ORIGINAL

ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF:	)
PROPOSED AMENDMENTS TO:	)
PART 309 SUBPART A -	)
35 Ill. Adm Code 309.105, 309.7, 309.8,	)
309.9, 309.10, 309.12, 309.13, 309.14,	)
309.117, 309.119, 309.143, 309.147; and	)
PROPOSED 35 Ill.Adm, Code 120	)
through 122 - NPDES PERMITS AND	)
PERMITTING PROCEDURES	)

R 03-19

NOTICE OF FILING

PLEASE TAKE NOTICE that the Environmental Law and Policy Center of the Midwest, Illinois Chapter of the Sierra Club, Prairie Rivers Network and the 225 persons whose signatures are included with the petition, hereby petition the Illinois Pollution Control Board to amend Illinois Administrative Code Title 35 Environmental Protection Act; Subtitle C: Water Pollution; Chapter I: Pollution Control Board; Part 309 subpart A.

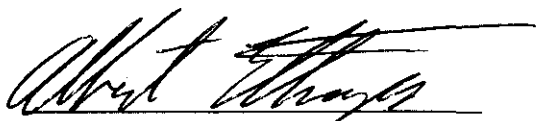
Petitioners are today filing:

- The language of the proposed rules and rule amendments;
- A statement of reasons supporting the proposed rules and rule changes together with 4 exhibits (A-D) to the statement;
- A synopsis of the testimony to be presented by the proponents at the hearing consisting of the pre-filed testimony of Cynthia Skrukrud Ph.D., Beth Wentzel and Albert Ettinger;

- A petition signed by at least 200 persons

- Proof of service of the original and 9 copies on the Clerk and one copy each with the Attorney General, the Illinois Environmental Protection Agency and the Illinois Department of Natural Resources.

The pre-filed testimony of Albert Ettinger includes a written statement that the proposal amends the most recent version of the rule as published on the Board's Web site.



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312 795 3707

January 13, 2003

Section 309.105 Authority to Deny NPDES Permits

No NPDES Permit may be issued in any case in which:

a) The permit would authorize the discharge of a radiological, chemical or biological warfare agent or high-level radioactive waste;

b) The discharge would, in the judgment of the Secretary of the Army acting through the Chief of Engineers, result in the substantial impairment of anchorage and navigation;

c) The proposed permit is objected to in writing by the Administrator of the U.S. Environmental Protection Agency pursuant to any right to object given to the Administrator under Section 402(d) of the CWA;

d) The permit would authorize a discharge from a point source which is in conflict with a plan approved under Section 208(b) of the CWA; or

e) The applicant has not provided proof to the Agency that he will meet any schedule of compliance which may be established, in accordance with the Act and regulations, as a condition of his permit.

f) The public has not had a fair opportunity to comment on all substantial terms of the permit,

g) The permit, permit conditions or procedures used to draft or issue the permit are not consistent with any applicable federal law.

Section 309.107 Distribution of Applications

When the Agency determines that an application for an NPDES Permit is complete, it shall:

a) Unless otherwise agreed, send a copy of the application to the District Engineer of the appropriate district of the U.S. Corps of Engineers with a letter requesting that the District Engineer provide, within 30 days or as otherwise stated in the Agency's letter, his evaluation of the impact of the discharge on anchorage and navigation. If the District Engineer responds that anchorage and navigation of any of the navigation waters would be substantially impaired by the granting of a permit, the permit will be denied and the Agency shall notify the applicant. If the District

Engineer informs the Agency that the imposition of specified conditions upon the NPDES Permit is necessary to avoid any substantial impairment of any of the navigable waters, the Agency shall include in the permit those conditions specified by the District Engineer.

b) Send two copies of the application to the Regional Administrator of the U.S. Environmental Protection Agency with a letter stating that the application is complete.

c) Subject to any memorandum of agreement between the Agency and the Illinois Department of Natural Resources (IDNR), notify the IDNR.

Section 309.108 Tentative Determination and Draft Permit

Following the receipt of a complete application for an NPDES Permit, the Agency shall prepare a tentative determination. Such determination shall include at least the following:

a) A Statement regarding whether an NPDES Permit is to be issued or denied; and

b) If the determination is to issue the permit, a draft permit containing:

1) Proposed effluent limitations, consistent with federal and state requirements;

2) A proposed schedule of compliance, if the applicant is not in compliance with applicable requirements, including interim dates and requirements consistent with the CWA and applicable regulations, for meeting the proposed effluent limitations;

3) A brief description of any other proposed special conditions which will have a significant impact upon the discharge.

c) A statement of the basis for each of the permit conditions listed in Section 309.108(b), including a description of how the conditions of the draft permit were derived as well as the statutory or regulatory provisions and appropriate supporting references.

d) Upon tentative determination to issue or deny an NPDES Permit:

1) If the determination is to issue the permit the Agency shall notify the applicant in writing of the content of the tentative determination and draft permit and of its intent to circulate public

notice of issuance in accordance with Sections 309.108 through 309.112;

2) If the determination is to deny the permit, the Agency shall notify the applicant in writing of the tentative determination and of its intent to circulate public notice of denial, in accordance with Sections 309.108 through 309.112. In the case of denial, notice to the applicant shall include a statement of the reasons for denial, as required by Section 39(a) of the Act.

e) In support of its tentative decision to issue or deny an NPDES permit the Agency shall prepare a draft administrative record containing the basis for the allowances or disallowances of each proposed discharge and which:

1) Shows that any discharge to be permitted will not cause or contribute to the violation of any applicable numeric or narrative water quality standard,
2) Shows the basis for each limit and special condition in the permit,
3) Shows the method(s) by which each limit or special condition of the permit will be monitored for compliance.

Section 309.109 Public Notice

a) Upon tentative determination to issue or deny an NPDES Permit, completion of the draft permit, if any, or re-notice of a substantively changed draft permit, and not earlier than 10 days following notice to the applicant pursuant to Section 309.108(d), the Agency shall circulate public notice of the completed application for an NPDES Permit in a manner designed to inform interested and potentially interested persons of the discharge or proposed discharge and of the proposed determination to issue or deny an NPDES Permit for the discharge or proposed discharge. Procedures for the circulation of public notice shall include at least the following concurrent actions:

1) Notice shall be mailed to the applicant;

2) Notice shall be circulated within the geographical area of the proposed discharge; such circulation may include any or all of the following:

A) Posting in the post office and public places of the municipality nearest the premises of the applicant in which the effluent source is located;

B) Posting near the entrance to the applicant's premises and in nearby places;

C) Publishing in local newspapers and periodicals, or, if appropriate, in a daily newspaper of general circulation; and

D) Any other notice requirements necessary to meet the requirements of the Act and the CWA;

3) Notice shall be mailed to any person or group upon request;

4) The Agency shall add the name of any person or group upon request to a mailing list to receive copies of notices for all NPDES applications within the State of Illinois or within a certain geographical area.

b) The Agency shall provide a period of not less than 30 days following the date of first publication of the public notice during which time interested persons may submit their written views on the tentative determinations with respect to the NPDES application. All comments shall be submitted to the Agency and to the applicant. All written comments submitted during the ~~30-day~~ comment period shall be retained by the Agency and considered in the formulation of its final determinations with respect to the NPDES application. The period for comment may be extended at the discretion of the Agency by publication as provided in Section 309.109.

(Source: Amended at 2 Ill. Reg. no. 16, page 20, effective April 20, 1978.)

Section 309.110 Contents of Public Notice of Application

The contents of public notice of applications for NPDES Permits shall include at least the following:

a) Name, address, and telephone number of the Agency;

b) Name and address of the applicant;

c) Brief description of the applicant's activities or operations which result in the discharge described in the NPDES application (e.g., municipal waste treatment plant, steel manufacturing, drainage from mine activities);

d) Name, if any, of the waterway to which the discharge is made and a short description of the location of the discharge indicating whether it is

a new or an existing discharge including the latitude and longitude of the outfalls as well as the river mile of the outfall;

e) A statement of the tentative determination to issue or deny an NPDES Permit for the discharge described in the application;

f) A brief description of the procedures for the formulation of final determinations, including:

(1) The beginning and ending dates of the comment period and the address where comments will be received;

(2) Procedures for requesting a hearing and the nature of that hearing; and

(3) Any other procedures by which the public may participate in the final decision.

g) Address and telephone number of Agency premises at which interested persons may obtain further information, request a copy of the fact sheet, and inspect and copy NPDES forms and related documents.

Section 309.112 Agency Action After Comment Period

Subject to Sections 309.121 and 309.122, if, after the comment period provided, no public hearing is held with respect to the permit, the Agency shall, after evaluation of any comments which may have been received, either issue or deny the permit.

(Source: Amended at 2 Ill. Reg. no. 16, page 20, effective April 20, 1978.)

Section 309.113 Fact Sheets

a) For every discharge which has a total volume of more than 500,000 gallons (1.9 megaliters) on any day of the year, the Agency shall prepare and, following public notice, shall send upon request to any person a fact sheet with respect to the application described in the public notice. The contents of such fact sheets shall include at least the following information:

1) A sketch or detailed description of the location of the discharge described in the application;

2) A quantitative description of the proposed discharge described in the application which includes at least the following:

A) The rate or frequency of the proposed discharge; if the discharge is continuous, the average daily flow;

B) For thermal discharges subject to limitation under the Act, the average monthly temperatures for the discharge;

C) The average daily mass discharged and average concentration in milligrams per liter, or other applicable units of measurement, of any contaminants which are present in significant quantities or which are subject to limitations or prohibitions under applicable provisions of the CWA or the Act or regulations adopted thereunder;

3) The tentative determinations required under Section 309.108;

4) A brief citation, including an identification of the uses for which the receiving waters have been classified, of the water quality standards and effluent standards and limitations applicable to the proposed discharge;

5) A brief description of the significant factual, legal, methodological and policy questions considered in preparing the draft permit;

6) Flow of the receiving waters in the permit and permit fact sheet, including 7Q10 low flow;

7) A description of the mixing zone, or the dilution factor used to calculate allowed mixing, pursuant to §302.102;

8) In the case of modified and reissued permits, a summary of changes between the public noticed permit and the previous permit;

9) Summary of the Agency's antidegradation analysis and characterization of the receiving waters including the existing uses of the receiving waters;

10) A more detailed description of the procedures for the formulation of final determinations than that given in the public notice, including:

A) The ~~30-day~~ comment period;

B) Procedures for requesting a public hearing and the nature thereof; and

C) Any other procedures by which the public may participate in the formulation of the final determination and

11) Information on how to obtain the complete draft permit administrative record supporting the tentative determination.

b) The Agency shall add the name of any person or group, upon request, to a mailing list to receive copies of fact sheets.

Section 309.114 Notice to Other Governmental Agencies

At the time of issuance of public notice pursuant to Sections 309.109 through 309.112, the Agency shall:

a) Send a fact sheet, if one has been prepared, to any other States whose waters may be affected by the issuance of the proposed permit and, upon request, provide such States with a copy of the application and a copy of the draft permit. Each affected State shall be afforded an opportunity to submit written recommendations within a stated number of days to the Agency and to the Regional Administrator of the U.S. Environmental Protection Agency, which the Agency may incorporate into the permit if issued. Should the Agency decline to incorporate any written recommendations thus received, it shall provide to the affected State or States (and to the Regional Administrator) a written explanation of its reasons for declining to accept any of the written recommendations.

b) Following the procedure set forth in (a) above, notify and receive recommendations from any interstate agency having water quality control authority over waters which may be affected by the permit.

c) Unless otherwise agreed, in accordance with 40 CFR 124.34(c), send a copy of the fact sheet, if one has been prepared, to the appropriate District Engineer of the Army Corps of Engineers for discharges (other than minor discharges) into navigiable waters.

d) Upon request, send a copy of the public notice and a copy of the fact sheet for NPDES Permit applications to any other Federal, state, or local agency, or any affected country, and provide such agencies an opportunity to respond, comment, or request a public hearing pursuant to Sections 309.115-309.119. Such agencies shall include at least the following:

1) The agency responsible for the preparation of an approved plan pursuant to Section 208(b) of the CWA; and

2) The State or interstate agency responsible for the preparation of a plan pursuant to an approved continuous planning process under Section 303(e) of the CWA.

e) Send notice to, and coordinate with, appropriate public health agencies for the purpose of assisting the applicant in integrating the relevant provisions of the CWA with any applicable requirements of such public health agencies.

Section 309.117 Agency Hearing

The applicant or any person shall be permitted to submit oral or written statements and data concerning the proposed permit or group of permits. The Chairman shall have authority to fix reasonable limits upon the time allowed for oral statements, and may require statements in writing. The documents or other materials referred to or relied on by the Agency or the applicant to support the tentative decision shall be identified by the Agency or Applicant at the hearing.

Section 309.119 Agency Action After Hearing

Subject to Sections 309.121 and 309.122, following the public hearing, the Agency may make such modifications in the terms and conditions of proposed permits as may be appropriate and shall transmit to the Regional Administrator for his approval a copy of the permit proposed to be issued unless the Regional Administrator has waived his right to receive and review permits of its class. The Agency shall provide a notice of such transmission to the applicant, to any person who participates in the public hearing, to any person who requested a public hearing, and to appropriate persons on the mailing list established under Sections 309.109 through 309.112. Such notice shall briefly indicate any significant changes which were made from terms and conditions set forth in the draft permit. All permits become effective when issued.

Section 309.120 Obligation of Applicant and Commenters to Place Arguments in Record

All persons, including applicants, who believe any condition of a draft permit is inappropriate or that the Agency's tentative decision to deny an application, terminate a permit, or prepare a draft permit is inappropriate, must raise all reasonably ascertainable issues and submit all reasonably available arguments supporting their position by the close of the public comment period (including any public hearing and post-hearing comment period). Any supporting materials that are submitted shall be included in full and may not be

incorporated by reference, unless they are already part of the administrative record in the same proceeding, or consist of State or Federal statutes and regulations, EPA documents of general applicability, or other generally available reference materials. Commenters shall make supporting materials not already included in the administrative record available to EPA as directed by the agency (A comment period longer than 30 days may be necessary to give commenters a reasonable opportunity to comply with the requirements of this section. Additional time shall be granted to the extent that a commenter who requests additional time demonstrates the need for such time).

Section 309.121 Reopening the Record to Receive Additional Written Comment

1) The Agency may order the public comment period reopened for written comment if the procedures of this paragraph could expedite the decision making process. When the public comment period is reopened under this paragraph, all persons, including applicants, who believe any condition of a draft permit is inappropriate or that the Agency's tentative decision to deny an application, terminate a permit, or prepare a draft permit is inappropriate, must submit all reasonably available factual grounds supporting their position, including all supporting material, by a date not less than sixty days after public notice under paragraph (2) of this section, set by the Agency. Thereafter, any person may file a written response to the material filed by any other person, by a date not less than thirty days after the date set for filing of the material, set by the Agency.

2) Public notice of any comment period under this paragraph shall identify the issues as to which the public comment period is reopened.

3) On its own motion or on the request of any person, the Agency may direct that the requirements of paragraph (1) of this section shall apply during the initial comment period where it reasonably appears that issuance of the permit will be substantially contested and that applying the requirements of paragraph (1) of this section will substantially expedite the decision making process. The notice of the draft permit shall state whenever this has been done.

4) A comment period of longer than 60 days will often be necessary in complicated proceedings to give commenters a reasonable opportunity to comply with the requirements of this section. Commenters may request longer comment periods and they shall be granted to the extent they appear necessary.

Section 309.122 **Requirement to Reopen Record if Draft Permit is Substantially Modified or Substantial New Questions Are Raised During Comment Period.**

a) If, after giving public notice of its tentative decision, the Agency determines to modify any draft permit significantly, the Agency shall prepare a new draft permit, appropriately modified and give notice of the new permit under Section 309.109. The Agency may restrict comments on the modified draft permit to issues on which there has not been a previous opportunity to comment.

b) If any data, information or arguments submitted during the public comment period appear to raise substantial new questions concerning a permit, the Agency may take one or more of the following actions:

1) Prepare a revised statement of basis under § 309.121; or

2) Reopen or extend the comment period to give interested persons an opportunity to comment on the information or arguments submitted. Comments filed during the reopened comment period shall be limited to the substantial new questions that caused its reopening. The public notice under § 309.109 shall define the scope of the reopening.

Section 309.123 Definition of the "Record before the Agency"

The record "before the Agency" includes all documents or other materials prepared, properly placed in the record or identified in the record pursuant to 35 Ill. Adm. Code 309.108-110, 113,117, or 119-22.

SUBPART A: NPDES PERMITS

Section 309.143 Effluent Limitations

a) Effluent limitations must control all pollutant or pollutant parameters (either conventional, nonconventional, or toxic pollutants) which the Agency determines are or may be discharged at a level which will cause, have the reasonable potential to cause, or contribute to an excursion above any State water quality standard, including State narrative criteria for water quality.

b) **In the application of effluent standards and limitations, water quality standards and other applicable requirements, the Agency shall, for each**

permit, specify average and maximum daily quantitative limitations for the level of pollutants in the authorized discharge in terms of weight (except pH, temperature, radiation, and any other pollutants not appropriately expressed by weight, and except for discharges whose constituents cannot be appropriately expressed by weight). The Agency may, in its discretion, in addition to specification of daily quantitative limitations by weight, specify other limitations, such as average or maximum concentration limits, for the level of pollutants in the authorized discharge. Effluent limitations for multiproduct operations shall provide for appropriate waste variations from such plants. Where a schedule of compliance is included as a condition in a permit, effluent limitations shall be included for the interim period as well as for the period following the final compliance date.

Section 309.146 Authority to Establish Recording, Reporting, Monitoring and Sampling Requirements

a) The Agency shall require every holder of an NPDES Permit, as a condition of the NPDES Permit issued to the holder, to:

1) Establish, maintain and retain records;

2) Make reports adequate to determine the compliance or lack of compliance by the permit holder with all effluent limits and special conditions in the permit.

3) Install, calibrate, use and maintain monitoring equipment or methods (including where appropriate biological monitoring methods);

4) Take samples of effluents (in accordance with such methods, at such locations, at such intervals, and in such a manner as may be prescribed; and

5) All permits shall specify requirements concerning the proper use, maintenance, and installation, when appropriate, of monitoring equipment or methods (including biological monitoring methods when appropriate); required monitoring including type, intervals, and frequency sufficient to yield data which are representative of the monitored activity including, when appropriate, continuous monitoring;

6) Provide such other information as may reasonably be required.

b) The Agency may require every holder of an NPDES Permit for a publicly owned and publicly regulated treatment works, as a condition of the NPDES Permit, to require industrial users of such a treatment works to:

1) Establish, maintain and retain records;

2) Make reports;

3) Install, calibrate, use and maintain monitoring equipment or methods (including where appropriate biological monitoring methods);

4) Take samples of effluents (in accordance with such methods, at such locations, at such intervals, and in such a manner as may be prescribed); and

5) Provide such other information as may reasonably be required.

c) All such requirements shall be included as conditions of the NPDES Permit issued to the discharger, and shall be at least as stringent as those required by applicable federal regulations when these become effective.

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IN THE MATTER OF:)
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309.9, 309.10, 309.12, 309.13, 309.14,)
309.117, 309.119, 309.143, 309.147; and)
PROPOSED 35 Ill.Adm, Code 120)
through 122 - NPDES PERMITS AND)
PERMITTING PROCEDURES)

STATEMENT OF REASONS

The Environmental Law and Policy Center of the Midwest, Illinois Chapter of the Sierra Club, Prairie Rivers Network and the 225 persons whose signatures are filed with this petition, petition the Illinois Pollution Control Board ("IPCB") to amend Illinois Administrative Code Title 35 Environmental Protection Act; Subtitle C: Water Pollution; Chapter I: Pollution Control Board; Part 309 subpart A. The amendments sought are to improve Illinois' implementation of the Clean Water Act, 33 U.S.C. Section 1251 et seq., and the National Pollutant Discharge Elimination System (NPDES) by amending the relevant regulations to require that:

- The public is properly informed of draft NPDES permits and is provided a fair opportunity to comment on substantial terms of permits before they are issued;
- hearings are held when necessary to allow the public an opportunity to comment on draft permits and important revisions to draft permits;
- the administrative record regarding each permit shows that the permit was properly issued and that the permit does not purport to allow discharges that would cause or contribute to a violation of Illinois water quality standards;
- necessary monitoring of NPDES limits and conditions are include in permits; and,
- Illinois permit procedures and NPDES permits comply with the Clean Water Act.

Adoption of the proposed amendments by the IPCB will improve the Illinois NPDES permitting process, Illinois EPA issued permits, and Illinois water quality.

I. The Proposed Amendments, Facts Supporting the Proposal and the Purpose and Effect of the Proposal

It is proposed to amend Part 309 as discussed below.

Proposed New 309.105(f) - The proposed language increase the situations in which a NPDES permit may not be issued to include cases in which "The public has not had a fair opportunity to comment on all substantive terms of the permit." It is beyond debate that both the federal Clean Water Act and the Illinois Environmental Protection Act mandate that members of the public be granted broad opportunities to participate in the permitting process. The proposed amendment would help assure an opportunity for public participation as to all NPDES permits.

The opportunity for meaningful public participation is an essential part of the NPDES permitting process. Section 101(e), 33 U.S.C. § 1251(e), of the Clean Water Act provides:

> Public participation in the development, revision, and enforcement of any regulation, standard, effluent limitation, plan, or program established by the Administrator or any State under this chapter shall be provided for, encouraged, and assisted by the Administrator and the States.

Section 402 of the Clean Water Act, 33 U.S.C. § 1342, requires that effective public participation be allowed in the drafting of NPDES permits. In a case involving a third-party appeal of a NPDES permit, the United States Court of Appeals for the First Circuit wrote that

> Congress enacted public participation rules understanding that "these regulations would do more than pay lip service to public participation; instead 'the public must have a genuine opportunity to speak on the issue of protection of its waters' on federal, state and local levels.'" Natural Resources Defense Council v. U.S.E.P.A., 859 F.2d 156,177 (D.C. Cir. 1988) (citations omitted) (construing public participation regulations in state enforcement process). The legislative history of the CWA also echoes the desire "that its provisions be administered and enforced in a fishbowl-like atmosphere."

Adams v. U.S. Environmental Protection Agency, 38 F.3d 43, 52 (1st Cir. 1994). See also Webb v. The Honorable William L. Fury, 167 W.Va. 434, 282 S.E.2d 28, 38 n.5 (W. Va. 1981) (important role of public participation in permit writing and enforcement discussed in a case involving a suit to silence public opposition to certain mining).

Illinois law also requires that the public be allowed to participate fully in the NPDES permitting process. This is true because, as discussed further below, Illinois law requires that Clean Water Act requirements be followed in NPDES permitting. Further, the Illinois General Assembly in passing the Environmental Protection Act acted *inter alia* to "assure that all interests are given a full hearing and to increase public participation in the task of protecting the environment ..." 415 ILCS 5/2 (a)(v).

Public participation must be allowed as to all substantive provisions of the permit. For example, the monitoring conditions of a permit must be developed in public, not behind closed doors.

The Environmental Appeals Board, a specialized federal administrative board which reviews NPDES permits issued by the U.S. Environmental Protection Agency, rendered a decision that makes clear that all important terms of a permit must be subject to public participation and opportunity for comment. In Re: Government of the District of Columbia Municipal Separate Storm Sewer Systems, 20 EAD (2002) (hereinafter "DC Storm Sewer Systems" attached as Ex. A) held that the U.S. EPA had erred in granting a NPDES permit to the District of Columbia that allowed certain monitoring conditions for a discharge on "Hickey Run" to be developed after issuance of the permit. The Environmental Appeals Board wrote:

> [W]hile we recognize that the monitoring requirements are expected to be added at the time of the District's First Annual Report and thus should be in place before the Hickey Run effluent limit becomes effective, we are troubled that this would

> be accomplished through a minor permit modification without notice and opportunity for public comment. See Permit pts. III.E & IX.A.5 (as amended). Given that the regulations appear to contemplate that monitoring requirements ordinarily be included as up-front permit conditions - conditions which would thus ordinarily be subjected to public notice and comment and the fact that we find nothing in the regulations allowing for minor permit modifications that authorizes use of a minor permit modification in this setting, we conclude that this Permit does not meet minimum regulatory requirements and that remand of these parts of the Permit is necessary. (pp. 32-33)

The Appellate Court in Prairie Rivers Network v. Illinois Pollution Control Board No. 4-01-0801 (hereinafter "Prairie Rivers", Slip Opinion attached as Ex. B), which considered a number of objections raised to public participation procedures used in the consideration of a particular NPDES permit, expressed no opinion on the merits of appellant's "policy-related" arguments relating to flaws in Illinois' public participation practices. The Appellate Court indicated that such issues should be taken to the Board. (Slip op. at 10-11) Fairness, as well as sound policy, favors allowing citizens to participate in decisions that effect the health of Illinois rivers, lakes and streams. Accordingly, we hereby petition the IPCB for changes to Part 309 that will prevent permits from being issued if the public has not been allowed an opportunity to comment on all substantial terms of the permit.

Petitioners do not anticipate that many permits will be overturned on appeal based on the proposed provision. Illinois EPA currently normally affords the public an opportunity to comment on all substantive provisions of NPDES permits and adoption of the proposed rule will probably cause Illinois EPA to be even more careful in this regard.

Proposed New 309.105(g) - The proposed language adds to the situations in which an NPDES permit may not be issued the case in which the "permit, permit conditions or procedures used to draft or issue the permit are not consistent with any applicable federal law." The wording

of this proposed provision borrows from 415 ILCS 5/28.1(c)(4), which pertains to adjusted standards.

Illinois law is clear that Illinois environmental statutes and regulations should be read to accord with the Clean Water Act and other federal laws. Peabody Coal Co. v. Pollution Control Bd., 36 Ill. App. 5, 344 N.E.2d 279, 285 (5th Dist. 1976); see also 415 Ill. Comp. Stat. 5/13(b) (Board rules shall be consistent with the Clean Water Act). If the Illinois Environmental Protection Act is interpreted or implemented by Illinois in such a manner that it does not fully implement the letter and policies of the Clean Water Act, Illinois could lose the ability to administrate NPDES permitting in Illinois. See 40 C.F.R. §§123.63, 123.64(b) (U.S. EPA may withdraw program approval when a state program no longer complies with federal regulations, person may petition U.S. EPA for withdrawal of state program authority). It is the express policy of the General Assembly that the IPCB and the Illinois EPA administer the Clean Water Act in a manner consistent with Illinois administering the NPDES permitting system. 415 ILCS 5/11(a)(7), (b). Clearly, the Illinois legislature intended Illinois permits and procedures to comply with federal law.

Nonetheless, the Appellate Court in Prairie Rivers held that any conflicts between Illinois regulations and federal law can only be corrected by the IPCB by changing the regulations (slip op. at 11) or by U.S. EPA disapproving of the Illinois NPDES permit program (Slip op. at 9). Accordingly, petitioners ask the IPCB to make clear through this proposed regulatory change that in the future no deviations will be allowed between federal legal requirements and Illinois NPDES program and that permits may only be issued if they meet at least the minimum requirements of federal law.

Proposed New 309.107(c) - Giving a copy of the application to the Illinois Department of Natural Resources ("IDNR") is clearly beneficial. IDNR has much of the responsibility for studying and protecting wildlife in Illinois. Giving notice to IDNR is already required as to permits proposing new or increased discharges (see 35 Ill. Adm. Code 105(f)(1)(F)) and should be done as a matter of course.

The proposal allows for a memorandum of understanding to be reached between IEPA and IDNR that will specify the terms for giving IDNR notice. It is our understanding that such a memorandum is already under discussion between Illinois EPA and IDNR.

Proposed Additional Clause to 309.108(c) and Proposed New 309.108(e) - The proposed revisions to Section 309.108 elaborate on the matters that Illinois EPA shall discuss in its statement of the basis for the permit and provide that the agency shall create a draft administrative record in support of its tentative decision to issue the permit.

Section 39(a) of the Environmental Protection Act that states that permits shall only be issued "upon proof by the applicant" that the permit "will not cause a violation of this Act or the regulations hereunder." 415 ILCS 5/39(a); See also Panhandle Eastern Pipe Line Co. v. Illinois EPA, 314 Ill. App. 3d 296, 743 N.E. 2d 18, 24 (4th Dist. 2000); ESG Watts, Inc. v. Pollution Control Board, 224 Ill. App. 3d 592, 586 N.E. 2d 1320, 1322 (3d Dist. 1992). The Environmental Protection Act also implicitly requires that the Illinois EPA create a reviewable record. 415 Ill. Comp. Stat. 5/40(d) and (e), which govern appeals both refer to the "administrative record" as the subject of IPCB review and 5/40(e) states that "the Board shall hear the petition ... exclusively on the basis of the record before the Agency." Plainly, then, it is necessary that a clear record supporting the Illinois EPA's permit decision be created.

Although use of the U.S. EPA NPDES Permit Writers' Manual (December 1996) (hereinafter "Permit Writers' Manual" portions of which are attached as Ex. C) is not strictly mandatory on state NPDES programs, its discussion of the need for creation of a clear administrative record is useful here:

> The administrative record is the foundation for issuing permits. If EPA is the issuer, the contents of the administrative record are prescribed by regulation (see 40 CFR §§124.9 and 124.18). All supporting materials must be made available to the public, whether a State, Territory, Tribe or EPA issues the permit. 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. It also must be made available to the public at any time and may be examined during the public comment period and any subsequent public hearing. (¶ 11.1.1, p.193)

Proposed Additional Clause in 309.109(a) - This amendment is proposed to recognize re-noticed draft permits. This issue is discussed further below in connection with proposed new sections 309.121 and 309.122.

Proposed Deletion From 309.109(b) and 309.113(a)(10)(A) - This is merely a clarifying provision which eliminates an inconsistency in the terminology in the regulations. Its is proposed to strike the reference to a "30 day" comment period because the comment period may be longer than 30 days under the first sentence of 309.109(b).

Proposed Additions to 309.110(f) - This proposed revision further specifies the information that must be contained in the permit notice. The information to be added is useful and much of it is already given by Illinois EPA as a matter of course.

40 CFR §124.10(d)(v), which is applicable to all states that wish to administer a NPDES program, explicitly requires providing all of the information that the proposal would require to be

supplied. If Illinois is to continue administering an NPDES program, it must adopt rules regarding notice that are at least as stringent as the federally required language. 40 CFR 123.25.

Proposed Additions to 309.113(a) - This proposed language would add information to the fact sheets that is necessary for documentation of compliance with 35 Ill. Adm. Code 302.102, 302.105 and 304.105. The portion of the proposal that requires a "brief description of the significant factual, legal, methodological and policy questions considered in preparing the draft permit" is federally required language taken directly from 40 CFR §124.8(a). The portion of the proposed language that is not taken directly from 40 CFR §124.8 is reasonably necessary to inform the public of the critical facts regarding the permit and comply with 40 CFR § 124.56, which is also directly applicable to states wishing to administer a NPDES program.

To the extent that the proposal goes beyond what is explicitly required by applicable federal regulations, it requires information that is necessary to understanding the basis for the permit. As is explained by the U.S. EPA Permit Writers Handbook, "a detailed discussion of permit limits for each pollutant should be included in the fact sheet" and:

> For each pollutant the following information is necessary:
> Calculation and assumptions
> - Production
> - Flow
> Types of limitations (i.e. effluent guideline-, water quality-, or BPJ [best professional judgement]-based)
> Whether the effluent guidelines used were BPT, BCT or BAT
> The water quality standards or criteria used
> Whether any pollutants were indicators for other pollutants
> Citations to appropriate wasteload allocation studies, guidance documents, other references. ¶11.1 (p.197)

Proposed Change to 309.114(c) - Spelling Correction on "Navigable".

Proposed Additional Sentence to 309.117 - This proposal requires that Illinois EPA identify the materials it relied on in making its tentative decision regarding the permit. This

information is needed to allow proper review of Illinois EPA permit decisions. Particularly given that Illinois law restricts third party review to documents in the administrative record, 415 ILCS 5/40(e), the rules should leave no room for debate as to what was properly before the Agency. See also, Permit Writers' Manual §11.1.1.

Proposed Additions to 309.112 and 309.119 - This language is added simply to prevent any confusion regarding the applicability of proposed sections 309.121 and 309.122, discussed below. The change to 309.119 is necessary to eliminate the inference drawn by the IPCB and the Appellate Court in Prairie Rivers that the public should never be allowed an opportunity to comment on a revised permit even in circumstances in which the Clean Water Act or proper concern for public participation requires that opportunity for additional comment be allowed.

Proposed New 309.120 - This proposed amendment provides that persons wanting to object to permits or permit conditions must make their points during the public comment period. The proposed section is modeled on 40 CFR § 124.13, which is used by U.S. EPA in states in which it administers the NPDES program.

The federal regulation that was used as a model for the proposal is not mandatory on the states and Illinois is not legally bound to track exactly this federal procedure. However, fairness and administrative economy call for all persons, including applicants, to raise all reasonably ascertainable issues and submit all reasonably available arguments to the Illinois EPA before the close of the public comment period. There is no excuse for failing to present arguments to Illinois EPA during the comment period.

Proposed New 309.121 and Proposed New 309.122 - The proposed language for 309.121 is borrowed from 40 CFR § 124.14(a) which is not directly applicable to the states, but

which should be adopted by Illinois. It sets forth an orderly procedure for reopening the record when circumstances make it fair and necessary to do so.

The proposed language of 309.122 is based on 40 CFR § 124.14(b) and requires that the record be reopened to allow further comment in a limited class of circumstances. The proposed language is less restrictive than 40 CFR § 124.14(b) which appears to require a new comment period whenever a draft permit is modified. The proposed language only would require a new comment period if the changes are significant. Although the specific language proposed is not mandatory on the states, making allowance for reopening of the hearing record after changes are made to a draft permit is required by the Clean Water Act and basic concepts of fairness.

Decisions by the IPCB and the Appellate Court in Prairie Rivers have made it absolutely imperative that an amendment be made that makes clear that another opportunity for public comment must be allowed in cases in which substantial changes have been made to the draft permit on which the public was allowed to comment. Prairie Rivers held that a second opportunity for public comment can never be allowed under Illinois law no matter how significant the changes that are made to the draft permit by Illinois EPA. This allows as a practical matter the complete destruction of the public's ability to participate in the process and is not tolerable under the Clean Water Act.

That the public must be allowed in some circumstances to comment on a revised draft permit can be seen by considering a simple example. Let us assume that in a particular draft permit all of the pollutants that may be discharged are strictly limited and monitored so as to prevent any damage to the receiving waters or violation of water quality standards. No members of the public would probably even bother to comment after receiving notice of such a draft permit. Now, what if Illinois EPA, after the close of the public comment period, eliminated

effluent limits or critical monitoring from the permit and then issued the transmogrified permit as the final permit ? Certainly, persons concerned with the receiving waters would want to object, but, if there can never be a second round of opportunity for public comment, those persons are precluded from having any say on the actual terms of the permit as issued.

Persons concerned about the receiving water in the example could take a third party appeal to the IPCB, but they would have a very hard time establishing a basis for appeal. Appeals to the Board are limited to the record before the Agency (415 ILCS 5/40(e)), but, under the facts presented by the example, there will be no comments in the record showing that the permit needs the effluent limits or monitoring requirements that were deleted after the close of the comment period. No one would have had any chance to put anything into the record showing that the deletions were improper because no round of comment was allowed after the deletions were made. Under this example, effective public participation is completely denied but nothing can be done about it under current Illinois regulations.

It is not suggested that the Illinois EPA currently makes a habit of deleting substantial protections from permits after the close of the public comment period. Petitioners believe, however, that in a few cases changes have been made to draft permits in circumstances in which further comment should have been allowed. The key point is that Illinois procedures allow a wholesale circumvention of public participation. This loophole must be plugged or Illinois' NPDES program is very unfair and violates the Clean Water Act.

Judicial and administrative decisions show that the Clean Water Act and proper respect for public participation requires that provision be made for reopening the administrative record to allow further public comment in cases where the agency has decided to make substantial changes in the draft permit. When the revised permit substantially deviates from the draft permit, the

public is not given an opportunity to comment on the permit that is actually issued unless the revised permit is submitted to public comment.

In Hi-Line Sportsmen Club v. Milk River Irrigation Districts, 786 P.2d 13 (Mont. 1990), persons concerned with potential injury to fisheries objected to certification under § 401 of the Clean Water Act of a proposal to allow warm water from an auxiliary outlet from a reservoir to flow into an important fishery. Id. at 14-15. During proceedings regarding the auxiliary outlet proposal, the applicant proposed a scheme whereby cooler water would be siphoned from below the auxiliary outlet. Id. at 16. This proposal was approved by the decision maker without giving the public a chance to comment. Id. Although this siphon proposal was designed to meet environmental concerns, the Montana Supreme Court affirmed the decision of the trial court that due process would be violated if the Clean Water Act § 401 certification was granted without giving the third parties the opportunity in hearings to explore the proposal of a using a siphon to prevent thermal pollution. Id. at 17.

Similarly, a very recent decision by U.S. EPA Administrator Christine Todd Whitman on a permit granted under the Clean Air Act ("CAA") provides strong persuasive authority regarding what was required. In Matter of Orange Recycling and Ethanol Production Facility, Pencor-Masada Oxynol LLC (Petition No: II-2000-07), Administrator Whitman decided that revisions made by the New York State Department of Conservation ("NYSDEC") in consultation with the applicant and U.S. EPA to a draft permit after the close of the public comment period, while sound, had to be renoticed to allow further comment. Administrator Whitman wrote:

> The CAA and its implementing regulations at part 70 provide for public comment on "draft" permits and generally do not require permitting authorities to conduct a second round of comments when sending the revised "proposed" permit to EPA for review. It is a basic principle of administrative law that agencies are encouraged to learn from public comments and, where appropriate, make changes

that are a "logical outgrowth" of the original proposal. See, e.g., *Sierra Club v. Costle*, 657 F.2d 298, 352 (DC Cir. 1981). However, there are well recognized limits to the concept of "logical outgrowth" in the context of Agency rulemaking that, by analogy, apply to title V permits as well. As the US Court of Appeals for the DC Circuit has explained, "if the final rule deviates too sharply from the proposal, affected parties will be deprived of notice and an opportunity to respond to the proposal." *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 547 (DC Cir.1983) (vacating portion of final CAA rule governing leaded gasoline because agency notice was "too general" and did not apprise interested parties "with reasonable specificity" of the range of alternatives being considered). See also *Shell Oil Company v. EPA*, 950 F.2d 741 (DC Cir. 1991) (remanding final RCRA "mixture and derived from" rule because "interested parties cannot be expected to divine the EPA's unspoken thoughts"); *Ober v. EPA*, 84 F.3d 304, 312 (9th Cir. 1996) (requiring an additional round of public comment on EPA's approval of Arizona's PM-10 Implementation Plan because public never had an opportunity to comment on state's post-comment period justifications which were critical to EPA's approval decision). Courts have noted that providing the public meaningful notice improves the quality of agency decisionmaking, promotes fairness to affected parties, and enhances the quality of judicial review. *Small Refiner*, 705 F.2d at 547. I find that these fundamental principles apply with equal force in the context of title V permitting. Otherwise, if a final permit no longer resembled the permit that the public commented upon, then the public would be deprived of the opportunity to comment guaranteed by the CAA and EPA's rules.

Determining how much notice is sufficient is inherently a matter of judgment. In this case, however, the operational constraints imposed on the facility in the proposed permit were so significantly different from those in the draft permit that I find that additional public notice on this particular aspect of the permit is required.(Slip op. at 7-8, footnote omitted)[1]

It must be emphasized here that there are two things that proposed 309.121 and 309.122 do not do. First, these provisions do not require an infinite number of rounds of public comment. An additional round of public comment must only be allowed in very limited circumstances and the need for more than one additional round of public comment will probably never arise.

[1]This decision is attached as Ex. D. It is also published on the Internet at www.epa.gov/rgytgrnj/programs/ortd/air/title5/petitiondb/petitions/masasa_decision2000.pdf.

Second, even when it is decided that additional public comment should be allowed, it is not necessary to allow any additional hearing although Illinois EPA may hold additional hearings after significantly revising a permit if it believes that it would be useful to allow additional comment in that form. Thus, even in those very few cases in which it is necessary to allow additional comment, allowing written comment will normally suffice.

Proposed New 309.123 - This language simply makes clear what is in the "record before the Agency" so as to prevent any confusion as to the matters that are properly before the Board in hearing any appeal under 415 ILCS 5/40(d) or (e).

Proposed New 309.143 (a) - The proposed language requires that effluent limitations in NPDES permits control all pollutants sufficiently such that the discharge does not cause or contribute to a violation of water quality standards, including narrative standards. This language is taken verbatim from 40 CFR 122.44(d)(1)(i). Language as stringent, or more stringent, must be followed by Illinois EPA if it is to continue to administer the NPDES program. These requirements have been recognized by the IPCB in the past. In the Matter of: Petition of Commonwealth Edison Company for Adjusted Standard from 35 Ill. Adm. Code 302.211(d) and (e), AS 96-10 (PCB, October 3, 1996)

The Board could incorporate 40 CFR 122.48 by reference. See 415 ILCS 5/7.2. However, in view of the importance of this issue, it is best to place the federal requirement directly into the Illinois regulations.

309.143(b) in the proposal consists of the current 309.143

Proposed additions to 309.146(a)(2) - The proposed language makes clear that effluent limits and special conditions in the permit shall be monitored and enforceable both through Agency and citizen actions. See Permit Writer's Handbook Chapter 7; United States v.

Allegheny Ludlum Corp., 118 F.Supp. 2d 615, 618 (W.D. Pa. 2000) (importance of self-monitoring and reporting under Clean Water Act)

Proposed New 309.146(a)(5) - This language is taken verbatim from 40 CFR §122.48, which is applicable to state programs. Language as stringent, or more stringent, is mandatory for Illinois EPA if it is to continue to administer the NPDES program in Illinois. 40 CFR §123.25. A permit that fails to spell out the necessary monitoring violates this regulation and the public's right to participate in commenting on monitoring provisions. See also DC Storm Sewer Systems

Again, the Board could incorporate 40 CFR §122.48 by reference, See 415 ILCS 5/7.2. However, because there has been confusion in the past to the extent that it has sometimes by seen as acceptable to issue a permit without all of the key monitoring terms in the permit, it is wiser for the Board to incorporate this provision directly into the Board's regulations.

It is proposed to renumber what is currently 309.146(a)(5) as 309.146(a)(6).

II. Affected Sources and the Economic Impact of the Proposal

It is unclear whether any sources, facilities and dischargers will be affected by the proposal and it is also unclear if the proposal will have any significant economic impact. This is true because many of the procedures established by the proposal are already being followed to a large degree by the Illinois EPA in writing NPDES permits. This is true although, under Prairie Rivers, it appears Illinois EPA may not currently be required by Illinois law to follow those procedures or otherwise comply with federal law.

To the extent that the proposal will require the Illinois EPA to give notice, allow public comment or create descriptions or documents that it does not currently create, the proposal may have some effect on the speed in which the agency makes permitting decisions. It is believed by petitioners, however, that the proposal will ultimately expedite consideration of NPDES permit

applications by creating clearer and fairer procedures. As more information becomes available through proper notices, fact sheets and fair hearings, there will be less need for time consuming Freedom of Information Act document requests, hearings on matters that could have been avoided had the necessary information been recorded, and permit appeals to the IPCB. Proposed 309.120 will serve directly to expedite proceedings by preventing persons from attempting to base appeals on arguments that they did not place in the administrative record. Moreover, by assuring fair procedures and that permits are issued in compliance with the Clean Water Act, the proposal as a whole will prevent future delays and controversies regarding Illinois NPDES permits and Illinois EPA's permit writing authority.

To the extent that improved permitting procedures, permits and compliance with federal laws leads to the issuance of permits that require dischargers to reduce the extent or environmental impacts of their discharges, there may be some new costs imposed on dischargers. Petitioners believe that some such costs will result from enactment of this proposal but that the extent of such impacts is impossible to estimate. Moreover, any such economic impacts will be necessary to protect the environment and comply with the Clean Water Act.

Finally, improvements to the Illinois NPDES permitting process will result in better NPDES permits. This in turn will reduce water pollution and have a positive economic impact on all of the citizens, businesses and public entities in Illinois that benefit directly or indirectly from a healthier Illinois environment. As was specifically found by the Illinois General Assembly, "pollution of the waters of this State .... impairs domestic, agricultural, industrial, recreational, and other beneficial uses of water [and] depresses property values .... ." 415 ILCS 5/11(a)(1).

CONCLUSION

The Board should adopt the proposed changes to part 309 to assure that proper public participation in NPDES permitting is allowed, that Illinois NPDES permits are issued in compliance with federal law and that Illinois NPDES permits properly protect Illinois rivers, lakes and streams.

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January 13, 2003

(Slip Opinion)

NOTICE: This opinion is subject to formal revision before publication in the Environmental Administrative Decisions (E.A.D.). Readers are requested to notify the Environmental Appeals Board, U.S. Environmental Protection Agency, Washington, D.C. 20460, of any typographical or other formal errors, in order that corrections may be made before publication.

BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.

In re:	
Government of the District of Columbia Municipal Separate Storm Sewer System	NPDES Appeal Nos. 00-14 & 01-09
NPDES Permit No. DC 0000221	

[Decided February 20, 2002]

ORDER DENYING REVIEW IN PART AND REMANDING IN PART

Before Environmental Appeals Judges Scott C. Fulton, Edward E. Reich, and Kathie A. Stein.

EXHIBIT A

GOVERNMENT OF THE DISTRICT OF COLUMBIA
MUNICIPAL SEPARATE STORM SEWER SYSTEM

NPDES Appeal Nos. 00-14 & 01-09

ORDER DENYING REVIEW IN PART AND REMANDING IN PART

Decided February 20, 2002

Syllabus

In April 2000, U.S. EPA Region III (the "Region") issued a National Pollution Discharge Elimination System ("NPDES") permit, number DC 0000221 (the "Permit"), to the Government of the District of Columbia (the "District"). The Permit authorizes storm water discharges from the District's municipal separate storm sewer system ("MS4"). The Permit requires the District to use various best management practices ("BMPs") to control pollutant discharges in furtherance of attaining the District's water quality standards. The required BMPs are set forth in the District's storm water management plan ("SWMP"), which is incorporated into the Permit by reference. On August 11, 2000, Friends of the Earth and Defenders of Wildlife ("Petitioners") timely filed a petition requesting that the Environmental Appeals Board review the Permit (the "Petition") (the Petitioners also filed a second petition after the Region withdrew and reissued a portion of the Permit).

HELD: The Permit is remanded to the Region for further analysis and explanation in a number of areas. Petitioners and the Region have grouped their arguments in the nine categories described below, and the Board's holding on each is summarized as follows:

1. Compliance with Water Quality Standards. Petitioners object to the Permit's conditions that specify BMPs, rather than numeric limits, to control pollutant discharges and meet the District's water quality standards. The Petitioners' general argument that the Region violated an affirmative duty to set numeric limits is rejected, in keeping with the Board's decision on similar issues in *In re Ariz. Mun. Storm Water NPDES Permits*, 7 E.A.D. 646 (1998). The Petitioners' more specific argument that numeric limits could have been set equal to the numeric water quality standards of the receiving waters is also rejected on the grounds that Petitioners failed to demonstrate that they raised this argument and the cited authority during the public comment period. The Petitioners' argument that the Region should have included narrative provisions requiring compliance with water quality standards is also rejected on the grounds that there is no statutory or regulatory provision that requires use of narrative limits.

There is merit, however, to Petitioners' argument that the Region failed to show that the selected BMPs will be adequate to ensure compliance with water quality standards. First, it is not clear that the Region's determination that the specified BMPs are "reasonably capable" of achieving water quality standards fully comports with 40 C.F.R. § 122.4(d), which prohibits issuing a permit "when imposition of conditions cannot *ensure* compliance with the applicable water quality requirements of all affected states." (emphasis added). Second, even accepting the Region's suggestion that ensuring compliance was what the permit writer has in mind, there is nothing in the record, apart from the District's section 401 certification, that supports the conclusion that the Permit would, in fact, achieve water quality standards. Without such record support the Board cannot conclude that the approach selected by the Region is rational in light of all the information in the record. The Region does not dispute that the Region cannot rely exclusively on the District's section 401 certification, at least in a circumstance like this one in which there is a body of information drawing the certification into question. Accordingly, additional record support for the Region's determination is required, and the Permit is remanded for further analysis in this regard.

2. Hickey Run. Petitioners argue that the Permit is deficient in that (a) it contains an aggregate numeric effluent limit for four outfalls into Hickey Run instead of a limit for each outfall and (b) it contains monitoring requirements that the Petitioners allege are inadequate. The regulation cited by Petitioners contains the disjunctive phrase "outfall or other discharge point" and therefore must be read as contemplating some flexibility in appropriate circumstances to frame effluent limits at a discharge point other than the outfall. There is no clear error in the Region's conclusion that, in the unique circumstances of this case, an aggregate limit fixed at a point proximate to four closely connected outfalls was appropriate. However, the proposed delayed development of the Hickey Run monitoring requirements is problematic in two respects. First, both 40 C.F.R. § 122.48(b) and 40 C.F.R. § 122.44(i) require that certain monitoring conditions be included in all permits. The Region has not explained how its issuance of this Permit, which does not at its inception contain monitoring requirements for Hickey Run, comports with the regulatory directive that all permits include these conditions. Second, while the monitoring requirements are expected to be added at the time of the District's first annual report and thus should be in place before the Hickey Run effluent limit becomes effective, the Board finds it troubling that this would be accomplished through minor permit modification without notice and opportunity for public comment. Given that the regulations appear to contemplate that monitoring requirements ordinarily be included as up-front permit conditions -- conditions which would thus ordinarily be subjected to public notice and comment -- and there does not appear to be anything in the regulations allowing for minor permit modifications that authorizes use of a minor permit modification in this setting, the Board concludes that this Permit does not meet minimum regulatory requirements and that remand of these parts of the Permit is necessary.

3. Reductions to the "Maximum Extent Practicable". Petitioners' argument that the Region erred in determinating that the Permit will reduce storm water pollutant discharges to the maximum extent practicable ("MEP") as required by CWA § 402(p) is

rejected. The record demonstrates that the Region duly considered the issue raised by Petitioners in their comments, and the record does not lead to the conclusion that any additional BMPs beyond those identified in the Permit are practicable in this case.

4. Deferral of Complete Program. Petitioners' arguments that the Permit's provision for upgrading the SWMP indicates that the Permit is inadequate at its inception is rejected. The evaluation and upgrade requirement incorporates into the Permit a process for adjusting the Permit's terms and conditions to take into account new knowledge and changed circumstances affecting practicality of BMPs. This adjustment process does not imply that the Region has failed to properly assess MEP at the time of the Permit's issuance; it simply recognizes that what is practicable will change over time and that the Permit should be adaptable to such changes.

5. Failure to Require Compliance Within 3 Years. Petitioners' argument that the Permit fails to require compliance within the three-year time period set forth in CWA § 402(p)(4) is rejected. The Permit does not authorize a deferred implementation of the BMPs that were determined to be MEP at the time of issuance of the Permit; instead, the Permit simply recognizes that what is practicable will change during the Permit's term and that upgrades of the Permit's requirements should not be delayed until the Permit is renewed.

6 & 7. Storm Water Implementation Plan and Funding. Petitioners' argument that the "cost benefit and affordability" analysis required by Part III.E of the Permit violates the CWA is rejected. Information concerning a "cost benefit analysis" of the various BMPs is relevant to the upgrading of the SWMP and BMPs. Cost benefit information, however, is not relevant for purposes of determining compliance with the Permit's requirement that the District implement the BMPs in its current SWMP. The Permit recognizes this distinction and states that "[a]ffordability cannot be used as a defense for noncompliance."

8. Modifications. The Board addresses Petitioners' various arguments regarding deficiencies in the Permit's modification provisions as follows. The Board adopts the Region's interpretation that the reference in the Permit to 40 C.F.R. § 122.63 serves to limit the allowable extensions of interim compliance dates undertaken as minor modifications to "not more than 120 days after the date specified in the existing permit and [provided that it] does not interfere with attainment of the final compliance date requirement." 40 C.F.R. § 122.63(c).

The Region did not err in characterizing the deadlines set forth in Part III.A and Part III.B.10 of the Permit as "interim compliance date[s] in a schedule of compliance" that may be modified by minor modification as set forth in 40 C.F.R. § 122.63(c). On the other hand, Permit Parts IV.A.1, VIII.A, IX.A.5 & IX.C, which together authorize changes in monitoring location by minor modification, cannot be squared with 40 C.F.R. § 122.63(c). That section only authorizes the addition of new monitoring requirements by minor modification; it does not authorize a change in monitoring location by minor

modification. Accordingly, any such changes must be made through the formal "notice and comment" procedures of section 122.62. Therefore Permit Parts IV.A.1, VIII.A, IX.A.5 & IX.C are remanded for revision.

Petitioners object to the Permit's conditions that allow the Region to "approve" schedules for developing and implementing an enforcement plan (Petition, Part III.B.11), to approve certain additional SWMP program activities (Petition, Part III.B.12), and to approve, disapprove or revise the District's Annual Reports and Annual Implementation Plans (Petition, Part III.E). It is unclear whether these provisions are simply intended to reference EPA actions in administering the Permit that do not themselves result in changes to the Permit (or the SWMPs subsumed within the Permit) and thus should not be subjected to formal notice and comment procedures, or whether these provisions, referenced as they are in the minor modification section of the permit, are intended to serve as a basis for substantive changes to permit conditions. The Region is directed on remand to clarify the extent to which these provisions in the Permit allow for changes in permit conditions by minor modification.

9. Waivers and Exemptions. The Petitioners argue that the District's storm water regulations, incorporated into the Permit by reference, require the granting of various waivers or exemptions that are in conflict with the CWA and EPA rules. Because the Region's Second Response to Comments does not challenge the validity of Petitioners' Comments, but rather tends to treat them as meritorious, and because the Region failed to make changes to the Permit or to otherwise address Petitioners' concerns regarding these waivers and exemptions, this portion of the Permit is remanded to the Region to either make appropriate changes to the Permit or to explain why the Petitioners' comments do not merit such changes.

Before Environmental Appeals Judges Scott C. Fulton, Edward E. Reich, and Kathie A. Stein.

Opinion of the Board by Judge Fulton:

In April 2000, U.S. EPA Region III (the "Region") issued a National Pollution Discharge Elimination System ("NPDES")[1] permit, number DC 0000221 (the "Permit"), to the Government of the District of

[1]Under the Clean Water Act ("CWA"), persons who discharge pollutants from point sources (discrete conveyances, such as pipes) into waters of the United States must have a permit in order for the discharge to be lawful. CWA § 301, 33 U.S.C. § 1311. The National Pollutant Discharge Elimination System is the principal permitting program under the CWA. CWA § 402, 33 U.S.C. § 1342.

Columbia. The Permit authorizes storm water discharges from the District of Columbia's municipal separate storm sewer system ("MS4").[2] On August 11, 2000, Friends of the Earth and Defenders of Wildlife ("Petitioners") timely filed a petition requesting that the Environmental Appeals Board review the Permit (the "Petition").[3] The Petition argues that the Region clearly erred or abused its discretion in setting the Permit's conditions. The Region has filed a response to the Petition, and both parties have filed supplemental reply briefs.

As discussed below, we have, based on our consideration of the issues presented, determined that a number of issues warrant further consideration by the Region. Thus, we remand the Permit, in part, for further proceedings consistent with this decision.

I. BACKGROUND

A. *Factual and Procedural Background*

The MS4 that is owned and operated by the Government of the District of Columbia (the "District") discharges storm water into the Potomac and Anacostia Rivers and their tributaries. Pursuant to the requirements for system-wide MS4 permitting set forth in CWA § 402(p)(4) and the implementing regulations at 40 C.F.R. § 122.26(d),

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[2]Under CWA § 402(p) and 40 C.F.R. § 122.26, an NPDES permit is required for MS4s serving populations of 250,000 or more (large systems), and those serving populations of more than 100,000 but less than 250,000 (medium systems). It is undisputed that the District's MS4 is a large system.

[3]The Petitioners originally filed a timely request for an evidentiary hearing with the Regional Hearing Clerk. However, on May 15, 2000, EPA published a final rule modifying, among other things, the appeal process for NPDES permits set forth in 40 C.F.R. part 124. *See* Amendments to Streamline the NPDES Program Regulations: Round II, 65 Fed. Reg. 30,866 (May 15, 2000). This rule eliminated the previously existing requirement that a party seek an evidentiary hearing before filing a petition for review with this Board. The new rule granted certain petitioners, including the Petitioners in this case, until August 13, 2000, to file a petition for review with this Board.

the District was required to file a two-part application for an NPDES permit covering discharges from the District's MS4.[4] The District submitted Part 1 of the required NPDES permit application in July 1991 and the Part 2 application in 1994. *See* Certified Index to the Administrative Record ("Index") pts. I.1.n & I.3.a. On July 31, 1998, the District submitted revisions and updated materials for the Part 1 application, and, on November 4, 1998, the District submitted revisions and updated materials for the Part 2 application. *Id.* pts. I.5 - .6. The revised Part 2 application also included the District's current Storm Water Management Plan ("SWMP").

Thereafter, the Region prepared a draft permit and, on February 20, 1999, the Region provided public notice and requested public comments on its first draft permit for the District's MS4 discharges. Index pts. I.7 -.8. As part of the first public comment period, the Region conducted a public hearing on March 29, 1999. *Id.* pt. I.10. Subsequently, the Region revised the terms of the proposed permit in response to comments received from the public, and it issued a second draft permit on October 1, 1999 (the "Second Draft Permit") and requested further public comments. *Id.* pts. I.11 - .12. At that time, the Region also issued its response to comments regarding the February 1999 draft permit ("Region's First Response to Comments"). *Id.* pt. I.17.

On January 6, 2000, the District of Columbia Department of Health ("DCDH") issued its certification[5] that the conditions set forth in

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[4]The permitting process is described below in Part I.B of this decision. *See also In re City of Irving, Tex., Mun. Separate Storm Sewer Sys.*, NPDES Appeal No. 00-18, slip op. at 13-16 (EAB, July 16, 2001), 10 E.A.D. __.

[5]All NPDES permit applicants must obtain a certification from the appropriate state agency validating the permit's compliance with the pertinent federal and state water pollution control standards. CWA § 401(a)(1), 33 U.S.C. § 1341(a)(1). The regulatory provisions pertaining to state certification provide that EPA may not issue a permit until a certification is granted or waived by the state in which the discharge originates. 40 C.F.R. § 124.53(a). The regulations further add that "when certification is required * * * no final permit shall be issued * * * [u]nless the final permit incorporates the (continued...)

the second draft permit would comply with the District's water quality standards, approved water quality management plans and District monitoring requirements. *Id.* pt. I.15.a. On April 19, 2000, the Region issued the final Permit and fact sheet. *Id.* pt. I.20. The Region also issued its summary of the comments on the second draft permit and the Region's responses to those comments ("Region's Second Response to Comments"). *Id.* pt. I.18.

On May 25, 2000, the Petitioners filed a request for an evidentiary hearing pursuant to the regulations governing the NPDES program at that time. On July 14, 2000, the Region returned Petitioner's Request for Evidentiary Hearing and notified Petitioners of their right to file an appeal with the Board under changes made to the NPDES permit appeals process that became effective on June 14, 2000.[6] Thereafter, Petitioners timely filed the Petition with the Board on August 11, 2000. The Petition incorporates the May 25, 2000 request for an evidentiary hearing as stating the basis of the Petitioners' objections to the Permit. The Petitioners have grouped their arguments in nine categories. (Throughout this decision, we will generally follow the Petitioners' lead and consider the arguments grouped in categories identified by the issue number used in the Petition – we will summarize these categories below in Part I.C.)

The Region filed a response to the Petition. *See* Region III's Response to Petition for Review (Sept. 28, 2000) ("Region's Response"). The Region's Response generally argues that the Petitioners have not shown that their Petition should be granted. In one respect, however, the Region states that it withdraws a portion of the Permit in response to Petitioners' issue number eight (this issue, as described more fully below, relates to whether the Permit improperly allows amendments or changes without requiring the formal procedures contemplated by the regulations).

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[5](...continued)
requirements specified in the certification." 40 C.F.R. § 124.55(a).

[6]*See supra* note 3.

Subsequently, on January 12, 2001, the Region reissued the withdrawn portion of the Permit with several amendments. Thereafter, the Petitioners filed a petition requesting review of the amendments to the Permit and they requested that this second petition be consolidated with their original Petition. *See* Petition for Review and Motion to Consolidate (Feb. 2, 2001).[7] The Petitioners also filed supplemental briefing concerning issue number eight from their original Petition. *See* Supplemental Reply Based on Intervening Permit Modification (Feb. 2, 2001). The Region has responded to the Petitioners' second petition. More recently, on December 18, 2001, the Board held oral argument on several of the issues raised in this case.

B. *Statutory and Regulatory Background*

The CWA, which was enacted by Congress in 1972, prohibits the discharge of any pollutant to waters of the United States from a point source unless the discharge is authorized by an NPDES permit. Section 402(a)(1) of the CWA authorizes the Administrator to issue permits for the discharge of pollutants into navigable waters of the United States. 33 U.S.C. § 1342(a)(1).

Section 402(a)(2) of the CWA states that the "Administrator shall prescribe conditions for such permits to assure compliance with the requirements of" section 402(a)(1). A requirement of section 402(a)(1) is that the permitted discharges must comply with section 301 of the CWA, 33 U.S.C. § 1311. Section 301 requires, among other things, achievement of "any more stringent limitation, including those necessary to meet water quality standards * * * established pursuant to any State law or regulation * * *." 33 U.S.C. § 1311(b)(1)(C).

The statutory requirement of CWA § 301(b)(1)(C) to protect water quality standards has been implemented through a variety of

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[7]The Petitioners' original petition was assigned EAB docket number NPDES 00-14 and their second petition was assigned EAB docket number NPDES 01-09. The Petitioners' motion to consolidate their second petition for review with their original Petition is hereby granted.

regulatory provisions. For example, long-standing Agency regulations prohibit the issuance of a permit "when imposition of conditions cannot *ensure* compliance with the applicable water quality requirements of all affected states." 40 C.F.R. § 122.4(d) (emphasis added). In addition, section 122.44(d) provides that the permit must contain effluent limits as necessary to protect water quality standards. *Id.* § 122.44(d)(1). Long-standing Agency regulations have also authorized the use of "best management practices" ("BMPs") to control or abate the discharge of pollutants in a variety of circumstances including when "[n]umeric effluent limitations are infeasible." *Id.* § 122.44(k).

Although EPA initially attempted to exempt municipal storm sewer systems from the requirement to obtain an NPDES permit for discharge of pollutants into navigable waters of the United States,[8] in the Water Quality Act of 1987 ("WQA"), Congress amended the CWA to specifically cover storm water discharges from conveyances such as MS4s. Among other amendments, the WQA added section 402(p) governing permitting for MS4s and certain other storm water systems. In particular, Congress required EPA to establish no later than February 4, 1989, regulations governing the permit application requirements for storm water discharges from MS4s serving a population of more than 250,000, and Congress required applications for such permits to be filed no later than February 4, 1990. CWA § 402(p)(4)(A), 33 U.S.C. § 1342(p)(4)(A). Congress also stated in section 402(p)(3) that permits from MS4s "shall require controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices * * * and such other provisions as the Administrator or the State determines appropriate for the control of such pollutants." CWA § 402(p)(3), 33 U.S.C. § 1342(p)(3).

EPA initially promulgated regulations implementing section 402(p) of the CWA in 1990. These regulations, commonly referred to as

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[8]That exemption was rejected by the U.S. Court of Appeals for the District of Columbia. *See NRDC v. Costle*, 568 F.2d 1369, 1377 (D.C. Cir. 1977). This history is described more fully in *In re City of Irving, Tex. Mun. Separate Storm Sewer System*, NPDES Appeal No. 00-18, slip. op. at 9 (EAB, July 16, 2001), 10 E.A.D. __.

"Phase I" regulations, established the NPDES permit application requirements for storm water discharges associated with industrial activity and discharges from large and medium MS4s. *See* National Pollution Discharge Elimination System Permit Application Regulations for Storm Water Discharges, 55 Fed. Reg. 47,990 (Nov. 16, 1990) (codified at 40 C.F.R. pt. 122). In the preamble to the Phase I regulations, the Agency explained that the MS4 permitting program requires a substantial amount of flexibility but not "to such an extent that all municipalities do not face essentially the same responsibilities and commitments for achieving the goals of the CWA." 55 Fed. Reg. at 48,038. To achieve these ends, the Phase I regulations made a number of changes to the existing NPDES regulations to allow MS4s to focus less on end-of-pipe technology-based controls and to focus more on the development of site-specific SWMPs.

In the Phase I rulemaking, the Agency established a two-part permit application process for the development of MS4 permits that would assist permittees in developing SWMPs capable of meeting the statutory and regulatory goals. *Id.* The two parts of the permit application cover six general elements necessary for an MS4 permit: adequate legal authority, source identification, discharge characterization, proposed SWMP, assessment of controls, and fiscal analysis. *See* Office of Water, U.S. EPA, EPA 833-B-92-002, *Guidance Manual for the Preparation of Part 2 of the NPDES Permit Application for Discharges from Municipal Separate Storm Sewer Systems* at 2-1 to 2-4 (1992) (hereinafter "Part 2 Guidance Manual"); *see also In re City of Irving, Tex. Mun. Separate Storm Sewer Sys.*, NPDES Appeal No. 00-18, slip. op. at 13-15 (EAB, July 16, 2001), 10 E.A.D. __ (describing in greater detail the elements addressing adequate legal authority, proposed SWMP, and assessment of controls).

As part of a subsequent rulemaking, commonly referred to as the "Phase II" regulations, section 122.44(k) was amended to authorize use of BMPs not only when "[n]umeric effluent limitations are infeasible" as was previously authorized, but also when "[a]uthorized under section 402(p) of the CWA for the control of storm water discharges." *See* National Pollutant Discharge Elimination System – Regulations for

Revision of the Water Pollution Control Program Addressing Storm Water Discharges, 64 Fed. Reg. 68,722, 68,847 (Dec. 8, 1999) (codified at 40 C.F.R. § 122.44(k)(2)-(3)).

C. *Summary of Issues Raised in the Petitions*

As noted, Petitioners identify their bases for requesting review of the Permit in nine categories, which were separately numbered in their original Petition as issues one through nine. We will follow this numbering system in our discussion since the parties have used it to identify their arguments. The following is a brief summary of these nine issues, or categories of arguments, raised by Petitioners:

1. Compliance with Water Quality Standards. Under this heading, the Petitioners raise several arguments pertaining to whether the Permit is adequately protective of the District's water quality standards. In essence, Petitioners argue that the Permit does not have effluent limitations that assure compliance with the District's water quality standards. Petition at 3. The Region, in contrast, argues that the Permit does protect water quality standards. Region's Response at 10; *see also* Transcript of Oral Argument at 29, 32-33 (Dec. 18, 2001) (hereinafter "Tr. at __").[9]

[9]The Region also quotes an argument it made in its response to comments where the Region stated that the Permit is not necessarily required to assure compliance with state water quality standards but need only "control the discharge of pollutants to meet such provisions EPA or the State determines appropriate." Region's Second Response to Comments at 10, quoted in Region's Response at 9. In support of this argument the Region explained that the Ninth Circuit Court of Appeals has held that "EPA * * * has authority to require less than strict compliance with state water quality standards." Region's Response at 9 (quoting *Defenders of Wildlife v. Browner*, 191 F.3d 1159, 1166 (9th Cir. 1999)); *see also* Region's Reply at 7 n.4. However, at oral argument, the Region stated that, in issuing this Permit, it is not relying on the Ninth Circuit's conclusion that EPA has authority to require less than strict compliance with state water quality standards. Tr. at 31. Specifically, the Region stated that it intends this Permit to satisfy water quality standards. Tr. at 32-33.

2. Hickey Run. Petitioners argue that the Permit is deficient in that (a) it contains an aggregate numeric effluent limit for four outfalls into Hickey Run (which is a tributary of the Anacostia River) and (b) it contains monitoring requirements that the Petitioners allege are inadequate.

3. Reductions to the "Maximum Extent Practicable". Under this heading, Petitioners argue that the Region's determination that the Permit will reduce storm water pollutant discharges to the maximum extent practicable ("MEP") as required by CWA § 402(p) was clearly erroneous.

4. Deferral of Complete Program. Under this heading, the Petitioners raise arguments concerning the Permit's deferral of the time for the District to submit implementation and enforcement plans for its SWMP and concerning the Permit's deferral of an "upgraded" SWMP.

5. Failure to Require Compliance Within Three Years. Petitioners argue that the Permit fails to require compliance within the three-year time period set forth in CWA § 402(p)(4).

6. Storm Water Implementation Plan. Petitioners argue that the Permit in Part III.E uses language allowing for a "cost benefit and affordability" analysis that the Petitioners argue is contrary to the CWA.

7. Funding. Petitioners raise several additional arguments concerning the "cost benefit and affordability analysis" under Part III.E of the Permit as it pertains to funding of the implementation plan.

8. Modifications. The Petitioners argued in their original Petition that the Permit "illegally authorizes numerous substantive changes in permit requirements without a formal permit revision." Petition at 9. In its response, the Region stated that it withdraws the provisions of the Permit that are affected by Petitioners' arguments in this category, and the Region proposed amendments to address this issue. Response at 25. After the Region issued its amendments on January 12, 2001, the Petitioners filed both a petition for review of the amendments

and a supplemental brief, both of which argue that the modifications of the Permit fail to address most of the concerns raised by Petitioners in their original Petition.

9. Waivers and Exemptions. The Petitioners argue that the District's storm water regulations that are incorporated into the Permit by reference require the granting of various waivers or exemptions that the Petitioners argue are in conflict with the CWA and EPA rules.

Each of these arguments will be separately considered in the discussion that follows. We begin, however, with a brief discussion of the standards we use in evaluating petitions filed under 40 C.F.R. part 124 for review of NPDES permits.

II. *DISCUSSION*

A. *Standard of Review*

The Board generally will not grant review of petitions filed under 40 C.F.R. § 124.19(a), unless it appears from the petition that the permit condition that is at issue is based on a clearly erroneous finding of fact or conclusion of law or involves an important policy consideration which the Board, in its discretion, should review.[10] 40 C.F.R. § 124.19(a)

[10]Prior to the amendments to streamline the NPDES regulations (*see supra* note 3), the rules governing petitions for review of NPDES permitting decisions were set out in 40 C.F.R. § 124.91. These rules did not provide for an appeal directly to the Board. Instead, a person seeking review of an NPDES permitting decision was required to first request an evidentiary hearing before the Regional Administrator. *In re City of Moscow, Idaho*, NPDES Appeal No. 00-10, slip op. at 9 n.20 (EAB, July 27, 2001), 10 E.A.D. __. The outcome of the request for an evidentiary hearing or the outcome of an evidentiary hearing -- if the request was granted -- was then appealable to the Board. However, under those rules there was no review as a matter of right from the Regional Administrator's decision or the denial of an evidentiary hearing. *See In re City of Port St. Joe*, 7 E.A.D. 275, 282 (EAB 1997); *In re Fla. Pulp & Paper Ass'n*, 6 E.A.D. 49, 51 (EAB 1995); *In re J&L Specialty Prods. Corp.*, 5 E.A.D. 31, 41 (EAB 1994). Petitions for review of NPDES permits are now regulated by 40 C.F.R. § 124.19, as amended by 65 Fed. Reg. 30,886, 30,911 (May 15, 2000). Even though the regulations governing (continued...)

(2001); *see also City of Moscow, Idaho,* NPDES Appeal No. 00-10, slip op. at 8-9 (EAB, July 27, 2001), 10 E.A.D. __ (hereinafter "*Moscow MS4*"); *In re City of Irving, Tex. Mun. Separate Storm Sewer Sys.*, NPDES Appeal No. 00-18, slip op. at 16 (EAB, July 16, 2001), 10 E.A.D. __ (hereinafter "*Irving MS4*"). While the Board has broad power to review decisions under section 124.19, the Agency intended this power to be exercised "only sparingly." 45 Fed. Reg. 33,290, 33,412 (May 19, 1980); *see also Moscow MS4,* slip op. at 9, 10 E.A.D. __; *In re Rohm & Haas Co.*, RCRA Appeal No. 98-2, slip op. at 7 (EAB, Oct. 5, 2000), 9 E.A.D. __; *In re AES P.R. L.P.*, PSD Appeal Nos. 98-29 to 98-31, slip op. at 7 (EAB, May 27, 1999), 8 E.A.D. __, *aff'd sub nom. Sur Contra La Contaminación v. EPA*, 202 F.3d 443 (1st Cir. 2000).

Agency policy favors final adjudication of most permits at the regional level. 45 Fed. Reg. at 33,412; *see also Moscow MS4,* slip op. at 9, 10 E.A.D. __; *Irving MS4,* slip op. at 16, 10 E.A.D. __; *In re New England Plating Co.*, NPDES Appeal No. 00-07, slip op. at 7 (EAB, Mar. 29, 2001), 9 E.A.D. __; *In re Town of Ashland Wastewater Treatment Facility,* NPDES Appeal No. 00-15, slip op. at 9-10 (EAB, Feb. 26, 2001), 9 E.A.D. __; *In re Town of Hopedale, Bd. of Water & Sewer Comm'rs,* NPDES Appeal No. 00-4, slip op. 8-9 n.13 (EAB, Feb. 13, 2001), 9 E.A.D. ___. On appeal to the Board, the petitioner bears the burden of demonstrating that review is warranted. *Moscow MS4,* slip op. at 9, 10 E.A.D. __; *see also AES P.R.*, slip op. at 7, 8 E.A.D. __; *In re Haw. Elec. Light Co.*, PSD Appeal Nos. 97-15 to 97-23, slip op. at 8 (EAB, Nov. 25, 1998), 8 E.A.D. __; *In re Kawaihae Cogeneration Project*, 7 E.A.D. 107, 114 (EAB 1997).[11]

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[10](...continued)
NPDES appeals changed in the sense that the evidentiary hearing provisions were eliminated, the standard of review has not changed. *Moscow MS4,* slip op. at 9 n.20, *10 E.A.D.* __ (citing *In re Town of Ashland Wastewater Treatment Facility*, NPDES Appeal No. 00-15, slip op. at 9 n.11 (EAB, Feb. 26, 2001), 9 E.A.D. __).

[11]Standing to appeal a final permit determination is limited under 40 C.F.R. § 124.19 to those persons "who filed comments on [the] draft permit or participated in the public hearing." Any person who failed to comment or participate in the public (continued...)

Persons seeking review must demonstrate to the Board, among other things, "that any issues being raised were raised during the public comment period to the extent required by these regulations * * *." 40 C.F.R. § 124.19(a) (2001). Participation during the comment period must conform with the requirements of section 124.13, which requires that all reasonably ascertainable issues and all reasonably available arguments supporting a petitioner's position be raised by the close of the public comment period. 40 C.F.R. § 124.13 (2001); *see also, Moscow MS4*, slip op. at 9, 10 E.A.D. __; *In re New England Plating*, NPDES Appeal No. 00-7, slip op. at 7 (EAB, Mar. 29, 2001), 9 E.A.D. __; *In re City of Phoenix, Ariz. Squaw Peak & Deer Valley Water Treatment Plants*, NPDES Appeal No. 99-2, slip op. at 14 (EAB, Nov. 1, 2000), 9 E.A.D. __ ("Those persons seeking to appeal based on their status as commenters or public hearing participants must also demonstrate to the Board, *inter alia*, 'that any issues being raised were raised *during* the public comment period (including any public hearing) to the extent required by these regulations * * *.'").

The Board traditionally assigns a heavy burden to petitioners seeking review of issues that are essentially technical in nature. *Moscow MS4*, slip op. at 9, 10 E.A.D. __; *see also In re Town of Ashland Wastewater Treatment Facility*, NPDES Appeal No. 00-15, slip op. at 10 (EAB, Feb. 26, 2001), 9 E.A.D. __; *In re NE Hub Partners, L.P.*, 7 E.A.D. 561, 567 (EAB 1998), *petition for review denied sub nom. Penn Fuel Gas, Inc. v. EPA*, 185 F.3d 862 (3rd Cir. 1999). When the Board is presented with technical issues we look to determine whether the record demonstrates that the Region duly considered the issues raised in the comments and whether the approach ultimately adopted by the Region is rational in light of all the information in the record. *NE Hub*, 7 E.A.D. at 568. If we are satisfied that the Region gave due consideration to comments received and adopted an approach in the final permit decision

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[11](...continued)
hearing on the draft permit can appeal "only to the extent of the changes from the draft to the final permit decision." 40 C.F.R. § 124.19(a) (2001); *see In re City of Phoenix, Ariz. Squaw Peak & Deer Valley Water Treatment Plants*, NPDES Appeal No. 99-2, slip op. at 14 (EAB, Nov. 1, 2000), 9 E.A.D. __.

that is rational and supportable, we typically will defer to the Region's determination. *Id.*

For the following reasons, we conclude that Petitioners have shown that, in several respects, the Region's decision to issue the Permit was deficient under these standards. Accordingly, we remand the Permit for further proceedings consistent with this decision.

B. *Petitioners' Issue One: Water Quality Standards*

The Permit contains one numeric effluent limitation for discharges from four outfalls into Hickey Run. Other than this one numeric discharge limit, the Permit designates a variety of best management practices, or BMPs, to control the discharge of pollutants from the District's MS4. The Petitioners raise three arguments objecting to the Region's approval of the Permit conditions establishing BMPs to control pollutant discharges and ensure compliance with the District's water quality standards. First, the Petitioners argue that the Region should have established numeric limits for most of the system's outfalls, rather than relying on BMPs to control pollutant discharges. Petition at 2-3. Specifically, the Petitioners argue that the Region made no showing that numeric limits are infeasible and that the Region should set the numeric limits equal to the numeric water quality standards applicable to the receiving waters. Petition at 4; Petitioners' Reply Brief at 3. Second, Petitioners argue that the Region should, at a minimum, have established narrative limits. Petition at 4. Finally, Petitioners argue that the Region failed to make the requisite determination that the chosen BMPs will ensure protection of the District's water quality standards. Petition at 5; Petitioners' Reply at 4.

Before turning to these arguments, we must first address a number of issues by way of background, some of which were treated by the parties' briefs as being in dispute, but which the parties conceded during oral argument. As noted above, section 301 of the CWA requires, among other things, that NPDES permits contain "any more stringent limitation, including those necessary to meet water quality standards * * * established pursuant to any State law or regulation * * *." 33

U.S.C. § 1311(b)(1)(C). This statutory requirement has been implemented, in part, through long-standing regulations that prohibit the issuance of an NPDES permit "when imposition of conditions cannot *ensure* compliance with the applicable water quality requirements of all affected states." 40 C.F.R. § 122.4(d) (2001) (emphasis added.). In addition, section 122.44(d) provides that "the permit must contain effluent limits" for a particular pollutant "when the permitting authority determines * * * that a discharge causes, has the reasonable potential to cause, or contributes to an in-stream excursion above the allowable ambient concentration of a state numeric criteria within a State water quality standard for an individual pollutant." *Id.* § 122.44(d)(1)(iii).

In their filings with the Board, Petitioners maintain that, based on evidence in the record, the Permit is required by 40 C.F.R. § 122.44(d) to contain effluent limitations that protect water quality standards. Petition at 3 (citing 1998 Water Quality Report at 48, app. D at 3-75). Specifically, Petitioners argue that information submitted by the District with its application for the Permit shows that discharges from the District's MS4 causes, has the reasonable potential to cause, or contributes to in-stream excursions above the allowable ambient concentrations of the District's numeric water quality standards, thereby triggering the requirements of section 122.44(d)(1). They explain as follows:

> The monitoring data submitted with D.C.'s MS4 application confirms that storm sewer discharges present major threats to surface water quality in the District. The data shows that such discharges repeatedly exceed the District's water quality standards for fecal coliform bacteria, which are 200/100 mL max. 30-day mean for Class A waters, and 1,000/100 mL for Class B waters. 21 DCMR 1104.6. In almost all of the storm water sampling reported in the Part 2 application, fecal coliform counts exceeded one or both of these standards, often by wide margins. Part 2 application, Tables 4.3.4-3 to -14; 21 DCMR 1104.6. At least one discharge also

> exceeded arsenic criteria for fisheries. *Id.*, Part 2 application, table 4.3.4-10. * * *
>
> Under these circumstances, the Act and EPA rules require that the permit include effluent limitations to assure compliance with water quality standards. * * * [T]he District's 1998 Water Quality Report specifically identifies storm water discharges as known or suspected contributors to violations of water quality standards for specific pollutants in waters throughout the District. Water Quality Report at 48, Appendix D at 3-75. For a number of waters, the report lists urban runoff/storm sewers as the only source of impairment. *Id.*

Petition at 3.

The Region does not argue that this evidence cited by Petitioners is insufficient to trigger the requirements of section 122.44(d)(1), which as noted requires "effluent limits" if discharges cause or contribute to violations of water quality standards. Instead, the Region maintains that section 122.44(d)(1) does not require that "effluent limits" be expressed as numeric limits. The Region argues that BMPs are a type of effluent limit and that it properly explained the basis for its decision to use BMPs instead of numeric effluent limits. Specifically, the Region explained in the Fact Sheet that "In accordance with 40 CFR § 122.44(k), the [Region] has required a series of [BMPs], in the form of a comprehensive SWMP, in lieu of numeric limitations." Fact Sheet at 7. The Region explained further in the Region's First Response to Comments that "[d]erivation of water quality-based limits by application of the methods contained in the Technical Support Document for Water Quality-based Toxics Control is *not feasible* at this time because insufficient information is known about the magnitude, variation, and frequency of the flow rate of both the river and storm discharges." Region's First Response to Comments at 7 (emphasis added); *see also* Region's Response at 9.

The notion that effluent limits may be expressed as either numeric limits or as some other restriction that limits the discharge of

pollutants, such as BMPs, has been stated in EPA guidance and has been endorsed by this Board. In essence, because the term "effluent limitation" is defined to mean any restriction on quantities, rates, and concentrations of pollutants,[12] effluent limits required by section 122.44(d)(1) therefore may be expressed as either numeric limits or as BMPs, both of which serve to limit quantities, rates or concentrations of pollutants. *In re Ariz. Mun. Storm Water NPDES Permits,* 7 E.A.D. 646, 658-59 (EAB 1988) (hereinafter "*Arizona Municipal*")[13] (citing Questions and Answers Regarding Implementation of an Interim Permitting Approach for Water Quality-Based Effluent Limitations in Storm Water Permits, 61 Fed. Reg. 57,425, 57,426 (Nov. 6. 1996)). Initially, the Petitioners argued that the Region's failure to use numeric limits violated section 301 of the CWA and 40 C.F.R. §§ 122.4(d) & 122.44(d). Petition at 2-3. At oral argument, Petitioners also stated that where the water quality standards are numeric standards, the "only certain method to assure compliance with standards is with numeric effluent limits." Tr. at 6. The Petitioners, however, also acknowledged during oral argument that BMPs are a form of effluent limitation, Tr. at 7, and that BMPs may be used to satisfy water quality-based requirements. Tr. at 9.[14] Given this concession, we do not need to revisit our prior determination in *Arizona Municipal* that, as a general proposition, BMPs are a form of effluent limit that may in appropriate circumstances be used to satisfy the requirements of section 122.44(d) of the regulations in order to resolve the dispute at hand.

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[12]The term "effluent limitation" is defined by the regulations to mean "any restriction * * * on quantities, discharge rates, and concentrations of 'pollutants' which are 'discharged' from 'point sources' into 'waters of the United States,' the waters of a 'contiguous zone,' or the ocean." 40 C.F.R. § 122.2 (2001).

[13]Our holding in *Arizona Municipal* was affirmed by the Ninth Circuit Court of Appeals. *See Defenders of Wildlife v. Browner,* 191 F.3d 1159 (9th Cir. 1999), *aff'g on other grounds In re Ariz. Mun. Storm Water NPDES Permits,* 7 E.A.D. 646 (EAB 1988).

[14]However, the Petitioners consistently argued that if the Region chooses BMPs to meet water quality-based standards, the Region "would still have to show that they [the BMPs] are going to do the job." Tr. at 10. This issue is discussed further below.

With respect to whether deployment of BMPs was inappropriate under the circumstances of this case, we note that the regulations specifically authorize the use of BMPs in two potentially applicable circumstances. First, section 122.44(k)(2), as added in 1999, authorizes BMPs when "[a]uthorized under section 402(p) of the CWA for the control of storm water discharges." 40 C.F.R. § 122.44(k)(2) (2001). Second, section 122.44(k)(3) authorizes BMPs when "[n]umeric effluent limitations are infeasible." *Id.* § 122.44(k)(3); *see also Arizona Municipal*, 7 E.A.D. at 656 ("Under the regulations, best management practices * * * may be incorporated into storm water permits where numeric limitations are infeasible."). In the present case, the Region stated at oral argument that it did not base its decision to approve BMPs on the new 40 C.F.R. § 122.44(k)(2), which was added in the 1999 amendments[15] and which allows BMPs when authorized by CWA § 402(p). Tr. at 48. Instead, the Region determined that numeric limits were not feasible, which is the criterion for use of BMPs under 40 C.F.R. § 122.44(k)(3). Specifically, as noted above, the Region explained that "[d]erivation of water quality-based limits by application of the methods contained in the Technical Support Document for Water Quality-based Toxics Control is *not feasible* at this time because insufficient information is known about the magnitude, variation, and frequency of the flow rate of both the river and storm discharges." Region's First Response to Comments at 7 (emphasis added).

This brings us to the issues that remain in dispute. The Petitioners argue first that "the Region has made no showing that numeric limitations are infeasible * * * . The Region did not even attempt development of numeric effluent limits for discharges to waters of the District other than Hickey Run." Petition at 4. On this point, the Petitioners elaborate further in their Reply Brief that, where mixing

[15] *See* National Pollutant Discharge Elimination System – Regulations for Revision of the Water Pollution Control Program Addressing Storm Water Discharges, 64 Fed. Reg. 68,722, 68,847 (Dec. 8, 1999).

zones[16] have not been established (as is the case here for all outfalls other those into Hickey Run), "under long-established EPA guidance and practice, effluent limits must be set to assure compliance with water quality standards at the point of discharge." Petitioners' Reply Brief at 3. In other words, Petitioners argue that the Agency can easily set a numeric limit for each outfall that is equal to the numeric water quality standard for the receiving water. Presumably, Petitioners reason that the discharges will not cause or contribute to an in-stream excursion above an allowable standard if the discharges, themselves, must be below the applicable standard. Petitioners argue further that "[t]his is not an exercise requiring any information beyond the water quality criteria set in D.C.'s published water quality standards." *Id.* These arguments, however, do not persuade us that review of the Permit should be granted on this ground.

In *Arizona Municipal*, we considered a challenge to the permit issuer's determination pursuant to what is now section 122.44(k)(3)[17] that setting numeric effluent limits was not feasible for an MS4 system's discharges. *Arizona Municipal*, 7 E.A.D. at 656. In that case, the permit issuer made its determination of infeasibility because, due to "the unique

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[16]Briefly stated, a mixing zone is "an allocated impact zone in the receiving water which may include a small area or volume where acute criteria can be exceeded provided there is no lethality (zone of initial dilution), and a larger area or volume where chronic water quality criteria can be exceeded if the designated use of the water segment as a whole is not impaired as a result of the mixing zone." *Guidance on Application of State Mixing Zone Policies in EPA-Issued NPDES Permits*, (Aug. 1996).

[17]The current section 122.44(k)(3) was section 122.44(k)(2) prior to the amendment of section 122.44(k) in 1999. As previously discussed, the 1999 amendments added a new section 122.44(k)(2), allowing use of BMPs when authorized under section 402(p) of the Act. The old section 122.44(k)(2) shifted at that time to become the new and current section 122.44(k)(3). *See* National Pollutant Discharge Elimination System – Regulations for Revision of the Water Pollution Control Program Addressing Storm Water Discharges, 64 Fed. Reg. 68,722, 68,847 (Dec. 8, 1999). Accordingly, at the time of the *Arizona Municipal* decision, the regulatory provision authorizing use of BMPs when numeric limits are infeasible was set forth in section 122.44(k)(2), which is the regulation cited in the *Arizona Municipal* decision. *See Arizona Municipal*, 7 E.A.D. at 656.

nature of storm water discharges in the arid Arizona environment and the uncertainties associated with the environmental effects of short-term, periodic discharges, 'it would be premature to include in the final permit any specific toxicity-related effluent limitations * * *.'" *Id.* at 657. In considering arguments that this determination was insufficient, we noted that the permit issuer's reasons were consistent with Agency policy documents that "recogniz[e] that permitting agencies frequently lack adequate information to establish appropriate numeric water quality-based effluent limitations, and provid[e] for the inclusion of BMPs until such information becomes available." *Id.* at 658. The petitioners challenged the permit issuer's decision by arguing that the permit issuer had an affirmative duty to set numeric limits. We rejected this argument, stating that "the petitioners have failed to convince us that this determination was in any way unlawful or inappropriate." *Id.* at 659.

In the present case, the Petitioners have made many of the same generalized challenges to the Region's permitting decision as those we considered and rejected in *Arizona Municipal*, asserting that the Region has an affirmative duty to set numeric limits. In keeping with *Arizona Municipal*, we find these general arguments to be without merit. The Petitioners in this case, however, also rely on a more specific argument that numeric limits could have been derived under methods that the Petitioners describe as "long-established EPA guidance and practice." Petitioners' Reply Brief at 3. As discussed below, this more specific argument must also be rejected in this case because Petitioners failed to raise it and the cited authority during the public comment period.

The regulations governing the NPDES permitting program and review by this Board require that persons seeking review must demonstrate to the Board "that any issues being raised were raised during the public comment period to the extent required by these regulations * * *." 40 C.F.R. § 124.19(a) (2001); *Moscow MS4*, slip op. at 10, 10 E.A.D. __. The regulations provide further that all reasonably ascertainable issues and all reasonably available arguments supporting a petitioner's position must be raised by the close of the public comment period. 40 C.F.R. § 124.13 (2001); *see, e.g., Moscow MS4*, slip op. at 10, 10 E.A.D. __; *In re New England Plating*, NPDES Appeal No. 00-7, slip

op. at 7 (EAB, Mar. 29, 2001), 9 E.A.D. __; *In re City of Phoenix, Ariz. Squaw Peak & Deer Valley Water Treatment Plants*, NPDES Appeal No. 99-2, slip op. at 14 (EAB, Nov. 1, 2000), 9 E.A.D. __. "Accordingly, only those issues and arguments raised during the comment period can form the basis for an appeal before the Board (except to the extent that issues or arguments were not reasonably ascertainable)." *New England Plating*, slip op. at 8 (citing *In re Jett Black, Inc.*, UIC Appeal Nos. 98-3 & 98-5, slip. op. at 8 & nn.18, 23 (EAB, May 27, 1999), 8 E.A.D. __ (finding that reasonably ascertainable arguments not raised during the public comment period were not preserved for appeal)).

As we have previously explained, "[t]he effective, efficient and predictable administration of the permitting process, demands that the permit issuer be given the opportunity to address potential problems with draft permits before they become final." *In re Encogen Cogeneration Facility,* PSD Appeal Nos. 98-22 to 98-24, slip op. at 8 (EAB, Mar. 26, 1999), 9 E.A.D. __. "In this manner, the permit issuer can make timely and appropriate adjustments to the permit determination, or, if no adjustments are made, the permit issuer can include an explanation of why none are necessary." *In re Essex County (N.J.) Resource Recovery Facility,* 5 E.A.D. 218, 224 (EAB 1994). In particular, the petitioner must have raised during the public comment period the specific argument that the petitioner seeks to raise on appeal; it is not sufficient for the petitioner to have raised a more general or related argument during the public comment period. *See, e.g., In re RockGen Energy Ctr.,* PSD Appeal No. 99-1, slip op. at 11 (EAB, Aug. 25, 1999), 8 E.A.D. __ (petition denied because petitioner raised during the public comment period three issues regarding one type of emissions control technology, but had not raised the specific issue comparing that technology to the technology that was selected, which petitioner sought to raise on appeal). "At a minimum, commenters must present issues with sufficient specificity to apprise the permit issuing authority of the issue raised. Absent such specificity, the permit issuer cannot meaningfully respond to comments." *Id.* at 17 (citing *In re Spokane Reg'l Waste-to-Energy,* 2 E.A.D. 809, 816 (Adm'r 1989) ("Just as 'the opportunity to comment is meaningless unless the agency responds to significant points raised by the public,' so too is the agency's opportunity to respond to those

comments meaningless unless the interested party clearly states its position.") (quoting *Northside Sanitary Landfill, Inc. v. Thomas,* 849 F.2d 1516, 1520 (D.C. Cir. 1988)) (internal citations omitted)).

In the present case, Petitioners raised their general objection to the absence of numeric effluent limits during both the public comment period on the first draft permit and during the public comment period on the second draft permit. *See* Letter from David S. Baron to William Colley, EPA Region III, at 2-3 (Apr. 21, 1999); Letter from David S. Baron to William Colley, EPA Region III, at 1-2 (Oct. 29, 1999). The Petitioners, however, have not shown that they raised their argument concerning the alleged "long-established EPA guidance and practice" regarding point-of-discharge limits at any time during the first or second public comment periods, and the Petitioners have not explained why this argument and the cited authorities were not reasonably ascertainable at that time. In this regard, it is significant that the Region discussed the implications of "the Technical Support Document for Water Quality-based Toxics Control" in the Region's response to comments on the first draft permit. *See* Region's First Response to Comments at 8.[18] Presumably, Petitioners would recognize this document cited by the Region to be among the body of "long-established EPA guidance and practice" to which they now refer. Thus, the Region's basis for its decision was fully available to Petitioners during the second public comment period, and their failure to make their more specific response and citation to the allegedly countervailing authority at that time is fatal to their attempt to make their case at this juncture. Accordingly, Petitioners have failed to preserve this argument for appeal.

The Petitioners argue second that "[e]ven if numeric limits were infeasible, [the Region] has not shown why it could not include narrative

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[18]The Region explained in its First Response to Comments as follows: "Derivation of water quality-based limits by application of the methods contained in the 'Technical Support Document for Water Quality-based Toxics Control' (TSD) is not feasible at this time because insufficient information is known about the magnitude, variation, and frequency of the flow rate of both the river and storm water discharges." First Response to Comments at 8.

provisions in the permit requiring protection of water quality standards." Petition at 4. This argument also must fail. There is no statutory or regulatory provision that requires use of narrative limits. Moreover, the regulations specifically authorize the use of BMPs where numeric limits are infeasible. 40 C.F.R. § 122.44(k)(3) (2001). Accordingly, we conclude that the Region was authorized to use BMPs and was not required to include narrative provisions in the Permit of the kind suggested by Petitioners. However, as discussed below, we are remanding this Permit on other grounds, and our conclusion here that use of narrative limits is not required should not be viewed as discouraging the use of narrative limits in any reissued permit if the Region determines that narrative limits would be appropriate in addressing the concerns giving rise to the remand.

Finally, Petitioners argue that "[i]f EPA intends to rely on BMPs, it still must demonstrate that those management practices will be adequate to assure compliance with water quality standards in the receiving waters" and that "[t]he Agency has failed to do so here." Petition at 5. Petitioners elaborate further on this last argument in their Reply Brief by noting that the record contains "absolutely no facts or technical analysis" to support the Region's statement in its response to comments that the Permit's BMPs are 'reasonably capable of achieving water quality standards,'" and by noting that "the legal test is not whether the BMPs are 'reasonably capable' of achieving water quality standards. Rather, the permit must 'ensure' compliance with water quality standards." Petitioners' Reply Brief at 4 (citing 33 U.S.C. § 1311(b)(1)(C); 40 C.F.R. § 122.4(d)). In its Response, the Region reiterated that it "issued the Permit based on its determination (and certification of the Permit by [D.C. Department of Health] * * *) that the BMPs set forth in the District's SWMP are 'reasonably capable of achieving water quality standards.'" Region's Response at 10; *see also* Region's Reply at 6.[19]

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[19]As noted *supra* note 9, the Petitioners also presented a number of arguments addressing the Ninth Circuit's statement in *Defenders of Wildlife v. Browner*, 191 F.3d 1159, 1166 (9th Cir. 1999), that "EPA * * * has authority to require less than strict (continued...)

At oral argument, the Region stated that, in using the "reasonably capable" language, it was not seeking to establish a new, less restrictive, standard for MS4 permits, and that this Permit was intended to protect water quality standards. In particular, the Region stated that "[i]n the response to comments, we were not trying to set up a different standard." Tr. at 39. Instead, the Region stated that it intended the "reasonably capable" language as "merely a paraphrase of the requirement that [the Region] found that no more stringent limits were necessary to achieve water quality standards. That is set forth in [section] 301(b)(1)(c) [of the Act]." Tr. at 39.

We have two concerns regarding the manner in which the Region has addressed the question of the Permit's meeting water quality standards. First, it is not clear that the Region's determination that the BMPs required under the Permit are "reasonably capable" of achieving water quality standards fully comports with the regulatory prohibition on issuing a permit "when imposition of conditions cannot *ensure* compliance with the applicable water quality requirements of all affected states." 40 C.F.R. § 122.44(d) (2001) (emphasis added). Simply stated, the "reasonably capable" formulation, accepting as it is of the potential that the Permit will not, in fact, attain water quality standards, does not appear to be entirely comparable to the concept of *ensuring* compliance.[20]

Second, and more importantly, even accepting the Region's suggestion that ensuring compliance was what the permit writer had in mind, we find nothing in the record, apart from District's section 401

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[19](...continued)
compliance with state water quality standards." *See* Petitioners Reply at 4-6. We do not reach these arguments, however, because the Region has stated that it is not relying on this discretion identified in the Ninth Circuit's analysis. Tr. at 31.

[20]The "reasonably capable" formulation does not appear to be common usage in EPA permits. At oral argument, counsel for the Region indicated that he was unaware of any other permit that relied upon such a formulation or any Agency guidance that recommended this formulation or treated it as comparable to a determination that a permit *ensures* compliance with water quality standards. Tr. at 41-42.

certification,[21] that supports the conclusion that the Permit would, in fact, achieve water quality standards.[22] Indeed, the Region acknowledged that "[u]nfortunately, the permit writer didn't commit a lot of his analysis to writing * * *." Tr. at 46. Although we traditionally assign a heavy burden to petitioners seeking review of issues that are essentially technical in nature, *see e.g., Moscow MS4,* slip op at 9, 10 E.A.D. at __, we nevertheless do look to determine whether the record demonstrates that the Region duly considered the issues raised in the comments and whether the approach ultimately adopted by the Region is rational in light of all information in the record. *Id,* slip op. at 10, 10 E.A.D. __ (citing *In re NE Hub Partners, L.P.*, 7 E.A.D. 561, 567 (EAB 1998)). Without an articulation by the permit writer of his analysis, we cannot properly perform any review whatsoever of that analysis and, therefore, cannot conclude that it meets the requirement of rationality. Moreover, Petitioners argue, and the Region does not dispute, that the Region cannot rely exclusively on District's section 401 certification, at least in a circumstance like this one in which there is a body of information

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[21]As described more fully *supra* note 5, section 401 of the CWA requires that any applicant for a federal permit (including NPDES permits issued by EPA) must provide the permitting agency a certification from the state in which the discharge originates that the discharge will comply with the state's water quality standards. CWA § 401, 33 U.S.C. § 1341. In the present case, the District of Columbia Department of Health issued its certification on January 6, 2000, that the conditions set forth in the second draft permit would comply with the District's water quality standards, approved water quality management plans and District monitoring requirements. Index pt. I.15.a.

[22]It bears noting that, in the context of an MS4 permit, compliance with water quality standards need not be immediate, but must occur within "3 years after the date of issuance of such permit." CWA § 402(p)(4)(A), 33 U.S.C. § 1342(p)(4)(A); *see also* Memorandum by E. Donald Elliot, EPA Assistant Administrator and General Counsel, to Nancy J. Marvel, Regional Counsel Region IX, at 4-5 (Jan. 9, 1991) ("In light of the express language, we believe the Agency may reasonably interpret the three-year compliance provisions in Section 402(p)(4) to apply to all permit conditions, including those imposed under [section] 301(b)(1)(C) [water quality standards]."). Accordingly, the determination relative to water quality standards that the permit issuer is required to make at the time of issuance is that the permit will achieve compliance within three years. As explained below, however, even taking this flexibility into account the record is deficient here.

drawing the certification into question. *See* Tr. at 43. Accordingly, additional record support for the Region's determination is needed, and, finding such support altogether absent from the record, we are remanding the Permit to the Region to provide and/or develop support for its conclusion that the permit *will* "ensure" compliance with the District's water quality standards and to make whatever adjustments in the Permit, if any, might be necessary in light of its analysis.[23]

C. *Petitioners' Issue Two: Hickey Run Numeric Effluent Limits*

The second category of issues raised by the Petitioners concerns the Permit's effluent limits and monitoring requirements for four outfalls into Hickey Run. The Petitioners object that the prescribed numeric limit is set forth as an aggregate limit covering all four outfalls, and the Petitioners object that the prescribed requirements for monitoring compliance with the numeric limit lack the specificity required by the regulations. Petitioners object to the aggregate limit on the grounds that, according to Petitioners, the regulations "require that effluent limits be outfall specific unless infeasible" and "EPA has not shown that outfall specific limits are infeasible." Petition at 5. Petitioners elaborate on this point in their Reply Brief, stating that "EPA rules *explicitly* require outfall specific effluent limits." Petitioners' Reply at 6. Petitioners also argue in their Petition that "the monitoring provisions relevant to the Hickey Run effluent limit are inadequate because the Permit fails to "specify the type and interval of required monitoring as well as the frequency," and because the Permit fails to specify "the precise monitoring locations." Petition at 6.

[23]As we observed above, our determination that the Region is not required to include narrative permit conditions requiring compliance with water quality standards does not preclude the Region from employing such provisions in any reissued permit upon remand. We note in this regard that inclusion of enforceable narrative permit conditions requiring compliance with applicable water quality standards within three years may be particularly useful in the event that the Region has difficulty stating that, without such a condition, compliance with water quality standards is assured.

The Region argues in its response that the Hickey Run numeric effluent limit is the first numeric limitation used in any MS4 permit based on a total maximum daily load ("TMDL")[24] and that the effluent limit is consistent with wasteload allocation set forth in the Hickey Run TMDL as required by 40 C.F.R. § 122.44(d)(1)(vii)(B). The Region states that it approved the aggregate limit for four outfalls because those outfalls "combine to make up the Hickey Run headwaters," and "[a]bove these outfalls, Hickey Run does not exist outside the storm sewer pipes," and further that "the outfalls [are] located close together and one entity (the MS4) [is] responsible for all four outfalls and could best oversee the implementation." Region's Response at 14. The Region also states that the Hickey Run TMDL was not able to more precisely allocate the load between the outfalls and that the Petitioners did not provide any additional data or basis from which individual outfall limitations might be derived. *Id.* at 15. Thus, the Region states that it "had no additional legal or factual basis on which to make the Hickey Run limit outfall specific, and therefore concluded that such individual limits are infeasible." *Id.* at 15.

With respect to monitoring requirements, the Region argues that the Permit requires monitoring of Hickey Run no less than three times per year using the test analytic method specified in Part 136, and the Region notes that the Permit requires the District to develop a sampling plan with the First Annual Report. *Id.* at 16. The Region also argues that "[t]he Permit requires that all samples and measurements be representative of the volume and nature of the monitored discharges

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[24]Under section 303(d) of the CWA, states are required to identify those water segments where technology-based controls are insufficient to implement the applicable water quality standards, and which are therefore "water quality limited." 33 U.S.C. § 1313(d)(1)(A). Once a segment is identified as water quality limited, the state is further required to establish total maximum daily loads, or TMDLs, for the water segment. 40 C.F.R. § 130.7 (2001). A TMDL is the sum of waste load allocations for point sources discharging into the impaired segment and load allocations for nonpoint sources and natural background. A TMDL is a measure of the total amount of a pollutant from point sources, nonpoint sources and natural background that a water quality limited segment can tolerate without violating the applicable water quality standards. *See Id.* § 130.2(i) (2001).

consistent with 40 C.F.R. § 122.41(j)(1). Region's Reply at 11. Finally, the Region states that "[t]he monitoring requirements, therefore, are representative of the monitored activity and otherwise consistent with federal regulations." *Id.* at 11-12.

We conclude that the Petitioners have failed to demonstrate in their Petition that the Region's decision to specify an aggregate numeric limit for the four outfalls forming the headwaters of Hickey Run was clear error or a policy choice that otherwise warrants review of this Permit. In particular, we cannot endorse Petitioners' argument that "EPA rules *explicitly* require outfall specific effluent limits." Petitioners' Reply at 6. The regulation cited by Petitioners reads as follows: "All permit effluent limitations, standards and prohibitions shall be established for each outfall *or discharge point* of the permitted facility * * *." 40 C.F.R. § 122.45(a) (2001) (emphasis added). Notably, this regulation identifies the location to which the limitation is applied (i.e, "outfall or discharge point") in the disjunctive. Thus, if we are to give meaning to the disjunctive phrase "or discharge point," we must read the regulation as contemplating some flexibility in appropriate circumstances to frame effluent limits at a point other than the outfall. Therefore, we cannot conclude that the Petitioners' proffered interpretation is required nor that the regulation precludes per se the establishment of a limit at a point other than an outfall.

Moreover, we find no clear error in the Region's conclusion that, in the unique circumstances of this case, an aggregate limit fixed at a discharge point proximate to four closely connected outfalls was appropriate. In this regard, we note that, here, (1) the aggregate limit is consistent with the aggregate waste load allocation set forth in the Hickey Run TMDL, (2) the four outfalls are located close together, (3) a single entity is responsible for all four outfalls, (4) the four outfalls, together, form the entire headwaters of Hickey Run, (5) the Region determined that it was infeasible to allocate the load by outfall or otherwise establish an appropriate limit specific to the individual outfalls, and (6) the

Petitioners did not provide any additional data or basis for the Region to derive individual outfall limitations. *See* Region's Response at 13-15.[25]

With respect to monitoring requirements, Petitioners' point regarding the generality of the Permit's monitoring provisions is well taken. At its inception, the Permit would not specify the precise location or the sample collection method of monitoring tests to be performed on Hickey Run, although the Permit does contemplate that greater precision will be brought to the Hickey Run outfall monitoring plan as part of the District's First Annual Report. Agency guidance states that the permit's monitoring and reporting conditions should specify (1) the sampling location, (2) the sample collection method, (3) monitoring frequencies, (4) analytic methods, and (5) reporting and recordkeeping requirements. U.S. EPA NPDES Permit Writers' Manual, EPA-833-B-96-003, at 115 (Dec. 1996). This guidance states further that the permit writer is responsible for determining the appropriate monitoring location and for "explicitly specifying" this in the permit. *Id.* at 117. It further states that "[s]pecifying the appropriate monitoring location in a NPDES permit is critical to producing valid compliance data." *Id.* In addition, by "sample collection method," the guidance means the type of sampling, such as "grab" or "composite" samples, which is distinguished from the "analytic methods" referenced in 40 C.F.R. part 136. *Id.* at 122. The regulations require that all permits specify the required monitoring "type, interval, and frequency." 40 C.F.R. § 122.48(b) (2001).

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[25]We note that, since the Region has determined that setting limits for the individual outfalls into Hickey Run is not feasible, the Region might have, consistent with the regulations, established a system-wide BMP requirement in lieu of any effluent limitation. *See* 40 C.F.R. § 122.44(a), (k)(2001) (allowing the establishment of BMPs instead of effluent limits where effluent limitations are infeasible). Thus, if sustained, the Petitioners' objection might very well produce a result that is contrary to what Petitioners request: rather than resulting in individual limits for each outfall, the one numeric effluent limit in this Permit might be deleted in favor of reliance on system-wide BMP requirements. We are not suggesting that the Region alter the Permit in this regard. Rather we simply point out that this course of action may well have complied with the regulation.

In the present case, the Region has not explained why it departed from Agency guidance by not specifying the precise location for monitoring the Hickey Run discharges, nor has the Region adequately explained how the Permit conditions satisfy the regulatory requirement to specify the "type, interval, and frequency" of monitoring. Although the Region argues that the Permit satisfies the regulations by specifying that monitoring must be conducted three times per year, *see* Region's Response at 16, this Permit condition does not appear to specify both the "interval and frequency" of monitoring as required by 40 C.F.R. § 122.48(b). Further, the Permit's reference to the *monitoring* method specified in 40 C.F.R. part 136 does not appear to satisfy the requirement that *sampling* methods be specified in the Permit. However, the Region argues that these defects do not require remand because they will be cured before the Hickey Run numeric effluent limit becomes effective – the Permit requires the District to develop a sampling plan with the First Annual Report. Region's Response at 16.

We find the proposed delayed development of the Hickey Run monitoring requirements to be problematic in two respects. First, both section 122.48(b) and section 122.44(i) would appear to require that certain monitoring conditions be included in all permits. Section 122.48(b) states that "All permits shall specify" the monitoring type, intervals, and frequency. 40 C.F.R. § 122.48(b) (2001). Section 122.44(i) states that "each NPDES permit shall include" monitoring conditions in addition to those set forth in section 122.48 in order to assure compliance with permit limitations. *Id.* § 122.44(i). The Region has not explained how its issuance of this Permit, which does not at its inception contain monitoring requirements for Hickey Run, comports with the regulatory directive that all permits include these conditions. Second, while we recognize that the monitoring requirements are expected to be added at the time of the District's First Annual Report and thus should be in place before the Hickey Run effluent limit becomes effective, we are troubled that this would be accomplished through a minor permit modification without notice and opportunity for public comment. *See* Permit pts. III.E & IX.A.5 (as amended). Given that the regulations appear to contemplate that monitoring requirements ordinarily be included as up-front permit conditions – conditions which

would thus ordinarily be subjected to public notice and comment – and the fact that we find nothing in the regulations allowing for minor permit modifications that authorizes use of a minor permit modification in this setting,[26] we conclude that this Permit does not meet minimum regulatory requirements and that remand of these parts of the Permit is necessary. We can foresee two possible paths available to the Region for addressing the Permit's imprecision in the Hickey Run monitoring requirements on remand. The path most easily reconciled with the regulatory requirements would be to add the missing precision to the revised permit at its inception. An alternative path may be to add the precision later in the context of formal, notice and comment permit modification. However, if the Region pursues the latter option, it must articulate its rationale for the consistency of such an approach with the regulations discussed above.[27] Accordingly, we remand the Permit's conditions for monitoring discharges into Hickey Run to afford the Region an opportunity to address these issues or to provide a more detailed explanation of its analysis.

D. *Issues Three Through Seven: MEP Standard*

In issues three through seven of the Petition, the Petitioners argue that the Region failed to properly apply the requirement in section 402(p)(3)(B)(iii) of the CWA to reduce the discharge of pollutants to the "maximum extent practicable." Petitioners raise the following sub-issues: In issue number three, Petitioners argue that the BMPs required by the Permit will produce no reductions in the discharges of a variety of pollutants and that the Permit does not contain a number of controls listed

[26]40 C.F.R. § 122.63 (2001). While this provision allows for the permit issuer to impose by minor modification "more frequent monitoring or reporting," there is no suggestion in the text of the regulation that the establishment of monitoring locations can be accomplished by minor modification. *See infra* Part II.E for further discussion of 40 C.F.R. § 122.63.

[27]Further, it would appear that, in any case, the Permit must be constructed in such a manner that ensures monitoring requirements are in place before the Hickey Run numeric effluent limit becomes effective

in the Agency guidance manual for MS4 permits. Petition at 6-7. In issue number four, the Petitioners argue that the Permit's requirement for evaluation and upgrade of the BMPs over time constitutes an admission that the current BMPs are not MEP and that therefore the permit contains an illegal deferral of compliance. *Id.* at 7. In issue number five, Petitioners argue that this deferral of compliance through upgrades over time does not comply with the requirement of section 402(p) to achieve implementation within 3 years. *Id.* at 7-9. Finally, in issues number six and seven, Petitioners argue that a "cost benefit and affordability analysis" required by Part III.E of the Permit is not authorized by the regulations and illegally introduces cost and affordability as grounds for not implementing BMPs that are required to meet MEP. *Id.* at 8-9.

1. *Issue Three: Permit Fails MEP Due to No Reductions in Certain Pollutants*

The Petitioners argue that the Permit fails to satisfy the requirement of section 402(p)(3)(iii) of the CWA that the Permit reduce pollutant discharges to the "maximum extent practicable." Petition at 6. Petitioners argue that the BMPs required by the Permit will produce no reductions in cadmium (Potomac, Anacostia and Rock Creek), dissolved phosphorous (Potomac and Rock Creek) and copper and lead (Rock Creek). *Id.* They also argue that the reductions of total suspended solids, BOD, COD, total nitrogen and total phosphorus are so small as to constitute no meaningful reduction. *Id.* The Petitioners also argue that the Permit fails to comply with the EPA guidance manual for the Part 2 application, which according to Petitioners "sets out in great detail the specific control measures that must be included in any SWMP, and requires that those measures be incorporated into the MS4 permit." *Id.* at 7 (citing U.S. EPA Guidance Manual for the Preparation of Part 2 of the NPDES Permit Applications for Discharges from Municipal Separate Storm Sewer Systems at 1-9, 6-1 to -25 (1992)).

The Region argues that, in the absence of promulgated technology-based standards defining MEP, the permitting authority must necessarily approach the question of what constitutes MEP on a case-by-case basis, taking into account the totality of the circumstances. Here, the

Region concluded that "a relatively large number of new activities to be performed" under the Permit's BMPs satisfies the MEP criterion. Region's Response at 17 (quoting Region's First Response to Comments at 9-10). The Region notes that "the Current SWMP identifies over 220 structural BMPs that have been installed and over 600 that have been approved for installation and/or construction." *Id.* at 18 (citing Revised SWMP at 6-2 & tbl. 6.2-1). The Region notes further that "the SWMP also details storm water capital projects over the next several years starting with FY 1998 expenditures of over $1.3 million, FY 1999 projects costing more than $3.1 million and projected costs from FY2000-FY2007 of $39 million." *Id.* at 18-19. In addition, the Region argues that "the Permit requires the District to implement its current SWMP, and then to focus on specific revisions to develop an upgraded SWMP that (following EPA approval) will assure pollutants will be reduced to the maximum extent practicable." *Id.* at 19 (citing Permit pt. III).

We conclude that the Petitioners have failed to show any clear error of fact or law in the Region's analysis or any policy choice that warrants review. As we noted at the outset of our discussion, we traditionally assign a heavy burden to petitioners seeking review of issues that are essentially technical in nature. *Moscow MS4,* slip op. at 9, 10 E.A.D. __; *see also In re Town of Ashland Wastewater Treatment Facility*, NPDES Appeal No. 00-15, slip op. at 10 (EAB, Feb. 26, 2001), 9 E.A.D. __; *In re NE Hub Partners, L.P.*, 7 E.A.D. 561, 567 (EAB 1998). This is grounded on the Agency policy that favors final adjudication of most permits at the regional level. 45 Fed. Reg. 33,290, 33,412 (May 19, 1980); *see also Moscow MS4,* slip op. at 9, 10 E.A.D. __; *Irving MS4,* slip op. at 16, 10 E.A.D. __; *In re New England Plating Co.*, NPDES Appeal No. 00-7, slip op. at 7 (EAB, Mar. 29, 2001), 9 E.A.D. __; *Town of Ashland,* slip op. at 9-10, 9 E.A.D. __; *In re Town of Hopedale, Bd. of Water & Sewer Comm'rs,* NPDES Appeal No. 00-4, slip op. 8-9 n.13 (EAB, Feb. 13, 2001), 10 E.A.D. __.

When the Board is presented with technical issues, we look to determine whether the record demonstrates that the Region duly considered the issues raised in the comments and whether the approach

ultimately adopted by the Region is rational in light of all the information in the record. *Moscow MS4*, slip op. at 10, 10 E.A.D. __ (citing *NE Hub*, 7 E.A.D. at 568). If we are satisfied that the Region gave due consideration to comments received and adopted an approach in the final permit decision that is rational and supportable, we typically will defer to the Region's position. *Id.*

In the present case, we note at the outset that Petitioners' emphasis on the *amount* of reduction achieved for the various pollutants is misplaced. The key question under section 402(p)(3)(B) of the statute is what is practicable.[28] Here, taking into account the full range of considerations before it,[29] the Region concluded that the BMPs required by the Permit collectively represent the maximum practicable effort to reduce pollution from the District's MS4. We are loath to second guess

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[28]As noted previously, the Region stated at oral argument that it intends this Permit to also satisfy water quality standards under section 301 of the Act. Tr. at 32-33. Although we determine in this part that the Petitioners have not shown any clear error in the Region's determination that the BMPs specified in this Permit were MEP at the time of issuance of the Permit, the Region must also determine, as discussed above in Part II.B, whether the conditions of this Permit ensure attainment of water quality standards as required by 40 C.F.R. § 122.4(d).

[29]The circumstances that existed when the Region issued this Permit were unusual as explained by the Region at oral argument: "When the District finished their application in 1998 and when we issued the permit, the District was still under the control of the Financial Oversight and Management Authority and there was some difficulty in the District in determining which of the many parts of its government would be accomplishing which task in what time frame. Nevertheless, the [Region] found that it would be remiss in not issuing the permit with the requirements as specific as we could set them at that time, but to also require the District to further identify who would do what when, where the funding would come from, and to reevaluate the controls they had in place." Tr. at 50. The Region stated further that, since the issuance of the Permit, the District's Water and Sewer Authority has been authorized to lead the administration of the storm water management program and that "[t]he District has also been proceeding forward with the implementation of many new structural and other structural BMPs and other programs to reduce pollutants." Tr. at 51. We assume that these improvements will be incorporated in current or revised form into the Permit as SWMP upgrades pursuant to the process outlined in the Permit for such upgrades. Permit pts. III.A & III.F.

the Region's technical judgment in this regard. The record demonstrates that the Region duly considered the issue raised by Petitioners in their comments, and the record does not lead to the clear conclusion that any additional BMPs beyond those identified in the Permit are practicable taking into account all of the relevant circumstances in the District.[30] Accordingly, we conclude that the position adopted by the Region is rational in light of the information in the record and consequently we deny review of this issue.

2. *Issue Four: Upgrade of the SWMP over Time*

The BMPs specified in the Permit as the applicable effluent limits are the BMPs set forth in the District's SWMP. The Permit requires that the District's SWMP, and the BMPs set forth in the SWMP, be evaluated and upgraded over time. The Petitioners argue that the Permit's requirement for the BMPs to be evaluated and upgraded over time constitutes an admission that the current BMPs do not meet the MEP criterion and that therefore the permit contains an illegal deferral of compliance with the permitting requirements of the CWA. Petition at 7. This argument, however, must fail. The Region correctly responds that the current BMPs are what the Region has determined to be MEP and that the evaluation and upgrade requirement is a "normal process of adjustment that the Region believes is necessary and appropriate to protect water quality and meet the MEP criterion." Region's Response at 19. The evaluation and upgrade requirement of the Permit, and Agency policy for MS4s, recognizes that knowledge concerning effective methods for controlling pollutant discharges and barriers restricting the ability to control pollutant discharges will necessarily change over time.

[30]To the extent that the Petitioners seek to rely on Agency guidance that lists specific kinds of control measures to be included in the permit application and permit (EPA, Guidance Manual for the Preparation of Part 2 of the NPDES Permit Applications for Discharges from Municipal Separate Storm Sewer Systems at 1-9, 6-1 to -25 (1992)) as somehow showing that the Region failed to include in this Permit required permit elements, the Petitioners have failed to show how the Region's response to comments on this issue did not adequately respond to their comments. More particularly, the Petitioners have not even identified what conditions that they believe should be included in the Permit under the guidance. Accordingly, we deny review on this ground.

The evaluation and upgrade requirement incorporates into the Permit a process for adjusting the Permit's terms and conditions to take into account new knowledge and changed circumstances affecting practicality of BMPs. This adjustment process does not imply that the Region has failed to properly assess MEP at the time of the Permit's issuance; it simply recognizes that what is practicable will change over time and that the Permit should be adaptable to such changes. In short, the Petitioners have not shown clear error in the Region's determination of what is "practicable" at the time of Permit issuance.

3. *Issue Five: Compliance within Three Years*

The Petitioners argue that the evaluation and upgrade process discussed above does not comply with the requirement of section 402(p)(4)(A) of the CWA to achieve actual implementation within three years. Petition at 7-8. This argument also must fail. The Region correctly notes that the Permit requires the District to *immediately* implement the BMPs that have been determined to be MEP at the time of Permit issuance and, in addition, the Permit requires the District to begin a process of continual upgrade and improvement of those BMPs. Region's Response at 21. Thus, the Permit does not authorize a deferred implementation of the BMPs that were determined to be MEP at the time of issuance of the Permit; instead, the Permit simply recognizes that what is practicable will change during the Permit's term and that upgrades of the Permit's requirements should not be delayed until the Permit is renewed. Accordingly, here again we deny review.

4. *Issues Six and Seven: The Implementation Plan and Cost Benefit Analysis*

The Petitioners note that the Permit requires the District to submit each year a SWMP implementation plan covering the work to be done in the next three years and to analyze that work "based on a cost benefit and affordability analysis." Petition at 8 (quoting Permit pt. III.E). The Petitioners argue that this "cost benefit and affordability analysis" is not found anywhere in the Agency's regulations or guidance documents. *Id.* at 8-9. Petitioners also argue that the "cost benefit and

affordability" analysis would allow the District to avoid BMP effluent limitations by claiming that it has inadequate resources to meet the implementation schedule. *Id.* at 9 (issue number seven). Specifically, they state that "compliance cannot be contingent on the willingness of the Mayor, the Control Board, or Congress to appropriate funds." *Id.* The Region argues that the Petitioners' concerns are unfounded. The Region argues that the "cost benefit and affordability analysis" is authorized by the CWA because it is meant to implement the "practicability" part of the MEP test in determining BMP requirements. Region's Response at 23. The Region also argues that the Permit specifically states that affordability is not a defense for compliance with the Permit's terms. *Id.* (citing Permit, pt. III.E).

We conclude that the Petitioners have not shown any clear error of fact or law or shown that a policy choice made by the Region with respect to the "cost benefit analysis" in part III.E of the Permit warrants review. We base this holding, in part, on our recognition that this Permit contains provisions establishing BMPs set forth in the current SWMP that were determined to be MEP at the time of the Permit's issuance, and it also contains provisions requiring upgrade of the current SWMP within three years of the Permit's issuance. In this context, the required Annual Report and SWMP Implementation Plan serve two functions: they provide reporting on compliance with the Permit's requirement to implement the current SWMP, and they provide information, analysis and preliminary proposals for terms to be included in the upgraded SWMP when the Permit is amended.[31] Information concerning a "cost benefit analysis" of the various BMPs is relevant for the process of amending the Permit with an upgraded SWMP and upgraded BMPs. As stated by the Region, "[i]n terms of establishing the permit requirements to reduce pollutants to the *maximum extent practicable,* the Region finds cost and affordability information useful in determining the degree of *practicability.*" Region's Response at 24.

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[31]As discussed below in Part II.E of this decision, we are remanding those portions of Part III.E of the Permit that purport to allow the Region to change the terms of the Permit by minor modification procedures.

This cost benefit information, however, is not relevant for determining compliance with the Permit's requirement that the District implement the BMPs in its current SWMP. By incorporating the District's current SWMP into the Permit, the Region has determined that the BMPs set forth in that SWMP are MEP. The Region, thus, has already determined that those BMPs are "practicable" and consideration of costs or benefits is not appropriate when considering whether the District has complied with the requirement to implement those BMPs. This distinction between the compliance-reporting and future planning functions of the Annual Report and Annual Implementation Plan is recognized and mandated by the Permit's condition that states that "[a]ffordability cannot be used as a defense for noncompliance." Permit pt. III.E. Accordingly, we see no clear error in the Region's decision to require that the District's Annual Implementation Plan provide information regarding the costs and benefits of the various BMPs covered by the plan, and we deny review of this condition of the Permit.

E. *Issue Eight: Modifications of the Permit*

Petitioners argue that the Permit "illegally authorizes substantive changes in permit requirements without a formal permit revision." Petition at 9. In its Response, the Region "notifies the Board of the Region's proposal to amend the permit to address this issue and that such amendment would remove the issue from this appeal in accordance with 40 C.F.R. § 124.19(d)." Region's Response at 25. Subsequently, on January 12, 2001, the Region re-issued the withdrawn portion of the Permit with several amendments. Thereafter, the Petitioners filed a petition for review of the amendments to the Permit. *See* Petition for Review and Motion to Consolidate (Feb. 2, 2001). The Petitioners also filed a supplemental brief supporting their original Petition on this issue. *See* Supplemental Reply Based on Intervening Permit Modification. As noted above in Part I.B, we have consolidated the February 2001 petition with the original Petition, and will consider all related issues in this part of our analysis.

In their second petition, Petitioners recall that they had argued in the first Petition that the Permit would improperly allow eight types of

permit modifications to be made under the regulations governing *minor* modifications. Second Petition at 5. The Petitioners listed these allegedly improper modifications in eight categories. Petitioners argue that all of the types of modifications identified in its original list are major modifications that must comply with the more stringent requirements for formal permit revisions, including public notice and comment. *Id.* at 7-9. Petitioners state that the Region's amendment to the Permit addressed only a portion of one of those eight types of modifications. *Id.* The types of modifications originally identified by Petitioners as improper minor modifications are as follows:

> a. Changes in deadlines for submission of Annual Review, Annual Report, Annual Implementation Plan, and Upgraded SWMP (Permit pt. III.A).
> b. Changes in deadlines for implementing outfall monitoring and implementing upgraded SWMP (Permit pt. III.A).
> c. Extension of time for implementing illicit discharge program (Permit pt. III.B.10, at 22).
> d. EPA approval of schedule for developing and implementing an enforcement plan and approval of the plan itself (Permit pt. III.B.11, at 22-23).
> e. EPA determination of minimum levels of effort required for additional SWMP program activities needed to meet requirements of EPA rules (Permit pt. III.B.12, at 25).
> f. EPA approval, disapproval or revision of Annual Report and Annual Implementation Plan, and upgraded SWMP (Permit pt. III.E, at 29).
> g. Other program modifications (Permit pt. III.H, at 30).
> h. Changes in monitoring locations from those specified in the Permit (Permit pt. IV.A.1, at 34; pt. VIII.A, at 45; pt. IX.C, at 49).

Second Petition at 4; *see also id.* at 7; Petition at 9-10. Petitioners recognize that the Region's amendment to the Permit requires that EPA approval of the upgraded SWMP (a part of item (f) in the list) be subject

to major modification procedures of 40 C.F.R.§ 122.62. Second Petition at 5. The Petitioners continue to argue that all of the remaining modifications contemplated by these eight categories, including the remnant of category (f) not changed by the Region's amendment, are also major modifications that cannot be made under the minor modification procedures. Petitioners also specifically argue that any changes in interim compliance dates cannot extend the date of compliance more than 120 days if implemented under the minor modification provisions of 40 C.F.R. § 122.63 and that any longer extensions can only be accomplished by modification under the procedures of section 122.62.

The Region, in contrast, argues that all of the modifications at issue fall within the ambit of permissible minor modifications under 40 C.F.R. § 122.63. *See* Region III's Response to Petition for Review at 7-8 (Mar. 28, 2001) ("Region's Second Response"). With respect to the issue of extensions of interim compliance dates, the Region argues that "[w]hile the Permit does not explicitly limit such extensions to the 120 days allowed by the regulations, the Permit requires that such revisions be 'in accordance with 40 C.F.R. § 122.63,' which sets forth such a requirement for interim compliance dates." Region's Second Response at 8. The Region goes on to argue that the modifications challenged by Petitioner in its categories (a), (b), (c) and (d) are interim compliance date changes falling within the scope of section 122.63. *Id.* at 10-12. The Region maintains that the modifications challenged by Petitioner in its categories (e) and (f) are merely the proper exercise of "review and approval" of various reports and implementation plans and that such oversight is properly part of the Region's duties in administering this Permit. *Id.* at 12-13.[32] The Region argues that the modification addressed in Petitioners' category (g) "only lays out the procedures by which the SWMP modifications will be implemented by the District in context with the compliance schedule discussed above. By itself this provision has no substantive effect." *Id.* at 13. With respect to Petitioners' final category concerning changes in monitoring locations

[32]The Region raises a similar argument regarding category (d) to the extent that Petitioners object to interim "approvals" in that category. Region's Second Response at 11.

(Petitioners' category (h)), the Region argues that "there is nothing in 40 C.F.R. § 122.63 that would prohibit EPA from authorizing change in monitoring locations for MS4 compliance purposes." *Id.* The Region also argues that allowing the District to select other equally representative outfalls for monitoring is a reasonable exercise of its authority to monitor a complex and dynamic permit. *Id.* at 14.

We begin with the regulatory text. Section 122.63, which governs minor modifications, provides as follows:

> Upon the consent of the permittee, the Director may modify a permit to make the corrections or allowances for changes in the permitted activity listed in this section, without following the procedures of part 124. *Any permit modification not processed as a minor modification under this section must be made for cause and with part 124 draft permit and public notice as required in § 122.62.* Minor modifications may *only*:
>
> (a) Correct typographical errors;
>
> (b) Require more frequent monitoring or reporting by the permittee;
>
> (c) Change an interim compliance date in a schedule of compliance, provided the new date is not more than 120 days after the date specified in the existing permit and does not interfere with attainment of the final compliance date requirement; or
>
> (d) Allow for a change in ownership or operational control of a facility where the Director determines that no other change in the permit is necessary, provided that a written agreement containing a specific date for transfer of permit responsibility, coverage, and liability between the current and new permittees has been submitted to the Director.
>
> (e) (1) Change the construction schedule for a discharger which is a new source. No such change shall affect a discharger's obligation to have all pollution

> control equipment installed and in operation prior to discharge under § 122.29.
>
> (2) Delete a point source outfall when the discharge from that outfall is terminated and does not result in discharge of pollutants from other outfalls except in accordance with permit limits.
>
> (f) [Reserved]
>
> (g) Incorporate conditions of a POTW pretreatment program * * * as enforceable conditions of the POTW's permits.

40 C.F.R. § 122.63(a) - (g) (2001) (emphasis added). Significantly, this regulation allows changes to the Permit without formal notice and comment procedures "only" when the changes fall within the listed categories, and it expressly requires all other modifications to be made pursuant to the formal procedures of section 122.62.

With respect to the narrow issue of whether the Permit authorizes extensions of interim compliance dates that are longer than 120 days, we conclude that the better interpretation of the Permit is one that reconciles the text of the Permit with the applicable rules. Thus, we adopt the Region's interpretation that the reference in the Permit to 40 C.F.R. § 122.63 serves to limit the allowable extensions of interim compliance dates undertaken as minor modifications to "not more than 120 days after the date specified in the existing permit and [provided that it] does not interfere with attainment of the final compliance date requirement." 40 C.F.R. § 122.63(c) (2001). In addition, we also adopt the Region's interpretation that Part III.H of the Permit (Petitioners' category (g)) "[b]y itself * * * has no substantive effect." Regions' Second Response at 13. Thus, Part III.H may not be relied upon as independent authority for modifying the Permit; rather authority for a proposed modification must be provided elsewhere in the Permit or in the applicable regulation. With respect to both of these issues, our interpretation of the Permit's terms will be binding on the Region in implementing the permit. *See Irving MS4*, slip op. at 26 n.20, 10 E.A.D. __ ("[B]ecause we serve as the final decision maker for the Agency in this matter, our interpretation[s] will be binding on the Region in its implementation of the permit").

Next, we consider whether the Region is correct that the modifications challenged by Petitioner in its categories (a), (b) and (c) are interim compliance date changes falling within the scope of section 122.63(c). *See* Region's Second Response at 10-13. That section authorizes the minor modification procedures to be used to change "an interim compliance date in a schedule of compliance." 40 C.F.R. § 122.63(c) (2001). Thus, in analyzing the issues raised by Petitioner and the Region's response, we first must determine whether the changes authorized by the Permit in Petitioners' categories (a), (b) and (c) are changes to interim compliance dates in a "schedule of compliance."

The term "schedule of compliance" is defined by the regulations to mean "a schedule of remedial measures included in a 'permit,' including an enforceable sequence of interim requirements (for example, actions, operations, or milestone events) leading to compliance with the CWA and regulations." 40 C.F.R. § 122.2 (2001). Schedules of compliance are required to be included as conditions of a permit "to provide for and assure compliance with all applicable requirements of CWA and regulations." *Id.* § 122.43(a). "Schedules of compliance" are governed by 40 C.F.R. § 122.47, which requires, among other things, that a schedule of compliance "shall require compliance as soon as possible, but not later than the applicable statutory deadline under the CWA." *Id.* § 122.47(a)(1).

In the present case, Part III.A of the Permit is captioned "Compliance Schedule." In that part of the Permit, there are various substantive requirements leading to the implementation of an upgraded SWMP and a schedule of "deadlines" for steps in that process. In particular, deadlines are set for "First Annual Report," "Implement outfall monitoring," "First Annual Implementation Plan," submission of "Upgraded SWMP," and "Implement Upgraded SWMP." Permit pt. III.A, tbl. 1. Part III.A of the Permit also states that "the requirements in Table 2 in Part III.B of this permit are to be used in development of the upgraded SWMP" and that "[t]he District's November 4, 1998 SWMP (or revised/upgraded SWMP) is also incorporated by reference into this permit." Permit pt. III.A at 6. Both the substantive requirements set forth in Part III.A of the Permit and the requirements in Table 2 in

Part III.B of the Permit appear to be "schedule[s] of remedial measures" fitting the regulatory definition of "schedule of compliance." 40 C.F.R. § 122.2 (2001). In addition, these deadlines appear to be "enforceable sequence[s] of interim requirements (for example, actions, operations, or milestone events) leading to compliance with the CWA and regulations." Thus, we conclude that the Petitioners have failed to show any clear error of fact or law, or important policy decision, warranting review of the Region's decision to characterize the deadlines set forth in Part III.A as "interim compliance date[s] in a schedule of compliance" that may be modified as set forth in 40 C.F.R. § 122.63(c). Accordingly, as Petitioners' categories (a) and (b) list deadlines set forth in Part III.A, we decline to grant review of these portions of the Permit.

We also find credible the Region's argument that the deadlines identified by Petitioners in their category (c) are appropriately viewed as "interim compliance date[s] in a schedule of compliance" under 40 C.F.R. § 122.63(c). Category (c) refers to deadlines, and authorizations for extensions of such deadlines, that are set forth in Part III.B.10 of the Permit. These deadlines appear to be additional detailed sub-parts of the deadlines identified in the schedule of compliance set forth in Part III.A of the Permit. Accordingly, we decline review of Petitioners' category (c). We note, consistent with our holding above, that any extension of the deadlines set forth in Parts III.A and III.B.10 of the Permit may not be more than 120 days from the date in the existing Permit. 40 C.F.R. § 122.63(c) (2001).

We conclude, however, that the Petitioners have shown that the Region erred in approving a Permit condition that authorizes changes listed in Petitioners' categories (h) as minor modifications under section 122.63, and we conclude that Petitioners have raised substantial questions regarding the scope of changes authorized by the Permit conditions identified in Petitioners' categories (d), (e) and (f) that require clarification.

In Petitioners' category (h), they object to the Permit's conditions that authorize changes to the monitoring locations that are required by the Permit (Permit pts. IV.A.1, VIII.A, IX.A.5 & IX.C). The Region

them as meritorious,[33] and because the Region failed to make changes to the Permit or to otherwise address Petitioners' concerns regarding these waivers and exemptions, we are remanding this portion of the Permit to the Region to either make appropriate changes to the Permit or to explain why the Petitioners' comments do not merit changes to the Permit.

III. *CONCLUSION*

For the foregoing reasons, this matter is remanded to the Region for further proceedings consistent with this decision.

So ordered.

[33]Based on our review, there may be cause for treating these concerns as meritorious. Petitioners observe that 21 DCMR § 514.1 allows variances to requirements for land disturbing activities, erosion control requirements, and storm water control at construction sites, all of which are part of the storm water management activities incorporated as BMPs into the Permit. Petitioners' Reply at 12-13. In addition, Petitioners point out that the exemption provisions of 21 DCMR §§ 527.1 and 528 also apply to storm water management requirements incorporated as BMPs into the Permit. *Id.* at 13. It is not clear how these BMPs can be enforceable obligations of the Permit when the District's regulations that are also incorporated into the Permit grant the District the right to grant waivers and exemptions from these BMP requirements under standards that apparently are not found in federal law and without notice to the Region or the public. The Region should address these issues on remand, either by changes to the Permit or by an explanation of the Region's rationale for why these concerns do not warrant modifications to the Permit.

PRAIRIE RIVERS NETWORK, Petitioner, v. THE ILLINOISPOLLUTION CONTROL BOARD; THE ILLINOIS ENVIRONMENTAL PROTECTION AGENCY; and BLACKBEAUTY COAL COMPANY, Respondents.
NO. 4-01-0801

APPELLATE COURT OF ILLINOIS, FOURTH DISTRICT

2002 Ill. App. LEXIS 1244

July 17, 2002, Submitted
October 24, 2002, Filed

NOTICE:

[*1] THIS DECISION IS NOT FINAL UNTIL EXPIRATION OF THE 21 DAY PETITION FOR REHEARING PERIOD.

PRIOR HISTORY: Administrative Review of the Illinois Pollution Control Board. No. 01112.

DISPOSITION: Affirmed.
CASE SUMMARY

PROCEDURAL POSTURE: Petitioner conservationists sought review of a decision of respondent Illinois Pollution Control Board in which it refused to set aside a National Pollutant Discharge Elimination System (NPDES) permit issued to respondent coal company by respondent Illinois Environmental Protection Agency (IEPA). They argued primarily that the IEPA should have reopened public comment after significantly altering a draft permit.

OVERVIEW: Pursuant to *33 U.S.C.S. § 1342*, the federal Environmental Protection Agency had authorized the IEPA to administer its own NPDES permit program, according to its own rules, within the parameters of the Federal Water Pollution Control Act. Nothing in the authorizing federal statute required the IEPA to go beyond the requirement that it allow public participation to require it to reopen a public comment period. In the instant case, in fact, the final permit contained far greater limitations on the coal company's discharge of effluent into a creek than the draft permit had. The regulations promulgated pursuant to the Illinois Environmental Protection Act provided plentiful opportunities for public participation. Section 40(e) of that act, *415 Ill. Comp. Stat. Ann. 5/40(e)* (West 2000), further made it clear that it was the conservationists' burden to show irregularities in the issuance of the permit, and this they had failed to do. The other issues that the conservationists sought to raise were either moot or inadequately argued for review.

OUTCOME: The court affirmed the administrative decision.

CORE TERMS: regulation, public comment, issuance, Clean Water Act, public hearing, monitoring, administrator, public participation, tentative, revised, round, burden of proof, issuing, water, public notice, notice, third-party, tributary, storm, drastically, administer, guidelines, revision, prepare, third party, biological, unnamed, basin, tentative decision, permit application

CORE CONCEPTS -

Environmental Law: Environmental Quality Review
Environmental Law: Water Quality
The United States Environmental Protection Agency generally waives its right to review National Pollutant Discharge Elimination System permits issued by the Illinois Environmental Protection Agency to coal mine operators.

Environmental Law: Water Quality
The ultimate objective of the Federal Water Pollution Control Act (the Clean Water Act), as described at *33 U.S.C.S. § 1251*(a), is to restore and maintain the chemical, physical, and biological integrity of the nation's waters, and it establishes a permit program, the National Pollutant Discharge Elimination System (NPDES), to achieve this goal. Under this program, any

EXHIBIT B

pollutant discharge into navigable waters without an authorization permit is banned. Congress intended that much of this authority devolve to the states. *33 U.S.C.S. § 1251*(b). The Clean Water Act stipulates that any time after the promulgation of federal guidelines establishing the minimum elements of state permit programs, a state may submit a description of a proposed program, along with a statement from the state attorney general that state law provides adequate authority to carry out the program, for evaluation by the Administrator of the United States Environmental Protection Agency. If the state program satisfies the statutory requirements of *33 U.S.C.S. § 1342*(b), and the guidelines issued under *33 U.S.C.S. § 1314*(i), the Administrator must approve the program. The state then assumes primary responsibility for the issuance of permits and for the administration and enforcement of the NPDES program within its jurisdiction.

Environmental Law: Water Quality
See *415 Ill. Comp. Stat. Ann. 5/13(b)(1)* (West 2000).

Environmental Law: Water Quality
In Illinois, a party seeking a National Pollutant Discharge Elimination System permit must file an application with the Illinois Environmental Protection Agency (IEPA). 35 *Ill. Admin. Code tit. 35, § 309.103* (2002). If the application is complete, the IEPA prepares a tentative determination regarding the application, and if the agency intends to issue the permit, prepares a draft permit. *Ill. Admin. Code tit. 35, § 309.108* (2000).

Environmental Law: Water Quality
Upon receiving a National Pollutant Discharge Elimination System (NPDES) permit application, the Illinois Environmental Protection Agency (IEPA) must issue a public notice of the permit application and the agency's tentative determination to issue or deny the permit. *Ill. Admin. Code tit. 35, § 309.109* (2002). This notice must provide for a period of not less than 30 days for persons to submit public comments on the agency's tentative determination and, where applicable, on the draft permit. *Ill. Admin. Code tit. 35, § 309.109(b)* (2002), pursuant to which all comments shall be submitted to the agency and to the applicant and shall be retained by the agency and considered in the formulation of its final determinations with respect to the NPDES application. The IEPA also must provide notice of the permit application to other governmental agencies. *Ill. Admin. Code tit. 35, § 309.114* (2002).

Environmental Law: Water Quality
If the Illinois Environmental Protection Agency (IEPA) determines that there exists a significant degree of public interest in a proposed National Pollutant Discharge Elimination System (NPDES) permit, the agency shall hold a public hearing on the issuance or denial of the permit. *Ill. Admin. Code tit. 35, § 309.115(a)* (2002). Following the public hearing, the agency may make such modifications in the terms and conditions of proposed permits as may be appropriate. *Ill. Admin. Code tit. 35, § 309.119* (2002). The IEPA must transmit to the regional administrator of the United States Environmental Protection Agency for his approval a copy of the permit proposed to be issued unless the regional administrator has waived his right to receive and review permits of its class. *Ill. Admin. Code tit. 35, § 309.119* (2002). The IEPA also must provide a notice of such transmission to the applicant, to any person who participates in the public hearing, to any person who requested a public hearing, and to appropriate persons on the mailing list established under *Ill. Admin. Code tit. 35, §§ 309.109-*309.112. Such notice shall briefly indicate any significant changes that were made from terms and conditions set forth in the draft permit. *Ill. Admin. Code tit. 35, § 309.119* (2002).

Environmental Law: Water Quality
After conducting a hearing on an application for a National Pollutant Discharge Elimination System permit, the Illinois Environmental Protection Agency (IEPA) must issue a responsiveness summary, addressing comments made during the public hearing. *Ill. Admin. Code tit. 35, § 166.192* (2002). If the IEPA does not hold a public hearing after the close of the comment period, the agency must, after evaluation of any comments which may have been received, either issue or deny the permit.

Governments: Legislation: Interpretation
In cases involving the interpretation of a statute by an agency charged with administering it, the agency's interpretation is afforded considerable deference, but it is not binding on the court and will be rejected if erroneous.

Governments: Legislation: Interpretation
The cardinal rule of statutory construction is to ascertain and give effect to the intent of the legislature.

Governments: Legislation: Interpretation
The words of a statute are given their plain and commonly understood meanings.

Governments: Legislation: Interpretation
Only when the meaning of the enactment is unclear from the statutory language will the court look beyond the language and resort to aids for construction.

Governments: Legislation: Interpretation
A court should not depart from the language of the statute by reading into it exceptions, limitations, or conditions that conflict with the intent of the legislature.

Environmental Law: Water Quality
Administrative Law: Agency Adjudication: Review of Initial Decisions
See Illinois Environmental Protection Act § 40(e)(1), (3), *415 Ill. Comp. Stat. Ann. 5/40(e)(1)*, (3) (West 2000).

Governments: Legislation: Interpretation
The best evidence of legislative intent is the statutory language itself, which must be given its plain and ordinary meaning.

Environmental Law: Water Quality
When the petitioner in a National Pollutant Discharge Elimination System permit appeal is the permit applicant, the petitioner has the burden of proving that the requested permit would not violate the Illinois Environmental Protection Act or the regulations of the Illinois Pollution Control Board. The scope of this burden does not change when the petitioner is a third party challenging the issuance of a permit. Thus, a third-party petitioner must show that the permit, as issued, would violate the Act or the Board's regulations.

Environmental Law: Water Quality
Administrative Law: Agency Rulemaking: State Proceedings
Pursuant to Federal Water Pollution Control Act (Clean Water Act) § 1342(b)(3), *33 U.S.C.S. § 1342*(b)(3), any state desiring to administer its own National Pollutant Discharge Elimination System (NPDES) permit program must demonstrate that it has adequate authority to insure that the public receives notice of each application for a permit and to provide an opportunity for public hearing before a ruling on each such application. This public participation requirement for draft permits is specifically set forth at 40 C.F.R. §§ 124.6, 124.10, 124.11, 124.12 (2000). Notably absent from the Clean Water Act's requirements for state NPDES programs is any requirement that such programs include provisions for the reopening of the public comment period or the preparation of a new draft permit based on information submitted during the initial comment period.

Environmental Law: Water Quality
Because the United States Environmental Protection Agency (USEPA) has approved the Illinois National Pollutant Discharge Elimination System (NPDES) permit program as complying with the Federal Water Pollution Control Act (Clean Water Act), challenges to the issuance by the Illinois Environmental Protection Agency (IEPA) of an NPDES permit must be evaluated solely on the basis of applicable provisions of the Illinois Environmental Protection Act and state regulations. To the extent that a challenger believes that the Illinois NPDES permit program does not conform to the applicable provisions of the Clean Water Act, it may challenge the USEPA approval of the Illinois program.

Environmental Law: Water Quality
See *Ill. Admin. Code tit. 35, § 309.119* (2002).

Administrative Law: Agency Rulemaking: Rule Application & Interpretation
In general, administrative agencies are required to apply their rules as written, without making ad hoc exceptions in adjudications of particular cases.

Administrative Law: Separation & Delegation of Power: Legislative Controls
Agencies only have the power given to them through enabling legislation.

Environmental Law: Water Quality
Section 39 of the Illinois Environmental Protection Act, *415 Ill. Comp. Stat. Ann. 5/39(a)* (West 2000), explicitly provides that in granting National Pollutant Discharge Elimination System permits, the Illinois Environmental Protection Agency may impose such conditions as may be necessary to accomplish the purposes of that Act, and as are not inconsistent with the regulations promulgated by the Illinois Pollution Control Board thereunder.

Environmental Law: Water Quality
Administrative Law: Agency Rulemaking: State Proceedings
Any person may submit a regulatory proposal for the adoption, amendment, or repeal of a regulation. *415 Ill. Comp. Stat. Ann. 5/27* (West 2000); *Ill. Admin. Code tit. 35, § 102.200* (2002).

Civil Procedure: Justiciability: Mootness
When an opinion on a question of law cannot affect the result as to the parties or controversy in the case before it, a court should not resolve the question merely for the sake of setting a precedent to govern potential future cases. However, in certain, rare cases, a moot issue may be considered where the magnitude or immediacy of the interests involved warrants action by the court or where the issue is likely to recur but unlikely to last long enough to allow appellate review to take place because of the intrinsically short-lived nature of the controversies.

Civil Procedure: Appeals: Briefs
Civil Procedure: Appeals: Records on Appeal
It is a rudimentary rule of appellate practice that an appellant may not make a point merely by stating it without presenting any argument in support. Failure to cite to relevant authority forfeits an issue on appeal. Strict adherence to the requirement of citing relevant

pages of the record is necessary to expedite and facilitate the administration of justice.

COUNSEL: For Prairie Rivers Network, Petitioner/Appellant: Albert Ettinger, Environmental Law & Policy Center, Chicago, IL. ARGUER: For Appellant: Albert Ettinger.

For Pollution Control Board, RELATED NAME: Environmental Protection Agency, Respondent/Appellee: Honorable James E. Ryan, Attorney General State of Illinois, Chicago, IL, Joel D. Bertocchi, Solicitor General, Chicago, IL, Diane M. Potts, Assistant Attorney General, Chicago, IL. ARGUER: For Appellee: Diane M. Potts.

For Black Beauty Coal Company, Respondent/Appellee: W. C. Blanton, Blackwell Sanders Peper Martin LLP, Kansas City, MO.
For Vermilion Coal Company, Amicus Curiae: Fred L. Hubbard, Attorney at Law, Danville, IL.

For Ill. Environmental Regulatory Group, Amicus Curiae: Thomas G. Safley, Hodge Dwyer Zeman, Springfield, IL, Cassandra I. Karimi, Hodge Dwyer Zeman, Springfield, IL, Robert A. Messina, Ill. Environmental Regulatory Group, Springfield, IL.

JUDGES: JUSTICE ROBERT J. STEIGMANN delivered the opinion of the court. Honorable[*2] John T. McCullough, J. - CONCUR, Honorable John W. Turner, J. - CONCUR.

OPINIONBY: Robert J. Steigmann

OPINION: JUSTICE STEIGMANN delivered the opinion of the court:

In December 2000, respondent, the Illinois Environmental Protection Agency (IEPA or agency), issued a final National Pollutant Discharge Elimination System (NPDES) permit to respondent Black Beauty Coal Company (Black Beauty). In January 2001, petitioner, Prairie Rivers Network (Prairie Rivers) , a river conservation group, filed a petition with respondent, the Illinois Pollution Control Board (Board), requesting that the Board set aside the final NPDES permit issued to Black Beauty. In August 2001, the Board denied Prairie Rivers' petition and affirmed the IEPA's issuance of the final permit.

Prairie Rivers appeals, arguing that the Board erred by denying Prairie Rivers' petition because (1) the IEPA failed to provide it with a meaningful opportunity to participate in the final NPDES permit-writing process; (2) the final permit did not include certain required conditions; and (3) the IEPA improperly relied on documents produced by Black Beauty after the public comment period. We affirm.

I. BACKGROUND

Vermilion Grove Mine is[*3] a new coal mine located a few miles southeast of Georgetown, Illinois. Black Beauty leases the Vermilion Grove Mine from Vermilion Coal. In May 2000, the IEPA received Black Beauty's "Application for Surface Coal Mining and Reclamation Operations Permit," in which Black Beauty sought an NPDES permit to discharge groundwater and storm water into an unnamed tributary of the Little Vermilion River. Black Beauty's plans showed that it intended to (1) drill a hole in the ground to establish the mine entrance, (2) create air shafts for ventilation, (3) establish sediment basins to control drainage in the disturbed areas, and (4) build a preparation plant, a rail loop and load-out facility, and an office building. According to the plan, the coal would be moved by conveyors from the underground mine to a processing area, where it would be cleaned, screened, and crushed. All storm water runoff from the mine would be collected into three connected basins (designated as "003," "003A," and "003B"). In the event that the basin system reached its capacity due to heavy rainfall, the water that could not be held in the basins would be diverted through a discharge point (outfall 003) into the unnamed[*4] tributary.

On August 4, 2000, the IEPA issued a public notice, pursuant to *section 309.109 of Title 35 of the Illinois Administrative Code* (Code) (*35 Ill. Adm. Code § 309.109* (Conway Greene CD-ROM June 2002)), that after reviewing Black Beauty's application, the agency had tentatively decided to issue Black Beauty an NPDES permit. The public notice also included a copy of the draft NPDES permit.

Although the United States Environmental Protection Agency (US EPA) has generally waived its right to review NPDES permits issued by the IEPA to coal mine operators, on August 29, 2000, the US EPA exercised its preemptive rights under section 123.44 (a) (1) of the Code of Federal Regulations (40 C.F.R. § 123.44(a) (1) (2000)) and requested 90 days to review the draft permit.

Based on the degree of public interest in its tentative decision, the IEPA determined that a public hearing was required under section 309.115 of Title 35 of the Code (*35 Ill. Adm. Code § 309.115* (Conway Greene CD-ROM June 2002)). On September 20, 2000, the agency and the Illinois Department of Natural Resources conducted[*5] a public meeting at Georgetown-Ridge Farm High School to inform the public about the proposed permit and prepare those citizens who planned on participating

in the subsequent public hearing. On September 27, 2000, a public hearing on the draft permit was held at the Georgetown-Ridge Farm High School. Prairie Rivers attended and participated in both the public meeting and the hearing.

On October 6, 2000, in response to concerns raised at the public hearing and other comments on the draft permit, an IEPA employee asked Black Beauty to provide the agency with additional information regarding the permit. In response, Black Beauty hired a consultant, Advent Group, Inc. (Advent), to perform a study and prepare a report. On October 20, 2000, Advent issued its report, in which Advent's scientists concluded that the anticipated infrequent discharge through outfall 003, which would only occur during significant rainfall, would not harm the environment.

The public comment period on the IEPA's tentative decision closed on October 27, 2000. During the public comment period, several agencies and groups submitted comments regarding the IEPA's tentative decision and suggested changes to the draft[*6] NPDES permit. On October 27, 2000, Prairie Rivers submitted comments that criticized the draft permit and advocated for stringent monitoring conditions.

On October 30, 2000, the US EPA objected to the draft NPDES permit. The IEPA considered all input and suggested changes to the draft permit, discussed and reached a consensus with the US EPA, and developed a final NPDES permit. On December 22, 2000, the US EPA withdrew its objection to the draft permit and approved the final permit. On December 27, 2000, the IEPA issued the final permit and issued a public notice of its decision and a responsive summary, which addressed all concerns raised by citizens and organizations, including Prairie Rivers and the US EPA.

The final NPDES permit issued to Black Beauty was generally more restrictive and contained more conditions than the draft permit. In particular, the final permit included the following changes: (1) the effluent limitation for sulfate was reduced to a more restrictive level (1,000 milligrams per liter, as compared to the previous 3,500 milligrams per liter); (2) the potential for Black Beauty to avoid sulfate and chloride monitoring was eliminated; (3) discharge monitoring requirements[*7] were increased from one sample per storm water discharge event (with a total requirement of three per quarter), to daily monitoring of all storm water discharge events; (4) all references to mine discharges being exempt from water quality standards were removed; (5) additional sedimentation pond operation and maintenance restrictions were included; and (6) biological inventory and water quality monitoring of the Little Vermilion River and the unnamed tributary were added.

In January 2001, Prairie Rivers filed a petition with the Board, requesting that the Board set aside the final NPDES permit issued to Black Beauty. In that petition, Prairie Rivers alleged the following: (1) during the September 27, 2000, public hearing and during the public comment period, Prairie Rivers and its members identified legal and scientific flaws in the draft NPDES permit; (2) the final permit contained "certain conditions and limits that were not contained in the draft permit that was subject to public review"; (3) the final permit contained "most of the defects that were identified by [Prairie Rivers] in the draft permit"; (4) the final permit contained ambiguous provisions regarding monitoring and[*8] no operation plan was set forth regarding how provisions related to precipitation events would be implemented or enforced; (5) a proper antidegradation analysis had not been completed; and (6) Prairie Rivers' members "will be affected adversely when pollution discharged under the permit injures the ecology of the Little Vermilion watershed as a result of [the IEPA's] failure to require protective effluent limits, monitoring, antidegradation analysis and mixing zone delineation."

In May 2001, the Board conducted a hearing, at which the parties introduced evidence and presented oral argument. In addition, members of the public provided comments both during and after the hearing. Following the hearing, the parties submitted written briefs. In August 2001, the Board denied Prairie Rivers' petition and affirmed the IEPA's issuance of the final NPDES permit to Black Beauty.

In September 2001, Prairie Rivers filed a notice of appeal. This court has allowed the Illinois Environmental Regulatory Group and the Vermilion Coal Company to file briefs as amici curiae.

II. ANALYSIS

A. The Illinois NPDES Permit Program

"The history and goals of the Federal Water Pollution Control Act[*9] [(Clean Water Act)] and its amendments have been chronicled in numerous judicial opinions. See, e.g., *American Frozen Food Inst. v. Train, 176 U.S. App. D.C. 105, 111-22, 539 F.2d 107, 113-24 (1976); California v. EPA, 511 F.2d 963 (9th Cir. 1975).* Congress' ultimate objective was 'to restore and maintain the chemical, physical, and biological integrity of the Nation's waters,' [*(33 U.S.C. § 1251*(a) (1976))], and it established a permit program, the NPDES, to achieve this goal. Under this program, any pollutant discharge

into navigable waters without [a US] EPA authorization permit is banned, and the [US] EPA was instructed to make the pollution controls inherent in its permits increasingly stringent over time.

Although the administration and enforcement of the permit program initially was vested entirely in the [US] EPA, Congress intended that much of this authority would devolve to the states. [*33 U.S.C. § 1251*(b) (Supp. I 1977).] The Clean Water Act stipulates that any time after the promulgation of [US] EPA guidelines establishing the minimum elements of state permit programs, a state [*10]may submit a description of a proposed program, along with a statement from the state attorney general that state law provides adequate authority to carry out the program, for evaluation by the Administrator of the [US] EPA. If the state program satisfies the statutory requirements of section 402 (b), *33 U.S.C. § 1342*(b), and the guidelines issued under section 304(i), *33 U.S.C. § 1314*(i), the Administrator must approve the program. The state would then assume primary responsibility for the issuance of permits and for the administration and enforcement of the NPDES program within its jurisdiction." *Citizens for a Better Environment v. Environmental Protection Agency, 596 F.2d 720, 721-22 (7th Cir. 1979).*

In October 1977, the US EPA administrator approved Illinois's proposal to administer the NPDES program within Illinois. In *Citizens for a Better Environment, 596 F.2d at 724,* the Seventh Circuit Court of Appeals invalidated the administrator's approval of the Illinois NPDES permit program, on the ground that the US EPA had failed to promulgate regulations providing for public participation in[*11] state enforcement actions. In response, the US EPA promulgated such a regulation (40 C.F.R. § 123.27(d) (2000)), and Illinois later agreed to abide by it. In April 1981, the US EPA approved the revision to Illinois's NPDES program *(46 Fed. Reg. 24295-02 (1981)).*

Subpart A of part 309 of Title 35 of the Code, which was enacted by the Board (see In re NPDES Regulations, 14 PCB 661 (Ill. Pollution Control Board, December 5, 1974)), specifies that the IEPA must issue NPDES permits using the following procedures. See *415 ILCS 5/13(b)(1)* (West 2000) ("the Board shall adopt *** requirements, standards, and procedures which *** are necessary or appropriate to enable the State of Illinois to implement and participate in the [NPDES]"). First, a party seeking an NPDES permit must file an application with the IEPA (*35 Ill. Adm. Code § 309.103* (Conway Greene CD-ROM June 2002)). If the application is complete, the IEPA prepares a tentative determination regarding the application, and if the agency intends to issue the permit, prepares a draft permit (*35 Ill. Adm. Code § 309.108* (2000)). [*12]

Second, the IEPA must issue a public notice of the permit application and the agency's tentative determination to issue or deny the permit (*35 Ill. Adm. Code § 309.109* (Conway Greene CD-ROM June 2002)). This notice must provide for a period of not less than 30 days for persons to submit public comments on the agency's tentative determination and, where applicable, on the draft permit. See *35 Ill. Adm. Code § 309.109(b)* (Conway Greene CD-ROM June 2002) ("All comments shall be submitted to the agency and to the applicant" and "shall be retained by the agency and considered in the formulation of its final determinations with respect to the NPDES application"). The IEPA also must provide notice of the permit application to other governmental agencies (*35 Ill. Adm. Code § 309.114* (Conway Greene CD-ROM June 2002)).

Third, if the IEPA determines that "there exists a significant degree of public interest in the proposed permit," the agency "shall hold a public hearing on the issuance or denial" of the permit (*35 Ill. Adm. Code § 309.115(a)* (Conway Greene CD-ROM[*13] June 2002)). "Following the public hearing, the agency may make such modifications in the terms and conditions of proposed permits as may be appropriate." (Emphasis added.) *35 Ill. Adm. Code § 309.119* (Conway Greene CD-ROM June 2002). The IEPA must "transmit to the regional administrator [of the US EPA] for his approval a copy of the permit proposed to be issued unless the regional administrator has waived his right to receive and review permits of its class." *35 Ill. Adm. Code § 309.119* (Conway Greene CD-ROM June 2002). The IEPA also must

"provide a notice of such transmission to the applicant, to any person who participates in the public hearing, to any person who requested a public hearing, and to appropriate persons on the mailing list established under sections 309.109 through 309.112. Such notice shall briefly indicate any significant changes which were made from terms and conditions set forth in the draft permit." (Emphasis added.) *35 Ill. Adm. Code § 309.119* (Conway Greene CD-ROM June 2002).

In addition, the IEPA must issue a responsiveness summary, [*14] addressing comments made during the public hearing. *35 Ill. Adm. Code § 166.192* (Conway Greene CD-ROM June 2002).

If the IEPA does not hold a public hearing after the close of the comment period, the agency must, "after evaluation of any comments which may have been

received, either issue or deny the permit." *35 Ill. Adm. Code § 309.112* (Conway Greene CD-ROM June 2002).

B. Standard of Review

The issues raised on appeal relate to the interpretation of statutes and administrative rules.

"In cases involving the interpretation of a statute by an agency charged with administering it, the agency's interpretation is afforded considerable deference, but it is not binding on the court and will be rejected if erroneous. [Citation.] The cardinal rule of statutory construction is to ascertain and give effect to the intent of the legislature. [Citations.] The words of a statute are given their plain and commonly understood meanings. [Citation.] Only when the meaning of the enactment is unclear from the statutory language will the court look beyond the language and resort to aids for construction." *R.L. Polk & Co. v. Ryan, 296 Ill. App. 3d 132, 139-40, 694 N.E.2d 1027, 1033, 230 Ill. Dec. 749 (1998).*[*15]

See also *Gem Electronics of Monmouth, Inc. v. Department of Revenue, 183 Ill. 2d 470, 475, 702 N.E.2d 529, 532, 234 Ill. Dec. 189 (1998)* ("A court should not depart from the language of the statute by reading into it exceptions, limitations[,] or conditions that conflict with the intent of the legislature").

C. Burden of Proof in a Third-Party Appeal before the Board

Prairie Rivers first argues that the Board misapplied the burden of proof. Prairie Rivers concedes that the Board properly considered the burden of proof to lie with Prairie Rivers on substantive matters; however, Prairie Rivers claims that to the extent the Board held it to that standard regarding its procedural claims, the Board erred. We conclude that the Board properly determined that Prairie Rivers had the burden of proof in its third-party appeal before the Board.

Section 40(e) of the Illinois Environmental Protection Act (Act) provides, in pertinent part, as follows:

"(1) If the agency grants or denies a permit under subsection (b) of section 39 of this Act, a third party, other than the permit applicant or agency, may petition the Board within 35 days from the date of issuance[*16] of the agency's decision, for a hearing to contest the decision of the agency.

* * *

(3) If the Board determines that the petition is not duplicitous or frivolous and contains a satisfactory demonstration under subdivision (2) of this subsection, the Board shall hear the petition (i) in accordance with the terms of subsection (a) of this section and its procedural rules governing permit denial appeals and (ii) exclusively on the basis of the record before the agency. The burden of proof shall be on the petitioner. The agency and permit applicant shall be named co[]respondents." (Emphasis added.) *415 ILCS 5/40(e)* (West 2000).

As earlier discussed, the cardinal rule of statutory construction is to ascertain and give effect to the legislature's intent. The best evidence of legislative intent is the statutory language itself, which must be given its plain and ordinary meaning. In construing a statute, a court is not at liberty to depart from the plain language of the statute by reading into it exceptions, limitations, or conditions that the legislature did not express. *Lulay v. Lulay, 193 Ill. 2d 455, 466, 739 N.E.2d 521, 527, 250 Ill. Dec. 758 (2000).* [*17]

Section 40(e)(3) of the Act clearly provides that in a third-party appeal, the burden of proof lies with the petitioner --in this case, Prairie Rivers. When a petitioner in a permit appeal is the permit applicant, the petitioner has the burden of proving that the requested permit would not violate the Act or the Board's regulations. *Browning-Ferris Industries of Illinois, Inc. v. Pollution Control Board, 179 Ill. App. 3d 598, 601, 534 N.E.2d 616, 619, 128 Ill. Dec. 434 (1989).* The scope of this burden does not change when the petitioner is a third party challenging the issuance of a permit. Thus, a third-party petitioner must show that the permit, as issued, would violate the Act or the Board's regulations. See Damron v. Illinois Environmental Protection Agency, Illinois Pollution Control Bd. Op. 93-215 (April 21, 1994) (construing Board regulations and holding that when a third party challenges the issuance of a permit, it must show that the permit, as issued, would violate the Act or applicable regulations).

Prairie Rivers acknowledges that in connection with its procedural objections to the NPDES permit, the Board had to determine whether the IEPA complied[*18] with applicable procedural statutes and regulations in issuing the permit. However, Prairie Rivers then suggests that the Board's determination that " Prairie Rivers [had] the burden of proving that the permit, as issued, would violate the Act or Board regulations" (emphasis in original) raises a question as to whether the Board analyzed its procedural objections on some basis other than whether the record "show[ed] that the proper procedures were used in issuing the permit." We are not persuaded.

We agree with Black Beauty that in the context of a procedural challenge to the IEPA's issuance of a permit, Prairie Rivers has offered no plausible interpretation of the phrase "that the permit, as issued, would violate the Act or Board regulations" other than "was issued in violation of the applicable procedural statutory and regulatory provisions." In addition, the record belies Prairie Rivers' suggestion that the Board analyzed its procedural objections on some basis other than whether the IEPA issued the permit in violation of applicable procedural statutory and regulatory provisions. In rejecting Prairie Rivers' procedural challenge, the Board stated, in pertinent part, as follows: [*19]

"Illinois has specific regulations setting forth the procedures [the IEPA] must follow in issuing an NPDES permit. See *35 Ill. Adm. Code [§§]309.108*, 309.109, 309.115, and 309.119. [The IEPA] complied with these procedures. Prairie Rivers' arguments that [the IEPA] should have provided additional opportunities pursuant to [US EPA] guidelines and the [Clean Water Act] are not persuasive, because these federal procedures are inapplicable here."

D. Prairie Rivers' Claim That It Was Denied a Meaningful Opportunity To Participate in the Final Permit-Writing Process

Prairie Rivers next argues that the Board erred by denying Prairie Rivers' petition because the IEPA failed to provide it with a meaningful opportunity to participate in the final permit-writing process. Specifically, Prairie Rivers contends that, instead of issuing a final NPDES permit in response to comments the IEPA received on the original draft permit, the IEPA should have issued a second draft permit and provided Prairie Rivers and interested citizens an opportunity to comment upon the changes that had been made to the original draft permit. Prairie Rivers claims[*20] that the IEPA's failure to submit the "drastically revised permit" to a another round of public comment contravened (1) the public participation requirement of the Clean Water Act *(33 U.S.C. § 1251* et seq. (2000)); (2) Illinois case law; and (3) article XI of the Illinois Constitution (Ill. Const. 1970, art. XI). Prairie Rivers also claims that because the "Board permitting rules of part 309 [of Title 35 of the Code] do not attempt to delineate every possible scenario," the IEPA should be required to hold a second round of public comment when the final permit "substantially deviates" from the draft permit. We disagree.

1. The Clean Water Act

Prairie Rivers first contends that the IEPA's failure to submit the "drastically revised" final permit to a another round of public comment contravened the public participation requirement of the Clean Water Act *(33 U.S.C. § 1251* et seq. (2000)). We disagree.

Illinois administers the federal NPDES permit program in this state, pursuant to section 1342(b) of the Clean Water Act *(33 U.S.C. § 1342*(b) (2000)), and, as earlier noted, it has done so since the US[*21] EPA first approved the Illinois NPDES program in October 1977. However, that does not mean that either the IEPA or the Board directly administers the Clean Water Act in Illinois. Instead, it means only that Illinois has demonstrated to the US EPA's satisfaction that the Illinois NPDES program satisfies the statutory requirements of the Clean Water Act (see *33 U.S.C. § 1342*(b) (2000)) and the guidelines issued thereunder (see *33 U.S.C. § 1314*(i) (2000)). See *Citizens for a Better Environment, 596 F.2d at 722* (after the US EPA approves a state's NPDES permit program, the state then assumes "primary responsibility for the issuance of permits and for the administration and enforcement of the NPDES program within its jurisdiction").

Pursuant to section 1342(b)(3) of the Clean Water Act, any state desiring to administer its own NPDES permit program must demonstrate that it has adequate authority "to insure that the public receive[s] notice of each application for a permit and to provide an opportunity for public hearing before a ruling on each such application." *33 U.S.C. § 1342*(b) (3) (2000). [*22] This public participation requirement for draft permits is specifically set forth in sections 124.6 and 124.10 through 124.12 of the federal regulations. 40 C.F.R. §§ 124.6, 124.10, 124.11, 124.12 (2000). Notably absent from the Clean Water Act's requirements for state NPDES programs is any requirement that such programs include provisions for the reopening of the public comment period or the preparation of a new draft permit based on information submitted during the initial comment period. While section 124.14(b) of the Code of Federal Regulations authorizes a US EPA regional administrator to provide additional public participation under certain circumstances in connection with federal NPDES permit application processing (40 C.F.R. § 124.14(b) (2000)), state NPDES programs do not have to be administered in accordance with that section (see 40 C.F.R. § 123.25 (2000)). The federal mandate for public participation in the application process, in turn, is incorporated into the Illinois NPDES program in sections 309.109, 309.113, 309.115, 309.116, and 309.117 of Title 35 of the Code (*35 Ill. Adm. Code §§ 309.109*, 309.113, 309.115, 309.116, 309.117 (Conway [*23]Greene CD-ROM June 2002)).

Because the US EPA has approved the Illinois NPDES permit program as complying with the Clean Water Act,

Prairie Rivers' challenges to the IEPA's issuance of the NPDES permit to Black Beauty must be evaluated solely on the basis of applicable provisions of the Act and state regulations. To the extent that Prairie Rivers believes that the Illinois NPDES permit program does not conform to the applicable provisions of the Clean Water Act, Prairie Rivers may challenge the US EPA's approval of Illinois's program. See, e.g., *Hall v. United States Environmental Protection Agency, 273 F.3d 1146 (2001)* (in which an individual challenged the US EPA's approval of a revision to a county's air quality plan); *Citizens for a Better Environment, 596 F.2d at 722* (in which a public interest group challenged the US EPA's approval of the Illinois NPDES program).

2. Illinois Case Law

Prairie Rivers next contends that the Fifth District Appellate Court's decision in *Village of Sauget v. Pollution Control Board, 207 Ill. App. 3d 974, 566 N.E.2d 724, 152 Ill. Dec. 847 (1990)*, "requires that the permit be remanded to the agency. [*24] " Specifically, Prairie Rivers relies on Sauget to support its contention that the IEPA should have submitted the "drastically revised permit" to another round of public comment. We disagree.

In Sauget, the Village of Sauget (Sauget) applied for an NPDES permit for one of its wastewater treatment facilities (AD facility). In response to the application, the IEPA prepared a draft permit covering the AD facility and another facility, the P/C plant. The US EPA then informed the IEPA that the US EPA wished to comment on the draft permit. The US EPA later untimely commented on the draft permit in three letters to the IEPA, but did not provide those letters to Sauget. In addition, the IEPA did not provide Sauget the US EPA's final letter until about one month after the IEPA had received it. Less than two weeks later, the IEPA issued two final permits to Sauget, one for each facility. *Sauget, 207 Ill. App. 3d at 976, 566 N.E.2d at 726.*

Sauget and Monsanto Company (Monsanto), whose plant was a major industrial facility served by the AD facility, appealed the terms of both final permits to the Board. The Board determined that the P/C permit was void, and with regard [*25]to the AD facility permit, "struck some of the contested conditions, affirmed others, and ordered the remainder to be modified." *Sauget, 207 Ill. App. 3d at 977, 566 N.E.2d at 726.* Sauget and Monsanto then appealed the Board's ruling to the Fifth District Appellate Court. *Sauget, 207 Ill. App. 3d at 976-77, 566 N.E.2d at 726.*

On appeal, the Fifth District concluded that the US EPA's comments were untimely and the US EPA improperly failed to provide its comments on the draft permit to the applicant, Sauget, in violation of section 309.109(b) of Title 35 of the Code (*35 Ill. Adm. Code § 309.109(b)* (Conway Greene CD-ROM June 2002)), stating as follows:

"Section 309.109(b) of [Title 35 of] the [Code] states that comments submitted on tentative determinations shall be submitted to the IEPA and to the applicant. [Citation.] The [US] EPA has never submitted its comments to Sauget. Appellees do not contest Sauget's statement that Sauget first received a copy of the [US] EPA's final comment letter of February 14, 1986, on March 10, 1986, when the IEPA provided Sauget with a copy. Monsanto claims that the late notice [*26]of the [US] EPA'S comments effectively denied anyone an opportunity to respond to the additional permit conditions, particularly when the final NPDES permit, including the [US] EPA'S additional conditions, was issued March 21, 1986, only 11 days after Sauget received a copy of the [US] EPA's final comment letter.

***

Had the [US] EPA timely submitted its comments on the draft permit, and provided the appellants with notice of the same, a prepermit issuance hearing could have been requested. [Citations.] We recognize that a hearing pursuant to these regulations is discretionary with the IEPA, yet under the circumstances appellants were denied the opportunity to request that the IEPA exert such discretion. ***

More significant with regard to the issue at bar are the requirements of section 309.108. [Citation.] That section provides in part that if the IEPA's tentative determination is to issue the NPDES permit, that determination should at least include:

* * *

(3) A brief description of any other proposed special conditions which will have a significant impact upon the discharge.

(c) A statement of the basis for each of the permit conditions listed [*27]in section 308.108(b)."

(Emphases in original.) *Sauget, 207 Ill. App. 3d at 980-81, 566 N.E.2d at 728-29.*

Contrary to Prairie Rivers' contention, Sauget is inapposite. That case considered (1) the failure of an entity that submitted comments regarding a draft permit and the IEPA to provide those comments to a permit applicant, as required by section 309.109(b) of Title 35

of the Code (*35 Ill. Adm. Code § 309.109(b)* (Conway Greene CD-ROM June 2002)); and (2) the IEPA's resulting failure to include in the public notice of its tentative determination certain proposed conditions. The Sauget court did not address whether the IEPA must reopen the public comment period whenever it makes significant changes to a draft permit. Accordingly, the Fifth District's decision in Sauget does not, as Prairie Rivers claims, "require[] that the permit" issued to Black Beauty "be remanded to the agency."

3. Article XI of the Illinois Constitution

Although not set forth in a separate argument section, Prairie Rivers contends, in conclusory fashion, that (1) its right to meaningfully participate in the NPDES permit process is[*28] "also supported by article XI of the Illinois Constitution"; and (2) article XI "give[s] persons seeking clean water at least as much right to participate as those seeking permits to pollute" (see Ill. Const. 1970, art. XI). We disagree.

In *Landfill, Inc. v. Pollution Control Board, 74 Ill. 2d 541, 559, 387 N.E.2d 258, 265, 25 Ill. Dec. 602 (1978),* our supreme court rejected a party's argument that the IEPA's issuance of a landfill permit impinged on the third-party intervenors' constitutional right to a healthful environment under article XI of the Illinois Constitution (Ill. Const. 1970, art. XI). In so concluding, the court reasoned that the "constitutional argument [was] without merit in light of the statutorily established mechanism for persons not directly involved in the permit-application process to protect their interests." *Landfill, Inc., 74 Ill. 2d at 559, 387 N.E.2d at 265.* Similarly, in this case, Prairie Rivers' constitutional argument lacks merit in light of part 309 of Title 35 of the Code, which establishes a procedure for the public to participate in the issuance of NPDES permits.

4. Regulations Under Section 309, Title[*29] 35, of the Code

Last, Prairie Rivers does not dispute that the IEPA complied with the applicable state regulations in issuing the NPDES permit to Black Beauty. As we earlier discussed, section 309 of Title 35 of the Code authorizes the IEPA to make "significant changes" in a draft permit after public comment. See *35 Ill. Adm. Code § 309.119* (Conway Greene CD-ROM June 2002) ("following the public hearing, the agency may make such modifications in the terms and conditions of proposed permits as may be appropriate," and when the IEPA transmits a final permit to the US EPA for review, the agency must notify the applicant and other interested parties of "any significant changes which were made from terms and conditions set forth in the draft permit"). Nonetheless, Prairie Rivers contends that because the "Board permitting rules of part 309 [of Title 35 of the Code] do not attempt to delineate every possible scenario," the IEPA should be required to hold a second round of public comment when the final permit "substantially deviates" from the draft permit. We disagree.

In general, "administrative agencies are required to apply their rules as written, [*30] without making ad hoc exceptions in adjudications of particular cases." *Panhandle Eastern Pipe Line Co. v. Environmental Protection Agency, 314 Ill. App. 3d 296, 303, 734 N.E.2d 18, 23-24, 248 Ill. Dec. 310 (2000).* Prairie Rivers cites no authority for its claims that (1) the applicable regulations merely establish a floor for NPDES permitting procedures; and (2) the IEPA has inherent authority to afford the public whatever additional opportunities for participation the agency may see fit. Instead, as the Board and the IEPA point out, agencies only have the power given to them through enabling legislation (*Granite City Division of National Steel Co. v. Illinois Pollution Control Board, 155 Ill. 2d 149, 171, 613 N.E.2d 719, 729, 184 Ill. Dec. 402 (1993)),* and section 39 of the Act explicitly provides that in granting permits, the IEPA "may impose such conditions as may be necessary to accomplish the purposes of this Act, and as are not inconsistent with the regulations promulgated by the Board hereunder" (*415 ILCS 5/39 (a)* (West 2000)). See also *415 ILCS 5/39(b)* (West 1998) (the IEPA may adopt[*31] "filing requirements and procedures" for NPDES permit applications, which must be "consistent with the Act or regulations adopted by the Board"); *Peabody Coal Co. v. Pollution Control Board, 36 Ill. App. 3d 5, 20, 344 N.E.2d 279, 290 (1976)* (holding that the Board does not have authority to delegate its NPDES rule-making responsibility to the IEPA). Accordingly, we conclude that the IEPA was not required to issue a second draft permit and reopen the public comment period in direct contravention of applicable regulations.

In so concluding, we note that Prairie Rivers makes several policy-related arguments in support of its contention that when the final permit is a "drastically revised" version of the draft permit, the IEPA should issue a second draft permit and provide the public an opportunity to comment on the revised permit. In particular, Prairie Rivers asserts the following: (1) if the public is never allowed a second round of public comment, it "would eviscerate the public's right to participate in the NPDES permitting procedure so severely that Illinois could not maintain its NPDES program"; (2) when "additional comments should be allowed is a matter of judgment[*32] that requires gauging whether the revisions raise issues or questions that were not sufficiently aired in the comments on the

initial draft permit"; (3) even after a permit is revised to benefit certain parties, "serious questions may remain regarding the permit and the sufficiency or efficacy of the revisions"; and (4) the ability of a third party to appeal the issuance of a permit "does not replace the important benefits that can be gained from additional comments." Whatever merit these assertions may possess, the appellate court is not the forum to which they should be addressed. Instead, Prairie Rivers should address its proposed change in the regulations to the Board. See *415 ILCS 5/27* (West 2000); *35 Ill. Adm. Code § 102.200* (Conway Greene CD-ROM June 2002) ("any person may submit a regulatory proposal for the adoption, amendment, or repeal of a regulation").

E. Prairie Rivers' Claim That the Final Permit Did Not Include Certain Required Conditions

Prairie Rivers next argues that the IEPA failed to include in the final NPDES permit certain monitoring conditions required by the Clean Water Act and state regulations.[*33] Specifically, Prairie Rivers contends that the final permit improperly allowed Black Beauty to develop and submit the following items after the final permit was issued: (1) a biological inventory of the Little Vermilion River around the mine site; and (2) an operational plan to assure compliance with the condition set forth in the final permit that Black Beauty may discharge storm and groundwater only when there is a three-to-one ratio between the unnamed tributary flow and the discharge flow.

We conclude that this issue is moot. At the time of the May 2001 hearing, Black Beauty had (1) submitted to the IEPA a biological inventory, and (2) installed a staff gauge in the tributary to determine whether the three-to-one dilution ratio exists. See *In re Adoption of Walgreen, 186 Ill. 2d 362, 365, 710 N.E.2d 1226, 1227, 238 Ill. Dec. 124 (1999)* ("when an opinion on a question of law cannot affect the result as to the parties or controversy in the case before it, a court should not resolve the question merely for the sake of setting a precedent to govern potential future cases"); see also *First National Bank of Waukegan v. Kusper, 98 Ill. 2d 226, 235, 456 N.E.2d 7, 10, 74 Ill. Dec. 505 (1983)*[*34] (a court will not review cases merely to establish a precedent or guide future litigation).

However, in "certain, rare cases," a moot issue may be considered where "'the magnitude or immediacy of the interests involved warrant[s] action by the court' or where the issue is '"likely to recur but unlikely to last long enough to allow appellate review to take place because of the intrinsically short-lived nature of the controversies."'" *Dixon v. Chicago & North Western Transportation Co., 151 Ill. 2d 108, 117-18, 601 N.E.2d 704, 708, 176 Ill. Dec. 6 (1992)*, quoting *Kusper, 98 Ill. 2d at 235, 456 N.E.2d at 10-11*, quoting *People ex rel. Black v. Dukes, 96 Ill. 2d 273, 277-78, 449 N.E.2d 856, 858, 70 Ill. Dec. 509 (1983)*. The present issue does not fall within either exception to the mootness doctrine. Indeed, Prairie Rivers does not contend that an exception to the mootness doctrine applies.

F. The IEPA's Alleged Reliance on Documents Produced by Black Beauty Following the Public Comment Period

Last, Prairie Rivers argues that the Board erred by denying Prairie Rivers' petition because the TEPA improperly relied on "key documents" produced[*35] by Black Beauty after the close of the public comment period.

Initially, we note that Prairie Rivers has failed to cite any authority in support of its position. In addition, although Prairie Rivers claims that the IEPA relied on a "portion" of the alleged "key documents" "to justify issuance of the permit," it fails to support its assertion with logical and reasoned argument or citation to relevant pages of the record. Prairie Rivers cites the page of the record where one of the alleged key documents can be found; however, it has failed to direct our attention to the other alleged key document or documents. Neither does it cite any page of the record indicating that the IEPA actually relied on the documents. It is a rudimentary rule of appellate practice that an appellant may not make a point merely by stating it without presenting any argument in support. See *Rivera v. Arana, 255 Ill. Dec. 333, 322 Ill. App. 3d 641, 648, 749 N.E.2d 434, 440 (2001)* (failure to cite to relevant authority forfeits an issue on appeal).

Strict adherence to the requirement of citing relevant pages of the record is necessary to expedite and facilitate the administration of justice. *Maun v. Department of Professional Regulation, 299 Ill. App. 3d 388, 399, 701 N.E.2d 791, 799, 233 Ill. Dec. 726 (1998)*;[*36] *Sohaey v. Van Cura, 240 Ill. App. 3d 266, 273, 607 N.E.2d 253, 260, 180 Ill. Dec. 359 (1992)*. With regard to this contention, defendant's brief fails to comply with the requirements set forth in Supreme Court Rule 341(e) (7) (188 Ill. 2d R. 341(e) (7)), which provides that the argument section of an appellant's brief "shall contain the contentions of the appellant and the reasons therefor, with citation of the authorities and the pages of the record relied on. Evidence shall not be copied at length, but reference shall be made to the pages of the record on appeal *** where evidence may be found." Arguments that do not satisfy Rule 341(e) (7) do not merit consideration on appeal (*Maun, 299 Ill. App. 3d at 399, 701 N.E.2d at 799)* and may be rejected for that

reason alone (*Calomino v. Board of Fire & Police Commissioners, 273 Ill. App. 3d 494, 501, 652 N.E.2d 1126, 1132, 210 Ill. Dec. 150 (1995))*. In light of Prairie it has forfeited this issue on appeal.

Moreover, even assuming that the IEPA relied on documents submitted by Black Beauty after the public comment period, our research has not revealed any applicable state law or regulation[*37] that prohibits the IEPA from seeking information from an NPDES permit applicant after the public comment period or considering such information in issuing a final permit.

III. CONCLUSION

For the reasons stated, we affirm the Board's decision.

Affirmed.

McCULLOUGH, P.J., and TURNER, J., concur.

United States
Environmental Protection
Agency

Office of Water
(4203)

EPA 833-B-96-003
December 1996

EPA

U.S. EPA NPDES Permit Writers' Manual

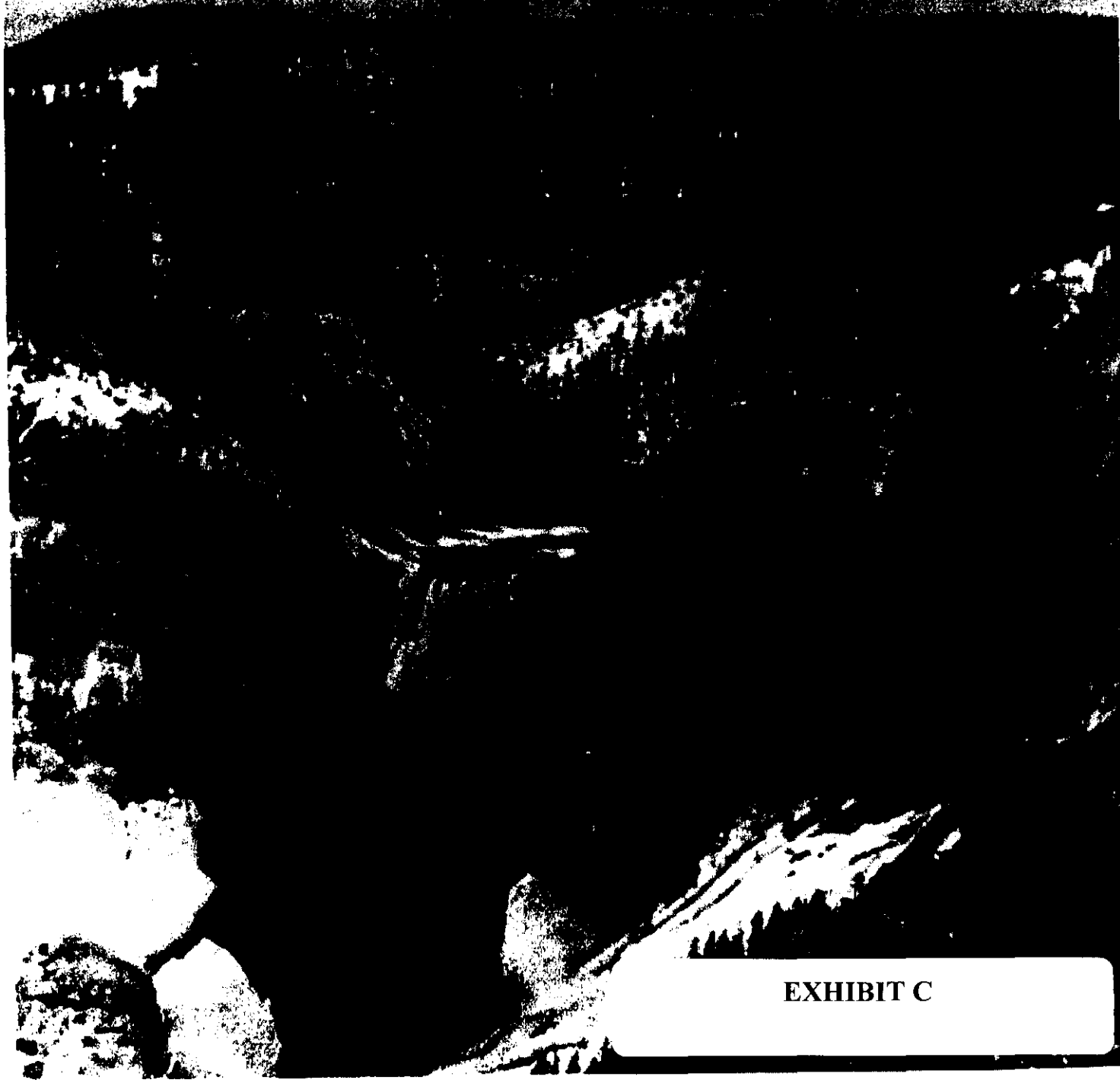


EXHIBIT C

Chapter 1

Introduction

The purpose of this manual is to provide the basic regulatory framework and technical considerations that support the development of wastewater discharge permits as required under the National Pollutant Discharge Elimination System (NPDES) Program. It is designed for new permit writers, but may also serve as a reference for experienced permit writers. In addition, the manual will serve as a useful source of information for anyone interested in learning about the legal process and technical aspects of developing NPDES permits. This manual updates the *Training Manual for NPDES Permit Writers.*[1]

It is recognized that each United States Environmental Protection Agency (EPA) Regional office or approved State will have NPDES permitting procedures adapted to address local situations. Therefore, it is the objective of this manual to explain the minimum national NPDES Program elements common to any State or Regional office that issues NPDES permits. The specific objectives and functions of this training manual are to:

- Provide an overview of the scope and regulatory framework of the NPDES Program

[1]USEPA (1993). *Training Manual for NPDES Permit Writers.* EPA/B-93-003. Office of Wastewater Management.

- Describe the components of a permit and provide an overview of the permitting process
- Describe the different types of effluent limits and the legal and technical considerations involved in limit development
- Describe other permit conditions including:
  - special conditions
  - standard conditions
  - monitoring and reporting requirements
- Describe other permitting considerations including:
  - variances
  - anti-backsliding
  - other applicable statutes (e.g., National Environmental Policy Act, Endangered Species Act, National Historic Preservation Act)
- Explain the administrative process for issuing, modifying, revoking and terminating NPDES permits.

This manual is not intended to be a stand-alone reference document. Instead, it is intended to establish the framework for NPDES permit development and should be supplemented, where necessary, by additional EPA and State guidance applicable to specific types of dischargers and circumstances. To this end, the *NPDES Permit Writers' Manual* identifies and references other guidance documents throughout the text and provides information on how these documents can be obtained. **Appendix D** of this manual provides the reader with detailed information on how to obtain comprehensive lists of available EPA publications and how these documents can be ordered.

1.1 History and Evolution of the NPDES Program

The NPDES Program has evolved from numerous legislative initiatives dating back to the mid-1960s. In 1965, Congress enacted legislation requiring States to develop water quality standards for all interstate waters by 1967. However, despite increasing public concern and increased Federal spending, only about 50 percent of the States had established water quality standards by 1971. Enforcement of the Federal legislation was minimal because the burden of proof lay with the regulatory agencies in demonstrating that a water quality problem had implications for human health or violated water quality standards. Specifically, the agencies had to demonstrate a direct link between a discharger and a water quality problem in order to enforce against a discharger. The lack of success in developing adequate water

quality standards programs, combined with ineffective enforcement of Federal water pollution legislation prompted the Federal government to advance the 1970 Refuse Act Permit Program (RAPP), under the Rivers and Harbors Act of 1899, as a vehicle to control water pollution.

RAPP required any facility that discharged wastes into public waterways to obtain a Federal permit specifying abatement requirements from the United States Army Corps of Engineers. The Administrator of EPA endorsed the joint program with the Corps of Engineers, and on December 23, 1970, the permit program was mandated through Presidential Order. EPA and the Corps of Engineers rapidly began to prepare the administrative and technical basis for the permit program. However, in December 1971, RAPP was struck down by a decision of the Federal District Court in Ohio (*Kalur v. Resor*), which held that the issuance of a permit for an individual facility could require the preparation of an environmental impact statement under the National Environmental Policy Act (NEPA) of 1969. The concept of a permit program survived, however, and, in November 1972, Congress passed a comprehensive recodification and revision of Federal water pollution control law, known as the Federal Water Pollution Control Act amendments of 1972. These amendments included the NPDES permit program as the centerpiece of the efforts for national water pollution control.

The enactment of the 1972 amendments marked a distinct change in the philosophy of water pollution control in the United States. The amendments maintained the water quality-based controls, but added an equal emphasis on a technology-based, or end-of-pipe, control strategy. The 1972 Act established a series of goals or policies in Section 101 that illustrated Congressional intent. Perhaps the most notable was the goal that the discharge of pollutants into navigable waters be eliminated by 1985. This goal was not realized, but remains a principle for establishing permit requirements. The Act had an interim goal to achieve "water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water" by July 1, 1983. This is more commonly known as the "fishable, swimmable" goal. The Act also contained four important principles:

- The discharge of pollutants to navigable waters is not a right.
- A discharge permit is required to use public resources for waste disposal and limits the amount of pollutants that may be discharged.

- Wastewater must be treated with the best treatment technology economically achievable—regardless of the condition of the receiving water.
- Effluent limits must be based on treatment technology performance, but more stringent limits may be imposed if the technology-based limits do not prevent violations of water quality standards in the receiving water.

More specifically, Title IV of the Act created a system for permitting wastewater discharges (Section 402), known as the National Pollutant Discharge Elimination System (NPDES), with the objective to implement the goals and objectives of the Act. An outline of the Titles contained in the Act is provided as **Exhibit 1-1**.

EXHIBIT 1-1
Organization of the Clean Water Act

Title I – Research and Related Programs

Title II – Grants for Construction of Treatment Works

Title III – Standards and Enforcement

- Section 301 Effluent Limitations
- Section 302 Water Quality-Related Effluent Limitations
- Section 303 Water Quality Standards and Implementation Plans
- Section 304 Information and Guidelines [Effluent]
- Section 305 Water Quality Inventory
- Section 307 Toxic and Pretreatment Effluent Standards.

Title IV – Permits and Licenses

- Section 402 National Pollutant Discharge Elimination System (NPDES)
- Section 405 Disposal of Sewage Sludge.

Title V – General Provisions

- Section 502 Definitions
- Section 510 State Authority
- Section 518 Indian Tribes.

Title VI – State Water Pollution Control Revolving Funds

The first round of NPDES permits issued between 1972 and 1976 provided for control of a number of traditionally regulated pollutants, but focused on 5-day biochemical oxygen demand (BOD_5), total suspended solids (TSS), pH, oil and grease, and some metals, by requiring the use of the Best Practicable Control Technology currently available (BPT). The Act established a July 1, 1977, deadline for all facilities to be in compliance with BPT. Additionally, the Act established the compliance deadline for installing Best Available Technology Economically Achievable (BAT) as July 1, 1983. Most of the major permits issued to industrial facilities in the first round of NPDES permitting contained effluent limitations based on Best Professional Judgment (BPJ) because regulations prescribing nationally uniform, technology-based effluent limitations were generally unavailable. The second round of permitting in the late 1970s and early 1980s began to emphasize the control of toxics, but, due to a lack of information on treatability, failed to complete the task.

EPA's failure to develop adequate controls for toxic discharges under the 1972 Act prompted the Natural Resources Defense Council (NRDC) to sue EPA. [NRDC v. Train, 8 E.R.C. 2120 (D.D.C. 1976)]. The suit was settled through a court supervised "consent decree" in 1976. The consent decree identified (1) the "priority" pollutants to be controlled; (2) the "primary industries" for technology-based control; and (3) the methods for regulating toxic discharges through the authorities of the 1972 Act. The provisions of the consent decree were incorporated into the framework of the 1977 amendments of the Act, and resulted in the Act's refocus toward toxics control.

The 1977 amendments to the legislation, known formally as the Clean Water Act (CWA) of 1977, shifted emphasis from controlling conventional pollutants to controlling toxic discharges. This era of toxic pollutant control is referred to as the second round of permitting. The concept of BAT controls was clarified and expanded to include toxic pollutants. Hence, the compliance deadline for BAT was extended to July 1, 1984. The conventional pollutants (BOD_5, TSS, pH, fecal coliform, and oil and grease) controlled by BPT in the first round of permitting were now subject to a new level of control, termed Best Conventional Pollutant Control Technology (BCT). The compliance deadline for meeting BCT was also July 1, 1984.

On February 4, 1987, Congress amended the CWA with the Water Quality Act (WQA) of 1987. The amendments outlined a strategy to accomplish the goal of

meeting water quality standards set by the States. The WQA required all States to identify waters that were not expected to meet water quality standards after technology-based controls on point sources have been imposed. The State must then prepare an individual control strategy to reduce toxics from point and nonpoint sources in order to meet the water quality standards. Among other measures, these plans were expected to address control of pollutants beyond technology-based levels.

The WQA once again extended the time to meet BAT and BCT effluent limitations. The new compliance deadline was no later than March 31, 1989. The WQA also established new schedules for industrial and municipal storm water discharges to be regulated by NPDES permits. Industrial storm water discharges must meet the equivalent of BCT/BAT effluent quality. Discharges from municipal separate storm sewer systems (MS4) required controls to reduce the discharge of pollutants to the maximum extent practicable (MEP). Additionally, the WQA required EPA to identify toxics in sewage sludge and establish numerical limits to control these pollutants. The WQA also established a statutory anti-backsliding requirement that would not allow an existing permit to be modified or reissued with less stringent effluent limitations, standards, or conditions than those already imposed. There were a few exceptions for technology-based limits, but in no case could the limits be less stringent than existing effluent guidelines (unless a variance has been granted) or violate water quality standards.

Chapter 2

Regulatory Framework and Scope of the NPDES Program

This chapter provides a discussion of the regulatory framework of the NPDES Program, identifies the types of activities regulated under the NPDES Program, and discusses the program areas that address the various types of regulated activities.

2.1 Regulatory Framework of the NPDES Program

Chapter 1 discussed how Congress, in Section 402 of the CWA, required EPA to develop and implement the NPDES permit program. While Congress' intent was established in the CWA, EPA had to develop specific regulations to carry out the congressional mandate. The primary regulations developed by EPA to implement and administer the NPDES Program are found in Title 40 of the *Code of Federal Regulations* (CFR) Part 122.

The CFR is a set of documents listing all regulations issued by every United States government agency. The CFR is published by the National Archives and Records Service of the General Services Administration. The CFR is updated annually based on the regulations published daily in the *Federal Register* (*FR*).

The *FR* is the vehicle by which EPA and other branches of the Federal government provide notice of, propose, and promulgate regulations. Although all of the regulations can be found in the CFR, the background and implementation information related to these regulations can be found in the preamble to the regulations contained in the *FR*. This information is important to the permit writer because it explains the regulatory basis upon which permitting decisions are made.

An outline of the Federal NPDES regulations (40 CFR Part 122) is provided in **Exhibit 2-1**. Other parts of 40 CFR that are related to the NPDES Program include:

- 40 CFR Part 123 (State program requirements)
- 40 CFR Part 124 (procedures for decision making)
- 40 CFR Part 125 (technology-based standards)
- 40 CFR Part 129 (toxic pollutant standards)
- 40 CFR Part 130 (water quality management plans)
- 40 CFR Part 131 (water quality-based standards)
- 40 CFR Part 133 (sewage secondary treatment regulations)
- 40 CFR Part 135 (citizen suits)
- 40 CFR Part 136 (analytical procedures)
- 40 CFR Part 257 (State sludge disposal regulations)
- 40 CFR Part 401 (general effluent guidelines provisions)
- 40 CFR Part 403 (general pretreatment regulations)
- 40 CFR Parts 405-471 (effluent limitations guidelines)
- 40 CFR Part 501 (State sludge permitting requirements)
- 40 CFR Part 503 (sewage sludge disposal standards).

An index to the NPDES regulations is provided in **Appendix A**. This index groups the regulatory requirements by subject area to provide the permit writer easier access to specific provisions.

2.2 Scope of the NPDES Program

Under the NPDES Program, all facilities which discharge pollutants from any point source into waters of the United States are required to obtain a NPDES permit. Understanding how each of the key terms ("pollutant," "point source," and "waters of

EXHIBIT 2-1
Federal NPDES Regulations (40 CFR Part 122)

Subpart A - Definitions and General Program Requirements
122.1 Purpose and Scope of NPDES Program
122.2 Definitions
122.3 Exclusions
122.4 Prohibitions
122.5 Effect of a Permit
122.6 Continuation of Expired Permits
122.7 Confidentiality of Information

Subpart B - Permit Application and Special NPDES Program Requirements
122.21 Applications
122.22 Signatures Requirements for Applications
122.23 Animal Feeding Operations
122.24 Aquatic Animal Production
122.25 Aquaculture
122.26 Storm Water Discharges
122.27 Silviculture
122.28 General Permits
122.29 New Sources and New Discharges

Subpart C - Permit Conditions
122.41 Standard Conditions
122.42 Standard Conditions Applicable to Specified Categories
122.43 Permit Conditions
122.44 Permit Limitations

(a) Technology Basis
(b) Other Basis (not WQ)
(c) Reopeners
(d) Water Quality Basis
(e) Priority Pollutants
(f) Notification Levels
(g) 24 Hour Reporting
(h) Duration of Permits
(i) Monitoring
(j) Pretreatment Program
(k) Best Management Practices
(l) Anti-Backsliding
(m) Private Treatment Works
(n) Grants
(o) Sludge
(p) Coast Guard
(q) Navigation

122.45 Calculating Limitations

(a) Discharge Points
(b) Production Basis
(c) Metals
(d) Continuous Discharges
(e) Non-continuous Discharges
(f) Mass Based Limits
(g) Intake Water Pollutants
(h) Internal Waste Streams
(i) Discharge into Wells

122.46 Duration of Permits
122.47 Schedules of Compliance
122.48 Reporting
122.49 Consideration of Other Federal Laws
122.50 Disposal to Other Points

Subpart D - Transfer, Modification, Revocation and Reissuance, and Termination of Permit
122.61 Transfer of Permits
122.62 Modification or Revocation and Reissuance of Permits
122.63 Minor Modifications of Permits
122.64 Termination of Permits

the United States") have been defined and interpreted by the regulations is the key to defining the scope of the NPDES Program.

Pollutant

The term "pollutant" is defined very broadly by the NPDES regulations and includes any type of industrial, municipal, and agricultural waste discharged into water (see glossary). For regulatory purposes, pollutants have been grouped into three general categories under the NPDES Program: conventional, toxic, and nonconventional. By definition, there are five conventional pollutants: 5-day biochemical oxygen demand (BOD_5), total suspended solids (TSS), fecal coliform, pH, and oil and grease. Toxic or "priority" pollutants are those defined in Section 307(a)(1) of the CWA (and listed in 40 CFR §401.15) and include metals and manmade organic compounds. Nonconventional pollutants are those which do not fall under either of the above categories and include such parameters as ammonia, nitrogen, phosphorus, chemical oxygen demand (COD), and whole effluent toxicity (WET).

Point Source

Pollutants can enter waters of the United States from a variety of pathways including agricultural, domestic and industrial sources (see **Exhibit 2-2**). For regulatory purposes these sources are generally categorized as either "point sources" or "non-point sources." Typical point source discharges include discharges from publicly owned treatment works (POTWs), industrial facilities, and discharges associated with urban runoff. While provisions of the NPDES Program do address certain specific types of agricultural activities (i.e., concentrated animal feeding operations), the majority of agricultural facilities are defined as non-point sources and are exempt from NPDES regulation.

Pollutant contributions to waters of the United States may come from both "direct" and "indirect" sources. "Direct" sources discharge wastewater directly into the receiving waterbody, whereas "indirect" sources discharge wastewater to a POTW, which in turn discharges into the receiving waterbody. Under the national program, NPDES permits are issued only to direct point source discharges. Industrial and commercial indirect dischargers are controlled by the national pretreatment program (see Section 8.3.1).

EXHIBIT 2-2
Sources of Discharge to Waters of the United States

[ducks, deer, and sewage picture]

As indicated above, the primary focus of the NPDES permitting program is municipal and non-municipal (industrial) direct dischargers. Within these major categories of dischargers, however, there are a number of more specific types of discharges that are regulated under the NPDES Program. **Exhibit 2-3** provides an overview of the scope of the NPDES Program and identifies the program areas that control various categories of wastewater discharges.

Municipalities (e.g., POTWs receive primarily domestic sewage from residential and commercial customers. Larger POTWs will also typically receive and treat wastewater from industrial facilities (indirect dischargers) connected to the POTW sewerage system. The types of pollutants treated by a POTW, therefore, will always include conventional pollutants (BOD_5, TSS, pH, oil and grease, fecal coliform), and will include nonconventional and toxic pollutants depending on the unique characteristics of the commercial and industrial sources discharging to the POTW. The treatment typically provided by POTWs includes physical separation and settling (e.g., screening, grit removal, primary settling), biological treatment (e.g., trickling filters, activated sludge), and disinfection (e.g., chlorination, UV, ozone). These processes produce the treated effluent and a biosolids (sludge) residual. An additional

EXHIBIT 2-3
NPDES Program Areas and Applicable Regulations

Source	Activity	Program Areas	Applicable Regulations
Municipal	Municipal Effluent Discharge	NPDES Point Source Control Program	40 CFR 122 40 CFR 125 40 CFR 133
	Indirect Industrial/ Commercial Discharges	Pretreatment Program	40 CFR 122 40 CFR 403 40 CFR 405-499
	Municipal Sludge Use and Disposal	Municipal Sewage Sludge Program	40 CFR 122 40 CFR 257 40 CFR 501 40 CFR 503
	Combined Sewer Overflow (CSO) Discharges	CSO Control Program	40 CFR 122 40 CFR 125
	Storm Water Discharges (Municipal)	Storm Water Program	40 CFR 122 40 CFR 125
Industrial	Process Wastewater Discharges	NPDES Point Source Control Program	40 CFR 122 40 CFR 125 40 CFR 405-499
	Non-process Wastewater Discharges	NPDES Point Source Control Program	40 CFR 122 40 CFR 125
	Storm Water Discharges (Industrial)	Storm Water Program	40 CFR 122 40 CFR 125

concern to some older POTWs are "combined sewer" systems (i.e., sewerage systems that are designed to collect both sanitary sewage and storm water). Exhibit 2-3 illustrates how the NPDES Program is structured to control all of the various types of pollutant sources and wastestreams that contribute to municipal point sources.

Non-municipal sources, which include industrial and commercial facilities, are unique with respect to the products and processes present at the facility. Unlike municipal sources, the types of raw materials, production processes, treatment technologies utilized, and pollutants discharged at industrial facilities vary widely and are dependent on the type of industry and specific facility characteristics. The

operations, however, are generally carried out within a more clearly defined plant area; thus, collection system considerations are generally much less complex than for POTWs. In addition, residuals (sludge) generated by industrial facilities are not currently regulated by the NPDES Program. Industrial facilities may have discharges of storm water that may be contaminated through contact with manufacturing activities, or raw material and product storage. Industrial facilities may also have non-process wastewater discharges such as non-contact cooling water. As illustrated in Exhibit 2-3, the NPDES Program addresses each of these potential wastewater sources for industrial facilities.

Waters of the United States

The term "waters of the United States," has been defined by EPA to include:

- Navigable waters
- Tributaries of navigable waters
- Interstate waters
- Intrastate lakes, rivers, and streams:
  - Used by interstate travelers for recreation and other purposes; or
  - Which are the source of fish or shellfish sold in interstate commerce; or
  - Which are utilized for industrial purposes by industries engaged in interstate commerce.

The intent of this definition is to cover all possible waters within Federal jurisdiction under the framework of the Constitution (i.e., Federal versus State authorities). The definition has been interpreted to include virtually all surface waters in the United States, including wetlands and ephemeral streams. As a general matter, groundwater is not considered a waters of the United States. Therefore discharges to groundwater are not subject to NPDES requirements. If, on the other hand, there is a discharge to groundwater that results in a "hydrological connection" to a nearby surface water, the Director may require the discharger to apply for an NPDES permit. [Note: Because States maintain jurisdiction over groundwater resources, they may choose to require NPDES permits for discharges to groundwater.]

2.3 NPDES Program Areas

As indicated in Exhibit 2-3, the national NPDES Program includes provisions that address several different types of discharges from municipal and industrial sources. This section provides a brief description of how the NPDES Program addresses each of these program areas.

2.3.1 NPDES Program Areas Applicable to Municipal Sources

The NPDES permitting program focuses on the development of effluent limits and conditions for the discharge of treated effluent. The NPDES Program, however, also incorporates other control measures to address certain types and categories of discharges that may be present at some municipal facilities. A description of these control measures, and a discussion of how they are incorporated into the permitting process is provided below.

National Pretreatment Program

The national pretreatment program regulates the discharges of wastewater from non-domestic (i.e., industrial and commercial) facilities that discharge to POTWs (i.e., "indirect" discharges). The pretreatment program requires industrial and commercial indirect dischargers to "pretreat" their wastes, as necessary, prior to discharge to POTWs, to prevent interference or upset to the operation of the POTW. The Federal program also requires many indirect dischargers to meet technology-based requirements similar to those for direct dischargers. The pretreatment program is generally implemented directly by the POTW receiving indirect discharges, under authority granted through the NPDES permit. The Federal regulations specifying which POTWs must have pretreatment programs, and the authorities and procedures that must be developed by the POTW prior to program approval are found in 40 CFR Part 403. The implementation of a local pretreatment program is typically included as a special condition in NPDES permits issued to POTWs. The incorporation of pretreatment special conditions is discussed in Chapter 8.

Municipal Sewage Sludge Program

Section 405 of the CWA requires that all NPDES permits issued to POTWs and other Treatment Works Treating Domestic Sewage (TWTDS) contain conditions

implementing 40 CFR Part 503 Standards for the Use and Disposal of Sewage Sludge. Thus, POTWs and other TWTDS must submit permit applications for their sludge use or disposal practices. TWTDS include sewage sludge incinerators, sewage sludge surface disposal sites, and facilities that do not discharge to waters of the United States (sludge-only facilities such as sludge composting facilities that treat sewage sludge).

The permitting regulations can be found at 40 CFR Part 122 for the Federal program. Regulations for State program approval are found at 40 CFR Parts 123 or 501 (depending on whether the State wishes to administer the sewage sludge program under its NPDES Program or under another program, e.g., a solid waste program). The technical regulations governing sewage sludge use and disposal are contained in 40 CFR Part 503. Where applicable, sludge management requirements are included as a special condition in permits issued to POTWs. The incorporation of special conditions that address sludge requirements is discussed in Chapter 8.

Combined Sewer Overflows

Combined sewer systems (CSS) are wastewater collection systems designed to carry sanitary wastewaters (commercial and industrial wastewaters) and storm water through a single conduit to a POTW. As of 1995, CSSs serve about 43 million people in approximately 1,100 communities nationwide. During dry weather, CSSs collect and convey domestic, commercial, and industrial wastewater to a POTW; however, during periods of rainfall or snowmelt, these systems can become overloaded. When this occurs, the CSS overflows at designed relief points, discharging a combination of untreated sanitary wastewaters and storm water directly to a surface water body. These overflows, called combined sewer overflows (CSOs), can be a major source of water pollution in communities served by CSSs. CSOs often contain high levels of suspended solids (SS), pathogenic microorganisms, toxic pollutants, floatables, nutrients, and other pollutants, causing exceedances of water quality standards.

To address CSOs, EPA issued the National CSO Control Strategy on August 10, 1989 (54 *FR* 37370). While the 1989 Strategy resulted in some progress in controlling CSOs, significant public health risks and water quality impacts remained. To expedite compliance with the CWA and to elaborate on the 1989 Strategy, EPA, in collaboration with other CSO stakeholders (communities with CSSs, State water

quality authorities, and environmental groups), developed and published the CSO Control Policy on April 19, 1994 (59 *FR* 18688). The Policy establishes a uniform, nationally consistent approach to developing and issuing NPDES permits that address CSOs. With respect to NPDES permittees, State water quality standards authorities, and NPDES permitting and enforcement authorities, the CSO Policy states the following:

- Permittees should immediately implement the nine minimum controls (NMCs), which are technology-based actions or measures designed to reduce CSOs and their effects on receiving water quality, as soon as practicable, but no later than January 1, 1997.
- Permittees should give priority to environmentally sensitive areas.
- Permittees should develop long-term control plans (LTCPs) for controlling CSOs. A permittee may use one of two approaches: (1) demonstrate that its plan is adequate to meet the water quality-based requirements of the CWA ("demonstration approach"), or (2) implement a minimum level of treatment (e.g., primary clarification of at least 85% of the collected combined sewage flows) that is presumed to meet the water quality-based requirements of the CWA, unless data indicate otherwise ("presumptive approach").
- Water quality standards authorities should review and revise, as appropriate, State water quality standards during the CSO long-term planning process.
- NPDES permitting authorities should consider the financial capability of permittees when reviewing CSO control plans.

The CSO Policy recommends that NPDES permitting authorities utilize a phased approach in addressing CSOs. Phase I permits should require the permittee to implement the NMC within two years of notice from the NPDES permitting authority and to develop a LTCP. Phase II permits should require continued implementation of the NMC and implementation of a LTCP.

Prior to issuing a permit that requires conditions that address CSOs, permit writers should consult the CSO Control Policy and associated guidance materials. The incorporation of permit conditions that address CSOs is provided in Chapter 8.

Storm Water Program (Municipal)

EPA has determined that storm water runoff from major metropolitan areas is a significant source of pollutants discharged to waters of the United States. While rainfall and snow are natural events, the nature of runoff and its impact on receiving waters is highly dependent on human activities and use of the land. Runoff from lands modified by human activities (i.e., metropolitan areas) can affect surface water resources in two ways: (1) natural flow patterns can be modified; and (2) pollution concentrations and loadings can be elevated.

To address these discharges, the 1987 amendments to the CWA added a provision [Section 402(p)] that directed EPA to establish phased NPDES requirements for storm water discharges. Section 402(p)(2) of the Act identifies discharges covered under Phase I of the Storm Water Program and includes discharges from municipal separate storm sewer systems (MS4s) serving a population of 100,000 or more. Section 402(p)(3) identifies the standards for MS4 permits. These standards mark the significant difference in permits that address storm water discharges from MS4s versus permits that address other more traditional sources (i.e., POTWs and non-municipal sources). In general, Congress provided that permits for discharges from MS4s:

- May be issued on a system- or jurisdiction wide basis;
- Shall effectively prohibit non-storm water discharges into the MS4; and
- Shall require controls to reduce the discharge of pollutants to maximum extent practicable (MEP).

In response, EPA published regulations addressing storm water discharges from municipal separate storm sewer systems on November 16, 1990 (55 *FR* 47990). The regulations define a MS4 as any conveyance or system of conveyances that is owned or operated by a State or local government entity designed for collecting and conveying storm water. Under Phase I of the Storm Water Program, only those MS4s which served a population of 100,000 or more were required to apply for a NPDES permit. Unlike permits that are developed and issued to individual POTWs (also referred to as "municipals"), permits that address storm water discharges from MS4s may be issued on a jurisdiction-wide basis to the operator of the storm water collection

system (e.g., a county or city public works department). Chapter 8 discusses considerations for developing NPDES permits for storm water discharges from MS4s.

2.3.2 NPDES Program Areas Applicable to Industrial Sources

In addition to the development of effluent limits and conditions for discharges of process and non-process wastewater from direct dischargers, the NPDES Program also includes provisions for control of storm water discharges from industrial sources. A description of this program area and a discussion of how it is incorporated into the permitting process is provided below.

Storm Water Program (Industrial)

All storm water discharges associated with industrial activity that discharge through municipal separate storm sewer systems or that discharge directly into the waters of the United States are required to obtain NPDES permit coverage, including those which discharge through MS4s located in municipalities with a population of less than 100,000. Discharges of storm water to a sanitary sewer system or to a POTW are excluded. As with the Municipal Storm Water Program discussed in Section 2.3.1 above, EPA published the initial permit application requirements for certain categories of storm water discharges associated with industrial activity on November 16, 1990 (55 *FR* 48065).

The regulations define storm water discharges associated with industrial activity as discharges from any conveyance used for collecting and conveying storm water directly related to manufacturing, processing, or raw materials storage areas at an industrial plant. The NPDES permitting regulations at 40 CFR §122.26 were promulgated on November 16, 1990 (55 *FR* 48065) to identify the following 11 industrial categories required to apply for NPDES permits for storm water discharges:

- Facilities subject to storm water effluent limitations guidelines (ELG), new source performance standards (NSPS), or toxic pollutant effluent standards under 40 CFR Subchapter N
- Certain heavy manufacturing facilities (lumber, paper, chemicals, petroleum refining, leather tanning, stone, clay, glass, concrete, ship construction)
- Active and inactive mining operations and oil and gas operations with contaminated storm water

- Hazardous waste treatment, storage, or disposal facilities, including Resource Conservation and Recovery Act (RCRA) Subtitle C facilities
- Landfills, open dumps, and RCRA Subtitle D facilities
- Recycling facilities, including metal scrapyards, battery reclaimers, salvage yards, and automotive junkyards
- Steam electric power generating facilities, including coal handling sites
- Transportation facilities that have vehicle maintenance shops, equipment cleaning operations, or airport de-icing operations
- Major POTW sludge handling facilities; including onsite application of sewage sludge
- Construction activities that disturb five acres or more
- Light industrial manufacturing facilities.

Operators of industrial facilities that are federally, state or municipally owned or operated that meet the description of the facilities listed in 40 CFR 122.26(b)(14)(1)-(xi) must also submit applications (note: the Transportation Act of 1991 provides exceptions for certain municipally owned or operated facilities). EPA published final rules regarding the NPDES Storm Water Regulations on both April 1, 1992 (57 *FR* 11394) and December 18, 1992 (57 *FR* 60444). The rule promulgated on April 2, 1992 was, in part, to codify provisions of the Transportation Act of 1991. The December 18, 1992 rule was in response to the mandate of the Ninth Circuit United States Court of Appeals in NRDC v. EPA (June 4, 1992). Each of these final rules are summarized below:

- **Transportation Act of 1992**—The Transportation Act of 1991 provides an exemption from Phase I storm water permitting requirements for certain industrial activities owned or operated by municipalities with a population of less than 100,000 (note: population threshold not tied to a service population for a MS4). Such municipalities must submit storm water discharge permit applications only for airports, powerplants, and uncontrolled sanitary landfills that they own or operate.
- **Ninth Circuit Court Decision**—The Ninth Circuit United States Court of Appeals' opinion in NRDC v. EPA (June 4, 1992) invalidated and remanded for further proceedings two regulatory exemptions from the definition of "storm water discharges associated with industrial activity":
  1. The exemption for construction sites disturbing less than five acres of land (category x), and
  2. The exemption of certain "light" manufacturing facilities without exposure of materials and activities to storm water (category xi).

In response to these two remands, EPA intends to conduct further rulemaking proceedings on construction activities under five acres and light industry without exposure. As ordered by the Court, EPA will not require permit applications for construction sites disturbing less than five acres of land and category xi facilities without exposure until this further rulemaking is completed.

Generally, storm water discharges from industrial sources are regulated by Federal or State issued general permits (see Section 3.1 for a description of the types of NPDES permits). However, in some cases, storm water conditions may be incorporated into a comprehensive individual NPDES permit for a facility, or a storm water-specific individual NPDES permit. The incorporation of permit conditions that address storm water discharges from industrial facilities is provided in Chapter 8. For more information regarding the scope of the NPDES Storm Water Program, refer to EPA's storm water regulations at 40 CFR 122.26 and the *Overview of the Storm Water Program.*[2]

[2]USEPA (1996). *Overview of the Storm Water Program.* EPA 833-R-96-008. Office of Water.

Chapter 7

Monitoring and Reporting Conditions

Having developed the effluent limits for a municipal or industrial discharger, the permit writer's next step is to establish monitoring and reporting requirements. Requiring the permittee to routinely self-monitor its discharge and to report the analytical results of such monitoring provides the permitting authority with the information necessary to evaluate discharge characteristics and compliance status. Periodic monitoring and reporting also serve to remind the permittee of its compliance responsibilities and provides feedback regarding the performance of the treatment facility(s) operated by the permittee. Permit writers should be aware of and concerned with the potential problems that may occur in a self-monitoring program such as improper sample collection procedures, poor analytical techniques, and poor or improper report preparation and documentation. To prevent or minimize these problems, the permit writer should clearly detail monitoring and reporting requirements in the permit.

The monitoring and reporting conditions section of a NPDES individual permit should contain specific requirements for the following items:

- Sampling location
- Sample collection method
- Monitoring frequencies
- Analytical methods
- Reporting and recordkeeping requirements.

Several factors should be considered in determining the specific requirements to be imposed. Basic factors that may affect sampling location, sampling method, and sampling frequency are:

- Applicability of "effluent limitations guidelines" (ELG)
- Effluent and process variability
- Effect of flow and/or pollutant load on the receiving water
- Characteristics of pollutants discharged
- Permittee compliance history.

These factors must be carefully considered by the permit writer, as any error could lead to inaccurate compliance determination, misapplication of national ELGs, and/or misapplication of State water quality standards.

The following sections provide an overview of the considerations involved in determining appropriate monitoring, reporting, and recordkeeping requirements, and describe how to properly incorporate the requirements in a NPDES permit.

7.1 Establishing Monitoring Conditions

The NPDES Program is structured such that facilities that discharge pollutants in waters of the United States are required to periodically evaluate compliance with the effluent limitations established in their permit and provide the results to the permitting authority. In addition, NPDES permits can require the permittee to monitor for additional parameters or processes not directly linked to the effluent discharge such as storm water, combined sewer overflows, municipal sludge, and/or treatment plant influent. This section describes the regulatory requirements and authorities for

monitoring conditions, and describes how these conditions can be incorporated in NPDES permits.

The regulations requiring the establishment of monitoring and reporting conditions in NPDES permits are found in 40 CFR §122.44(i) and 40 CFR §122.48. Section 122.44(i) requires permittees to monitor pollutant mass (or other applicable unit of measure), effluent volume, provide other measurements (as appropriate), and to utilize the test methods established at 40 CFR §136. Section 122.41(i) also establishes that NPDES permittees (with certain specific exceptions) must monitor for all limited pollutants and report data at least once per year.

EPA regulations at 40 CFR §122.48 state that all permits must specify requirements concerning the proper use, maintenance, and installation of monitoring equipment or methods (including biological monitoring methods when appropriate). All permits must also specify the required monitoring including the type, intervals, and frequency sufficient to yield data that are representative of the activity. The following sections focus on ensuring that permit monitoring conditions properly address these regulatory requirements.

7.1.1 Monitoring Location

The NPDES regulations do not specify the exact location to be used for monitoring. The permit writer is responsible for determining the most appropriate monitoring location and explicitly specifying this in the permit. Ultimately, the permittee is responsible for providing a safe and accessible sampling point that is representative of the discharge (40 CFR §122.41(j)(1)).

Specifying the appropriate monitoring location in a NPDES permit is critical to producing valid compliance data. Important factors to consider in selecting a monitoring location include:

- The wastewater flow should be measurable
- The location should be easily and safely accessible
- The sample must be representative of the effluent during the time period that is monitored.

Technical Note

When establishing monitoring locations for determining NPDES permit compliance, permit writers must select locations that are representative of the expected wastewater discharge. Locations should be established where the wastewater is well mixed, such as near a parshall flume or at a location in a sewer with hydraulic turbulence. Weirs tend to enhance the settling of solids immediately upstream and the accumulation of floating oil or grease immediately downstream. Such locations should be avoided for sampling.

The most logical monitoring point for an effluent is just prior to discharge to the receiving water. This is particularly true for ensuring compliance with water quality-based effluent limits (WQBELs). However, there are instances when the permit writer may need to specify alternate monitoring locations in a permit.

One typical instance that necessitates establishing an alternative monitoring location occurs when a facility combines a variety of process and non-process wastewaters prior to discharge through a common outfall structure. Under certain circumstances, when a variety of wastewaters are combined, requiring monitoring only at the final combined outfall may not be appropriate. To address this situation, 40 CFR §122.45(h) allows permit writers to establish monitoring locations at internal outfalls. Examples of situations that may require designation of internal monitoring locations include:

- **To ensure compliance with effluent limitations guidelines and standards (at non-municipal facilities)**—When non-process wastewaters dilute process wastewaters regulated under effluent guidelines, monitoring the combined discharge may not accurately depict whether the facility is complying with the effluent guidelines. Under these circumstances, the permit writer may consider requiring monitoring for compliance with technology-based effluent limits (based on application of effluent guidelines) before the process wastewater is combined with the other wastewaters.
- **To ensure compliance with secondary treatment standards (for POTWs only)**—Certain POTWs include treatment processes that are ancillary to the secondary treatment process that may impact their ability to monitor for compliance with secondary treatment standards. Under these circumstances, the permit writer may consider requiring monitoring for compliance with secondary treatment standards just after the secondary treatment process (e.g., require monitoring of effluent just after secondary clarification) before any additional treatment processes.
- **To allow detection of a pollutant**—Instances may arise where the combination of process and non-process wastewaters result in dilution of a pollutant of concern that will not be detectable using approved analytical

methods. Establishing monitoring for the pollutant at an internal location will enable characterization of the pollutant prior to dilution with other wastewaters.

When establishing internal monitoring points, permit writers need to consider the location of wastewater treatment units within the facility. This is particularly true when establishing internal monitoring locations for determining compliance with technology-based effluent limits. A facility will most likely not be able to comply with technology-based effluent limits if the permit writer establishes the monitoring location prior to the wastewater treatment unit.

Permit writers may also need to require monitoring of influent to the wastewater treatment units for certain facilities. Influent monitoring must be required for POTWs to ensure compliance with the 85 percent removal condition of the secondary treatment standards. Influent monitoring at non-POTWs may also be desired to determine influent characteristics, and if additional information related to the performance of the wastewater treatment unit is needed.

Exhibit 7-1 provides examples of how to specify sampling locations in a permit either by narrative or diagram.

7.1.2 Monitoring Frequency

The frequency for monitoring pollutants should be determined on a case-by-case basis, and decisions for setting the frequency should be set forth in the fact sheet. Some States have their own recommended sampling guidelines that can help a permit writer determine an appropriate sampling frequency. The intent is to establish a frequency of monitoring that will detect most events of noncompliance without requiring needless or burdensome monitoring.

To establish a monitoring frequency, the permit writer should estimate the variability of the concentration of the parameter by reviewing effluent data for the facility (e.g., from DMRs) or in the absence of actual data, information from similar dischargers. A highly variable discharge should require more frequent monitoring than a discharge that is relatively consistent over time (particularly in terms of flow and

EXHIBIT 7-1
Examples of Specifying Sampling Locations in Permits

NARRATIVE:

Part I. SELF-MONITORING REQUIREMENTS

A. Sample Locations

1. Discharge from the Chemistry-Fine Arts Building shall be sampled at outfall 001
2. Discharge from the Duane Physics Building shall be sampled at outfall 002
3. Discharge from the Research Lab No. 1 shall be sampled at outfall 003

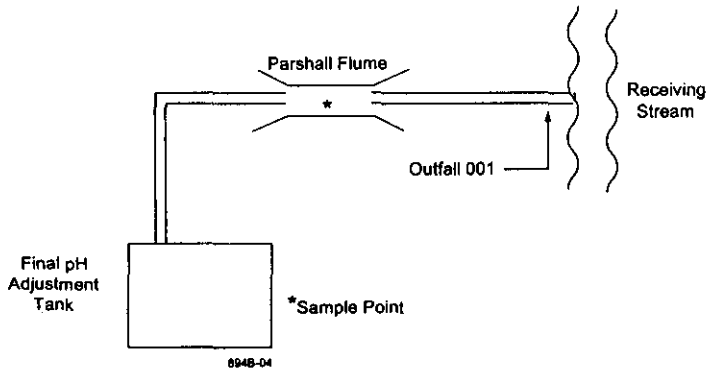
DIAGRAM:

Part I. EFFLUENT LIMITATIONS AND MONITORING REQUIREMENTS

A. Sample Locations

Outfall Description

001 Discharge Pipe—Discharge of wastewater generated by all regulated metal finishing processes at the facility. Samples shall be collected at the point indicated on the attached diagram.



pollutant concentration). In addition to the estimated variability, other factors that should be considered when establishing appropriate monitoring frequencies include:

- **Design capacity of treatment facility**—As an example, at equivalent average flow rates, a large lagoon system that is not susceptible to bypasses requires less frequent monitoring than an overloaded treatment facility that experiences fluctuating flow rates due to infiltration or large batch discharges from an industrial user system. The lagoon should have a relatively low variability compared to the facility receiving batch discharges.

- **Type of treatment method used**—The type of wastewater treatment used by the facility will determine the need for process control monitoring and effluent monitoring. An industrial facility with biological treatment would have similar monitoring frequencies to a secondary treatment plant with the same units used for wastewater treatment. If the treatment method is appropriate and achieving high pollutant removals on a consistent basis, the need for monitoring may be less than a plant with little treatment or insufficient treatment.
- **Post compliance record/history**—The monitoring frequency may be adjusted to reflect the compliance history of the facility. A facility with problems achieving compliance generally should be required to perform additional monitoring to characterize the source or cause of the problems or to detect noncompliance.
- **Cost of monitoring relative to discharger's capabilities**—The permit writer should not require excessive monitoring unless it is necessary to provide sufficient information about the discharge (analytical costs are addressed in Section 7.1.5).
- **Frequency of the discharge**—If wastewater is discharged in batches on an infrequent basis, the monitoring frequency should be different from a continuously discharged, highly concentrated wastewater, or a wastewater containing a pollutant that is found infrequently and at very low concentrations. The production schedule of the facility (e.g., seasonal, daily), the plant washdown schedule, and other similar factors should be considered.
- **Number of monthly samples used in developing permit limit**—The monitoring frequency should reflect the number of monthly samples used in developing the permit limits, and/or the monitoring frequencies used to develop any applicable effluent guidelines.
- **Tiered Limits**—Where the permit writer has included "tiered" limits in an NPDES permit, consideration should be given to varying the monitoring frequency requirements to correspond to the applicable tiers. For example, if a facility has seasonal discharge limits, it may be appropriate to increase the monitoring frequency during the higher production season, and reduce the frequency during the off-season.

An alternative method that can be used by permit writers to establish monitoring frequencies is the quantitative approach described in the *Technical Support Document for Water Quality-Based Toxics Control* (TSD)[30]. In short, the TSD[31] approach

[30]USEPA (1991). *Technical Support Document for Water Quality-Based Toxics Control.* EPA-505/2-90-001. Office of Water Enforcement and Permits.

[31]ibid.

requires calculating the long-term average pollutant concentration (accounting for the expected variability of the discharge) and comparing it to the permit limit to determine the likelihood of noncompliance. The closer the long-term average is to the permit limit, the more frequent the monitoring that should be required. Obviously, this quantitative approach requires a reasonable data set from which to calculate the long-term average. Permit writers should refer to the TSD[32] for more information regarding this approach.

A permit writer may also establish a tiered monitoring schedule that reduces or increases monitoring frequency during a permit cycle. Tiered monitoring, which reduces monitoring over time, may be useful for discharges where the initial sampling shows compliance with effluent limits. If problems are found during the initial sampling, more frequent sampling and more comprehensive monitoring can be applied. This step-wise approach could lead to lower monitoring costs for permittees while still providing an adequate degree of protection of water quality.

Regulatory Update

In response to President Clinton's Regulatory Reinvention initiative, which established the goal of reducing monitoring and reporting burden by 25%, EPA issued *Interim Guidance for Performance-Based Reductions of NPDES Permit Monitoring Frequencies* on April 19, 1996 (EPA-833-B-96-001). Under this guidance, NPDES reporting and monitoring requirements are reduced based on a demonstration of excellent historical performance. Facilities can demonstrate this historical performance by meeting a set of compliance and enforcement criteria and by demonstrating their ability to consistently discharge pollutants below the levels necessary to meet their existing NPDES permit limits. Reductions are determined parameter-by-parameter, based on the existing monitoring frequency and the percentage below the limit that parameter is being discharged at. The reductions are incorporated into the permit at the time of permit reissuance. To remain eligible for these reductions, permittees are expected to maintain parameter performance levels and good compliance and enforcement history that were used as the basis for granting the reductions.

7.1.3 Sample Collection Methods

In addition to establishing the frequency of monitoring, the permit writer must specify the type of sample that must be collected. The two basic sample collection methods include "grab" and "composite."

The analytical methods specified in 40 CFR Part 136 are required for all monitoring performed under the NPDES Program, unless the permit specifically

[32]USEPA (1991). *Technical Support Document for Water Quality-Based Toxics Control.* EPA-505/2-90-001. Office of Water Enforcement and Permits.

requires alternate methods. For many analytical procedures, the sample collection method (grab or composite) is not specified in 40 CFR Part 136, thus it should be specified in the discharge permit. 40 CFR Part 136 specifies that grab samples must be collected for pH, temperature, dissolved oxygen, chlorine, purgeable organics, sulfides, oil and grease, coliform bacteria and cyanide. The reason grab samples must be taken for these parameters is that they evaluate characteristics that may change during the time necessary for compositing.

A "grab" sample is a single sample collected at a particular time and place that represents the composition of the wastestream only at that time and place. When the quality and flow of the wastestream being sampled is not likely to change over time, a grab sample is appropriate. Grab samples should be used when:

- The wastewater characteristics are relatively constant.
- The parameters to be analyzed are likely to change with storage such as temperature, residual chlorine, soluble sulfide, cyanides, phenols, microbiological parameters and pH.
- The parameters to be analyzed are likely to be affected by the compositing process such as oil and grease and volatiles.
- Information on variability over a short time period is desired.
- Composite sampling is impractical or the compositing process is liable to introduce artifacts of sampling.
- The spatial parameter variability is to be determined. For example, variability through the cross section and/or depth of a stream or a large body of water.
- Effluent flows are intermittent from well-mixed batch process tanks. Each batch dumping event should be sampled.

Grab samples can measure maximum effect only when the sample is collected during flows containing the maximum concentration of pollutants toxic to the test organism.

Another type of grab sample is sequential sampling. A special type of automatic sampling device collects relatively small amounts of a sampled wastestream, with the interval between sampling either time or flow proportioned. Unlike the automatic composite sampler, the sequential sampling device automatically retrieves a sample and holds it in a bottle separate from other automatically retrieved samples. Many individual samples can be stored separately in the unit, unlike the

composite sampler which combines aliquots in a common bottle. This type of sampling is effective for determining variations in effluent characteristics over short periods of time.

A "composite" sample is a collection of individual samples obtained at regular intervals, usually based upon time or flow volume. A composite sample is desirable when the material being sampled varies significantly over time either as a result of flow or quality changes. There are two general types of composites and the permit writer should clearly express which type is required in the permit:

- Time composite samples collect a fixed volume at equal time intervals and are acceptable when flow variability is not excessive. Automatically timed composited samples are usually preferred over manually collected composites. Composite samples collected by hand are appropriate for infrequent analyses and screening.

  Composite samples can be collected manually if subsamples have a fixed volume at equal time intervals when flow variability is not excessive.
- Flow-proportional compositing is usually preferred when effluent flow volume varies appreciably over time. The equipment and instrumentation for flow-proportional compositing have more downtime due to maintenance problems.

  When manually compositing effluent samples according to flow where no flow measuring device exists, use the influent flow measurement without any correction for time lag. The error in the influent and effluent flow measurement is insignificant except in those cases where extremely large volumes of water are impounded, as in reservoirs.

There are numerous cases where composites are inappropriate. Samples for some parameters should not be composited (pH, residual chlorine, temperature, cyanides, volatile organics, microbiological tests, oil and grease, total phenols). They are also not recommended for sampling batch or intermittent processes. Grab samples are needed in these cases to determine fluctuations in effluent quality.

For whole effluent toxicity (WET), composite samples are used unless it is known that the effluent is most toxic at a particular time. Some toxic chemicals are short-lived, degrade rapidly, and will not be present in the most toxic form after lengthy compositing even with refrigeration or other forms of preservation. Grab samples should be required for bioassays to be taken under those circumstances.

If a sampling protocol is not specified in the regulations, the duration of the compositing time period and frequency of aliquot collection is established by the permit writer. Whether collected by hand or by an automatic device, the time frame within which the sample is collected should be specified in the permit. The number of individual aliquots which compose the composite should also be specified. NPDES application requirements specify a minimum of four aliquots for non-stormwater discharges lasting four or more hours.

Eight types of composite samples and the advantages and disadvantages of each are shown in **Exhibit 7-2**. As shown in Exhibit 7-2, samples may be composited by time or flow and a representative sample will be assured. However, where both flow and pollutant concentration fluctuate dramatically, a flow-proportioned composite sample should be taken because a greater quantity of pollutant will be discharged during these periods. As an alternative, time-proportioned samples may be taken with flow records used for weighing the significance of various samples.

Continuous monitoring is another option for a limited number of parameters such as flow, total organic carbon (TOC), temperature, pH, conductivity, fluoride and dissolved oxygen. Reliability, accuracy and cost of continuous monitoring vary with the parameter. Continuous monitoring can be expensive, so continuous monitoring will usually only be an appropriate requirement for the most significant dischargers with variable effluent. The environmental significance of the variation of any of these parameters in the effluent should be compared to the cost of continuous monitoring.

Technical Note

When establishing continuous monitoring requirements, the permit writer should be aware that the NPDES regulations concerning pH limits allow for a period of excursion when the effluent is being continuously monitored (40 CFR §401.17).

7.1.4 Analytical Methods

The permit writer must specify the analytical methods to be used for monitoring. These are usually indicated as 40 CFR Part 136 in the standard conditions of the permit [40 CFR §§122.41(j)(4) and 122.44(i)]. In particular, analytical methods for industrial and municipal wastewater pollutants must be conducted in accordance with

EXHIBIT 7-2
Compositing Methods

Method	Advantages	Disadvantages	Comments
Time Composite			
• Constant sample volume, constant time interval between samples	Minimal instrumentation and manual effort; requires no flow measurement	May lack representativeness, especially for highly variable flows	Widely used in both automatic samplers and manual handling
Flow-Proportional Composite			
• Constant sample volume, time interval between samples proportional to stream flow	Minimal manual effort	Requires accurate flow measurement reading equipment; manual compositing from flowchart	Widely used in automatic as well as manual sampling
• Constant time interval between samples, sample volume proportional to total stream flow at time of sampling	Minimal instrumentation	Manual compositing from flowchart in absence of prior information on the ratio of minimum to maximum flow; chance of collecting too small or too large individual discrete samples for a given composite volume	Used in automatic samplers and widely used as manual method
• Constant time interval between samples, sample volume proportional to total stream flow since last sample	Minimal instrumentation	Manual compositing from flow chart in absence of prior information on the ratio of minimum to maximum flow; chance of collecting either too small or too large individual discrete samples for a given composite volume	Not widely used in automatic samplers but may be done manually
Sequential Composite			
• Series of short period composites, constant time intervals between samples	Useful if fluctuations occur and time history is desired	Requires manual compositing of aliquots based on flow	Commonly used; however, manual compositing is labor intensive
• Series of short period composites, aliquots taken at constant discharge increments	Useful if fluctuations occur and time history is desired	Requires flow totalizer; requires manual compositing of aliquots based on flow	Manual compositing is labor intensive
Continuous Composite			
• Constant sample volume	Minimal manual effort, requires no flow measurement	Requires large sample capacity; may lack representativeness for highly variable flows	Practical but not widely used
• Sample volume proportional to stream flow	Minimal manual effort, most representative especially for highly variable flows	Requires accurate flow measurement equipment, large sample volume, variable pumping capacity, and power	Not widely used

the methods specified pursuant to 40 CFR Part 136, which references one or more of the following:

- Test methods in Appendix A of 40 CFR Part 136[33]
- *Standard Methods for the Examination of Water and Wastewater, 18th Edition*[34]
- *Methods for the Chemical Analysis of Water and Wastewater*[35]
- *Test Methods: Methods for Organic Chemical Analysis of Municipal and Industrial Wastewater.*[36]

The analytical methods contained in 40 CFR Part 136 are test methods designed only for priority and conventional pollutants, and some nonconventional pollutants. In the absence of analytical methods for other parameters, the permit writer must still specify the analytical methods to be used. An excellent source of analytical method information is the Environmental Monitoring Methods Index (EMMI). The EMMI is an official EPA database linking 50 EPA regulatory lists, 2,600 substances and 926 analytical methods on EMMI. EMMI data correlate EPA's regulated substances with their associated analytical methods, published detection limits, and regulatory limits. For more information, call NTIS at (703) 321-8547 for system requirements.

7.1.5 Other Considerations in Establishing Monitoring Requirements

The regulations do not specifically require a permit writer to evaluate costs when establishing monitoring conditions in a permit. However, as a practical matter, the permit writer should consider the cost of sampling that he/she imposes on the permittee. The sample frequency and analyses impact the analytical cost. The estimated 1994-1995 costs for analytical procedures are shown in **Exhibit 7-3.**

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[33]*Guidelines Establishing Test Procedures for the Analysis of Pollutants Under the Clean Water Act (40 CFR Part 136).* (Use most current version)

[34]American Public Health Association, American Water Works Association, and Water Pollution Control Federation (1992). *Standard Methods for the Examination of Water and Wastewater,* 18th Ed.

[35]USEPA (1979). *Methods for the Chemical Analysis of Water and Wastewater.* EPA-600/ 4-79-020. Environmental Monitoring and Support Laboratory.

[36]USEPA (1982). *Test Methods: Methods for Organic Chemical Analysis of Municipal and Industrial Wastewater.* EPA-600/4-82-057.

EXHIBIT 7-3
Estimated Costs for Common Analytical Procedures[1]

BOD_5	$30
TSS	$15
TOC	$60
Oil and Grease	$35
Odor	$30
Color	$30
Turbidity	$30
Fecal coliform	$15
Metals (each)	$15
Cyanide	$35
Gasoline (Benzene, Toluene, Xylene)	$100
Purgeable Halocarbons (EPA Method 601)	$113
Acrolein and Acrylonitrile (EPA Method 603)	$133
Purgeables (EPA Method 624)	$251
Phenols (EPA Method 604)	$160
Organochlorine Pesticides and PCBs (EPA Method 608)	$157
Polynuclear Aromatic Hydrocarbons (EPA Method 610)	$175
Dioxin (2, 3, 7, 8-TCDD (EPA Method 613))	$400
Base/Neutrals and Acids (EPA Method 625)	$434
Priority pollution scan[2]	$2,000
Acute WET	$750
Chronic WET	$1,500

[1] Based on 1994–1995 costs.

[2] Includes 13 metals, cyanide, dioxin, volatiles (purgeables), base/neutral and acids, pesticides and PCBs, and asbestos.

If simple or inexpensive indicator parameters (e.g., BOD_5 acts as an indicator for the priority pollutants in the Wood and Gum Chemicals category) or alternate parameters will produce data representative of the pollutant present in the discharge, then the indicators or surrogate pollutants or parameters should be considered. Complex and expensive sampling requirements may not be appropriate if the permit writer cannot justify the need for such analyses.

7.1.6 Establishing Monitoring Conditions for Unique Discharges

There are a variety of discharges that are regulated under the NPDES permit program that are different than traditional wastewater discharges. A permit writer needs to account for these unique discharges in establishing monitoring requirements. This section discusses several of these unique discharges including storm water, combined sewer and sanitary sewer overflows, WET, and municipal sludge.

Storm Water Monitoring Considerations

Monitoring requirements vary according to the type of permit regulating the storm water discharge and the activity. Storm water discharges may be regulated by State programs, provided the State is authorized to administer the NPDES Storm Water Program, or EPA Regions. At the Federal level, several permitting options are available; depending on the type of activity, industrial facilities may seek coverage under an individual permit, the Baseline Industrial General Permit, or the Multi-sector General Permit. In addition, construction activities that disturb 5 or more acres of land are regulated under the Baseline Construction General Permit. Municipalities serving over 100,000 people are also regulated, but on an individual permit basis. Each of these permitting mechanisms establishes different monitoring programs. Several States have used the Federal permits as models for their permit conditions.

Specific monitoring conditions for the Federal general permits are detailed in the following documents:

- "*Final NPDES General Permits for Storm Water Discharges Associated With Industrial Activity*," *Federal Register*, September 9, 1992. (Baseline Industrial General Permit).

- "*Final NPDES General Permits for Storm Water Discharges from Construction Sites*," *Federal Register*, September 9, 1992. (Baseline Construction General Permit).
- "*Final NPDES Storm Water Multi-Sector General Permit for Industrial Activities*," *Federal Register*, September 9, 1992. (Multi-Sector General Permit).

Monitoring Combined Sewer Overflows and Sanitary Sewer Overflows

EPA's CSO Control Policy (59 *FR* 18688) requires monitoring to characterize the combined sewer system, assist in developing the Long-Term Control Plan (LTCP), and illustrate compliance with permit requirements. Monitoring as part of the nine minimum controls (NMC) is done to develop an initial system characterization and includes analyzing existing data on precipitation events, on the combined sewer system and CSOs, on water quality, and conducting field inspections. As part of the LTCP, a permittee is required to develop a more complete characterization of the sewer system through monitoring and modeling. Finally, to illustrate compliance with the permit requirements, the permittee is required to conduct a post-construction compliance monitoring program. Specific monitoring requirements of this post-construction compliance monitoring program will be unique to each permittee's LTCP and should be established as specific monitoring conditions in the individual NPDES permit. These monitoring conditions should require monitoring of a representative number of CSOs for a representative number of wet weather events for certain key parameters along with ambient water quality monitoring to ascertain attainment with water quality standards. EPA is currently preparing eight guidance manuals on various aspects of the CSO Control Policy, including one on monitoring, *Combined Sewer Overflows: Guidance for Monitoring and Modeling (draft).*[37]

A facility's permit may also contain monitoring requirements for sanitary sewer overflows (SSOs). These would be developed on a case-by-case basis.

[37]USEPA (1995). *Combined Sewer Overflows–Guidance for Monitoring and Modeling.* (DRAFT). EPA-832/R-95-005.

Whole Effluent Toxicity Monitoring

The use of whole effluent toxicity (WET) testing to evaluate the toxicity in a receiving stream was discussed in Chapter 6. The biomonitoring test procedures were promulgated in 40 CFR Part 136 on October 16, 1995 (60 *FR* 53529). WET monitoring conditions included in permits should specify the particular biomonitoring test to be used, the test species, required test endpoint, and QA/QC procedures. EPA has published recommended toxicity test protocols in four manuals:

- *Methods for Measuring the Acute Toxicity of Effluents and Receiving Waters to Freshwater and Marine Organisms.*[38]
- *Short-Term Methods for Estimating the Chronic Toxicity of Effluents and Receiving Waters to Marine and Estuarine Organisms.*[39]
- *Short-Term Methods for Estimating the Chronic Toxicity of Effluents and Receiving Waters to Freshwater Organisms.*[40]
- *NPDES Compliance Monitoring Inspector Training: Biomonitoring.*[41]

Samples for WET may be composite or grab samples. Twenty-four hour composite samples are suggested **except** when (1) the effluent is expected to be more toxic at a certain time of day; (2) toxicity may be diluted during compositing; and (3) the size of the sample needed exceeds the composite sampler volume (e.g., 5 gallons).

WET tests are relatively expensive (see Exhibit 7-3 on costs). Therefore the test frequency should be related to the probability of any discharger having whole

[38]USEPA (1991). *Methods for Measuring the Acute Toxicity of Effluents and Receiving Waters to Freshwater and Marine Organisms*

[39]USEPA (1991). *Short-Term Methods for Estimating the Chronic Toxicity of Effluents and Receiving Waters to Marine and Estuarine Organisms.* EPA-600/4-91-003. Environmental Monitoring and Support Laboratory.

[40]USEPA (1991). *Short-Term Methods for Estimating the Chronic Toxicity of Effluents and Receiving Waters to Freshwater Organisms, Third Edition.* EPA-600/4-91-002. Environmental Monitoring and Support Laboratory.

[41]USEPA (1990). *NPDES Compliance Monitoring Inspector Training: Biomonitoring.* Office of Water.

effluent toxicity. Samples should be evenly spaced throughout the year so that seasonal variability can be ascertained.

Municipal Sludge Monitoring

The purpose of monitoring municipal sludge is to ensure safe use or disposal. The 40 CFR Part 503 sludge regulations require monitoring of sewage sludge that is applied to land, placed on a surface disposal site, or incinerated. The frequency of monitoring is based on the annual amount of sludge that is used or disposed by these methods. POTWs that provide the sewage sludge to another party for further treatment (such as composting) must provide that party with the information necessary to comply with 40 CFR Part 503. Sewage sludge disposed of in a municipal solid waste landfill unit must meet the requirements in 40 CFR Part 258, which is the criteria for municipal solid waste landfills.

Exhibit 7-4 shows the minimum monitoring requirements for sewage sludge prior to use and disposal established in 40 CFR Part 503. More frequent monitoring for any of the required or recommended parameters is appropriate when the POTW:

- Influent load of toxics or organic solids is highly variable
- Has a significant industrial load
- Has a history of process upsets due to toxics, or of adverse environmental impacts due to sludge use or disposal activities.

The sampling and analysis methods specified in 40 CFR §503.8 should be followed for monitoring the required parameters. In the absence of any specific methods in 40 CFR Part 503, guidance on appropriate methods is contained in *Part 503 Implementation Guidance,*[42] *Control of Pathogens and Vector Attraction in Sewage Sludge,*[43] and *POTW Sludge Sampling and Analysis Guidance Document.*[44]

[42]USEPA (1995). *Part 503 Implementation Guidance.* EPA 833-R-95-001. Office of Water.

[43]USEPA (1992). *Control of Pathogens and Vector Attraction in Sewage Sludge.* EPA-625/R-92-013. Office of Research and Development.

[44]USEPA (1989). *POTW Sludge Sampling and Analysis Guidance Document.* Office of Water, Permits Division.

EXHIBIT 7-4
Minimum Requirements for Sewage Sludge Monitoring, Based on Method of Sludge Use or Disposal

Method	Monitoring Requirements	Frequency	Citation
Land Application	(1) Sludge weight and % total solids Metals: As, Cd, Cu, Pb, Hg, Mo, Ni, Se, and Zn Pathogen Reduction Vector Attraction Reduction	(1) 0< and < 290*, annually 290< and < 1,500, quarterly 1,500< and < 15,000, bimonthly 15,000 = or <, monthly	40 CFR Part 503.16
Co-disposal in Municipal Solid Waste Landfill	(1) Sludge weight and % total solids (2) Passes Paint-Filter Liquid Test (3) Suitability of sludge used as cover (4) Characterize in accordance with hazardous waste rules	(1), (2), (3), and (4) Monitoring requirements or frequency not specified by 40 CFR Part 503. Determined by local health authority or landfill owner/operator	40 CFR Part 258.28
Surface Disposal: Lined Sites with leachate collection and Unlined Sites	(1) Sludge weight and % total solids Pathogen Reduction Vector Attraction Reduction Metals: As, Cr, Ni (Unlined Sites Only) (2) Methane gas	(1) Based on sludge quantity (as above) (2) Continuously	40 CFR Part 503.26
Incineration	(1) Sludge weight and % total solids Metals: As, Cd, Cr, Pb, and Ni (2) Be and Hg (Nat. Emissions Standards) (3) THC or CO, O_2, moisture, combustion temperatures (4) Air pollution control device operating parameters	(1) Based on sludge quantity (as above) (2) As required by subparts C and E of 40 CFR Part 61 as may be specified by permitting authority (local air authority) (3) Continuously (4) Daily	40 CFR Part 503.46

Notes: 1. Monitoring frequencies required under 40 CFR Part 503 may be reduced after 2 years of monitoring, but in no case shall be less than once per year.

2. A successful land application program may necessitate sampling for other constituents of concern (such as nitrogen) in determining appropriate agronomic rates. This will be determined by the permit writer.

*Dry weight of sludge in metric tons per year.

7.2 Reporting and Recordkeeping Requirements

The NPDES regulations at 40 CFR §§122.41(l)(4)(j) and (l) require the permittee to keep records and periodically report on monitoring activities. Discharge Monitoring Reports (DMRs) (see form in **Exhibit 7-5**) must be used by permittees to report self-monitoring data. Data reported include both data required by the permit and any additional data the permittee has collected consistent with permit requirements. All facilities are required to submit reports (on discharges and sludge use or disposal) at least annually per 40 CFR §122.44(i)(2). POTWs with pretreatment programs are required to submit a pretreatment report at least annually per Section 403.12(i). However, the NPDES regulation states that monitoring frequency and reporting should be dependent on the nature and effect of the discharge/sludge use or disposal. Thus, the permit writer can require more frequent than annual reporting.

Records must be kept by the permittee for at least 3 years and this time may be extended by the Director upon request. An exception is for sewage sludge records which must be kept 5 years or longer if required by 40 CFR Part 503. The permit writer should designate where records should be located. Monitoring records include:

- Date, place, time
- Name of sampler
- Date of analysis
- Name of analyst
- Analytical methods used
- Analytical results.

According to 40 CFR §122.41(j), monitoring records must be representative of the discharge. Records which must be retained include continuous strip chart recordings, calibration data, copies of all reports for the permit, and copies of all data used to compile reports and applications. Sludge regulations under 40 CFR §§ 503.17, 503.27, and 503.47 establish recordkeeping requirements that vary depending on the use and disposal method for the sludge. The same recordkeeping requirements should be applied to other sludge monitoring parameters not regulated by the 40 CFR Part 503 rule.

EXHIBIT 7-5.
Discharge Monitoring Report (DMR)

Chapter 11

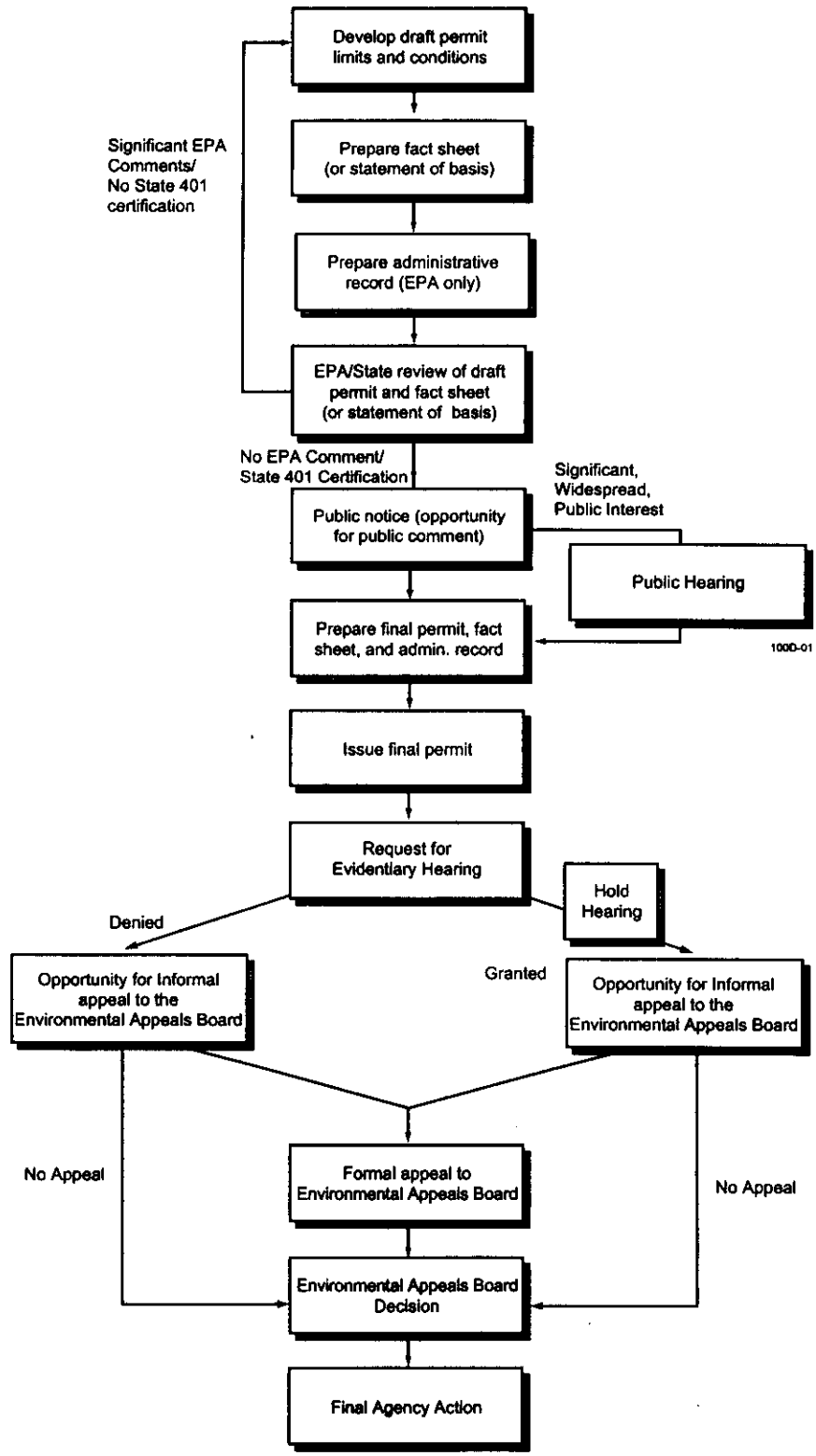
Administrative Process

Previous discussions in this manual focused on the process of developing NPDES permit conditions and effluent limits. This chapter describes the administrative process that is associated with the issuance of a NPDES permit. **Exhibit 11-1** provides a flow diagram of the NPDES permit administrative process. In general, the administrative process includes:

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

Note that Exhibit 11-1 provides the general framework for both EPA and State NPDES permit administration. State requirements need not be identical to Federal regulatory requirements, provided they are as stringent. Therefore, some delegated States may have slightly different processes for developing and issuing NPDES permits. In addition, the evidentiary hearing and appeal process presented depicts EPA procedure. State procedures for NPDES permit hearings and appeals may vary according to State law.

EXHIBIT 11-1
NPDES Permitting Administrative Process



11.1 Documentation For Development of the Draft Permit

When the permit is issued, the fact sheet and supporting documentation (administrative record) are the primary support for defending the permit in administrative appeals and evidentiary hearings. The process of 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 directed by Federal and State regulation and the rest is dictated by good project management. Permit writers should recognize the importance of:

- Ensuring development of a thorough permit in a logical fashion
- Meeting legal requirements for preparation of an administrative record, fact sheet, and statement of basis
- Helping to substantiate permit decisions and provide a sound basis in case challenges are made to the derivation of permit terms, conditions, and limitations
- Establishing a permanent record of the basis of the permit for use in future permit actions.

The following sections describe the requirements pertaining to the development of permit documentation, particularly the administrative record and the fact sheet.

11.1.1 Administrative Record

The administrative record is the foundation for issuing permits. If EPA *is the* issuer, the contents of the administrative record are prescribed by regulation (see 40 CFR §§124.9 and 124.18). All supporting materials must be made available to the public, whether a State, Territory, Tribe or EPA issues the permit. 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. It also 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 administrative record for a draft permit consists, at a minimum, of certain specific documents as shown in **Exhibit 11-2**. Materials that are readily available in the permit issuing office or published material that is generally available, does not

EXHIBIT 11-2
Elements of the Draft NPDES Permit Administrative Record

- 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 limits
- All other items in the supporting file
- For new sources, any environmental assessment, the draft/final environmental impact statement (EIS), or other such background information, such as a Findings of No Significant Impact (only applies if EPA issues the permit).

need to be physically included with the record as long as it is specifically referred to in the fact sheet or statement of basis. If EPA issues new source draft permits, the administrative record should include any EIS or environmental assessment performed in accordance with 40 CFR §122.29(c).

The administrative record should include all meeting reports and correspondence with the applicant and correspondence with other regulatory agency personnel. In addition, trip reports and telephone memos should be included in the record. All correspondence, notes, and calculations should indicate the date and the name of the writer, as well as all other persons involved. Since correspondence is subject to public scrutiny, references or comments that do not serve an objective purpose should be avoided. Finally, 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. The administrative record for the final permit consists of the items in **Exhibit 11-3**.

11.1.2 Fact Sheets and Statements of Basis

A fact sheet is a document that briefly sets forth the principle 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 to the permittee and the general public the rationale and assumptions used in deriving the limits.

EXHIBIT 11-3
Elements of the Administrative Records for a Final Permit

- All elements for the draft permit administrative record (see Exhibit 11-2)
- 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.

The NPDES regulations set forth in 40 CFR §124.8(a) require 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 40 CFR §124.56(b) (toxic pollutants, internal waste stream, and indicator pollutants and for privately owned waste treatment facilities)
- Is a NPDES general permit
- Is subject to widespread public interest (see 40 CFR §124.8)
- Is a Class 1 sludge management facility
- Includes a sewage sludge land application plan.

EPA permit writers are required to prepare a statement of basis for all permits that do not merit the detail of a fact sheet. Such statements briefly describe the derivation of the effluent limits and the reasons for special conditions (see 40 CFR §124.7). However, a prudent permit writer will develop a fact sheet for any permit that required complex calculations or special conditions. This will be particularly true for permit conditions based on BPJ.

With a well-documented rationale for all decisions, much of the work in reissuing a permit in the future will be done. This will avoid any conjecture and guessing concerning the development of any conditions that are being carried forward from the expired permit to the next permit. This is also true if a modification is initiated during the life of the permit. A permit rationale can be as short as two to three pages for a relatively simple permit or as long as 20 to 100 pages for an

extremely complicated permit (e.g., several discharge points, many BPJ determinations). The required contents of a fact sheet, as specified in 40 CFR §§124.8 and 124.56, include the items listed in **Exhibit 11-4.**

EXHIBIT 11-4
Required Contents of a Fact Sheet

- A brief description of the type of facility or activity that is being regulated by the NPDES permit
- The type and quantity of pollutants discharged
- A brief summary of the basis for the draft permit conditions, including references to the applicable statutory or regulatory provisions
- Name and telephone number of person to contact for additional information
- Provisions satisfying the requirements of 40 CFR §124.56:
  - Explanation of derivation of effluent limitations
  - Explanation of any conditions applicable to toxic, internal waste streams, or indicator pollutants
  - A sketch or detailed description of the location of the discharge
  - For EPA issued permits, the requirements of any State certification
- For every permit to be issued to a treatment works owned by a person other than a State or municipality, an explanation of the decision to regulate the users under a separate permit
- For every permit that includes a sewage sludge land application plan, a brief description of how each of the required elements of the land application plan are addressed in the permit
- If applicable, reasons why any requested variances do not appear justified
- A description of the procedures for reaching a final decision on the draft permit, including:
  - The dates of the public comment period and the address
  - Procedures for requesting a hearing
  - Other procedures for public participation.

A detailed discussion of the development of permit limits for each pollutant should be included in the fact sheet. For some permits, a considerable amount of time is spent within the permitting agency debating a permit issue that then becomes an assumption upon which the permit conditions are based. Documenting the

decision process may prevent a repeat of the debate in 5 years when the permit is up for reissuance. For each pollutant the following information is necessary:

- Calculations and assumptions
  - Production
  - Flow
- Type of limitations (i.e., effluent guideline-, water quality-, or BPJ-based)
- Whether the effluent guidelines used were BPT, BCT, or BAT
- The water quality standards or criteria used
- Whether any pollutants were indicators for other pollutants
- Citations to appropriate wasteload allocation studies, guidance documents, other references.

Often, it is as important to keep a record of items that were **not** included in the draft permit, such as the following:

- Why was BPJ or effluent guidelines used instead of water quality-based limitations (i.e., were the limitations checked to see that water quality considerations did not govern the setting of permit limits)?
- 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 comment period begin and end dates, procedures for requesting a hearing, and the public involvement in the final decision.

11.2 Items to Address Prior to Issuance of 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.

11.2.1 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 of other significant actions with respect to a 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 a permit application or a permit. The exact scope, required contents, and methods for effecting public notices may be found in 40 CFR §124.10.

The NPDES permit-related actions that must receive public notice are shown in **Exhibit 11-5**.

EXHIBIT 11-5
Actions That Must Receive Public Notice

- 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
- Granting of an evidentiary appeal of an EPA-issued permit under 40 CFR §124.74
- Formal appeal of permit
- New Source Determinations (EPA only)

The permit writer should be primarily concerned with the first three items in Exhibit 11-5. 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 the various NPDES-related activities is provided by the following methods:

- For major permits, publication of a notice in daily or weekly newspaper within the area affected by the facility or activity. In addition, for general permits issued by EPA, publication in the *Federal Register* is required.

- 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 is required to issue a Resource Conservation and Recovery Act, Underground Injection Control, Corps of Engineers, or PSD permit for the same facility
  - All appropriate government authorities (e.g., United States Fish and Wildlife Services, National Marine Fisheries Service, neighboring States)
  - Users identified in the permit application of a POTW.

A public notice must contain the information shown in **Exhibit 11-6**.

EXHIBIT 11-6
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 regulated by the permit
- A brief description of the business conducted at the facility
- Name, address, and telephone number of a contact from whom interested persons can obtain additional information
- A brief description of the comment procedures required
- For EPA-issued permits, the location and availability of the administrative record
- Any additional information considered necessary.

Public notice of the preparation of the draft permit (including a notice of intent to deny a permit application) must allow 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/Tribal issued permits will 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 environmental impact statement (EIS), public notice is not given until after a draft EIS is issued.

11.2.2 Public Comments

Public notice of a draft permit elicits 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, those parties providing comments must submit all reasonable arguments and factual material in support of their positions. 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 may 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 may be possible to diffuse a potentially controversial situation by providing further explanation of permit terms and conditions. It is also good public practice to inform parties who provide public comments that their comments have been received and are being considered.

The permitting agency is obliged to respond to all significant comments (in accordance with 40 CFR §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 raised during the public comment period or during any hearing.

In the event that any information submitted during the public comment period raises substantial new questions about the draft permit, one of the following actions may occur:

- A new draft permit with revised fact sheet or statement of basis is prepared.
- A final permit with necessary changes explained is issued.
- The comment period is reopened but is limited only to new findings.

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

11.2.3 Public Hearing

A public hearing may be requested in writing by any interested party. The request 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 30-day public comment period or when it is necessary to clarify the issues involved in the permit decision.

Thus, the decision of whether or not 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 of 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 prior to 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). Scheduling a hearing automatically extends the comment period until at least the close of the hearing [40 CFR §124.12(c)].

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.

A presiding officer is responsible for the hearing's scheduling and orderly conduct. Anyone may submit written or oral comments concerning the draft permit at the hearing. The presiding officer should set reasonable time limits for oral statements. The public comment period may be extended by so stating during the hearing. It should be noted that a transcript or recording of the hearing must be available to interested persons.

11.2.4 State/Tribal Roles in Reviewing Draft Permit

State/Tribal issued draft permits must be submitted to EPA for review if they relate to:

- Discharges into the territorial seas
- Discharges that may affect waters of a State other than the one in which the discharge originates
- 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 industrial category
- Discharges of from other sources with a daily average discharge exceeding 500,000 gallons per day (however, EPA may waive review for non-process wastewater), and
- Class I sludge management facilities.

Permits issued by EPA require State/Tribal review and certification under Section 401 of the CWA. Such certification ensures that the permit will comply with applicable Federal CWA standards as well as with State or Tribal water quality standards. This State/Tribal certification also ensures that State and Tribal initiatives or policies are addressed in EPA-issued NPDES permits, and functions to promote consistency between State- and EPA-issued permits.

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 is usually accomplished by allowing States to review and certify the application prior to draft permit preparation. Regulations in 40 CFR §124.53 [State Certification] and §124.54 [Special provisions for State certification and concurrence on applications for section CWA 301(h) variances] describe procedures a permit writer should follow to obtain State or Tribal certification. Under 40 CFR §124.53, when a draft permit is prepared by EPA, but State certification has not yet been granted, 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 60 days, the State is deemed to have waived its right to

certify. If the State chooses to certify the draft permit, the State may only require changes to the draft permit to incorporate more stringent State laws. If the State requires such changes, the State must send EPA a letter justifying the changes and citing State regulations that support the changes. When a permit applicant requests a CWA Section 301(h) variance, the State certification process is very similar to the process just described for permit applications and draft permits (refer to Section 40 CFR §124.54).

11.2.5 Schedule for Final Permit Issuance

The final permit may be issued after the close of the public notice period and after State/Tribal certification has been received (for permits issued by EPA). The public notice period includes:

- 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 comments request changes in 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). 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).

11.3 Administrative Actions After Final Permit Issuance

Once the final permit has been issued, the issuing authority should integrate the permit limitations and any special conditions into the NPDES tracking system (i.e., the permit compliance system (PCS)). This will ensure that the facility's performance will be tracked and the permitting agency will be alerted to the need for corrective action in the event of violations of permit limitations, terms, or conditions.

After final permit issuance, interested parties have other opportunities to change the permit thorough permit appeals, major/minor permit modifications, permit termination or permit transfer. These administrative procedures are described below.

11.3.1 Permit Appeals

In the process of developing a draft permit and during the public notice period, the permit writer should carefully consider the legitimate concerns of the permittee as well as the concerns of any third party who may have an interest in the permit terms and conditions. However, 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 an interested party may choose to legally contest or appeal the NPDES permit.

Various mechanisms are available to resolve legal challenges to NPDES permits. In the case of EPA-issued permits, the administrative procedure involved is called an evidentiary hearing. Many NPDES States and Tribes have similar administrative procedures designed to resolve challenges to the conditions of a permit. These procedures involve hearings presided over by an administrative law judge. For the sake of convenience, these hearings will hereafter be referred to as evidentiary hearings. They will naturally be known by different names in different State or Tribe jurisdictions. However, 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 preparation of the administrative record and notices, the permit writer may not be concerned with procedural matters relating to evidentiary hearings. All requests for evidentiary hearings are coordinated through the office of the EPA Regional Counsel or the appropriate State legal personnel. The permit writer's first involvement with the hearing process will come as a result of designation of the trial staff and his/her role will be limited to that of a witness and technical advisor to legal counsel.

A permit writer may 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 be familiar with those laws, regulations, and policies that may affect the permit. The permit writer should be thoroughly familiar with the technical basis for the permit conditions. For

example, if the effluent limits are based on water quality requirements, the permit writer should thoroughly study any applicable basin plan or water quality simulation used to develop the effluent limits and be prepared to defend any assumptions inherent in the plan or simulation. If BPJ limits are based on proposed effluent guidelines, it will be necessary to carefully review not only the guidelines themselves but all applicable data, including the development document for the specific guidelines. The technical defense of other BPJ requirements is much more difficult. The permit writer should be sure that (1) the information on which BPJ limits are based are unimpeachable, (2) the limits were derived from the data in a logical manner, in accordance with established procedures, and (3) the BPJ limits so derived are technically sound and meet BCT or BAT standards for economic reasonableness.

As technical advisor to legal counsel, the permit writer's most important function is to develop direct testimony in support of contested permit conditions. No attempt should be made 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 agency withdraw those conditions.

The second most important advisory function of the permit writer is assisting counsel in the development of questions for cross-examination of the opposing witnesses. 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. If a question must be phrased in such a way that the witness could attempt lengthy explanations, counsel should be forewarned.

Finally, the permit writer should remember that in requesting an evidentiary hearing, the permittee has declared an adversary relationship with the regulatory agency, and the permit writer must therefore refrain from discussions about the case without prior consultation with legal counsel. In the role of witness and/or technical advisor, the permit writer should:

- 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.

Where the permitee is granted relief at the evidentiary hearing, the Administrative Law Judge generally will order appropriate relief. Where a request for an evidentiary hearing is denied, the permittee may file a notice of appeal and petition for review with the Environmental Appeals Board (EAB), which may or may not grant an evidentiary hearing based on the factual and legal issues alleged. Similarly, where a permittee is denied relief at an evidentiary hearing, the permittee may appeal to the EAB to overturn the hearing decision. Finally, under certain circumstances decisions of the EAB against the permittee may be appealed in Federal court.

11.3.2 Permit Modification, Revocation, Termination, and Transfer

After the final permit is issued, the permit may still need to be modified or revoked prior to the expiration date. 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 may be reconsidered when it is revoked and reissued. A permit modification may be triggered in several ways. For example, a representative of the regulatory agency may conduct an inspection of the facility that indicated a need for the modification (i.e., the improper classification of an industry), or information submitted by the permittee may suggest the need for a change. Of course, any interested person may request that a permit modification be made.

There are two classifications of modifications: major and minor. From a procedural standpoint, they differ primarily with respect to the public notice requirement. Major modifications require public notice; minor modifications do not.

Virtually all modifications that result in less stringent conditions must be treated as major modifications, with provisions for public notice and comment. Generally speaking, a permit will not need to be modified during the term of the permit if the facility can fully comply with permit conditions. Conditions that would necessitate a major modification of a permit are described in 40 CFR §122.62 and shown in **Exhibit 11-7**.

EXHIBIT 11-7
Conditions Requiring Major Modification

- Reopener—Conditions in the permit that required it to be reopened under certain circumstances.
- Technical Mistakes—To correct technical mistakes or mistaken interpretations of law made in developing the permit conditions.
- 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.
- Alterations—When alterations or changes in operations 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—When standards or regulations on which the permit was based have been changed by promulgation of amended standards or regulations or by judicial decision.
- Compliance Schedules for Innovative or Alternative Facilities—To modify the compliance schedule in light of the additional time that may be required to construct this type of facility; or when good cause for modification of a compliance schedule exists, such as an Act of God, strike, or flood.
- Pretreatment—To require that an approved program be implemented or to change the schedule for program development.
- Failed BPJ Compliance—When BPJ technology is installed and properly operated and maintained but the permittee is unable to meet its limits, the limits may be reduced to reflect actual removal; but in no case may they be less than the guideline limits. If BPJ operation and maintenance costs are totally disproportionate to the costs considered in a subsequent guideline, the permittee may be allowed to backslide to the guideline limits.
- Non-Limited Pollutants—When the level of discharge 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.
- Variance Requests—When requests for variances, net effluent limitations, pretreatment, etc., are filed within the specified time but not granted until after permit issuance.
- Adjust limits to reflect net pollutant treatment—Upon request of a permittee who qualifies for effluent limitations on a net basis under 40 CFR §§122.45(g) and (h).
- Insert CWA §307(a) toxic or 40 CFR Part 503 sludge use/disposal requirements.
- Notification Levels—To establish notification levels for toxic pollutants that are not limited in the permit but must be reported if concentrations in the discharge exceed these levels.

Minor modifications are generally non-substantive changes (e.g., typographical errors that require more stringent permit conditions). The conditions for minor modifications, described in 40 CFR §122.63, are shown in **Exhibit 11-8**.

EXHIBIT 11-8
Conditions Requiring Minor Modification

- Typographical errors must be corrected.
- More frequent monitoring or reporting is necessary.
- An interim compliance date in the schedule of compliance needs revision, 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.
- Ownership has changed but no other change is necessary.
- The construction schedule for a new source discharger needs revision.
- A point source outfall that does not result in the discharge of pollutants from other outfalls must be deleted from the permit.
- An approved local pretreatment program must be incorporated into the permit.

11.3.3 Termination of Permits

Situations may arise during the life of the permit that are cause for termination (i.e., cancellation, revocation) of the permit. Such circumstances include the following (see 40 CFR §122.62(b)):

- Noncompliance by the permittee with any condition of the permit
- Misrepresentation or omission of relevant facts by the permittee
- A determination that the permitted activity endangers human health or the environment, either in an emergency or other situation
- A temporary or permanent reduction or elimination of a discharge (e.g., plant closure).

Once the permit is terminated, it can be placed into effect again only by the reissuance process, which requires a new permit application. All of the above situations may also be addressed through the permit modification process on a case-by-case determination.

11.3.4 Transfer of Permits

Regulatory agencies will occasionally receive notification of a change in ownership of a facility covered by a 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 modification, either major or minor. It may also be addressed by revoking and subsequently reissuing the permit.
- **Automatic Transfer**—A permit may be automatically 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 on the terms of the transfer.
  - The Director of the regulatory agency does not indicate that the subject permit will be modified or revoked.

BEFORE THE ADMINISTRATOR
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

IN THE MATTER OF ORANGE RECYCLING AND ETHANOL PRODUCTION FACILITY, PENCOR- MASADA OXYNOL, LLC Permit ID: 3-3309-00101/00001 Facility NYSDEC ID: 3330900101 Issued by the New York State Department of Environmental Conservation	)	ORDER RESPONDING TO PETITIONER'S REQUEST THAT THE ADMINISTRATOR OBJECT TO ISSUANCE OF A STATE OPERATING PERMIT Petition No.: II-2000-07

ORDER PARTIALLY GRANTING AND PARTIALLY DENYING PETITION FOR OBJECTION TO PERMIT

The New York State Department of Environmental Conservation, Region 3 (NYSDEC) issued a state operating permit to Pencor-Masada Oxynol, LLC on July 25, 2000, authorizing construction of the Orange Recycling and Ethanol Production Facility (Masada).[1] The Masada permit was issued pursuant to title V of the Clean Air Act (CAA or the Act), 42 U.S.C. §§ 7661-7661f, CAA §§ 501-507, the federal implementing regulations, 40 CFR Part 70, and the New York State permitting regulations. Between June and September, 2000, the Environmental Protection Agency (EPA) received 35 petitions from 29 different petitioners, requesting that EPA object to the issuance of the Masada permit.

Under section 505(b) of the Act, EPA may object to the issuance of a permit if the Administrator finds that it is "not in compliance with the applicable requirements of the [Act], including the requirements of an applicable [state] implementation plan." The Act and EPA's implementing regulations provide that, if the Administrator does not object in writing, "any person" may petition the Administrator to object to the permit. CAA § 505(b)(2); 40 CFR 70.8(d).

[1] Pencor-Masada Oxynol, LLC is the corporate owner of the Orange Recycling and Ethanol Production Facility to be built in Middletown, New York. In the interests of clarity, this Order uses the term "Masada" to encompass both the corporate owner and the Middletown facility at issue here. The phrase "the Masada permit" refers to the permit issued by NYSDEC for the Middletown facility.

EXHIBIT D

The petitions with respect to this facility raise a number of distinct claims.[2] For organizational purposes, these claims have been divided into two categories, the first addressing administrative/public participation issues and the second addressing technical/regulatory issues. More specifically, the petitioners allege that the NYSDEC did not comply with the applicable public participation requirements in issuing the Masada permit because NYSDEC did not: (1) notify the public of the extended opportunity for comment; (2) make available to the public requisite information necessary to review the permit; (3) offer the public an opportunity to comment on significant changes to the draft permit; (4) properly inform the public of its right to petition to the EPA Administrator; (5) substantively review public comments; (6) grant requests for a second public hearing, and (7) translate the public notices and key documents for the non-English speaking members of the community.

The petitioners also assert that the Masada permit did not comply with the applicable technical/regulatory requirements in that the permit: (1) fails to assure compliance with major source preconstruction permitting requirements under the Act; (2) does not assure compliance with several allegedly applicable federal emissions standards, (3) omits required provisions governing chemical accident prevention requirements, namely section 112(r) of the Act and EPA's implementing regulations at 40 CFR Part 68, and (4) does not comply with the Executive Order 12898 on environmental justice. The petitioners have requested that EPA object to the issuance of the Masada permit pursuant to § 505(b)(2) of the Act and 40 CFR 70.8(c) for these reasons.

EPA has performed an independent review of the petitioners' claims. Based on review of all the information before me, including the Masada permit of July 25, 2000, the permit application, and the information provided by the petitioners in the petitions, I hereby grant the petitions in part, and deny in part. In sum, I am granting the petitions insofar as they claim that (1) NYSDEC must provide an opportunity for public review of selected portions of the final operating permit issued to Masada, and (2) that applicable reporting and recordkeeping requirements of NSPS Subpart Db (governing Industrial, Commercial and Institutional Steam Generating Units) should be included in the permit. The petitioners' other requests are denied for the reasons set forth in this Order.

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[2] Robert C. LaFleur, president of Spectra Environmental Group, Inc. (Spectra), submitted the most detailed petition. Spectra's petition raised many of the same issues posed by other petitioners. For purposes of this Order, unless specified otherwise, the term "petitioner" refers to the petition received from Spectra. However, this Order also responds to the petitions submitted by Lois Broughton, Wanda Brown, Louisa and George Centeno with Leslie Mongilia, Maria Dellasandro, R. Dimieri, Lori Dimieri, Dawn Evesfield, Marvin Feman, Deborah Glover, Anne Jacobs, Barbara Javalli-Lesiuk, Marie Karr, June Lee, Ruth MacDonald, Bernice Mapes, Donald Maurizzio, Alice Meola, Daniel Nebus, Jeanette Nebus , Mr. and Mrs. Hillary Ragin, M. Schoonover and Mildred Sherlock, LaVinnie Sprague, Matthew Sprague, Hubert van Meurs, Alfred and Catherine Viggiani, Paul Weimer and Leonard Wodka. EPA has been unable to verify the correct name and address for Dawn Evesfield, R. Dimieri and Lori Dimieri.

I. STATUTORY AND REGULATORY FRAMEWORK

Major stationary sources of air pollution and other sources covered by title V are required to obtain an operating permit that includes emission limitations and such other conditions as are necessary to assure compliance with applicable requirements of the Act. See CAA §§ 502(a) and 504(a). Section 502(d)(1) of the Act calls upon each State to develop and submit to EPA an operating permit program to meet the requirements of title V. EPA granted interim approval to the title V operating permit program submitted by the State of New York effective December 9, 1996. 61 Fed. Reg. 57589 (Nov. 7, 1996); see also 61 Fed. Reg. 63928 (Dec. 2, 1996) (correction); 40 CFR Part 70, Appendix A.

The title V operating permit program does not generally impose new substantive air quality control requirements (which are referred to as "applicable requirements"), but does require permits to contain monitoring, recordkeeping, reporting, and other compliance requirements to assure compliance by sources with existing applicable requirements. 57 Fed. Reg. 32250, 32251 (July 21, 1992). One purpose of the title V program is to enable the source, EPA, States, and the public to clearly understand the regulatory requirements applicable to the source and whether the source is meeting those requirements. Thus, the title V operating permits program is a vehicle for assuring that existing air quality control requirements are appropriately applied to facility emission units in a single document and assuring compliance with these requirements.

In New York State, title V operating permits are issued to new sources through the same process which authorizes them to construct the facility. The procedures for issuing construction permits, the State's New Source Review (NSR) program, were in place prior to approval of the title V program, and have been combined with the State's title V program, so that this program meets the combined requirements of both NSR and title V. While combining the programs offers simultaneous review of the NSR requirements and the title V requirements, it does not alter the underlying requirements of these two programs: NSR establishes case-by-case control requirements for certain new sources, while title V assures (through permitting, monitoring, certification, etc.), compliance with all Clean Air Act requirements (including NSR, where applicable).

Under section 505(a) of the Act and 40 CFR § 70.8(a), States are required to submit to EPA for review all operating permits proposed for issuance, following the close of the public comment period. EPA is authorized under section 505(b) of the Act and 40 CFR § 70.8(c) to review proposed permits, and object to permits that fail to comply with applicable requirements of the Act, including the State's implementation plan (and the associated public participation requirements), or the requirements of 40 CFR Part 70.

If EPA does not object to a permit on its own initiative, section 505(b)(2) of the Act and 40 CFR 70.8(d) provide that any person may petition the Administrator, within 60 days of the expiration of EPA's 45-day review period, to object to the permit. When a petitioner asks EPA to object to a

title V permit, a petitioner must provide enough information for EPA to discern the basis for its petition. Under section 505(b)(2) of the Act and 40 CFR § 70.8(c), EPA can only object to a title V permit in response to a citizen petition based on the same grounds on which EPA could have objected on its own initiative. The statute provides that a petition for review does not stay the effectiveness of the permit or its requirements if the permit was issued after the expiration of EPA's 45-day review period and prior to an EPA objection. If EPA objects to a permit in response to a petition and the permit has been issued, EPA or the permitting authority will modify, terminate, or revoke and reissue such a permit consistent with the procedures in 40 CFR §§ 70.7(g)(4) or (5)(i) and (ii) for reopening a permit for cause.

II. ISSUES RAISED BY THE PETITIONERS

As discussed above, this Order divides the issues raised into two categories: administrative/public participation issues, and technical/regulatory issues. This is solely for clarity, and should not be read as conferring different legal status to the issues in either category.

A. Administrative Issues

The petitioners have requested that EPA object to Masada's permit based on a number of alleged flaws in the administrative processing of the permit. These administrative issues each relate to whether the NYSDEC provided adequate procedures for public notice pursuant to 40 CFR § 70.7(h) and 6 NYCRR part 621. Spectra's petition identified five such issues. Ms. Nebus and Ms. Glover raised some of the same issues, as well as two others. Public participation is an important part of the title V process, and is an appropriate subject of an objection by EPA pursuant to 40 CFR § 70.8(c)(3)(iii). Each of the administrative allegations are discussed below.

1. Extended Comment Period

Petitioner Spectra asserts that the NYSDEC never explicitly advised members of the public of their right to submit written comments up until the close of the public hearing. The issue raised in this claim points to NYSDEC's failure to explicitly advise the public of the right to submit written comments after the NYSDEC public comment period closed on October 22, 1999, and prior to the public hearing of December 29, 1999.

Both New York state and EPA regulations provide for reasonable public notice of title V permits. 6 NYCRR 621.6(a)(2), 40 CFR 70.7(h). Where a public hearing is scheduled, NYSDEC needs to give a 30-day notice to the public prior to the hearing. 40 CFR 70.7(h). NYSDEC satisfied this requirement by publishing a hearing announcement notice on November 24, 1999. Neither the part 70 regulations nor the State rules require NYSDEC to explicitly advise the public that comments may be submitted up until the close of the hearing. See 40 CFR part 70.7(h); NYCRR §§ 621.6 and 621.7. Given that comments were solicited for the day of hearing, it is implicit that comments submitted

up to that date would also be accepted without prejudice. Indeed, no party has informed EPA of any specific comments that were not considered by NYSDEC due to untimeliness and there has been no allegation that any of the petitioners suffered harm. Accordingly, EPA denies the petition on this point.

2. Unavailability of Certain Documents

Spectra claims that certain important documents were not made available to the public. Spectra lists EPA letters of October 20, 1999, December 6, 1999, and December 22, 1999 among those not available. Spectra also names a submittal from Masada to NYSDEC on November 2, 1999 as not available. Spectra further alleges that the revised applications (August 1999) and support documents (Masada's June 1999 pilot plant emissions testing data) were not made available to the public or EPA during the public comment period. Spectra claims that the public was completely unaware of these documents during the public comment period, and this was "information necessary to meaningfully review the proposed project," therefore NYSDEC violated 40 CFR 70.7(h)(2).

As the Administrator stated in the Borden Chemical Inc. petition response, petition VI-01-01, available at http://www.epa.gov/region07/programs/artd/air/title5/petitiondb/petitions (under Borden_response1999), "access to information is a necessary prerequisite to meaningful public participation." Public involvement is required throughout the CAA title V permit process (see, e.g., CAA section 502(b), 503)(e) and 505(b)), EPA's implementing regulations (see 40 CFR §§ 70.7 and 70.8) and New York regulations (6 NYCRR 621). However, EPA disagrees with Spectra, finding that the documents in questions were neither legally nor technically necessary for the public to meaningfully review and comment on the draft permit. NYSDEC made available Masada's complete permit application, including July and August 1999 amendments, the draft permit, and the State Environmental Quality Review Determination. As explained below, based on our review of the information provided by NYSDEC in this case, I find that the public had access to sufficient documentation to formulate comments and meaningfully participate in the permit process.

The documents named by Spectra fall in two categories: those that were generated prior to the public comment period, and those that were generated later. Regarding the pre-comment period documents, NYSDEC informed EPA that it believes that the application revisions of July 26 and August 6, 1999, were part of the permit application that was placed in the Middletown library at the beginning of the comment period and that the draft permit reflected all the last minute revisions.[3] The September 22, 1999, Notice of Complete Application, published in the State's Environmental News Bulletin, notes that "the draft permit and permit applications are available for review during normal business hours at the DEC Region 3 Office." It further notes that "[t]he application consists of a two volume part 360 solid waste engineering report/plan dated July 1999; an air emissions estimate dated

[3] EPA confirmed this via a telephone conversation between L. Steele, EPA Region 2, and T. Miller, NYSDEC Region 3, on January 5, 2001, and a subsequent conversation between L. Steele and M. Merriman, NYSDEC Region 3, on January 8, 2001.

December 1998, revised July 1999; and an air quality modeling report, dated March 1999, amended August 1999."

The other early document Spectra names is the June 1999 report of the pilot plant emission testing data. NYSDEC states that this document was not in the public docket because their staff never requested the actual pilot testing data as part of the Part 70 permit application review. They explain that it was not necessary for Part 70 purposes as they relied on Masada's summaries of the data for permit review purposes. EPA finds that the information in this report was adequately summarized by the documents provided by Masada, and therefore there was no need for NYSDEC to obtain the raw data. *Cf.* Akpan v. Koch, 75 N.Y.2d 561, 573-74 (1986) (holding that "[t]here is no requirement that [an environmental impact statement] contain all the raw data supporting its analysis so long as that analysis is sufficient to allow informed consideration and comment on the issues raised").

The other documents cited by Spectra were generated between October 20, 1999 and December 22, 1999, spanning the time between the public comment period and the public hearing. On October 20, EPA Region 2 commented to NYSDEC on the draft permit. On November 2, Masada responded to NYSDEC, addressing many of EPA's comments. On December 6, EPA Region 2 made additional comments to NYSDEC, as part of the regular process of permit review. This response relied on information provided by Masada as well as EPA headquarters. On December 22, EPA Region 2 responded to Mayor DeStefano's letter of October 22, 1999.

None of these documents introduced new information that was material to the design or operation of the Masada project. Although some of the information in the November 2, 1999 letter was ultimately useful in clarifying the applicability of some requirements (see II.B1c below), it did not amend the permit application. These documents reflect the on-going dialogue between EPA and NYSDEC that is envisioned in section 505 of the Clean Air Act. The Act provides the public an opportunity to review and comment upon the draft permit, but does not require that the public be afforded an opportunity to respond to EPA's comments or NYSDEC's response. *Cf.* Rybachek v. EPA, 904 F.2d 1276, 1286 (9th Cir. 1990) (denying claims of notice and comment violations because the petitioners' "unviolated right was to comment on the proposed regulations, not to comment in a never-ending way on EPA's responses to their comments."). In addition, the December 22, 1999 letter from EPA Region 2 to Mayor DeStefano was not relied upon by NYSDEC in making its permitting decision and NYSDEC did not violate the notice and comment procedures by failing to make EPA's letter publicly available.

When NYSDEC transmitted the proposed permit to EPA, it updated the Middletown library docket with several additional documents, including many of the documents discussed above. NYSDEC's June 2, 2000, letter to concerned citizens announced that EPA's October 20, 1999 letter, Masada's November 2, 1999 response, EPA's December 6, 1999 comments, and several other documents had been sent to the Middletown library. Spectra indeed acknowledges that it received and

"subsequently commented on the previously unavailable EPA and Masada correspondence." Spectra petition, at 27.

EPA encourages NYSDEC to manage their files as carefully as possible, so that information requests can be met expeditiously. EPA appreciates NYSDEC's willingness to use local libraries as document repositories for certain projects. Although there is no specific federal requirement to do so, this is a resourceful way to meet citizens' needs. During the Masada project review, there may have been delays in adding new documents to the public file placed in the Middletown library as they arrived in the office, and NYSDEC's document management procedures may not be flawless. Nonetheless, the public in this instance had access to and in fact commented upon the complete draft permit, the application, and ultimately the documents at issue. Therefore, EPA finds no violation of 40 CFR 70.7(h)(2), and denies the petition with respect to this issue.

3. Opportunity for Comment on Changes to Permit

The Spectra petition claims that "[t]he public...was not provided an opportunity to review the 'latest draft title V permit' for the Project" (Spectra petition, p. 12) and "[t]he public comment period was based on a September draft permit that is a shell of what was ultimately granted to Masada." (Id. at 26). Spectra expresses the concern that NYSDEC excluded the public from meaningfully reviewing and commenting on the proposed permit sent to EPA in May 2000. Petitioner Nebus raises similar issues in her petitions of July 23 and August 7, arguing that such significant modifications of a draft permit without additional public notice violate 40 CFR § 70.7(h).

The CAA and its implementing regulations at part 70 provide for public comment on "draft" permits and generally do not require permitting authorities to conduct a second round of comments when sending the revised "proposed" permit to EPA for review.[4] It is a basic principle of administrative law that agencies are encouraged to learn from public comments and, where appropriate, make changes that are a "logical outgrowth" of the original proposal. See, e.g., Sierra Club v. Costle, 657 F.2d 298, 352 (DC Cir. 1981). However, there are well recognized limits to the concept of "logical outgrowth" in the context of Agency rulemaking that, by analogy, apply to title V permits as well. As the US Court of Appeals for the DC Circuit has explained, "if the final rule deviates too sharply from the proposal, affected parties will be deprived of notice and an opportunity to respond to the proposal." Small Refiner Lead Phase-Down Task Force v. EPA, 705 F.2d 506, 547 (DC Cir. 1983) (vacating portion of final CAA rule governing leaded gasoline because agency notice was "too general" and did not apprise interested parties "with reasonable specificity" of the range of alternatives

[4] The CAA in part 502 (b)(6) specifies that one required element of a title V permit program is "adequate, streamlined, and reasonable procedures...for public notice, including offering an opportunity for public comment and a hearing." 40 CFR 70.7 (h) mirrors this language of the Act, stating that, "...all permit proceedings...shall provide adequate procedures for public notice including offering an opportunity for public comment and a hearing on the draft permit."

being considered). See also Shell Oil Company v. EPA, 950 F.2d 741 (DC Cir. 1991) (remanding final RCRA "mixture and derived from" rule because "interested parties cannot be expected to divine the EPA's unspoken thoughts"); Ober v. EPA, 84 F.3d 304, 312 (9th Cir. 1996) (requiring an additional round of public comment on EPA's approval of Arizona's PM-10 Implementation Plan because public never had an opportunity to comment on state's post-comment period justifications which were critical to EPA's approval decision). Courts have noted that providing the public meaningful notice improves the quality of agency decisionmaking, promotes fairness to affected parties, and enhances the quality of judicial review. Small Refiner, 705 F.2d at 547. I find that these fundamental principles apply with equal force in the context of title V permitting. Otherwise, if a final permit no longer resembled the permit that the public commented upon, then the public would be deprived of the opportunity to comment guaranteed by the CAA and EPA's rules.

Determining how much notice is sufficient is inherently a matter of judgment. In this case, however, the operational constraints imposed on the facility in the proposed permit were so significantly different from those in the draft permit that I find that additional public notice on this particular aspect of the permit is required. The NYSDEC's reason for including operational constraints in Masada's draft permit was to effectively limit the potential to emit (PTE) and prevent this source from being a "major source"[5] of air emissions for PSD and/or NSR purposes. The PTE is a critical factor in determining the applicability of the CAA major source permitting requirements. Many large facilities are potentially subject to major source preconstruction requirements, unless they install pollution control equipment and/or accept operational constraints, such as limitations in the hours of operation, raw material throughput or production rate, that limit the facility's PTE below major source thresholds.

Masada's title V application and permit do not list the major source preconstruction requirements as applicable requirements. Therefore, for pollutants where the source's unconstrained capacity exceeds major source thresholds, the permit must constrain the facility to emit air pollution only at levels that would not trigger major source applicable requirements. In order to be cognizable as limits on the source's PTE, such constraints must always be stated in a practically enforceable form in a source's construction permit as well as its operating permit(s). Since the source is subject to title V permitting, any preconstruction permit requirements, including PTE limits, qualify as applicable requirements under part 70, and must be set forth in the source's operating permit.

Generally, applicable requirements in permits are subject to many degrees of technical and legal review before and during rulemaking or permitting procedures. However, in the case of PTE limits, the

[5] A major source is defined under 40 CFR § 52.21 as any stationary source (or any group of stationary sources that are located on one or more contiguous or adjacent properties, and are under common control of the same (or persons under common control)) belonging to a single major industrial grouping that emits or has the potential to emit: 1) 250 tons per year (tpy) or more of any air pollutant regulated under title I of the Act; or 2) 100 tpy of any regulated air pollutant if the source belongs to one of the categories of stationary sources as listed under title I of the Act.

.State generally fashions the necessary operational constraints and subjects them to review for the first time during the permitting process. In the case of the Masada facility, the PTE-limiting terms were originally drafted by NYSDEC, as is normally done. When EPA staff commented on the draft permit, they raised several concerns with the enforceability of the PTE limits. Subsequent comments from citizens raised similar concerns.

After the close of the public comment period, NYSDEC revised the PTE limits with input from EPA and Masada, in order to better define the operational constraints and associated method for verifying the source's emissions. While the need to improve the PTE limits was identified by the concerns raised in the comment period, the final permit ultimately adopts a fundamentally different approach to limit the source's PTE than the one found in the draft permit. It is for this reason that I am requiring a new review period for these new PTE limits. As explained further in section II.B.1.c below, it is EPA's judgment that this new approach is a valid and enforceable way to limit PTE in certain cases, but additional public notice is required to finally determine whether it is appropriate to apply this approach to this facility and whether the permit does so in an appropriate manner.

Masada's draft permit expressed annual emissions limits on sulfur dioxide (SO_2) and nitrogen oxides (NOx) in terms of a 12-month rolling average. These limits, under EPA policy, would have to rely on short term (e.g., pounds/hour) emissions rates, coupled with restrictions on the source's hours of operation (e.g., hours/year). Indeed, much of EPA Region 2's comments, as well as the public comments filed on the draft permit, focused on the specifics of these short-term emissions rates and operational limitations. In contrast, the permit ultimately issued by NYSDEC does not rely on short term emissions rates as the basis for calculating an operational limit to restrict the source's PTE. Instead, it relies on real time data from continuous emissions monitors (CEMs). Short-term emissions rates are still in the permit, but the issued permit reflects a change to indicate that these limits are no longer used for PTE-limiting purposes.

EPA observes that the approach used in the issued permit is a relatively new (and more flexible) approach that takes advantage of continuous emissions monitoring systems. While the draft permit calculated emissions as a function of two factors – short-term emissions rate and hours of operation – the issued permit directly measures emissions with real-time accurate emissions measurements. Furthermore, whereas the draft permit relied on a 12-month rolling average, the final permit instead relies on a 365-day rolling total, resulting in a different reporting and recordkeeping regime, and effectively enabling more frequent compliance checks. To support this approach, the final permit requires extensive data collection procedures and quality assurance measures. Similarly, rather than impose exact limits on the hours of operation, the proposed permit allows the source to operate as long as its 365-day measured total is below the major source cutoff. Thus, specific limits on hours of operation were excluded from the PTE limiting language.

EPA finds that, as to the terms of the permit which were intended to express operational constraints on this facility that effectively limit Masada's PTE below major source thresholds,

specifically permit conditions 36 and 41, there has not been adequate adherence to the applicable public participation requirements. The draft permit gave no indication that such a different and relatively new approach might ultimately be contained in the issued permit. In fact, it suggested that the PTE limit would be a typical limit based on short-term emissions rates and limits on hours of operation. EPA's and the public's comments are clearly based on this understanding. As such, EPA finds that it is unreasonable to conclude that the public had an opportunity to comment on whether the PTE limit ultimately found in Masada's permit assures compliance with applicable requirements. Therefore, EPA is granting the request to object to the permit according to 40 CFR 70.8(c)(3)(iii), with respect to this issue.

Pursuant to Sections 505(b) and 505(e) of the Act, 42 U.S.C. §§ 7661d(b) and (e), and 40 C.F.R. §§ 70.7(g)(4) or (5) and 70.8(d), EPA objects to the title V operating permit issued to Masada by the NYSDEC on July 25, 2000. NYSDEC shall modify the permit by re-opening the above cited portion of the permit to provide for public participation based on the changes made after the initial public comment period. This process includes a new 30-day comment period for the public, a new review period for EPA, and a new petition period for commenters. Only the portions that speak to the monitoring, recordkeeping, and operational requirements that cap the facility's PTE need to be renoticed, and comments do not need to be accepted on other aspects of the permit. In this new public notice, NYSDEC should clarify that only conditions 36 and 41, and at least pages 3, 5, and 10-15 of the facility description, are being reopened pursuant to this Order.

4. Notification of Petition Period

Petitions received from Spectra and from Ms. Nebus claim that NYSDEC failed to properly inform the public with respect to the commencement of the public's 60-day period for petitioning the EPA Administrator to object to the issuance of the Masada title V permit. NYSDEC sent a letter to all concerned citizens dated June 2, 2000, announcing that EPA has completed its review and found the proposed permit to be acceptable. NYSDEC further stated, regarding the opportunity for citizens to petition, "[y]ou will be notified when this (the 60-day) period begins." When the final permit was issued on July 25, 2000, NYSDEC then advised the public that their June 2, 2000 letter erred in its statement about the commencement of the 60-day petition period. The July 25, 2000, letter indicated that the 60-day petition period began on June 19, 2000 and would end on August 21, 2000. Spectra and Ms. Nebus claim that NYSDEC shortened the statutory 60-day petition period as a result of their error and seeks an EPA objection to the issuance of the final permit on the basis that NYSDEC failed to properly inform the public of its right to petition.

Section 505(b) of the Act provides those who commented during the public review period have 60 days to petition the EPA Administrator to object to the issuance of a title V permit if EPA did not so object during its 45-day review period. This 60-day petition period immediately follows EPA's 45-day review period. Neither the Act nor the current part 70 regulations require the State to inform the public of the commencement of EPA's 45-day review period and of the citizen's 60-day petition period.

Nonetheless, NYSDEC took it upon itself to notify the public when the petition period began. However, NYSDEC misread the part 70 regulations and misinformed the public. NYSDEC's mistake may have caused confusion regarding the time period in which the public may petition the EPA Administrator. Spectra alleges a violation of 40 CFR 70.8(d) as a result of NYSDEC's error which may have, in effect, shortened the public's petition period for those who relied solely on NYSDEC's advice and not the rules themselves. NYSDEC did not and could not shorten the statutory period for public petitions. Its inaccurate statement may have misled the public. However, as discussed below, I find this to be a harmless error that did not cost any petitioner the opportunity to file a title V petition. *See e.g.* Massachusetts Trustees of Eastern Gas & Fuel Associates v. United States, 377 U.S. 235, 248 (1964) (an error can be dismissed as harmless "when a mistake of the administrative body is one that clearly had no bearing on the procedure used or the substance of the decision reached").

NYSDEC's notice would not have mattered to those who were aware of the statutory requirement since they knew when the 60-day petition period commenced. However, those who relied on NYSDEC's notification had 36 fewer days to prepare and file their petitions. Despite NYSDEC's error, many members of the community were aware of the proper filing deadline and submitted timely petitions to the Administrator. While EPA acknowledges that NYSDEC's error may have caused some confusion to the public, it was unintentional and inadvertent. Nevertheless, this error may have contributed to the filing of a petition on September 11, 2000 (21 days late) from Louisa Centeno, George Centeno, and Leslie Mongilia of New Hampton, New York. To ensure that NYSDEC's error does not frustrate the public participation process, I am exercising my discretion to consider their letter as a petition to reopen the permit for cause under 40 CFR 70.7(f) and (g). I therefore address their concerns on their merits in the below Order. On the basis that NYSDEC's error resulted in no harm being done to the public's opportunity to file petitions concerning the Masada project, I decline to object to the permit on these grounds.

5. Lack of Substantive Review of Comments

Spectra claims that "petitioners' comments have not been substantively reviewed or responded to by NYSDEC or EPA as they post-dated EPA's conclusions and findings on the matters raised." Spectra petition, at 13. In particular, the petition claims that NYSDEC's responsiveness summary did not fully address such fundamental issues as PSD/NSR applicability raised during the public comment period. Spectra argues that this is an indication that these fundamental issues and questions were not yet resolved prior to the issuance of the final permit. In responding to the PSD and NSPS applicability issues, NYSDEC referred to EPA's letters of December 6, 1999 and March 29, 2000 letters addressing PSD and NSPS applicability without any additional explanation of NYSDEC's position or justification. The petitioner alleges that NYSDEC did not perform a substantive review of all comments received, and therefore did not intend to consider public comments in its final permit decision.

EPA recognizes the importance of public scrutiny in the permitting process as evidenced in the public review and administrative petition opportunities offered in title V of the CAA and its

implementing regulations. The law requires that the public be allowed to review proposed projects and offer comments relevant to requirements applicable to the source. Such comments would most certainly assist the State in making a sound permit decision. The law also requires the State to consider comments received, but it does not require that all comments be incorporated into the final permit. It also does not indicate how much detail must be included in a permitting authority's response to any comment received. As a general matter, EPA recognizes that governmental bodies are entitled to a "presumption of regularity." *See e.g.* Citizens to Preserve Overton Park, Inc., et al. v. Volpe, Secretary of Transportation, 401 U.S. 402, 415 (1971). In the absence of specific evidence, EPA will not speculate that NYSDEC has failed to consider all comments. As a result, EPA finds that NYSDEC did not violate either the part 70 regulations or the State code at 6 NYCRR 621.9(e)(1) in referring to EPA's analyses of December 6, 1999, and March 29, 2000, to respond to the PSD and NSPS issues raised by commenters. EPA denies the petition on this issue.

6. Improper Denial of Request for a Second Public Hearing

Ms. Nebus claims NYSDEC violated the public participation requirements of 40 CFR §70.7(h) by not responding to her numerous requests, during and after the public comment period, for a second public hearing. The second hearing request denial was given to her verbally by NYSDEC after her numerous written and telephone requests to NYSDEC. Ms. Glover similarly complained that the December 29th public hearing "did not provide the opportunity for all affected parties to formally submit comments on the proposed facility ... to ask questions and share concerns for their health and safety." Ms. Glover also stated that another public hearing was requested on December 29, 1999 and on several subsequent occasions. The petitioners alleged that NYSDEC acted inappropriately in not granting their requests for a second public hearing.

EPA disagrees that DEC's failure to grant a second hearing request is a violation of the applicable public participation requirements. Although NYSDEC could have been more responsive to the petitioners' requests for a second hearing (e.g., responded by telephone or mail), neither 40 CFR §70.7(h) nor 6 NYCRR Part 621.6 and 621.7 require NYSDEC to honor requests for a second public hearing. The New York regulations at 6 NYCRR Part 621 list criteria for determining whether a public hearing will be held on an application. NYSDEC utilized those criteria and determined to hold a public hearing on December 29, 1999. New York regulations do not require multiple hearings, and thus the state can exercise its discretion whether to conduct a second hearing. In this case, the public had an opportunity to participate in the title V permit process by submitting written comments to NYSDEC and by speaking during the December 29th hearing. Many concerned citizens, including Ms. Nebus and Ms. Glover, availed themselves of these opportunities. Thus, NYSDEC was able to hear the community's views about the proposed facility and incorporate their concerns into the State's decisionmaking process. As a result, the decision whether to hold a second public hearing rested with NYSDEC and EPA denies the petitioners' allegations that NYSDEC violated the applicable public participation requirements by not granting requests for additional public hearings.

7. Failure to Translate Public Documents for Spanish Speaking Community

Ms. Nebus and Mrs. Glover allege that Spanish speaking members of the Middletown community were not aware of the proposed Masada project and its potential impacts on health and other issues and could not voice their concerns in the form of written comments or at the hearing. I interpret this complaint to broadly suggest that NYSDEC violated the public participation procedures by failing to translate the public notices or the key documents related to the Masada facility into Spanish. Similarly, they suggest that translators should have been made available at the December 29th hearing.

EPA disagrees with petitioners that NYSDEC violated the federal or State public participation procedures required by title V of the Act by not providing Spanish translation for the public notices, certain documents, and during the December 29th, 1999 hearing. First, there is no record of this concern being raised to NYSDEC during the comment period, and thus, under 40 CFR 70.8(d), it is inappropriate to raise the issue for the first time in a petition to the Administrator. Second, the record shows there was ample public participation on the Masada permit. The public comment period started on September 22, 1999 and comments were received up until the December 29, 1999 hearing. During this 3-month period, the public was afforded the opportunity to review records held in the NYSDEC regional office, to submit comments on the project, and to express concerns at the hearing. NYSDEC developed a mailing list including over eighty citizens and interested parties, received eighteen letters on the draft permit and estimates that at least 500 people attended the public hearing. Finally, neither the part 70 regulations nor the State rules require NYSDEC to provide translation of these permit documents or during this public hearing. See 40 CFR part 70.7(h); NYCRR §§ 621.6 and 621.7. Therefore, the petitioners have not demonstrated that the lack of translations during the comment period or translators at the public hearing violated the public participation provisions of either the State or federal rules implementing the Act.[6]

B. Technical Issues

1. Prevention of Significant Deterioration (PSD) Program Applicability

Part C of the Clean Air Act establishes the prevention of significant deterioration ("PSD") program, a preconstruction review program that applies to areas of the country that have attained the NAAQS. 42 U.S.C. §§ 7470-7479. In such areas, a major stationary source may not begin construction or undertake certain modifications without first obtaining a PSD permit. 42 U.S.C. §§ 7475(a)(1), 7479(1) & (2)(C). The PSD program includes two central requirements that must be satisfied before the permitting authority may issue a PSD permit. In broad overview, the program limits

[6] As discussed in section C.1 below, the petitioners may file a complaint under Title VI of the Civil Rights Act of 1964, as amended, and EPA's Title VI regulations if they believe that the state discriminated against them in violation of those laws by issuing the permit to Masada.

the impact of new or modified major stationary sources on ambient air quality and requires the application of the best available control technology (BACT). 42 U.S.C. § 7475.

NYSDEC determined that Masada was not subject to the preconstruction permitting requirements of the PSD program.[7] This determination was based on NYSDEC's finding that the facility would not emit any pollutant in major amounts, above which PSD applicability would be triggered. Specifically, the PSD program applies to the construction of major new stationary sources and modifications of existing stationary sources. Under the Act and EPA's implementing regulations, sources in certain identified categories are considered major if they have the potential to emit 100 tons per year (tpy) or more of a regulated pollutant. 42 U.S.C. § 7479, 40 CFR 52.21(b)(1)(i)(a). Sources in other categories are considered major if they have the potential to emit more than 250 tpy. In determining that the Masada facility is not a major source subject to PSD, NYSDEC looked at several key questions: (1) what is the "primary activity" of the Masada facility, which determines whether the PSD major source cutoff is 100 or 250 tpy; (2) if the major source cutoff for Masada is 250 tpy, is there an embedded source in a 100 tpy category (e.g., an embedded chemical process plant) whose emissions exceed 100 tpy; and (3) is the permit sufficient to assure that the emissions of the Masada facility will not exceed the applicable major source cutoff (either 100 or 250 tpy)? Petitioners Spectra, Ms. Glover and Ms. Nebus make several claims addressing each of these questions. Such claims are addressed separately below.

a. What is the primary activity of the Masada facility?

In determining the primary activity of a complex industrial facility, a permitting authority should consider the facility's operation as a whole. NYSDEC evaluated the Masada facility and concluded that its primary activity was refuse systems (Standard Industrial Classification (SIC) code 4953). Petitioners Spectra, Glover and Nebus challenge this conclusion, suggesting that the facility is primarily a chemical plant designed to manufacture ethanol, and should be identified as an industrial chemical processing facility (SIC Code 2869). Because under 40 CFR 52.21(b)(1)(i)(a), the 100 tpy major source threshold applies to "chemical process plants," but not to refuse processing facilities, this claim must be evaluated to determine if NYSDEC properly classified the source, and came to the appropriate conclusion that PSD did not apply to the Masada facility.

EPA finds that the petitioners have not demonstrated that the primary activity of the facility is chemical manufacturing. While certain factors tend to support the petitioners' claims, an examination of the facility's operations as a whole results in the opposite conclusion. As discussed below, this conclusion rests on a number of factors, including the relative share of the value of services rendered compared to the products sold, and the contractual relationship between the facility and Middletown and the neighboring communities.

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[7] The federal PSD regulations are codified at 40 CFR 52.21. Pursuant to 40 CFR 52.21(u), EPA has delegated NYSDEC the authority to run this program in New York.

Spectra asserts that the facility is a chemical process plant because it makes ethanol and carbon dioxide as products, and that numerous chemical processes such as acid hydrolysis, ion exchange, etc. occur at the facility. They point out that the original permit application submitted by Masada listed both SIC codes 4953 and 2869. Spectra also asserts that the facility uses municipal solid waste (MSW) only as an ingredient, and uses it in a different manner than traditional refuse systems. Spectra asserts that Masada will not "dispose" of waste, but rather will "convert" it to products, and argues that disposal is necessary for a facility to be classified as a refuse system. Finally, Spectra argues that most of the personnel and payroll at Masada will be dedicated to chemical processes.

For its part, Masada has argued that its principal product is a service rendered: the service of waste disposal. In support of this argument, Masada provided revenue estimates that over 70 percent of the revenue from the Middletown facility will come from tipping fees paid by the municipalities, and only 30 percent from the production of products like ethanol and carbon dioxide. However, Spectra calls these figures "suppositious," "not binding," and "speculative at best."

As the entity delegated authority to run the federal PSD program in New York, NYSDEC must rely on EPA regulations in assigning a primary activity to the Masada facility. EPA has long applied the "primary activity" test to categorize complex industrial sources for PSD. In cases where more than one activity is present at a source, the primary activity is determined by the source's "principal product (or group of products) produced or distributed, or services rendered."[8] In determining the principal products or services rendered, EPA considers, on a case-by-case basis, the particular circumstances at the source. The Standard Industrial Classification (SIC) Manual (published by the U.S. Government Printing Office, most recently in 1987) contains similar language to that used by EPA, and provides further discussion that, for its purposes, the principal product is to be determined by the relative share of value added, including the value of production for manufacturing, and the value of receipts for services. Generally, EPA believes that this is an approach appropriate for determining the principal product or service, and therefore, in establishing the primary activity for the source.[9]

Thus, in applying the primary activity test to the Masada facility, EPA believes it is appropriate to consider the revenue from refuse processing, in addition to the revenue from sale of chemical products. EPA expressed this view in a December 6, 1999 letter from Kathleen Callahan, Director, Division of Environmental Planning and Protection, EPA Region II, to Robert Warland, Director, Division of Air Resources, NYSDEC, ("December 6 letter"), which stated that "Masada's information indicates that more than 70 percent of the revenue generated by the project results from tipping fees associated with the collection of municipal solid waste and sewage sludge." The December 6 letter also

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[8] 45 Fed. Reg. 52695 (Aug. 7, 1980). See also U.S. EPA Office of Air Quality Planning and Standards, *New Source Review Workshop Manual*, Draft, 1990, page A-3.

[9] EPA further notes that there is no dispute in this case that the various interrelated activities at the Masada facility constitute a single source for PSD purposes.

indicated that EPA believes that the presence of a contractual relationship between Masada, the city of Middletown, and the surrounding towns to dispose of waste is itself evidence that the primary activity of the facility is refuse systems. In the original request for proposals to which Masada responded, the city sought an agreement with a facility to dispose of its waste, not to produce any product.[10] Although the production of ethanol may be integrated into the disposal facility to make the waste disposal more cost-effective, it is EPA's judgment that the facility is being built primarily to fulfill these municipalities' need to dispose of solid waste.

EPA Region 2's December 6 letter concluded that "the proposed facility is primarily a municipal waste collection and processing plant." NYSDEC relied in part on this letter in confirming its determination that PSD did not apply. Nothing in the Spectra petition refutes this conclusion. Neither the mere presence of chemical processing activity nor the mere production of chemical by-products is sufficient to determine the source's primary activity. The arguments set forth in the December 6 letter, and further discussed here represent an appropriate basis for NYSDEC to make a determination that the facility is a refuse system, and therefore subject to a 250 tpy PSD cutoff.

Furthermore, Spectra's statements about the speculative nature of Masada's revenue claims do not provide sufficient evidence to overturn NYSDEC's primary activity determination. Masada is legally obligated to provide NYSDEC with the information needed to make a PSD applicability determination, and to provide the best information available. While Masada acknowledges that the tipping agreements are not yet in effect, EPA does not find that NYSDEC erred in accepting Masada's revenue projections, which appear to be based on the best available information. Indeed, the rather large 70-30 dominance of tipping fees in the revenue estimate, in EPA's judgment, provides reasonable certainty that the majority of revenue from Masada will come from tipping fees. In addition, as noted above, this was only one factor of several that supported NYSDEC's determination. I also reject a related claim by Spectra that payroll or personnel activity should take precedence over revenue in establishing the primary activity, as Spectra's approach would ignore the facility's operations as a whole and Spectra has not demonstrated that such an approach is necessary based on the applicable requirements.

EPA also rejects the remaining arguments by the Spectra petitioners on the primary activity. EPA does not find conclusive the fact that the original permit application listed both SIC codes 4953 and 2869. Regardless of the number of SIC codes listed in the application, NYSDEC must make a primary activity determination, and ultimately did so, choosing refuse systems. The arguments that this source is different from traditional refuse systems, that the source uses MSW as an ingredient, and that it will not "dispose" of MSW, but rather "convert" it to products are insufficient to demonstrate that the facility is not appropriately classified as a refuse system. EPA observes that, while the Masada process is technologically innovative, and differs from many traditional types of waste processing facilities, it is

[10] Request for Solid Waste Facility Development and Management Proposals, issued by the city of Middletown on September 1, 1994.

still primarily engaged in waste minimization. The semantic difference between "disposal" and "conversion" has no regulatory consequence, because both are methods of minimizing solid waste, and both occur at the Masada facility.

For these reasons, EPA finds that NYSDEC acted appropriately in classifying the Masada facility as a refuse system.

b. Is there an embedded source in a 100 tpy category whose emissions exceed 100 tpy?

As discussed above, in evaluating Masada's request for a permit, NYSDEC determined that PSD did not apply. The basis for this determination was that the potential-to-emit for the facility was below the relevant PSD major source cutoffs for a source whose primary activity is refuse systems (SIC 4953). However, the PSD applicability test contains an additional step for facilities in a 250 tpy source category such as refuse systems. The additional step requires an evaluation of the facility to determine if there is a portion of the plant (which EPA calls an "embedded" or "nested" facility or source) which could be classified in one of the categories with a 100 tpy major source cutoff. If an embedded facility exists, the emissions from the embedded facility must be estimated separately, and if they exceed the 100 tpy cutoff, the embedded facility is itself considered a major source and subject to the PSD requirements.[11]

At the Masada facility, NYSDEC determined that there was no embedded facility subject to the PSD requirements. The permit record indicates that the most likely candidate for an embedded facility is a "chemical process plant," which is a source category with a 100 tpy major source cutoff under applicable EPA regulations, 40 CFR 52.21(b)(1)(i)(a). Indeed, NYSDEC noted in early discussions with EPA that there is "Industrial Organic Chemicals activity" at the source.[12] However, NYSDEC determined that, while there is an embedded chemical process plant, the emissions of any PSD pollutant from it would be below the major source size. NYSDEC reasoned that the gasifier's[13]

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[11] See, for example, EPA's New Source Review Workshop Manual, Draft, October 1990, at A.23, and the July 6, 1992, letter from Edwin Erickson, EPA Region 3 Regional Administrator, to George Freeman, Reserve Coal Properties Company (available at http://www.epa.gov/rgytgrnj/programs/artd/air/nsr/nsrmemos/primact.pdf).

[12] April 7, 1999 letter from Robert J. Stanton, NYSDEC Region 3 to S. Riva, EPA Region 2.

[13] Some confusion surrounds the terms "gasifier" and "boiler." For clarity, the term "gasifier" is used in this Order to refer to the unit where the gasification of lignin, and its subsequent oxidation, occurs. Energy is recovered from this process to produce steam used for other parts of the Masada process. For this reason, various parties refer to the gasifier as the gasifier/boiler. The term "package boiler" is used in this Order to refer to a separate natural gas boiler where natural gas is combusted to produce additional steam needed for the Masada process. Together, these two units are sometimes referred to as the facility's boilers. Emissions from the gasifier and the package boiler are eventually vented to the same stack, which is sometimes referred to as the gasifier/boiler stack.

emissions are best attributed to waste processing operations of the facility and that, therefore, the emissions from the embedded chemical plant would be well below the 100 tpy source cutoff, and PSD would not apply.

The Spectra petitioners argue that the emissions from the gasifier at the Masada facility should be attributed to the embedded chemical plant emissions, not waste processing. They argue that the gasifier is an essential part of the overall ethanol production operation. It gasifies the lignin,[14] combusts the gases, and recovers some of the energy produced, using it to provide steam back to the various waste and chemical processing operations. Furthermore, because virtually all of the lignin is eliminated in the gasifier, and without the gasifier the lignin would likely have to be landfilled, petitioners argue that the gasifier plays an essential waste disposal function in support of the ethanol production. As such, they believe its emissions should be attributed to ethanol manufacture.

EPA has considered the petitioners' arguments and nonetheless finds that Spectra has not demonstrated that there is a chemical process plant with emissions exceeding the PSD major source cutoff. There is little dispute that ethanol production falls within the category of a chemical process plant. EPA has determined that the source category "chemical process plant" includes activities defined within SIC major group 28.[15] This group includes "...establishments producing basic chemicals...such as acids, alkalis, salts and organic chemicals."[16] Thus, although the primary activity of the Masada facility is refuse processing, the presence of ethanol (an organic chemical) production indicates that an embedded chemical process plant is also present. However, EPA believes that the gasifier emissions do not belong with the embedded chemical plant because the gasifier is essential to the Masada facility's primary activity - waste processing.[17]

The key determinations in assessing the embedded chemical plant's emissions are (1) the primary activity of the facility, and (2) the activities at the facility which are principally devoted to activities other than this primary activity. Activities not principally devoted to the primary activity may be considered part of an embedded source. In the case of the Masada, as stated above, the primary activity of the facility as a whole is refuse processing. Determination of this primary activity is always

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[14] "Lignin" is the term Masada uses to describe the general process residue that remains after the hydrolysis of the municipal waste – residue that is eventually combusted in the gasifier. Lignin is not a technical term and has no meaning within the context of EPA or NYSDEC regulations.

[15] Memo from Ed Reich, Director, Division of Stationary Source Enforcement, EPA Office of Air, Noise, and Radiation, to Thomas Devine, Director, Air and Hazardous Materials Division, EPA Region 4, dated August 21, 1981.

[16] "Standard Industrial Classification Manual," 1987, U.S. Government Printing Office, at p.132.

[17] As noted in the preamble to the PSD regulations, "[w]here a single unit is used to support two otherwise distinct sets of activities, the unit is to be included within the source which relies most heavily on its support." 45 Fed. Reg. 52695 (Aug. 7, 1980).

the first step in analyzing embedded facilities. Following this, activities not principally devoted to the primary activity are considered. At the Masada facility, there are a number of processes including hydrolysis and separation,[18] sulfuric acid reconcentration, and fermentation and distillation, which are principally devoted to chemical processing. Although these activities play a dual role of refuse processing (i.e., converting some of the waste to usable products), it is EPA's judgment that these activities primarily serve to produce marketable ethanol and other products – a chemical process plant. Likewise, there is a natural gas package boiler which exists primarily to supply energy needed to reconcentrate the acid for hydrolysis, and there are tanks for product storage. These activities should also be considered primarily as part of the embedded chemical plant. Emissions from these activities have been evaluated to determine whether they exceed the 100 tpy cutoff for a chemical process plant. EPA finds that Spectra has failed to demonstrate that NYSDEC was correct in finding that they do not.[19]

The remaining processes, including sorting and drying the incoming waste as well as gasification/combustion are, in EPA's judgment, primarily devoted to refuse processing. Indeed, in petitioner Spectra's own words, "the principal purpose of the supposed gasifier is to eliminate the residue from the Project's chemical processes to avoid the need for landfill disposal." Spectra petition, at 24. However, petitioners err in suggesting that because a chemical process has occurred before gasification in this instance, that the gasifier must be a "support facility" to a chemical plant. As noted above, the primary activity of the Masada facility is refuse processing, and the gasifier, by substantially reducing the volume of the lignin, is primarily performing a refuse processing function. Even if energy is recovered from gasification/combustion as a side benefit and used for ethanol production, and even if the presence of a waste stream and integrated disposal process makes ethanol production economical at this site, this does not change the determination that the primary activity is refuse processing.

On the question of "support facilities" raised by Spectra, EPA observes that the gasifier plays a dual role of waste elimination and steam generation. While both of these roles arguably "support" the chemical process plant, the question of support is not the relevant factor in deciding how to attribute the emissions of the gasifier. Questions of "support facilities" often arise in making major source

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[18] In response to the Spectra petitioners' comment about EPA Region 2's prior assessment that the hydrolysis step is part of the refuse processing function (which the December 6 letter relied upon in allocating gasifier emissions to refuse processing), EPA has reconsidered, and now believes that the hydrolysis step properly belongs with the chemical processing plant. It is EPA's judgment that the hydrolysis step is included principally to produce sugars for conversion to ethanol. While the hydrolysis step serves a limited waste reduction function, EPA finds it unlikely that the hydrolysis step would be present were it not for the production of ethanol. However, this determination does not impact the PSD determination because there are no emissions from the hydrolysis step.

[19] Emissions from the hydrolysis step, the acid concentration/recycling step, the fermentation/ distillation step, the package boiler, and the storage tanks are well below the major source cutoffs. The primary emissions, according to Masada's estimates, are less than 1 tpy of VOC from the tanks, and less than 9 tpy of NO_x from the package boiler.

determinations under the PSD program when questions arise as to whether facilities are part of the same industrial grouping. Where a facility conveys, stores, or otherwise assists in the production of the principal product at another source, it may, under some circumstances, be deemed a support facility and treated as part of the same source as the facility it supports. This policy is used, for example, in determining whether two adjacent facilities should be treated as one source for PSD applicability purposes. However, the support facility test is not relevant to the Masada facility because there is no question that the chemical processing activities and the waste reduction activities at Masada facility are a single source. The boundaries of the major source have never been at issue. The support facility test is not used to evaluate embedded sources. Because both the boundary of the source and the primary activity have already been established, the Spectra petitioners' view that the gasifier "supports" the chemical process is simply not relevant. The gasifier is most appropriately associated with the primary activity – refuse processing – not the embedded chemical plant.

Another possible candidate for an embedded source in a 100 tpy PSD category is a "fuel conversion plant." Spectra mentions this in footnote 14 of their petition, but presents no elaboration on this point and no evidence to support this claim. Based on our review, EPA policy has historically defined this category as "plants which accomplish a change in state for a given fossil fuel. The large majority of these plants are likely to accomplish these changes through coal gasification, coal liquefaction or oil shale processing."[20] In this case, where fossil fuels are not involved, and where the processing involves hydrolysis, a chemical process, it is EPA's judgment that the Masada facility is not a fuel conversion plant. In any event, for reasons described above, even if a portion of the facility were determined to be a nested source in a 100 tpy category, the gasifier emissions would be associated with the primary activity, not the nested source, and the remaining emissions would not exceed 100 tpy.[21]

Therefore, EPA finds that NYSDEC acted appropriately in determining that the Masada facility does not contain an embedded source subject to PSD, and that PSD does not apply to the facility in general.

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[20] See January 20, 1976 memo from D. Kent Berry, EPA Headquarters, to Asa Foster, EPA Region IV.

[21] Yet another possible candidate for an embedded source in a 100 tpy category is a municipal waste incinerator capable of charging more than 50 tons of refuse per day. CAA section 169(1). The gasifier, and possibly certain other associated activities, may comprise an embedded incinerator because they combust a substance, lignin, which has its origin in part from municipal waste. Petitioners did not raise this issue directly, but it arises indirectly in evaluating the assertion by Spectra that the facility should be subject to the New Source Performance Standard (NSPS) for municipal waste combustors. Unless otherwise specified, EPA generally interprets the source category definition here in a similar fashion to the NSPS definition for that source category. For reasons described below (in the NSPS section discussing the municipal waste combustor standard), EPA does not believe the gasifier, or any other part of the Masada facility, meets the definition of a MWC. Thus, EPA finds that there is no embedded municipal waste incinerator at the Masada facility for PSD applicability purposes.

c. *Is the permit sufficient to assure that the emissions of the Masada facility will not exceed the applicable PSD major source cutoff for any pollutant?*

The question of whether Masada's emissions will exceed applicable PSD cutoffs focuses on the "potential-to-emit" (PTE) of the facility. PTE is a source's maximum capacity (determined on an annual basis) to emit a pollutant under its physical and operational design. 40 CFR 52.21(b)(4). In determining maximum capacity to emit, a source may consider enforceable limits on its operation and emissions, such as those in a title V permit. There is a significant amount of background information in the administrative record for the NYSDEC permit addressing and estimating Masada's PTE, including the following:

(1) a preliminary information package summarizing the proposed project, sent to NSYDEC on September 24, 1998.

(2) Masada's emissions estimate document and application for a title V permit filed with NYSDEC on December 21, 1998.

(3) A revised emissions estimate document and revised title V application, submitted in July and August 1999 (NYSDEC deemed the application "complete" on August 25, 1999).

(4) Masada's response, submitted on November 2, 1999 to EPA Region 2's October 20, 1999 request for additional details about the facility.

(5) Additional permit language developed by Masada, EPA, and NYSDEC during March 2000 to limit the source's PTE.

(6) a NYSDEC document submitted in May 2000 which addressed various public comments raised during a public hearing and written comment period, including comments about Masada's emissions estimates.

The title V permit conditions at the Masada facility are designed to ensure that the PTE at the facility will be no more than 246 tpy of sulfur dioxide, below the major source cutoff of 250 tpy. They similarly are designed to ensure that the facility will have the potential to emit 99.5 tpy of nitrogen oxides, below the major source cutoff of 100 tpy.[22]

NYSDEC sent EPA a proposed title V permit based on these limits on May 4, 2000. On May 17, 2000, EPA indicated, in a letter from Steven Riva of EPA Region 2 to Michael Merriman of

[22] Notwithstanding the above determination that the Masada facility falls within a 250 tpy source category, the Clean Air Act and NYSDEC regulations (6 NYCRR 231) establish a 100 tpy major source cutoff for NO_x for attainment areas which fall within the Ozone Transport Region, as is the case here.

NYSDEC Region 3 that the proposed permit meets all applicable title V requirements. It stated that "this proposed title V permit contains substantive permit requirements for stack testing, monitoring, and recordkeeping, as well as the rolling cumulative total methodology that will limit the "potential-to-emit" of this proposed facility. This statement indicates that EPA and NYSDEC were in agreement that the proposed Facility's emissions would not exceed the PSD major source cutoffs for any pollutant.

The Spectra petitioners raise numerous concerns that address this determination. First, they allege that Masada has not provided sufficient process and engineering information to accurately determine the Project's PTE. Similarly, they allege that the emissions estimates that are provided are not thorough enough and not reliable, claiming numerous general and specific technical defects, and providing their own estimate of NOx emissions for the gasifier and package boiler. Part of their reliability argument is based on the fact that the project is still in the design phase, and that specific contracts and vendor guarantees are not locked in sufficiently well to establish the project's operational parameters, and that the design of the project has changed during the permit process. They also allege that Masada cannot correlate process feedstock to emissions output. Ms. Nebus and Mr. van Meurs raise similar concerns about the unknown technology that will be used at the Masada facility.

Because of the alleged uncertainties and technical defects, petitioners also assert that the PTE limits in the permit are not likely to be met. They express concern that the permit appears to rely on after-the-fact monitoring, rather than engineering practices, test data, or vendor guarantees, to assure that emissions stay below major source cutoffs. They feel that Masada's allegedly inaccurate estimates of emissions are incompatible with PTE limits so close to the major source size because of the "small margin of safety." They further assert that the use of PTE limits for plantwide emissions of sulfur dioxide and nitrogen oxides is itself unlawful because it is inappropriate to use a plant-wide applicability limit (PAL) for avoiding initial PSD review of entirely new sources and because it uses post-construction monitoring as the basis for a preconstruction determination that NSR does not apply.

Before addressing Spectra's claims, it is helpful to briefly describe the PTE limit itself. The PTE limit in the Masada permit is based on what the permit record refers to as a "rolling cumulative total" methodology. Historically, many PTE limits have relied on a short-term emissions limit (e.g., pounds per hour), coupled as necessary with an operational limit (e.g., a limit on hours of operation), which, taken together, limit annual emissions below major source levels. However, in the case of Masada, the PTE limit does not rely on the short-term limit to establish the source as a minor source.[23] Instead, the limit relies on continuous emission monitors (CEMs) to track the total daily emissions from the facility. The emissions must be recorded each day, and must also be added to the total from the previous 364 days to determine an annual emissions total each day (i.e., a rolling cumulative total). If, on any day, this total exceeds the major source size, the source would be subject to a potential enforcement action (including penalties) for being in violation of its title V permit for the entire year, and would need, among

[23] There are pounds/hour mass limits in the permit, as required by the New York State Implementation Plan (SIP), but these are not used for the purposes of establishing the PTE limit.

other things, to apply for a PSD permit as a major source. Therefore, like any source with a PTE limit, complying with the limit is designed to keep the Masada facility a minor source, and a violation that exceeds the major source thresholds would require the source to obtain a major NSR permit. This serves to constrain the source's operation on a daily basis.[24] If the source has no room to operate under the PTE limiting emissions cap, it must cease operation or face a violation and a requirement to apply for PSD permitting as a major source. Contrary to petitioners claims that the PTE limit will not keep the source below major levels, EPA finds that this rolling cumulative methodology is an effective means of limiting PTE. It simply achieves practical enforceability (*e.g,* the ability to establish compliance at any given time) by relying on direct real-time measurements and calculations necessary to determine mass emissions, rather than on a mass emissions rate coupled with a limit on hours of operation.

Regarding petitioner's concern that the PTE limit relies on after the fact monitoring, EPA notes that all PTE limits rely on after the fact monitoring of some kind. Indeed, the use of CEMs in the Masada permit is a more rigorous type of monitoring than for some other kinds of PTE limits. EPA acknowledges that the emission factors for the Masada process may involve certain elements of uncertainty. However EPA believes that this CEM-based approach adequately addresses this uncertainty by requiring thorough real-time monitoring of the emissions. In cases like Masada, where the process involves new technology and the facility is the first of its kind, it is unrealistic to expect precise emission factors prior to construction. A strength of this rolling cumulative approach is that it compensates for uncertain emission factors by linking the source's operational constraints to the actual measured emissions, not the emissions factor, which itself often contains inherent uncertainty when applied to an individual case. Similarly, in response to Spectra's concerns about the lack of vendor guarantees, EPA notes that a PTE limit need not always be based on vendor guarantees. While vendor guarantees can be useful in estimating emissions, particularly when control devices are utilized, a vendor guarantee is not a necessary prerequisite to issuing a permit limiting PTE.[25] Again, the rolling cumulative approach, by using real-time emissions data, compensates for uncertain emission factors, which still contain uncertainty even if guaranteed by a vendor.

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[24] This limit also has the effect of requiring the source to employ pollution controls to reduce emissions of NO_x and SO_2, and to ensure that these controls are functioning properly in order to preserve its ability to operate below the daily PTE limit. However, the permit also specifically requires the utilization of dry lime injection and a spray dryer absorber system for SO_2 control from the gasifier, selective non-catalytic reduction (SNCR) for NO_x controls from the gasifier, and a baghouse for particulate control from the gasifier. Low-NO_x burners are required for NO_x control from the package boiler. To ensure that these control devices are being used as required and are working properly, the permit requires that operating parameters will be incorporated after testing is done to establish them.

[25] Masada has indicated, in its November 2, 2000, submittal to EPA that it intends to obtain vendor guarantees, but says they will not enter into a formal contract with a vendor until final approvals for the project are obtained. In any event, it is the permit conditions which are binding on the source, and Masada must abide by these regardless of what arrangements it makes with its vendor.

Regarding the petitioners' numerous concerns about the accuracy and reliability of the emissions estimates used in developing the PTE limit, EPA finds that the estimates are credible for the purposes of establishing a PTE limit of the type used in this permit. As noted above, EPA acknowledges that the exact emission factors for the Masada process are somewhat uncertain because the facility is the first of its kind. Although the facility must make a credible effort to project what its emissions will be, it is simply not possible for the facility, particularly in this case, to compute precisely its emissions until the facility is operational. To the extent that Masada has underestimated emissions, the PTE limit serves to constrain facility operations to keep emissions below the major source cutoff.[26] In this way, the limit itself is not critically sensitive to the accuracy of the preconstruction projections of emissions. This approach is certainly not without some risk to Masada, who must stay within these emissions limits even if they have underestimated them. However, as the Court found in United States v. Louisiana-Pacific Corp., 682 F. Supp. 1141, 1166 (D. Colo. 1988),

> "...the regulatory framework at issue may be unusually difficult to comply with because it requires a source to guess what its emissions will be prior to construction and the commencement of operations. Nonetheless, there must be no question that the burden of guessing correctly remains with the source, and that a mistake in this process can indeed result in penalty. Otherwise, future sources that are unsure of whether they will qualify as a major source will have no incentive to apply for PSD permits, which, undisputably, is a burden. Rather, they will build first and wait for the issuance of an NOV [notice of violation] before initiating the permit application process."

Having said that, EPA nonetheless understands the Spectra petitioners' comment that unreliable estimates may result in a PTE limit that cannot be actually met by the source during its planned operations. Indeed EPA has historically commented adversely on or objected to permits that have limited PTE using unreasonable underestimates of emissions factors or constraints on operation which, in reality, would constrain the source's operation so greatly that it would not be viable. EPA finds that this is not the case at this source. NYSDEC acted properly when it determined that the PTE limit is achievable, based on the best information available. The Agency has reviewed the emissions estimates relied upon in evaluating the PTE limits for NOx and SO_2 and finds that they serve as a reasonable basis for determining that the PTE limits can be met by the source operating as planned. While there may be some uncertainty in the exact calculations, as is often the case with any preconstruction estimate, the provisions of the PTE limit, as noted above, compensate for this uncertainty by constraining the source's operations as necessary to account for any underestimate. Any marginal difference between the estimates and the real emissions would not impact the source's ability to actually operate as planned. Similarly, contrary to Spectra's assertion, Masada's uncertain emissions estimates do not necessarily require that the PTE limit be set at some level below the major source size in order

[26] On the other hand, it is also possible that Masada has overestimated emissions. To the extent that their emissions are actually less than they projected, the PTE limit affords the source greater flexibility to operate while still remaining a minor source.

to provide a margin of safety. The relevant uncertainty in a limit like this is not the uncertainty in the emissions estimates; it is the uncertainty in the emissions measurement system. EPA finds that the CEM system, operated properly as required by the permit, provides reliable data to assure that Masada's emissions stay below the major source size. In addition, conservative measures are included in the permit for treatment of missing CEM data, as well as limits on how much data can be missing.

Regarding the specific technical defects alleged by Spectra, EPA finds that none of them negate EPA's basic conclusion: that the emissions estimates are sufficiently representative of the source's operation and are therefore credible for establishing permit limits on PTE. The specific defects in the emissions estimate that are alleged by Spectra, taken together, do not, in EPA's judgment, rise to the level of undermining this basic finding. The points raised by Spectra range from alleged defects with no factual basis, to legitimate points that illustrate a point which EPA has already agreed -- that there is some degree of uncertainty in Masada's estimates. However, in EPA's view, no single alleged defect, or combination of alleged defects presented by Spectra, is enough to prove that Masada has so grossly underestimated its emissions that a PTE limit using the "rolling cumulative total" methodology should not be based on the estimates.

Spectra also claims that the PTE limit itself is unlawful because it is a plantwide emissions cap. Spectra claims that this PTE limit is a special type of limit, referred to as a Plantwide Applicability Limit (PAL), and goes on to argue that a PAL is only legal for an existing major source, not a proposed source. They misconstrue the nature of the PTE limits imposed by NYSDEC in Masada's permit. The PTE limit simply assures that the source's total emissions do not exceed major source cutoffs. It does not create a PAL, which is a term of art referring to a limit that allows modifications at an existing major source without major source preconstruction review.[27] The PTE limit for the Masada facility, while covering multiple units, clearly does not authorize future changes without review. Therefore, it is not a PAL and any claims about the legality of a PAL for this kind of source are irrelevant here. The PTE limit developed here is both appropriate and authorized by applicable regulations.

In summary, EPA finds unconvincing the petitioners' assertions that the PTE limit is improper, illegal, or cannot be met. EPA believes that the emissions estimate document, as supplemented with additional information requested by various agencies, is a credible effort to estimate emissions based on the best available information, and is a legally acceptable permit application on which a PSD applicability determination may be made. Furthermore, EPA believes that the PTE limits for SO_2 and NOx are enforceable, and compliance with these limits can easily be verified at any time with real-time CEM data. As such, the limits provide assurance that the facility, operating in compliance with the permit, will not emit these pollutants in major amounts. Therefore EPA concludes that the Masada facility, as permitted, will not be a major source, and not subject to PSD.

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[27] More details about the proposed regulations addressing the operation of PALs may be found in the 1996 New Source Review Reform proposal. 58 Fed. Reg. 38250 (July 23, 1996).

2. Applicability of Federal Emissions Standards

The Spectra petitioners assert that, due to the uncertainty in emissions estimates and the alleged problems with limits on PTE, it is "not possible to determine whether or not the project is subject to various potentially applicable requirements." Spectra provides a list of requirements, consisting of federal New Source Performance Standards (NSPS) and National Emission Standards for Hazardous Air Pollutants (NESHAPS), that it feels were not properly evaluated, including the following:[28]

- 40 CFR Part 60 (NSPS) Subpart Eb (Large Municipal Waste Combustors)
- 40 CFR Part 60 (NSPS) Subpart O (Sewage Sludge Incinerators)
- 40 CFR Part 60 (NSPS) Subpart VV (Equipment Leaks of VOC in the Synthetic Organic Chemicals Manufacturing Industry)
- 40 CFR Part 63 (NESHAP) Subpart EEE (Hazardous Waste Combustors)
- 40 CFR Part 61 (NESHAP) Subpart E (National Emissions Standards for Mercury)

In the Appendix to their petition, the Spectra petitioners also list NSPS subparts RRR and NNN. Spectra also broadly argues that other standards not specifically identified may also have been left out of the permit. EPA addresses each of these allegations separately below, including the applicability of 40 CFR part 60, Subpart Db, the NSPS for Industrial-Commercial-Institutional Steam Generating Units, as it relates to comments raised by Spectra in its petition.

a. 40 CFR Part 60 (NSPS) Subpart Eb (Large Municipal Waste Combustors)

Masada's permit application and supporting materials assert that the gasifier combusts "lignin," which is the term they use to describe the general process residue that remains after the hydrolysis step. They distinguish lignin from municipal waste, and assert that the gasifier is not a municipal waste combustor subject to subpart Eb because it combusts lignin, not municipal solid waste (MSW). The draft permit did not incorporate subpart Eb requirements, and EPA in its December 6 letter affirmed that "NYSDEC has identified and applied the appropriate federal NSPS to this proposed facility."

Spectra argues that the lignin is simply "sugar-free MSW" because hydrolysis removes recoverable sugars from the municipal waste stream, but the remaining material is otherwise indistinguishable from MSW. They argue that simply referring to lignin as a by-product of chemical processing of MSW is not sufficient to allow lignin to avoid being classified as MSW. Spectra also

[28] Petitioners describe the list they submitted as "a starting point" but state that it is "not intended to be exhaustive." Without greater specificity, general claims about the inability to evaluate the applicability of potential requirements is not sufficiently detailed to maintain a title V count.

argues that the use of the term "gasifier/boiler" does not change the real purpose of the gasifier unit, which they describe as "heat transfer."[29]

Although petitioners do not refer to the definitions in the NSPS, these definitions are important in resolving their claims.[30] MSW means "household, commercial/retail, and/or institutional waste." The definition provides a specific exemption for "industrial process or manufacturing wastes," among others. This exemption is particularly important here because, as noted above, EPA has determined that part of the Masada facility is an embedded chemical process plant. The hydrolysis step is part of this chemical process plant, and is the step which results in the formation of lignin residue. It is EPA's judgment that the lignin residue is a process waste from the embedded chemical plant, and is therefore exempt from the definition of MSW. Although the input to the chemical process plant is itself a waste, the exemption in the NSPS definition is not restricted to wastes from processes using specific types of feedstocks. Any industrial process waste, unless specifically included in the definition, is exempt. Accordingly, the waste that results from the Masada process is exempt.

The definition of MSW does specifically include refuse derived fuel (RDF) within the meaning of "household, commercial/retail, and/or institutional waste." RDF means "a type of MSW produced by processing MSW through shredding and size classification." This aspect of the definition must also be addressed to see if it is at odds with the exemption noted above. EPA finds that the lignin is not RDF, and thus, there is no conflict with the exemption noted above. The types of material initially being collected by the Masada facility do fall within the definition of MSW, and the processing that occurs as an initial step does result in the production of RDF within the meaning of the NSPS. However, the Masada facility does not then combust the RDF. The RDF undergoes an acid hydrolysis step which significantly alters its chemical properties and creates what the parties in this case refer to as "lignin" or "lignin residue." Information provided by Masada in its November 2, 1999, response comparing the percentage (by dry weight) of various elements in MSW versus lignin residue indicates that acid hydrolysis processes like Masada's increase the sulfur content by 210 percent, the carbon content by 33 percent, and oxygen by 5 percent. Similarly there are significant decreases in hydrogen (37 percent), nitrogen (32 percent), and ash (43 percent).

These significant chemical changes, which result from the hydrolysis process, are well outside the shredding and size classification processes referenced in the RDF definition. Because the chemical separation (hydrolysis) of recoverable sugars from RDF, results in significant chemical changes to the original RDF, EPA finds that the lignin is not RDF under the NSPS. Because lignin is not RDF, and

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[29] Here, it is unclear whether Spectra believes that the purpose of the gasifier is to eliminate lignin or provide energy to the chemical process. However, regardless of Spectra's position, the relevant discussion for NSPS applicability is whether the gasifier is combusting MSW. The question of whether a combustion unit recovers energy through heat transfer is not relevant to whether the unit is covered by the NSPS for MWCs.

[30] The relevant definitions are found in 40 CFR 60.51b.

because industrial process waste is specifically exempted from the MSW definition, EPA finds that lignin does not fall within the definition of MSW.[31]

EPA does not further consider the question of whether the gasifier is a process which falls under the NSPS definition of a municipal waste combustor unit, because for reasons discussed above, the material charged to the gasifier (lignin residue) does not fall within the definition of MSW. Thus, EPA finds that NYSDEC acted properly in determining that the Masada facility is not subject to NSPS subpart Eb.

b. 40 CFR Part 60 (NSPS) Subpart O (Sewage Sludge Incinerators) and 40 CFR Part 61 (NESHAP) Subpart E (National Emissions Standards for Mercury)

The Spectra petitioners claim that Masada has "failed to expressly demonstrate that the proposed facility will not be subject to 40 CFR 60, Subpart O" and assert that it should apply unless Masada demonstrates that sewage sludge will not be incinerated (or incinerated in amounts below the NSPS cutoff of 1000 kg per day). They allege that Masada does not appear to know whether its sewage will be hydrolyzed or later combusted along with lignin. Petitioners likewise claim that Masada has failed to provide data on mercury in the incoming sewage sludge. They state that part 61 subpart E applies to any plant that dries or incinerates wastewater treatment plant sludge containing mercury.

Information from Masada indicates that, like the RDF discussed above, the sewage sludge used in the Masada process undergoes significant chemical transformation prior to gasification. According to its November 2, 1999, submittal to EPA, the sludge is blended and then hydrolyzed in sulfuric acid. Contrary to petitioner's claims, Masada has indicated in its November submittal that all of the sewage sludge, septage, and leachate undergoes this process. This process results in the formation of carbon dioxide and soluble compounds. The carbon dioxide is recovered, and the liquid containing the soluble compounds is used to facilitate hydrolysis. What remains is a dewatered material, which Masada refers to as "acidified biosolids." These biosolids are fed to the gasifier. As with the material that resulted from the hydrolysis of MSW, EPA concludes that this material, which results from the hydrolysis of blended sewage sludge, is significantly different from sewage sludge such that gasification/combustion of this material is not subject to the NSPS for sewage sludge incineration, nor is it subject to the NESHAP for mercury emissions from plants that incinerate sewage sludge.

c. 40 CFR Part 60 (NSPS) Subpart VV [Equipment Leaks of VOC in the Synthetic Organic Chemicals Manufacturing Industry (SOCMI)]

[31] In a footnote, the Spectra petitioners argue that Masada's lignin is hydrolyzed solid waste with no beneficial use (including as a fuel), in contrast to other types of lignin. The determination whether Masada's lignin is MSW under the NSPS has nothing to do with whether lignin has a beneficial use. Therefore, EPA is not considering this comment further in its evaluation of whether the NSPS applies.

The Spectra petitioners list subpart VV in its list of potentially applicable requirements, and argues that the standards of Subpart VV must be incorporated into any issued permit. Spectra does not allege any specific instance of the failure to properly apply subpart VV, and EPA notes that the issued permit does incorporate subpart VV standards. Therefore, EPA dismisses this claim as moot.

d. 40 CFR Part 63 (NESHAP) Subpart EEE (Hazardous Waste Combustors)

The Spectra petitioners assert that the facility is subject to the requirements applicable to sources burning hazardous waste in a combustor, 40 CFR part 63, subpart EEE. Specifically, they argue that the source has not demonstrated that the lignin or residual municipal solid waste that will be burned in the gasifier will not contain hazardous waste.

Spectra is correct that the NESHAP requirements apply to all hazardous waste combustors, defined in 40 CFR 63.1201 to include an incinerator that "burns hazardous waste at any time." However, Masada maintains that the source will not burn any hazardous waste and in fact is expressly prohibited from accepting any hazardous waste under its NY state solid waste permit. EPA has no information – nor has Spectra presented any – to suggest that the facility will accept any hazardous waste. Like all waste handlers, Masada will have to determine whether the material that it is handling is classified as a hazardous waste. More specifically, Masada will have to ensure that the waste they are processing is not hazardous at the time they accept the waste and after it has undergone the acid hydrolysis process and is placed into the combustion unit. This obligation, however, is independently applicable (subject to government oversight and potential enforcement action) and is not an applicable requirement that should be incorporated into the source's title V permit. Therefore, based on Masada's representation that the source will not burn any hazardous waste, I conclude that Spectra has not shown that the NESHAP requirements apply to this source.

e. 40 CFR Part 60 (NSPS) Subparts NNN (SOCMI Reactor Processes) and RRR (SOCMI Distillation Operations)

In the attachment to the Spectra petition, the Spectra petitioners assert that NSPS subparts for SOCMI Reactor Processes (subpart RRR) and SOCMI Distillation Operations (subpart NNN) should also apply to the Masada facility. They do not cite any more specific basis for this assertion. EPA has reviewed the applicability of these two standards, and has determined that neither of them applies to the Masada facility. EPA issued a determination on October 7, 1996, which clarified that subparts RRR and NNN do not apply to processes which produce ethanol through biological processes like Masada's process. The determination states that these two rules were developed for specific processes involving synthesis of organic chemicals using petroleum-based feedstocks and not biological fermentation processes.[32] As the October 1996 memorandum makes clear, because the Masada

[32] Memorandum regarding "Applicability Determination for Biomass Ethanol Production," dated October 7, 1996, from Reggie Cheatham, Chief, Chemical Industry Branch, EPA Office of Enforcement and

facility does not produce ethanol from a petroleum-based feedstock, it is not subject to NSPS subpart NNN nor is it subject to subpart RRR. Therefore EPA finds that the permit is not deficient with respect to these two standards.

f. 40 CFR Part 60 (NSPS) Subpart Db (Industrial-Commercial-Institutional Steam Generating Units)

EPA has examined the Spectra petitioner's broad claim that other standards not specifically identified may also have been left out of the permit. EPA found one instance of a requirement that was left out of the permit - NSPS subpart Db (Standards of Performance for Industrial-Commercial-Institutional Steam Generating Units). This standard was properly applied to the package boiler, and appropriate limits were included in the permit. However, as discussed below, subpart Db also contains requirements that apply to the gasifier.

Subpart Db applies to any steam generating unit that commenced construction, modification, or reconstruction after June 19, 1984, and has a heat input capacity of greater than 100 million BTU/hour, regardless of fuel. Whereas subparts Eb and O did not apply because the fuel charged to the gasifier was not covered by the regulations, general subpart Db applicability does not depend on the type of fuel used. Clearly, the gasifier unit is used to generate steam and its capacity of 245 million BTU/hour is within the NSPS specified range.[33]

Whereas general applicability of Subpart Db does not depend on the fuel, Subpart Db imposes specific emission limits which are based on the type of fuel combusted. Standards are specified for combustion of coal, oil, natural gas, wood, and MSW. EPA finds that none of these standards, including the MSW standard, apply to the combustion of lignin. The MSW standard does not apply under subpart Db for the same reason that subpart Eb did not apply, as discussed above: the fuel combusted (lignin residue) is not MSW.[34] However, EPA notes that there are certain basic reporting and recordkeeping requirements in 40 CFR 60.49b, which apply regardless of the fuel combusted.[35]

Compliance Assistance to George Czerniak, Air Enforcement and Compliance Assurance Branch, EPA Office of Enforcement and Compliance Assistance. The determination was later amended to clarify that such biological processes are still subject to NSPS subpart VV for equipment leaks. See Memorandum dated September 8, 1998 from Reggie Cheatham, Chief, Chemical Industry Branch, EPA Office of Enforcement and Compliance Assistance to Air Branch Chiefs, EPA Regions 1-10. As noted above, subpart VV has been addressed in the Masada permit.

[33] The gasifier is also subject to NSPS subpart Dc when burning natural gas, as it does at startup. The requirements for subpart Dc are already in the issued permit, and are not at issue in any of the petitions.

[34] Although the definition of MSW used in Db differs slightly from the definitions used in Eb, it is EPA's judgment that neither covers lignin residue, for reasons discussed above..

[35] Specifically, EPA finds that the requirements of sections 60.49b(a), (d), and (o) apply.

The purpose of these requirements is to assure that facilities potentially regulated by subpart Db (some of which are capable of burning multiple fuel types) are properly subjected to the appropriate emissions standards when burning a given fuel. These reporting and recordkeeping requirements clearly apply even if the source primarily combusts a fuel that is not further regulated by subpart Db emissions standards, as is the case here. Therefore, EPA is granting the request to object to the permit with respect to this issue. Pursuant to Sections 505(b) and 505(e) of the Act, 42 U.S.C. §§ 7661d(b) and (e), and 40 CFR 70.7(g)(4) or (5) and 70.8(d), NYSDEC is required to modify the permit to incorporate the reporting and recordkeeping requirements of 40 CFR 60.49b.[36] Where possible, these requirements should be harmonized with reporting and recordkeeping requirements already contained in the permit.

g. Accidental Release Provisions (40 CFR Part 68)

In separate petitions, petitioners Daniel Nebus and Jeanette Nebus both raise concerns about the possible effects of an explosion at the Masada facility. While the petitioners raise several general questions about such effects, the relevant question for this title V petition is whether the facility has complied with the Clean Air Act requirements for accidental releases of "regulated substances," which are extremely hazardous substances listed under section 112(r)(3) of the Act. On this point, the petitioners assert that section 112(r) requirements are "missing from the plan." Mr. Nebus is particularly concerned about an explosion of ethanol, but also identifies several other substances stored in tanks at the Masada facility, including sulfuric acid, gasoline, fuel oil and ammonia.

The regulations implementing 112(r), codified at 40 CFR Part 68, apply to sources that have regulated substances present above certain thresholds. EPA has reviewed Masada's application and supporting information and has located no evidence – nor has Spectra pointed to any – that any regulated substance will be present at the Masada facility in quantities above the 112(r) thresholds. The only substance identified by Mr. Nebus that is listed in the part 68 regulations is ammonia. However, the regulation applies to ammonia in concentrations of 20 percent or greater. NYSDEC determined that part 68 did not apply because the ammonia present does not exceed the 20 percent concentration threshold.[37] Based on this information, EPA finds that Spectra has failed to show that the part 68 requirements apply to the Masada facility. Thus, the permit, as issued, is sufficient under 40 CFR 68.215.[38]

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[36] Under 40 CFR 70.7(d)(1)(iii), permit amendments that require more frequent reporting by the permittee are eligible for the administrative permit amendment process.

[37] EPA confirmed this via a telephone conversation on March 7, 2001 between Thomas Miller, NYSDEC Region 3, and Lauren Steele, EPA Region 2.

[38] Compliance with the requirements of part 68 does not, however, relieve Masada of its legal obligation to meet the general duty requirements of section 112(r)(1) of the Act to identify hazards that may result in an accidental release, to design and maintain a safe facility taking such steps as are necessary to prevent releases, and to minimize the consequences of an actual accidental release. As the Administrator

h. Additional Requirements

With respect to all other applicable requirements not specifically addressed elsewhere in this Order, none of the petitioners have presented specific information to identify any missing or improperly included requirements. In response to the Spectra petitioners' general claim that there are other potentially applicable requirements, but that there is not sufficient information to evaluate their applicability, EPA has examined the record, and has determined that sufficient information is available to conclude that, except as specifically noted above, the permit is adequate to assure compliance with all applicable requirements.[39]

C. Other Issues

1. Environmental Justice and Non-Discrimination under Title VI of the Civil Rights Act

Petitioners Deborah Glover and Jeannette Nebus allege that the permit should be denied because US EPA and NYSDEC have not complied with Executive Order 12898, entitled "Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations." Petition of Deborah Glover, dated August 19, 2000, pp. 2 and 4. Ms. Glover notes that the City of Middletown has a large minority and low-income population and that US EPA and NYSDEC did not appropriately identify "the multiple and cumulative exposures" in this area. She also alleges that the many non-English speaking residents were precluded from meaningfully participating in the NYSDEC public process as the notices were not in Spanish nor were translators made available at the hearing. Ms. Nebus also argues that crucial public documents were not translated and that the local minority and low-income population has been "totally disregarded."

Executive Order 12898, signed on February 11, 1994, focuses federal attention on the environmental and human health conditions of minority and low-income populations with the goal of achieving environmental protection for all communities. The Order is intended to promote non-discrimination in federal programs substantially affecting human health and the environment, and to provide minority and low-income communities access to public information on, and an opportunity for

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stated in the Shintech Inc. Title V Order, Permit No. 2466-VO (Sept. 10, 1997), at 12, n.9, "section 112(r)(1) remains a self-implementing requirement of the Act, and EPA expects and requires all covered sources to comply with the general duty provisions of 112(r)(1)."

[39] Although not identified by the petitioners, this review also considered the recently-promulgated NSPS for Commercial and Industrial Solid Waste Incineration Units (40 CFR part 60, subpart CCCC). These standards do not apply to facilities that recover energy for industrial purposes. Masada recovers energy to produce steam, which is used elsewhere at the plant, and is thus not covered by this rule. I also note that EPA has listed "industrial boilers," "institutional/commercial boilers," and "process heaters" on the list of source categories for which hazardous air pollutant emission standards are being developed under section 112 of the Act. 66 Fed. Reg. 8223 (Jan. 30, 2001). However, these standards have not yet been proposed and clearly are not under consideration in this Order.

public participation in, matters relating to human health or the environment. It generally directs federal agencies to make environmental justice part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of their programs, policies, and activities on minority and low-income populations.

At issue here is whether EPA should object to the permit issued by NYSDEC because it did not implement the Order. However, the Order's provisions apply only to the actions of federal agencies. As noted in the Administrator's Order responding to the Shintech title V petition, Permit No. 2366-VO, 2467-VO, 2468-VO (Sept. 10, 1997), at p.8, n.5, "[w]hile Executive Order 12898 was intended for internal management of the executive branch and not to create legal rights, federal agencies are required to implement its provisions 'consistent with, and to the extent permitted by, existing law." Sections 6-608 and 6-609, 59 Fed. Reg. at 7629, 32-33 (Feb. 14, 1994). Thus, the Order does not apply to actions taken by New York State. The Masada facility received a combined permit incorporating the requirements of New York's title V program and its minor source construction program. New York's title V program received interim approval in 1996. 61 Fed. Reg. 57589 (Nov. 7, 1996); see also 61 Fed. Reg. 63928 (Dec. 2, 1996) (correction); 40 CFR Part 70, Appendix A). New York State therefore is responsible for issuing and administering Masada's permit under section 502 of the Act. Similarly, New York's minor source construction program, codified at 6 NYCRR 201, was approved by EPA in 1997 as part of the state's implementation plan. 62 Fed. Reg. 67006 (Dec. 23, 1997). As the U.S. Environmental Appeals Board recently stated, permits issued under a state's approved minor source construction program "are regarded as creatures of state law that can be challenged only under the state system of review." In re: Carlton, Inc. North Shore Power Plant, PSD Appeal No. 00-9 (Feb. 28, 2001), slip op. at 5.[40]

Consequently, Executive Order 12898 does not apply to the State's issuance of the permit at issue here. As explained above, to justify exercise of an objection by EPA to a title V permit pursuant to Section 505(b)(2) of the Act, 42 U.S.C. § 7661d(b)(2), the petitioner must demonstrate that the permit is not in compliance with the requirements of the Act. Since the Order by its terms does not extend to the State's issuance of permits, it is not an applicable requirement of the Act. Thus, the request to object on this ground is denied.

However, if NYSDEC is a recipient of EPA financial assistance, its programs and activities, including its issuance of the Masada permit, are subject to the requirements of Title VI of the Civil

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[40] Pursuant to 40 CFR § 52.21(u), NYSDEC has been delegated authority to administer the federal PSD program. See 47 Fed. Reg. 31613 (July 21, 1982). However, New York's decision that the source does not require a PSD permit means that there is no federal PSD permit for this source. *See e.g.* In re: Carlton, Inc. North Shore Power Plant, PSD Appeal No. 00-9 (Feb. 28, 2001), slip op. at 5 (dismissing challenge to permit issued under Illinois' approved minor NSR program because "the Board's jurisdiction is limited to federal PSD permits that are *actually issued*; it does not extend to state decisions reflected in state-issued permits, even where those decisions lead to the conclusion not to require a PSD permit at all") (emphasis in original).

Rights Act of 1964, as amended, and EPA's implementing regulations, which prohibit discrimination on the basis of race, color, or national origin. 42 U.S.C. § 2000d et seq.; 40 C.F.R. Part 7. The petitioners may file a complaint under Title VI and EPA's Title VI regulations if they believe that the state discriminated against them in violation of those laws by issuing the permit to Masada. The complaint, however, must meet the jurisdictional criteria that are described in EPA's Title VI regulations in order for EPA to accept it for investigation.[41]

2. Environmental Impacts

Many petitioners, including Ms. Dellasandro, Mr. Feman, Ms. Glover, Ms. Lee, Mr. Sprague, Ms. Sprague, Mr. Weimer and Mr. Wodka, broadly criticized the location of the Masada facility, suggesting that, by locating within the city limits of Middletown, the source will be too close to children and other industrial facilities. Similarly, another widespread concern was that this facility will contaminate the community's air and water. This issue was raised by Mr. Centeno, Ms. Centeno, Ms. Dellasandro, Ms. Jacobs, Ms. Lee, Ms. Mongilia, Mr. Sprague, Ms. Sprague, and Mr. Wodka.

The Clean Air Act and NYSDEC's applicable implementing regulations require review of the types of concerns raised by these petitioners. While recognizing that new sources of air pollution will have effects on local ambient air quality, this review assures that such ambient impacts are within levels that provide adequate protection for public health. This process focuses primarily on the National Ambient Air Quality Standards (NAAQS). EPA sets these standards to protect the public health with an adequate margin of safety. See CAA §109(b). States are required to adopt plans, known as State Implementation Plans (SIPs) to attain and maintain these NAAQS for six key pollutants, known as criteria pollutants. As part of these plans, States are required to adopt rules to assure that new and modified sources do not interfere with attainment or maintenance of the NAAQS, and do not conflict with the SIP. See 40 CFR §51.160-165. NYSDEC has submitted, and EPA has approved, regulations that fulfill these requirements.[42]

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[41] Under Title VI, a recipient of federal financial assistance may not discriminate on the basis of race, color, or national origin. Pursuant to EPA's Title VI administrative regulations, EPA's Office of Civil Rights conducts a preliminary review of Title VI complaints for acceptance, rejection, or referral. 40 C.F.R. § 7.120(d)(1). A complaint should meet jurisdictional requirements as described in EPA's Title VI regulations. First, it must be in writing. Second, it must describe alleged discriminatory acts that may violate EPA's Title VI regulations. Title VI does not cover discrimination on the grounds of income or economic status. Third, it must be timely filed. Under EPA's Title VI regulations, a complaint must be filed within 180 calendar days of the alleged discriminatory act. 40 C.F.R. § 7.120(b)(2). Fourth, because EPA's Title VI regulations only apply to recipients of EPA financial assistance, it must identify an EPA recipient that allegedly committed a discriminatory act. 40 C.F.R. § 7.15.

[42] The relevant regulations are found primarily in 6 NYCCR parts 200 and 201. Additional guidance is available discussing ambient impact assessments in more detail. See NYSDEC's *Air Guide* serious of documents.

The primary requirement in the New York SIP for addressing minor sources states that, "[t]he commissioner will not issue a permit... unless he determines that... the operation of the source will not prevent the attainment or maintenance of any applicable ambient air quality standard." 6 NYCRR 201.4. None of the aforementioned petitioners raise any specific claims that, in approving construction of the Masada facility, NYSDEC failed to meet this requirement. Indeed the permitting record demonstrates that the NYSDEC commissioner did make the required determination. The NYSDEC determination was based on an air quality (*i.e.,* modeling) analysis designed to simulate the ambient impacts of the Masada facility at its planned location. The analysis was submitted by Masada, and was conducted pursuant to New York State guidelines. Under these guidelines, modeling must generally reflect worst case operating and meteorological conditions, and must consider the effects of other sources in the area. A report issued by NYSDEC concludes that:

> "The applicant's air quality analysis has met Department guidelines in assessment of criteria and non criteria pollutants in the facility vicinity. It can further be concluded that the facility should meet all criteria AAQS [Ambient Air Quality Standards]..."[43]

The findings statement included with Masada's final operating permit reiterates the results of this review. The model results themselves showed that the resulting ambient levels of pollution were well within acceptable levels and well below the NAAQS. Based on this modeling, NYSDEC determined that the Masada facility would not interfere with attainment or maintenance of the NAAQS, and issued the construction permit. In order to maintain a legitimate grounds for objection to the title V permit, the petitioners would have to raise specific allegations that this analysis, or the determination by NYSDEC, failed to comply with applicable regulations. In the absence of such allegations, and based on the actions by NYSDEC described above, EPA finds that the aforementioned petitioners' have not demonstrated that the State has failed to make the required determination, and thus I deny the petitions on this basis.

I also note that NYSDEC conducted a similar review pursuant to its State air toxics regulations and policies. While these regulations are not considered applicable requirements for purposes of title V of the Act, NYSDEC further determined that the impacts of toxic pollutants were also all well below the maximum levels defined in the State guidelines.[44]

Regarding concerns about water quality raised by some of the aforementioned petitioners, no issues were identified that point to the failure of the Masada permit to incorporate all applicable

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[43] Letter and Review from Alan Elkerton, NYSDEC Division of Air Resources, to Tom Miller, NYSDEC Region 3, April 9, 1999.

[44] Id. As distinct from criteria pollutants, State programs to review ambient impacts of other pollutants, such as the NYSDEC regulations establishing guideline concentrations for a number of toxic pollutants, are not required under the Act, and are not applicable requirements for title V operating permits. States may elect to include these requirements in a "State-only" portion of a title V permit.

requirements under the Clean Air Act. As such, the EPA dismisses these claims. The petitioners concerns may be addressed by other environmental laws, but compliance with those laws is not a proper objection issue under title V of the Clean Air Act, and is not addressed further in this Order.

3. Additional Issues

The Spectra petitioners also incorporate into their petition, by reference only, "each and every comment contained in the 2000 Supplemental Comments as a basis for objecting to the permit as if they were fully reprinted herein." Further, they argue that each issue in their original 1999 comments is also incorporated into their petition. Part of the basis for such a claim is that the issues raised have never been substantively addressed by NYSDEC. EPA disagrees with this claim, as noted above. In addition, it is inappropriate for a petitioner to simply incorporate their prior comments into their title V petition. Under section 505(b)(2), it is the responsibility of a petitioner to demonstrate to the Agency that the terms of a permit are not in compliance with the requirements of the Act. As the Administrator stated in the Shintech Inc. title V Order, Permit No. 2366-VO, 2467-VO, 2468-VO (Sept. 10, 1997), at 20, "EPA has no generalized duty to review the permit and to determine and rectify all inaccuracies and inconsistencies." Likewise, I find that wholesale incorporation of an entire set of prior comments does not provide a specific enough basis for objection to meet the petitioner's burden. For these reasons, I reject the Spectra petition with respect to any issues included in the referenced sets of comments but not specifically raised in the petition.

Finally, several of the petitioners raise additional issues which are not germane to a petition under title V because they do not pertain to applicable requirements or permitting requirements of 40 CFR part 70. For example,

- Spectra notes that Masada withdrew plans to construct a similar facility in Birmingham, Alabama and charges that various elected officials contacted EPA and NYSDEC to influence approvals for the Masada project.
- Ms. Glover alleges that NYSDEC and Masada had a "callous indifference to the concerns of the citizens of Middletown." She also mentions EPA's NO_x SIP call and NYSDEC's compliance with other environmental statutes.
- Ms. Nebus also argues that NYSDEC has been "capricious and arbitrary in their dealings" with her. She further expresses concern about the exhaust from diesel trucks associated with the facility and suggests that NYSDEC should test the nearby Monhagan Brook for contamination.

None of these claims, even if true, could form the basis of an EPA title V objection since they do not allege that Masada's permit is not in compliance with the CAA requirements applicable to this source. As such, these issues are not germane, and EPA does not address them further in this Order.

III. CONCLUSION

For the reasons set forth above and pursuant to sections 505(b) and 505(e) of the Act, 42 U.S.C. §§ 7661d(b) and (e), and 40 CFR 70.7(g)(4) or (5) and 70.8(d), I deny the petitions submitted by the following persons: Lois Broughton, Wanda Brown, Louisa and George Centeno with Leslie Mongilia, Maria Dellasandro, R. Dimieri, Lori Dimieri, Dawn Evesfield, Marvin Feman, Deborah Glover, Anne Jacobs, Barbara Javalli-Lesiuk, Marie Karr, June Lee, Ruth MacDonald, Bernice Mapes, Donald Maurizzio, Alice Meola, Daniel Nebus, Mr. and Mrs. Hillary Ragin, M. Schoonover, Mildred Sherlock, LaVinnie Sprague, Matthew Sprague, Hubert van Meurs, Alfred and Catherine Viggiani, Paul Weimer and Leonard Wodka. I grant the petitions from Spectra and Jeanette Nebus to object to the NYSDEC permit on the basis of inadequate public notice with respect to the PTE limits, and Spectra's petition with respect to the applicability of the NSPS Db recordkeeping requirements. NYSDEC shall take appropriate steps, as discussed above, to resolve these objections. I deny the remainder of Spectra's and Ms. Nebus' petitions.

May 2, 2001
Dated:

/s/
Christine Todd Whitman,
Administrator

Pre-filed Testimony of Cynthia Skrukrud, Ph.D.

My name is Cindy Skrukrud. I am employed as the Clean Water Advocate for the Illinois Chapter of the Sierra Club. I have reviewed and commented on NPDES permits for the Club since 2000.

I first began to study NPDES permits issued in the Fox and Kishwaukee watersheds in 1996 while employed by the McHenry County Defenders, a county-based environmental organization. I have participated in commenting on a number of draft permits and participated in a number of hearings on draft NPDES permits. This is true although McHenry County Defenders and the Sierra Club comment on only a small fraction of the draft permits that are noticed, and hearings on draft NPDES permits are fairly rare.

The Sierra Club, Illinois Chapter, along with Prairie Rivers Network, is proposing amendments to Part 309 subpart A of the Illinois Administrative Code Title 35 Environmental Protection Act in order to better ensure full public participation in the issuance of NPDES permits in Illinois.

The process of the issuance of NPDES permits necessitates that the Illinois EPA and the discharger hold lengthy discussions about the nature of the proposed discharge in order to develop a draft permit. Consequently, a lot of information has been exchanged between the Agency and the discharger by the time the public receives notice of the proposal to issue a new, modified or reissued permit. In order to allow the public the opportunity to be fully engaged in the decision on whether or not to issue a permit for a given discharge, the public needs an informative public notice of the draft permit and access to the complete administrative record ("permit file" using current Illinois EPA terminology). The public should also be kept informed of any proposed changes in the draft permit that develop prior to the Agency's final decision to issue or deny the permit.

Because the impact of the proposed discharge on the receiving water body is usually the public's utmost concern, our proposed amendments require that more information about the receiving waters be included in the fact sheet. It is vital that the public know the information about the receiving water the Agency is using to base its decision. Because members of the public may have more intimate knowledge of a water body than the Agency does, they may be able to provide information about the water body and its uses, which the Agency lacks. This information could include site specific knowledge of the use of the water body by children (a factor important to the Agency's consideration of disinfection requirements in the permit) or by endangered and threatened species of aquatic and other terrestrial life.

The public needs to be able to fully understand the conditions of the permit. That the public has the opportunity to review and comment on the conditions that will appear in the final permit is critical. The public must be able to know about and comment on what will be discharged, the limits on the discharge, and how those limits are to be monitored. Over the time period for which a NPDES permit is issued (typically 5 years), the monitoring requirements are the only means by which the public (and the Agency) can gauge the impact which the discharge is having on the

Public participation in the NPDES process is too important to be subject to unnecessary or inappropriate limitation. Prairie Rivers Network urges the Pollution Control Board to adopt these changes to ensure that the public will always have full and fair opportunity to participate in this process.

Pre-filed Testimony of Albert Ettinger

I am Senior Staff Attorney at the Environmental Law & Policy Center of the Midwest and Water Issues Coordinator and General Counsel for the Illinois Chapter of the Sierra Club. I have worked in Illinois on matters relating to water pollution and implementation of the federal Clean Water Act since 1982. I am the primary drafter of the petition to amend the Part 309 Subpart A.

Earlier drafts of the petition were discussed with officials of Illinois EPA and members of various interest groups concerned with the NPDES permitting process. Various changes were made to the draft in response to views express in these discussions but no consensus was reached as to the proposal.

The proposal amends the most recent version of the rule as published on the Board's Web site.

I would be pleased to answer any questions by the Board or members of the public regarding the proposal, the reasons that it is being offered, or its expected effect.

Petition to the Illinois Pollution Control Board for Regulations

The undersigned residents of Illinois hereby petition the Pollution Control Board to amend Illinois Administrative Code Title 35 Environmental Protection Act; Subtitle C: Water Pollution; Chapter I: Pollution Control Board; Part 309. The amendments sought are to improve Illinois' implementation of the Clean Water Act, 33 U.S.C. Section 1251 et seq., and National Pollutant Discharge Elimination System (NPDES) by amending the relevant regulations to require that:

- The public is properly informed of draft NPDES permits and is provided a fair opportunity to comment on substantial terms of permits before they are issued;
- hearings are held when necessary to allow the public an opportunity to comment on draft permits and important revisions to draft permits;
- the administrative record regarding each permit shows that the permit was properly issued and that the permit does not purport to allow discharges that would cause or contribute to a violation of Illinois water quality standards;
- necessary monitoring of NPDES limits and conditions be required in permits; and,
- Illinois permit procedures and NPDES permits comply with the Clean Water Act.

	Name	Address
1.	Roger Rotth	516 S. Lincoln, Springfield, IL 6270x
2.	Cindy Warrington	414 Marion Spfld IL 6274
3.		710 W. Maple Spfld. 62704
4.		3605 Bunn South, Spfld, IL
5.	Carol Herndon	9 Partridge, Spfld, Ill
6.	Constance M Beattie	8000 Hunt Rd. Spfld 62707
7.		9 Penacook Rochester IL 62563
8.	Linda Flotow	2504 Winfield, Spfld, IL 62704
9.	Linda Connelly	R.R. 2 Box 55 Athens, Il 62613

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	Name	Address
1.	Joan K. Soltysiewicz	16191 Hare Rd. Minooka Ill.
2.	Wm J Ellis	13986 McKanna Rd. Minooka, IL
3.	Edward J Lauer	2745 Rt. 52 Minooka, IL. 60447
4.	Mary C. DeVries	13990 McKanna Rd - P.O. Box 436 Minooka 60447
5.	Cindy R Ellis	13986 McKanna Rd Minooka
6.	Richard A. Jaker	332 Nellie Ct. / Glenview, Ill. 60025
7.	[illegible]	7546 Brown Ave. Forest Park, IL 60130
8.	Katherine Laing	431 S. DEARBORN # 1402 CHICAGO 60605
9.	Marene Dickson	4700 S. Lake Pk # 1301 City 60615

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	Name	Address
1.	Dana Johnson	1776 Knox Hwy. 11 Gilson, IL. 61436
2.	Richard E. Johnson	1776 Knox Hwy. 11 Gilson, IL. 61436
3.	Joseph R Kuck	404 N Magnolia Elmwood Ill
4.	Mary A Kuck	404 N. Magnolia Elmwood, IL 61529-0697
5.	Dan Mitchell	2009 N. Broad St. Galesburg, IL 61401
6.	Margaret Mitchell	2009 No. Broad St. Galesburg, IL. 61401-1450
7.	Rebekah H. Sisler	2764 Sprucewood Rd #15 Galesburg, IL. 61401
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9.	Shirley J. Ford	PO Box 1061 Galesburg, IL 61402

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- necessary monitoring of NPDES limits and conditions be required in permits; and,
- Illinois permit procedures and NPDES permits comply with the Clean Water Act.

	Name	Address
1.	Joyce Scholl	RR#2 Wyoming, IL
2.	Kevin Scholl	RR#2 Wyoming IL
3.	Erica Johnson	695 Knox Rd 2000N Watauga IL 61488
4.	Heath Pence	2286 Windsor Dr. Galesburg IL 61401
5.	Brandi Todd	1368 Kara Ave Galesburg, IL 61401-5642
6.	[illegible]	1457 Farmstead Ct Monmouth, IL 61462
7.	Leonard T Vorski	149 Knollcrest - Dahinda, IL 61428
8.	Linnea Vorski	149 Knollcrest - Dahinda, IL 61428
9.	Richard A Stout	803 Bateman, Galesburg, IL 61401

Petition to the Illinois Pollution Control Board for Regulations

The ~~undersigned~~ residents of Illinois hereby petition the Pollution Control Board to amend Illinois Administrative Code Title 35 Environmental Protection Act; Subtitle C: Water Pollution; Chapter I: Pollution Control Board; Part 309. The amendments sought are to improve Illinois' implementation of the Clean Water Act, 33 U.S.C. Section 1251 et seq., and National Pollutant Discharge Elimination System (NPDES) by amending the relevant regulations to require that:

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	Name	Address
1.	Lambertus H. Princen	677 E. High Point Terr., Peoria, IL 61614
2.	Greet Princen	" " " " "
3.	Eleanor Smith	13474N 130 East Rd Homer IL 61849
4.	[illegible]	616 Wenonah, Oak Park, IL 60304
5.	Brian Kelly	1961 W Fargo, 1st Chicago, IL 60626
6.	Fidelia Sauer-Mitchell	5526 S. Racine, Apt 5 Chicago, IL 60636
7.	Paul Gaynor	645 Forest Evanston 60202
8.	Sam Mastrone	525 W. Arlington #556 Chicago, IL 60614
9.	Peggy Cedr	6844 W. Oakton Ct., Niles, IL 60714

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	Name	Address
1.	Virginia M. Gordon	2108 Merryfair Ln, Champaign, IL 61821
2.	Helen M. Warren	103 W. Delaware, Urbana, IL 61801
3.	James L. Hoyt	2107 W. White #3B Champaign IL 61821
4.	Barb Ramin	11450 Kickapoo Pk Rd, Oakwood IL 61858
5.	Edna W. Stirling	3310 WHITAKER RD, BYRON, IL 61010
6.	Brian Horner	434 N. CHARLOTTE, PALATINE, IL 60067
7.	Sharon Colman	2217 15½ St. Rock Island IL. 61201
8.	Bernadine Barb	2809 14th St Moline, IL 61265
9.	James D. Smith	13474 N. 130E Rd Homer, IL 61849

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	Name	Address
1.	Ruth S. Walker	307 W. Washington, Urbana IL 61801
2.	Bland Palmore	402 W. Vermont Av. Urbana 61801
3.	Elaine Y. Ryckr	306 Sunnycrest Ct. W., Urbana, Ill. 61801
4.	Janet Gluela	1701 Henry Square Lane #101, Champaign IL 61821
5.	Kenton Griffis	3405 Cherry Hills Dr, Champaign, IL 61822
6.	Arlo Rain	11155 Kickapoo Park Road, Oakwood, IL 61858
7.	John Dunkelberger	401 E. ILLINOIS, URBANA, IL 61801
8.	Colleen Brodie	1406 Mayfair, Champaign, IL 61821
9.	Edwin R. Gordon	2108 Mayfair Rd, Champaign IL 61821

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	Name	Address
1.	Fran Caffee Fran Caffee	726 W Downer Aurora IL 60506
2.	Jim Hohenberger Jim Hohenberger	150 S Wheeler Batavia IL 60510
3.	Barbara Vrchota Barbara Vrchota	120 Forestview Aurora IL 60506
4.	Catherine Bellend Catherine Bellend	335 S. Collins St., South Elgin 60177
5.	Chuck Roberts Chuck Roberts	305 E Main Yorkville, IL 60560
6.	Eugene McArdle	35W403 Pinelands Rd, Wayne 60184
7.	Dudley Case	4N016 SPUR LANE, ST CHARLES IL 60175
8.	Geri Castle	2651 Shawnee Lane South. Aurora, Illinois 60504
9.	THOMAS CAFFEE Thomas Caffee	726 W DOWNER AURORA IL 60506

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Name	Address
1. Donna J Clemens	2136 Bonnie Ln, Monticello IL 61856
2. Marsha S. Gates	Box 704 Tolono, IL 61880
3. Marge Chaney	1602 Kingston Dr, Urbana IL 61802
4. Debbie Miller	203 Munroe Bondville, IL 61815
5. Georgia Russell	1032 Pinecrest Rantoul, IL 61866
6. [illegible]	509 W Washington Urbana IL 61801
7. [illegible]	3023 N 770 E Rd, Sidell, IL [illegible]
8. Joan M McKesson	1505 E County Rd 1550 N Villa Grove, IL 61956
9. Nancy Wagner	3313 Grant St. Evanston, IL 60201

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	Name	Address
1.	Brian Saiger	553 Schwerr Ct. Peoria IC 6160
2.	Vicki Sandall	RR 2 Princeville, Illinois 61559
3.	Joseph A. Taylor	330 S BARNHART DR Peoria IL 61604
4.	Douglas C. Franks	6926 N. Kimberly Dr. Peoria, IL 61614
5.	Sarah Mullins	144 Wingate Dr. Tremont, IL 61568
6.	Dixie Smith Jackson	406 Yankee Ridge dr., Urbana, IL 61802
7.	Bill Wood	801 Hollycrest Dr. #3, Champaign IL 61821
8.	Sara Erikson	703 W. California Ave Urbana, IL 6180
9.	Nancy L. Bailey	302 S State #4 Champaign 61820
9.	Blair Bradley	610 Randi Lane Hoffman

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	Name	Address
1.	Ryan Stephens	330 W. Southmor Rd. Morris, IL 60450
2.	FRED ZEIEN	300 Windsor Terr, Antioch, IL 60
3.	[illegible]	1912 Country Dr. Gurnee, IL 60
4.	Gustave Lamparez	24 Roosevelt St, St Charles, IL 6017
5.	Janet Perez	"
6.	Jan Livingood	215 Rainmaker Run, Lake in the Hills IL 60156
7.	J B Livingood	215 Rainmaker Run Lake in the Hills IL 60156
8.	[illegible]	9 E Pettit Lemont IL 60439
9.	Gary Medranic	4905 N Hamlin Chicago, IL 60625
10.	[illegible]	10 N. Racine, Chicago
11.	[illegible]	214 S. Forest ave Batavia

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Name	Address
1. Mary F. Watson	1461 W. Wilson #B Batavia IL 60510
2. Tammy M. Cop	1309 4-H Park Rd #6 Pontiac IL 61764
3. Benjamin E. Joseph	4525 W. SHABBONA RD. MORRIS, IL 60450
4. [illegible]	832 W Parker Streator IL 61364
5. Donald Browning	3137 E Bending Crk. Rd. Crete, IL 60417
6. Thomas M. [illegible]	2138 Clinton, Rockford 61103
7. Stephen Luth	748 S. Dennison Wheeling, IL
8. Veronica Luth	3517 W. Diversey Ave Chicago, IL 6064
9. [illegible]	5946 W. Leland Chicago IL 60630
10. Ardus Bradley	610 Rand. Lane, Hoffman Estates, IL 60194

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	Name	Address
1.	Kathy John	RR#1, Dunlap, IL 61525
2.	[illegible]	8292 Edgewater Dr. Carlock 61725
3.	Marty Seigel	615 E. Chestnut, Bloomington, 61701
4.	Alice Deck	13487 Hungry Hollow Rd, Danville, IL 61832
5.	Marilyn V Black	RR 2 Box 5 Clinton IL 61727
6.	[illegible]	1345 N FORREST DR. METAMORA IL 61548
7.	Mary Jo ADAMS	2015 ELKINS LANE, CARLOCK 61725
8.	George M Burnett	701 E Polk Street Morton 61550
9.	Sandra A Burnett	701 E Polk Street Morton 61550

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	Name	Address
1.	Daniel B Faust	17 OAKWOOD DR. PONTIAC, IL 61764
2.	Carol A Faust	17 Oakwood DR Pontiac Il 61764
3.	Cindy Alexander	310 Jackson, Washington IL 61571
4.	James R. Dark	13487 HONEY HOLLOW RD DANVILLE, IL 61834
5.	Darrell Cobb	303 W SECOND ST Mackinaw IL 61755
6.	Rebecca V [illegible]	722 W NORTH ST CLINTON IL. 61727
7.	Mary M Kemp	407 BIRD AVE BARTONVILLE IL 61607
8.	Jack Nash	1440 Second Ave Morton, IL 61550
9.	[illegible]	6127 W. LEGION HALL RD DUNLAP, IL 61525

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	Name	Address
1.	Richard L Bishop	3514 N. High Cross Rd., Urbana, IL 61802
2.	[illegible]	404 W [illegible], Urbana IL 61801
3.	John J. Conway Jr.	1810 Kingsgrave Dr. Champaign 61822
4.	Larry D Miller	417 Crescent Dr. Mahomet IL 61853
5.	David DeRuntz	1404 WESTFIELD DR. CHAMPAIGN IL 6182
6.	Cindy Dunn	1404 Westfield Dr Champaign IL 61821
7.	Joel Conover	201 East Irene, Quincy, IL 62301
8.	Allan Leggett	1039 W Chatham, Palatine, IL 60067
9.	Zachary Craven	16 Grand Ave. Jacksonville, IL 62650

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Name	Address
1. Robert Alexander	310 Jackson, Washington IL
2. [illegible]	10408 MICHAEL TODD - GLENVIEW, IL. 60025
3. [illegible]	695 [illegible] IL 61488
4. Margaret A. Mitchell	2009 [illegible] Galesburg, IL. 61401
5. Richard A. [illegible]	803 Bateman, Galesburg, IL 61401
6. [illegible] Tinsley	RR2 Box 71 Athens IL. 62613
7. [illegible]	2803 Myra Ridge Dr. Urbana IL 61802
8. Nancy A. Dietrich	2803 Myra Ridge Dr. Urbana IL 61802
9. [illegible]	RR2 Box 71 Athens IL 62613

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	Name	Address
1.	[illegible]	1713E Florida Ave #203 Urbana, IL 61801
2.	Vernie Beaubien	PO Box 370, Morrisonville IL 62546
3.	Trey Devez	310 Yankee Ridge Lane, Urbana, IL 61802
4.	Tara X. Segal	1803 N Cunningham, Urbana 61802
5.	Mark C. Patton	506 E Oregon St. Urbana, IL 61801
6.	Deborah Faircloth	810 S Foley Champaign IL 61820
7.	Susan M Fuller	417 Crescent M Mattoon 61938
8.	Michael D. Miller	2212 Vawter St, Urbana, IL 61801
9.	Patricia C. Tannon	1208 W. Union St Champaign, IL 61821-5229

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	Name	Address
1.	Shirley Koch	1100 Fondulac/E. Peoria IL 61611
2.	Lynette Villalobos	309 N. Elmwood Av 61604
3.	David M Johnson	6221 N. JAMESTOWN, PEORIA
4.	Helen Clyne	1312 W Main St #219 Peoria, IL 61606
5.	Becky Gamet	1312 W main St #702 Peoria, IL 61606
6.	[illegible]	1109 N. University St Peoria IL 61604
7.	Emily Young	6606 N. Allen Rd #92 Pea. IL 6161
8.	[illegible]	RR1 Box 128 Toulon 61483
9.	[illegible]	RR1 Box 128 Toulon 61483

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	Name	Address
1.	[illegible]	702 W Washington St Urbana, IL 61801
2.	Elizabeth J. Chato	714 W. Vermont, Urbana IL 61801
3.	[illegible]	1911 McDonald, Champaign, IL 61821
4.	Suzanne Smith	2797 CR 1200 N, Homer, IL 61849
5.	Alice Engelbrecht	501 E. California, Urbana, IL 61801
6.	Kristin L Replogle	715 S Broadway Av Urbana IL 61801
7.	Carrie Simmons	601 E. Clark St. #31 Champaign, IL 61820
8.	Shannon Deerfrog	1511 W. Main St. Peoria 6161[illegible]
9.	Cecilia Sargent	388 CR 375 E Sparland IL

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	Name	Address
1.	Janaki Patel	2108 Morningview Place Champaign IL 61822
2.		1107 Eliot CHAMPAIGN, IL 61820
3.	Allison Wiegel	803 S Busey #123 URBANA, IL 61801
4.	Pierre Bull	74 Trent Ct, Burr Ridge, IL 60527
5.	Paul Kizior	22500 Muriel Circle, Deer Park, IL 60010
6.	Frank Hassler	1102 Frank Dr., Champaign, IL 61821
7.	Jennifer Walling	809 W. Main Urbana, IL 61801
8.	Ashley Peterson	5221 Edgewood Rd Dixon, IL 61021
9.	(Mark Miller)	PO Box 122 Monticello IL 61815-0122

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	Name	Address
1.	Douglas Chien	1047 S. Highland Ave. Oak Park, IL 60304
2.	Karen Groene	1915 W. Division Chicago, IL 60622
3.		2118 N. Campbell Ave., #2 Chicago, IL 60647
4.	JAMES CLARK	4520 N. SPAULDING CHICAGO, IL 60625
5.	Rick Smeltz	251 S. Water St. Batavia, IL 60510
6.	Patricia J Green	1950 N. Mozart #3 Chicago 60647
7.		68 Sterling Circle #208 Wheaton, IL 60187
8.	MICHELE GUERRA	1047 Highland Ave, Oak Park, IL 60304
9.		5440 N. Winthrop #3E Chicago 60640

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- hearings are held when necessary to allow the public an opportunity to comment on draft permits and important revisions to draft permits;
- the administrative record regarding each permit shows that the permit was properly issued and that the permit does not purport to allow discharges that would cause or contribute to a violation of Illinois water quality standards;
- necessary monitoring of NPDES limits and conditions be required in permits; and,
- Illinois permit procedures and NPDES permits comply with the Clean Water Act.

	Name	Address
1.		245 Woodland Dr. Plano, IL 60545
2.		114 N. Latham St. Sandwich IL 60548
3.		114 N. Latham St. Sandwich IL 60548
4.		5711 Lenox Hills, IL. 60532
5.		435 McKee St. Batavia, IL. 60510
6.		518 Jonquil, Deerfield, IL 60015
7.		103.404 Knoch Knolls Naperville Il. 60565
8.		440 Lampwick Ct. Naperville IL 60563
9.		440 Lampwick ct. Naperville, IL 60563
10.		24W501 Bluff Ct Naperville IL 60540

Petition to the Illinois Pollution Control Board for Regulations

The undersigned residents of Illinois hereby petition the Pollution Control Board to amend Illinois Administrative Code Title 35 Environmental Protection Act; Subtitle C: Water Pollution; Chapter I: Pollution Control Board; Part 309. The amendments sought are to improve Illinois' implementation of the Clean Water Act, 33 U.S.C. Section 1251 et seq., and National Pollutant Discharge Elimination System (NPDES) by amending the relevant regulations to require that:

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- Illinois permit procedures and NPDES permits comply with the Clean Water Act.

	Name	Address
1.	Thomas Huber	1318 S. Fairfield Spfld IL 62704
2.	Betsy Irwin	6480 West State Route 97 Pleasant Plains IL 62677
3.	MARCY MITCHELL	3558 Betrus Spfld 62707
4.	Jane Anlauf	520 S Clinton Oak Park, IL 60304
5.	Charles Kubert	2920 N. Commonwealth Chicago IL 60657
6.	Rachel Gold	1505 Greenleaf St. 2nd Fl Evanston, IL 60202
7.	Alicia M	301 W. Eugene Apt 1F Chicago, IL 60614
8.	Casey Jones	5 Cardinal Ct. Shorewood, IL 60107
9.	Erick E Bengel	1843A N Hudson Chicago IL 60614

CERTIFICATE OF SERVICE

I, Albert F. Ettinger, certify that on January 13, 2003, I filed the above petition to the Illinois Pollution Control Board to amend Illinois Administrative Code Title 35 Environmental Protection Act; Subtitle C: Water Pollution; Chapter I: Pollution Control Board; Part 309 subpart A. This petition consists of:

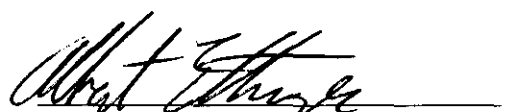
- The language of the proposed rules and rule amendments;
- A statement of reasons supporting the proposed rules and rule changes together with 4 exhibits (A-D) to the statement;
- A synopsis of the testimony to be presented by the proponents at the hearing consisting of the pre-filed testimony of Cynthia Skrukrud Ph.D., Beth Wentzel and Albert Ettinger;
- A petition signed by at least 200 persons

An original and 9 copies of the complete petition was filed, on recycled paper, with the Illinois Pollution Control Board, James R. Thompson Center, 100 West Randolph, Suite 11-500, Chicago, IL 60601, and copies were also served on:

Division of Legal Counsel
Illinois Environmental Protection Agency
1021 N. Grand Ave. East
P.O. Box. 19276
Springfield, Illinois 62794-9276

Office of Legal Services
Illinois Department of Natural Rosources
One Natural Resources Way
Springfield, Illinois 62702-1271

Division Chief of Environmental Enforcement
Office of the Attorney General
188 W. Randolph St., 20th Flr
Chicago, Illinois 60601



Albert F. Ettinger

Environmental Law and Policy Center
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