely of non-process wastewater with a total flow of less than one million gallons per day. EPA, however, cannot waive the right to review permits for certain classes or categories; among them, permits for major municipal and industrial facilities and general permits. You'll find the entire list of these classes or categories of permits in 40 CFR 123.24(d).

By the way, this provision does not mean that EPA must review every permit in one of the listed classes or categories of permits; rather, it simply indicates that there are certain types of permits that EPA cannot categorically give up its right to review.

OK, that was a lot of information to catch in a short time. Again, if you want all of the details on the EPA and state review process, take a closer look at the applicable NPDES regulations.


## 1.15 Public Notice



The slide features a light blue background with a white box containing text and a cartoon illustration. At the top left is the NPDES logo. The title 'Public Notice' is in large, bold, black font. Below it is a bulleted list of actions requiring public notice. To the right of the list is a cartoon man in a suit shouting into a megaphone. At the bottom of the slide is a landscape illustration with green hills, trees, and a blue sky. The EPA logo is in the bottom right corner.

 **Public Notice**

- Types of actions requiring public notice [§ 124.10(a)]
  - tentative denial of application (EPA-issued permits)
  - draft NPDES permit
  - public hearing scheduled
  - appeal granted (EPA-issued permits)
  - new source determination made (EPA-issued permits)
  - major permit modifications (after issuance)



### Notes:

We're going to move on now from the EPA and state review process to talk about how the public gets involved in NPDES permit issuance.

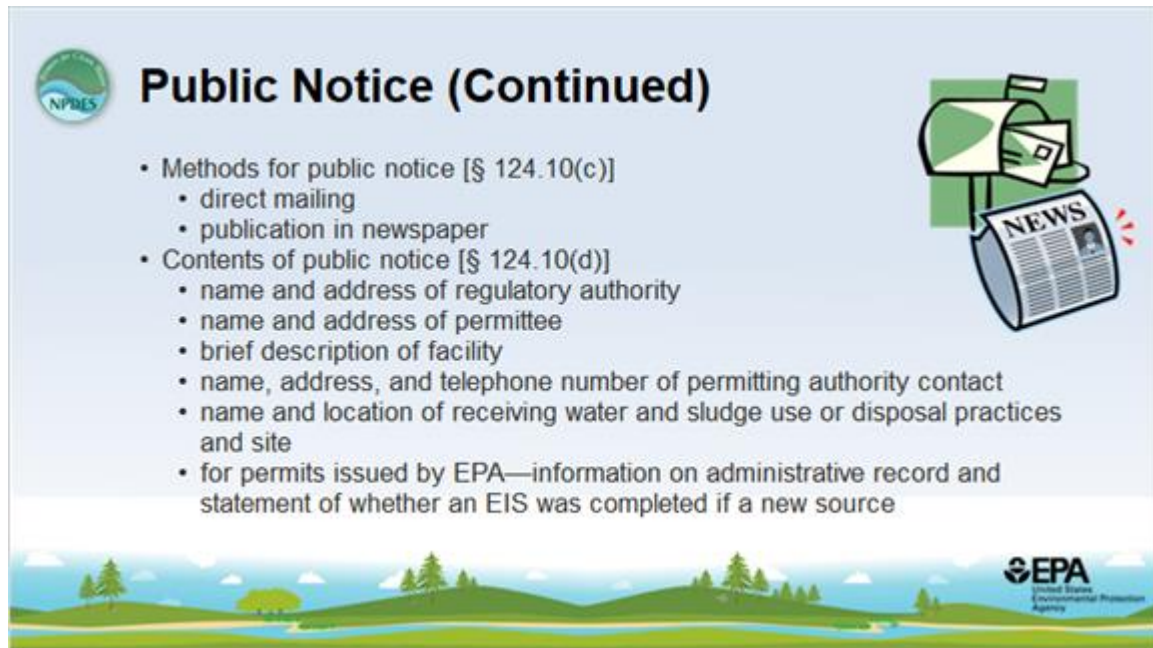
40 CFR 124.10 indicates the types of actions that require public notice. As you can see from the slide, that list includes nearly any significant decision made regarding NPDES permits.

You'll also note that the federal regulations require public notice of some decisions for EPA-issued permits only.

Specifically, the federal rules require public notice of tentative denial of a permit application, granting an appeal, and a determination that the discharge is a new source, only for EPA issued permits.

Keep in mind however that, in many cases, a state's rules might go beyond the federal minimum and require public notice of additional actions taken by the state.

## 1.16 Public Notice (Continued)



The slide features a light blue background with a decorative landscape at the bottom showing green hills, trees, and a blue river. In the top left corner is the NPDES logo. In the top right corner is an illustration of a mailbox with a newspaper labeled 'NEWS' and a red exclamation mark. The EPA logo is in the bottom right corner.

### Public Notice (Continued)

- Methods for public notice [§ 124.10(c)]
  - direct mailing
  - publication in newspaper
- Contents of public notice [§ 124.10(d)]
  - name and address of regulatory authority
  - name and address of permittee
  - brief description of facility
  - name, address, and telephone number of permitting authority contact
  - name and location of receiving water and sludge use or disposal practices and site
  - for permits issued by EPA—information on administrative record and statement of whether an EIS was completed if a new source

### Notes:

The regulations specify two methods for providing public notice. Those methods are direct mailing and publication in a newspaper.

The direct mailing must go to the permit applicant and other parties specified in the regulations who might have an interest in the permit, such as other agencies issuing permits, agencies with responsibilities for fish and wildlife, affected states, and anyone on a direct mailing list developed by the state.

Publication of public notice in a daily or weekly newspaper within the area affected by the facility or activity is required for permits involving major facilities, general permits, and permits that include a sewage sludge land application plan. For EPA-issued general permits the notice must be published in the Federal Register.

The required contents of public notice include basic information about the facility and its discharge, contact information for the permitting authority, and a description of the public comment procedures, time and place of any public hearing, and procedures for requesting a hearing.



For EPA-issued permits, the notice also must inform the public of the location of the administrative record and times it will be open for review and a statement as to whether an Environmental Impact Statement was prepared if the permittee is a new source.

### **1.17 Public Notice (Continued)**



**Public Notice (Continued)**

- Timing of public notice [§ 124.10(b)]
  - must allow at least 30 days for public comments
- Responding to comments [§ 124.11, 124.17]
  - significant comments require a response in writing
  - explain changes from the draft permit
  - response to comments must be made available to public

The slide features a light blue background with a green landscape illustration at the bottom. On the left is the NPDES logo, and on the right is the EPA logo with the text "United States Environmental Protection Agency".

#### **Notes:**

Sufficient time must be allowed for public comment on any action requiring public notice.

The minimum time that must be provided for public comment is 30 days; however, permitting authorities often provide longer comment periods (for example 45 or 60 days) for permits that are expected to elicit widespread public interest.

The permitting authority must develop a written response to any significant comments received during the comment period. This response to comments must indicate which provisions, if any, of the draft permit have been changed in the final permit decision and the reasons for the change.

For EPA-issued permits, any documents cited in the response to comments must be included in the administrative record for the final permit decision.

In addition, the response to comments must be available to the public.

## 1.18 Public Hearings – §§ 124.11, 124.12



### Public Hearings – §§ 124.11, 124.12

- Public hearings may be requested by any party
- Hearings are optional
- Scheduling the hearing automatically extends the comment period until the close of the hearing [§124.12(c)]
- A recording or transcript of the hearing must be available to interested persons



### Notes:

During the public comment period, any party may request a public hearing. The hearing must be requested in writing and the request must state the nature of the issues proposed to be raised during the hearing.

Public hearings are not mandatory, and the permitting authority determines whether or not to hold the public hearing based on its assessment of the circumstances. The NPDES regulations indicate that the decision of whether or not to hold a hearing is based on whether or not there is significant public interest in the draft permit.

The permitting authority could also decide on its own to hold a hearing, and state procedures might even make it automatic to hold a hearing for certain types of permits.

If a hearing is scheduled, the permitting authority must give public notice of the hearing and the public comment period for the draft permit is automatically extended until the close of the hearing.

A recording or transcript of the hearing must be available to interested persons, and it becomes part of the administrative record.

## 1.19 Contents of Administrative Record Final Permit – § 124.18



The slide features a light blue background. In the top left corner is the NPDES logo. The title 'Contents of Administrative Record Final Permit – § 124.18' is centered at the top. Below the title is a bulleted list of six items. To the right of the list is a colorful illustration of two hands holding a folder filled with papers. At the bottom of the slide is a decorative banner with a green landscape, a blue sky, and the EPA logo on the right.

- Administrative record of draft permit
- All comments received
- Response to comments
- Public hearing recording or transcript
- Final EIS for new sources
- Final permit

### Notes:

After the agency and public review process is completed, it's time to prepare the final permit.

Again, keep in mind that if there are significant issues raised in comments on the draft permit, the permitting authority could decide to prepare a new draft permit and another round of public notice and comment would ensue.

If EPA is the permitting authority, an administrative record for the final permit is required. The final administrative record should document the permit completely from start to finish and include everything in the administrative record for the draft permit, all comments received and the response to comments, the recording or transcript of any public hearing, the final environmental impact statement for new sources and, of course, the final permit.

For state-issued permits, the federal regulations do not specifically require an administrative record, but state rules might require something very similar.

Now that we have the final permit signed and issued, what's left Dave?

## 1.20 After Final Permit Issuance



The slide features a light blue background. In the top left corner is the NPDES logo. The title 'After Final Permit Issuance' is in a large, bold, black font. Below the title is a bulleted list of four items. To the right of the list is a cartoon illustration of a person in a purple shirt and pants running while holding a blue folder and a pencil. Above the person is a pink banner with the word 'FINAL' in black letters. At the bottom of the slide is a decorative border with a green landscape, a blue sky, and the EPA logo on the right.

**NPDES**

# After Final Permit Issuance

- Permit appeals
- Minor and major permit modifications
- Permit termination
- Permit transfer

**FINAL**

**EPA**  
United States  
Environmental Protection  
Agency


### Notes:

Well Greg, although we're at the point where the permit has been issued, it turns out that we might not be completely finished with this thing.


There are several events that can occur during the life of the permit, including challenges to the permit conditions or perhaps a change in circumstances, that create a need for the permitting authority to go back and make some edits to the permit before it comes up for renewal.

This slide lists some of the events that could happen after final permit issuance, and we'll look at each in more detail on the next few slides.



## 1.21 Permit Appeal – § 124.19



### Permit Appeal – § 124.19



- Used to contest final permit limits and conditions
- Regulatory requirements
  - must be requested within 30 days after final permit issuance
    - challenges limited to issues raised during public comment on draft permit (unless good cause is shown)
  - EAB decides to grant/deny request for appeal for permits issued by EPA and public notice required if granted
- Only contested permit conditions are stayed (for EPA permits)
- Permit writers' role during appeal is to serve as source of technical knowledge for attorney



### Notes:

Before we get started with this discussion, I should note that we will be describing the requirements established in EPA's administrative procedure regulations found in 40 CFR Part 124. State permitting authorities are governed by their own state regulations and policies, and their procedures might differ from EPA's.

OK, with that caveat in mind, let's take a look at the first item on our list: the permit appeal.

EPA's permit appeal regulations are found at 40 CFR 124.19. The process established by these regulations allows any person who filed comments during the public comment period to contest specific conditions in the final permit. A few things to keep in mind with respect to the appeal process include:

- the appeal must be filed within 30-days of issuance of the permit, and
- only issues raised during the comment period can be raised in the appeal unless good cause is shown for not commenting earlier.

In the case of EPA-issued permits, the Environmental Appeals Board (or EAB) will decide whether to grant or deny an appeal request and, if granted, EPA must issue a public notice indicating that the permit is under appeal.

If the EAB grants the request, the contested conditions (and only those contested conditions) are stayed, as detailed in 40 CFR 124.16(a). A stay indicates that the contested permit condition does not go into effect, and the condition from the previous permit remains in effect, pending the decision from the EAB.

An exception is for a new source or a new discharge, where the entire permit is stayed pending the EAB decision, and the permittee cannot commence its discharge.

The permit writer's role during the appeal process is to serve as the technical expert with respect to how the permit was developed. The permitting authority's legal counsel will take care of the administrative details, such as filing appropriate paperwork on time, but the permit writer will need to answer all questions about the technical merit of the permit. This is one of the biggest reasons to put a lot of work and a lot of detail into the permit fact sheet. If the permit goes to an appeal and there is only a 3-page fact sheet, it's going to be a very painful process. The more documentation you have, the better off you are.

## **1.22 Minor Modifications – § 122.63**



The slide features a light blue background. In the top left corner is the NPDES logo. The title 'Minor Modifications – § 122.63' is prominently displayed in the upper center. Below the title is a bulleted list of conditions and actions. At the bottom of the slide is a decorative graphic of a landscape with green hills, trees, and a blue sky, with the EPA logo in the bottom right corner.

**Minor Modifications – § 122.63**

- Used to make corrections to permit conditions with consent of the permittee
- Exempt from administrative procedures (i.e., draft permit, public notice, etc.)
- Actions considered minor:
  1. correcting typographical errors
  2. requiring more frequent monitoring
  3. changing interim compliance date (<120 days)
  4. allowing for a change in ownership
  5. changing the construction schedule for new source
  6. deleting a point source outfall
  7. incorporating an approved local pretreatment program

### **Notes:**

Hopefully you will be able to avoid the appeal process, and your final permit will go into effect unchallenged.

Now let's say that you're sailing along in the second or third year of a five year permit term and receive or become aware of some information that leads you to determine that changes are needed to the permit to address these new circumstances. Can you modify the permit before it expires?

Well, we have a couple of slides dealing with modifications, so I guess the answer must be "Yes."

The NPDES regulations address permit modifications in two sections. 40 CFR 122.62 addresses modification and revocation and reissuance of permits, and 40 CFR 122.63 addresses minor modifications. Let's take a look at minor modifications first.

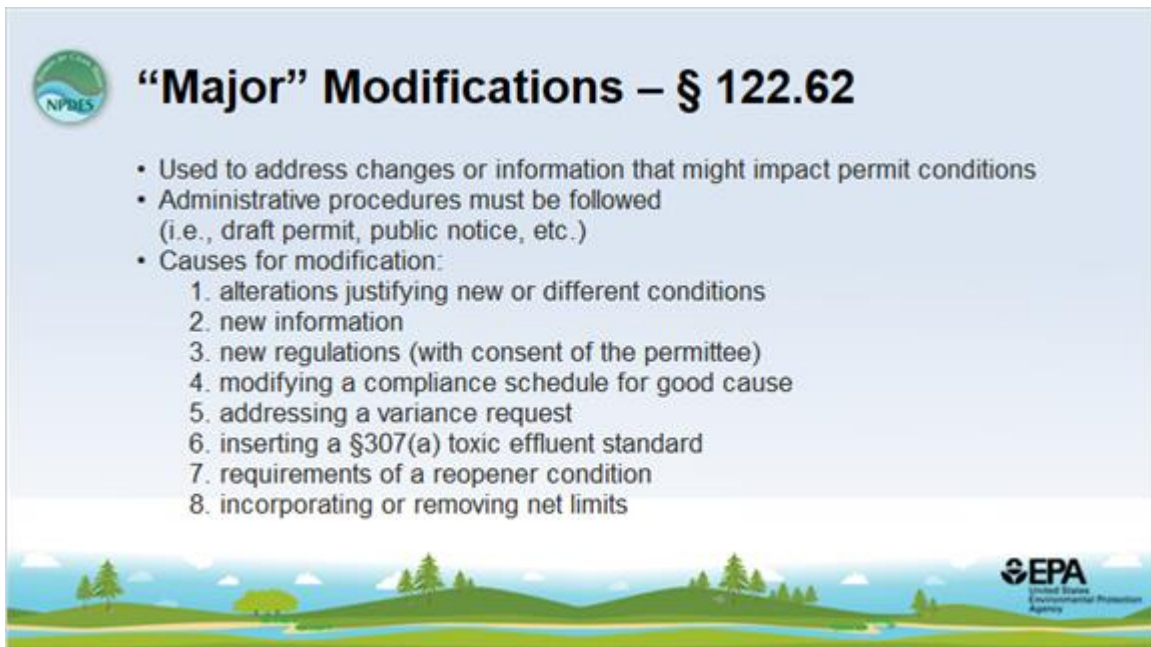
Minor modifications are nice and easy. They require a little paperwork to document that you've made a change to the permit, but the changes can be processed without reopening the permit and going through the public notice and comment procedures that we just covered. One thing to remember, however, is that in order to process a minor modification, you must have the consent of the permittee.

40 CFR 122.63 provides the explanation of what a minor modification entails, and it's pretty much limited to corrections and changes that no one other than the permittee and the permitting authority would be concerned about. The list includes:

- typographical errors,
- incorporation of more frequent monitoring requirements,
- change in a compliance schedule interim compliance date by 120 days or fewer,
- change in facility ownership,
- change in construction schedule for a new source,
- deletion of a point source outfall, and
- incorporation of an approved pretreatment program for a POTW.

It's not a long list, but if the change does fall into one of these seven categories, it's a very easy process. Now let's look at other permit modifications.

### **1.23 “Major” Modifications – § 122.62**



The slide features a light blue background with a decorative landscape at the bottom showing green hills, trees, and a blue sky. In the top left corner is the NPDES logo, and in the bottom right corner is the EPA logo with the text "United States Environmental Protection Agency".

## **“Major” Modifications – § 122.62**

- Used to address changes or information that might impact permit conditions
- Administrative procedures must be followed (i.e., draft permit, public notice, etc.)
- Causes for modification:
  1. alterations justifying new or different conditions
  2. new information
  3. new regulations (with consent of the permittee)
  4. modifying a compliance schedule for good cause
  5. addressing a variance request
  6. inserting a §307(a) toxic effluent standard
  7. requirements of a reopener condition
  8. incorporating or removing net limits

**Notes:**

We usually refer to other types of allowable modifications to the permit as major modifications; however, the term “major” is not actually used in the regulations.

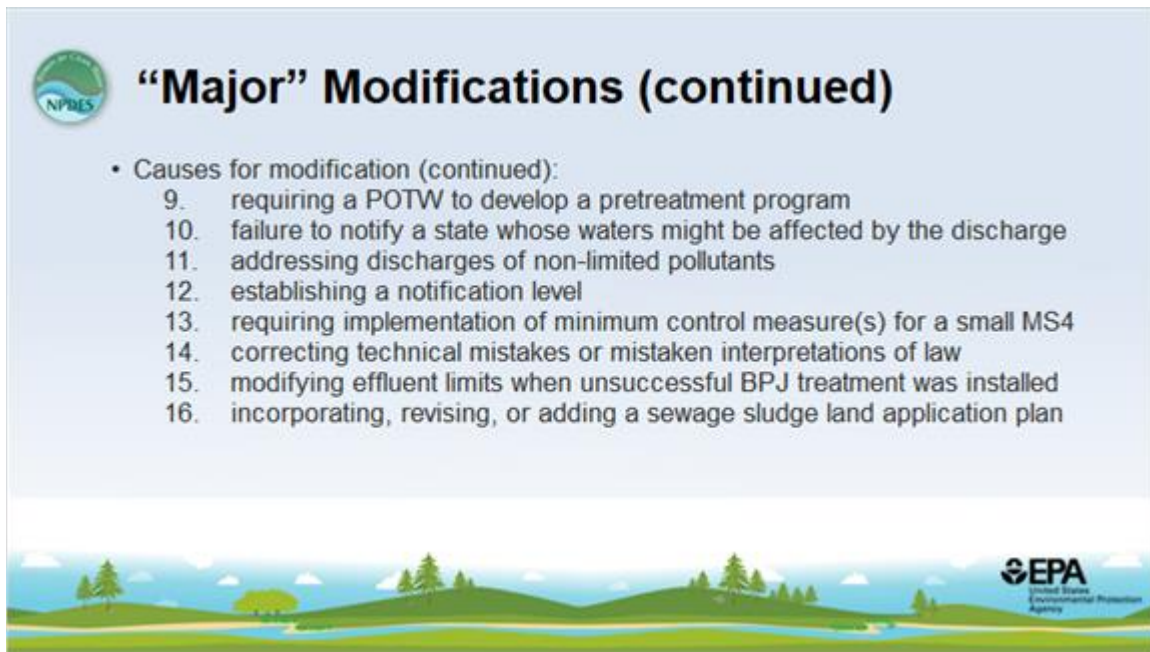
Because these modifications result in substantive changes to the permit terms and conditions, permitting authorities are required to process them by following the public notice and comment procedures similar to the procedures used to issue or reissue an NPDES permit. One important difference, however, is that only the portion of the permit being modified is reopened for comment. Unchanged portions of the permit remain in effect and are not subject to the administrative process.

So what gives rise to the need for a major modification? Well the regulations at 40 CFR 122.62 provide a specific list of 16 causes for permit modification. If any of these causes exist, then the permitting authority has the authority to modify the permit, subject to the administrative requirements in 40 CFR Part 124. The list includes:

- alterations justifying new or different conditions (for example, the facility has changed its manufacturing operations in some way or perhaps significantly increased capacity);
- new information, such as data or process information, that was not available at the time the permit was originally drafted and issued but, had it been available, would have led to different permit conditions;
- new regulations come into effect during the permit term, keeping in mind that modifications due to new regulations are only allowable with the permittee’s consent;
- modification of a permit compliance schedule where a good cause to do so exists;
- incorporation of an approved variance;
- insertion of a toxic effluent standard developed under section 307(a) of the Clean Water Act;
- revisions triggered by a specific reopener condition included in the permit;
- incorporation of net limits when a permittee requests, and qualifies for, net limits under 122.45(g), or removing net limits when a permittee is no longer eligible for them;



## 1.24 “Major” Modifications (continued)



The slide features a light blue background with a white box containing the title and list. At the bottom, there is a decorative landscape illustration with green hills, trees, and a blue sky, and the EPA logo on the right.

### “Major” Modifications (continued)

- Causes for modification (continued):
  9. requiring a POTW to develop a pretreatment program
  10. failure to notify a state whose waters might be affected by the discharge
  11. addressing discharges of non-limited pollutants
  12. establishing a notification level
  13. requiring implementation of minimum control measure(s) for a small MS4
  14. correcting technical mistakes or mistaken interpretations of law
  15. modifying effluent limits when unsuccessful BPJ treatment was installed
  16. incorporating, revising, or adding a sewage sludge land application plan

### Notes:

- incorporating a requirement for a POTW to develop a pretreatment program if the permitting authority receives information during the permit term indicating that such a program is necessary;
- permit changes to address the failure to notify an affected state (for example, where the permitted discharge is to waters shared by multiple states and the neighboring state was not notified and, therefore, not provided opportunity to comment);
- addressing non-limited pollutants that are at a level exceeding what can be achieved by technology-based treatment requirements appropriate to the permittee under 40 CFR 125.3(c);
- establishing a specific notification level as provided in 40 CFR 122.44(f);
- requiring implementation of minimum control measures for a small municipal separate storm sewer system;
- correcting technical and legal mistakes, such as errors in calculations or misinterpretations of law;
- making changes needed to address unsuccessful best professional judgment-based treatment; and, last but not least,
- incorporating, revising, or adding a sewage sludge land application plan when required by a permit condition.

That's quite a laundry list. The key point to remember is that the proposed modification must be based on one of these causes.

## 1.25 Permit Terminations – §§ 124.5(d), 122.64



### Permit Terminations – §§ 124.5(d), 122.64

- Used to retract privilege to discharge during permit term
- Causes for termination:
  - suspend effectiveness in emergency
  - terminate for falsifications, recalcitrance, or changed conditions (e.g., plant closure)
- Administrative procedures must be followed (i.e., public notice)
  - no public notice is required for termination because of outfall deletion or plant closure



### Notes:

Permitting authorities also have the legal authority to terminate a permit prior to its expiration if cause exists.

Permit termination is a very significant action because the permitting authority is telling the permittee that it no longer has the privilege to discharge.


A termination can be initiated by the permitting authority to address serious issues such as repeated violations, falsification of records or reports, or an emergency situation, or a termination might be requested by the permittee.

A voluntary termination might be initiated by the permittee if it determines that it no longer needs to discharge because it has gone to a closed-loop system or in some way changed its process to eliminate the discharge, or perhaps it has obtained authority from a POTW to allow it to discharge to the sanitary sewer rather than directly to a water of the United States. This type of termination often can be implemented without going through the administrative process.

For most other termination actions, the permitting authority must follow the same administrative procedures used to issue or reissue a permit.




The specific procedures that must be followed for a termination process are detailed in 40 CFR 124.5(d) and 122.64.

## 1.26 Permit Transfer – § 122.61



### Permit Transfer – § 122.61

- Necessary to address change in owner or operator
- Transfer Options
  - transfer by modification or by revocation and reissuance
  - automatic transfer
    - prior 30-day notice
    - written agreement between new and old owners
    - permit will not be modified or revoked



### Notes:

The last procedure that we'll cover in this presentation is the transfer of a permit from one owner or operator to another. This is a very common occurrence during the permit term and can generally be handled without a lot of paperwork.

40 CFR 122.61 lays out the requirements for transfer, and the permit standard condition at 40 CFR 122.41(l)(3) provides the permittee with notice of its responsibility to provide the appropriate information during the transfer process.

There are three options available to the permitting authority to process a permit transfer. They are:

- a minor modification of the permit,
- revoking and reissuing the permit, or
- an automatic transfer, provided the permitting authority has received 30-day notice, including a written agreement between the new and former owner.

The most common approach is the automatic transfer, which requires very little effort to process.

Whichever approach is taken, the record of the transaction should be clearly documented in the permit file.

OK, Greg, that does it for the administrative process. What's next?