Sunshine Act Meetings

Federal Register
Vol. 54, No. 83
Tuesday, May 2, 1989

This section of the FEDERAL REGISTER contains notices of meetings published under the "Government in the Sunshine Act" (Pub. L. 94-409) 5 U.S.C. 552b(e)(3).

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM

TIME AND DATE: 11:00 a.m., Monday, May 8, 1989.

PLACE: Marriner S. Eccles Federal Reserve Board Building, C Street entrance between 20th and 21st Streets, NW., Washington, DC 20551.

STATUS: Closed.

MATTERS TO BE CONSIDERED: .

1. Personnel actions (appointments, promotions, assignments, reassignments, and salary actions) involving individual Federal Reserve System employees.
2. Any items carried forward from a previously announced meeting.

CONTACT PERSON FOR MORE INFORMATION: Mr. Joseph R. Coyne, Assistant to the Board; (202) 452–3204. You may call (202) 452–3207, beginning at approximately 5 p.m. two business days before this meeting, for a recorded announcement of bank and bank holding company applications scheduled for the meeting.

Date: April 28, 1989.

Jennifer J. Johnson,

Associate Secretary of the Board.

[FR Doc. 89–10608 Filed 4–28–89; 3:38 am]

BILLING CODE 6210–01–M

FEDERAL RETIREMENT THRIFT INVESTMENT BOARD

TIME AND DATE: 9:00 a.m. May 15, 1989.

PLACE: 5th Floor, Conference Room, 805 Fifteenth Street, NW., Washington, DC.

STATUS: Open.

MATTERS TO BE CONSIDERED:

1. National Finance Center recordkeeping and agency liaison.
2. Benefits administration.
3. Investments.
4. Participant communications.
5. Department of Labor audit program.
6. Approval of the minutes of last meeting.
7. Thrift Savings Plan activities report by the Executive Director.
8. Approval of the update of the FY 1989—FY 1990 budget document.
9. Investment policy review.

CONTACT PERSON FOR MORE INFORMATION: Tom Trabucco, Director, Office of External Affairs, (202) 523–5660.

Date: April 28, 1989.

Francis X. Cavanaugh,

Executive Director, Federal Retirement Thrift Investment Board.

[FR Doc. 89–10607 Filed 4–28–89; 3:21 am]

BILLING CODE 6760–01–M

NUCLEAR REGULATORY COMMISSION

DATE: Weeks of May 1, 8, 15, and 22, 1989.

PLACE: Commissioner's Conference Room, 11555 Rockville Pike, Rockville, Maryland.

STATUS: Open and Closed.

MATTERS TO BE CONSIDERED:

Week of May 1

Tuesday, May 2

10:00 a.m.—Briefing on Severe Accident Research Plan (Public Meeting)
2:00 p.m.—Briefing on Results of Maintenance Team Inspections (Public Meeting)

Wednesday, May 3

2:00 p.m.—Periodic Briefing by Advisory Committee on Reactor Safeguards (ACRS) (Public Meeting)
3:30 p.m.—Affirmation/Discussion and Vote (Public Meeting) (if needed)
a. Reconsideration of Seabrook Decommissioning Funding Order CLI–88–10 (Tentative)

Friday, May 5

10:00 a.m.—Briefing on Status of Second Draft of NUREG–1150 (Public Meeting)

Week of May 8 (Tentative)

Wednesday, May 10

10:00 a.m.—NPOC Briefing on the State of the Nuclear Industry (Public Meeting)
2:00 p.m.—Briefing on Status of Operator Licensing Activities in the Area of Requalification Exams (Public Meeting)
3:30 p.m.—Affirmation/Discussion and Vote (Public Meeting) (if needed)

Week of May 15 (Tentative)

Monday, May 15

2:00 p.m.—Briefing on Interim Report on Accident Study for Plutonium Air Transport Packages (Public Meeting)

Thursday, May 18

3:30 p.m.—Affirmation/Discussion and Vote (Public Meeting) (if needed)

Friday, May 19

10:00 a.m.—Briefing on Final Rule and Regulatory Guide for Maintenance of Nuclear Power Plants (Public Meeting)

Week of May 22 (Tentative)

Thursday, May 25

3:30—Affirmation/Discussion and Vote (Public Meeting) (if needed)

Note.—Affirmation sessions are initially scheduled and announced to the public on a time-reserved basis. Supplementary notice is provided in accordance with the Sunshine Act as specific items are identified and added to the meeting agenda. If there is no specific subject listed for affirmation, this means that no item has as yet been identified as requiring any Commission vote on this date.

To verify the status of meetings call (recording) (301) 492–0292.

CONTACT PERSON FOR MORE INFORMATION: William Hill (301) 492–1661.

William M. Hill, Jr.,

Office of the Secretary.

[FR Doc. 89–10599 Filed 4–28–89; 2:12 pm]

BILLING CODE 7590–01–M

SECURITIES AND EXCHANGE COMMISSION

"FEDERAL REGISTER" CITATION OF PREVIOUS ANNOUNCEMENT: 54 FR 18195, April 27, 1989.

STATUS: Closed/open meeting.

PLACE: 450 Fifth Street, NW., Washington, DC.

DATE PREVIOUSLY ANNOUNCED: Monday, April 24, 1989.

CHANGES IN THE MEETING: Additional items.

The following additional items will be considered at a closed meeting on Tuesday, May 2, 1989, at 2:30 p.m.:

Formal orders of investigation.

The following additional item will be considered at an open meeting on Wednesday, May 3, 1989, at 10:00 a.m.:

Consideration of whether to propose for public comment rule 52 under the Public Utility Holding Company Act of 1935 ("Act") in connection with a rulemaking petition submitted by the twelve registered holding companies subject to the jurisdiction of the Act. The proposed rule would allow the routine issuance and sale of securities by public-utility subsidiary companies of registered holding companies to proceed without filing an application if certain conditions are met. For further information, please contact Robert F. McCulloch at (202) 272–7699.

Commissioner Cox, as duty officer, determined that Commission business required the above changes.

At times changes in Commission priorities require alterations in the scheduling of meeting items. For further information and to ascertain what, if any, matters have been added, deleted or postponed, please contact: Daniel Hirsch at (202) 272–2200.

Jonathan G. Katz,

Secretary.

April 27, 1989.

[FR Doc. 89–10570 Filed 4–28–89; 12:29 pm]

BILLING CODE 8010–09–M

Corrections

Federal Register
Vol. 54, No. 83
Tuesday, May 2, 1989

This section of the FEDERAL REGISTER contains editorial corrections of previously published Presidential, Rule, Proposed Rule, and Notice documents. These corrections are prepared by the Office of the Federal Register. Agency prepared corrections are issued as signed documents and appear in the appropriate document categories elsewhere in the issue.

DEPARTMENT OF AGRICULTURE

Packers and Stockyards Administration

9 CFR Part 201

RIN 0590-AA04

Poultry Regulations and Policy Statements

Correction

In rule document 89-9607 beginning on page 16353 in the issue of Monday, April 24, 1989, make the following corrections:

§ 201.82 [Corrected]

1. On page 16356, in the first column, in § 201.82(b), in the second line, "agreement" should read "arrangement".

§ 201.100 [Corrected]

2. On the same page, in the third column, in § 201.100(a)(2)(ii), in the first line, "or" should read "for".

BILLING CODE 1505-01-D

DEPARTMENT OF EDUCATION

National Institute on Disability and Rehabilitation Research; Funding Priorities for Research Activities

Correction

In notice document 89-9805 beginning on page 17896 in the issue of Tuesday, April 25, 1989, make the following correction:

On page 17908, in the table, under "Deadline for transmittal of applications", the date should read "June 9, 1989".

BILLING CODE 1505-01-D

DEPARTMENT OF TRANSPORTATION

Research and Special Programs Administration

Office of Hazardous Materials Transportation; Applications for Renewal or Modification of Exemptions or Applications to Become a Party to an Exemption

Correction

In notice document 89-5911 beginning on page 10776 in the issue of Wednesday, March 15, 1989, make the following correction:

On page 10778, in the second column, after the second line, and before the table, insert footnotes (*11*)and (*12*) to read as follows:

(*11*) To reissue an exemption authorizing transportation of lithium batteries containing parallel branches of series connected cells without diodes, by motor vehicles and cargo aircraft, previously issued as an emergency exemption.

(*12*) To reissue an exemption authorizing shipment of a rocket motor with the igniter installed by motor vehicle, previously issued as an emergency exemption.

BILLING CODE 1505-01-D

DEPARTMENT OF TRANSPORTATION

Research and Special Programs Administration

Office of Hazardous Materials Transportation; Applications for Renewal or Modification of Exemptions or Applications to Become a Party to an Exemption

Correction

In notice document 89-9145 beginning on page 15586 in the issue of Tuesday, April 18, 1989, make the following correction:

On page 15588, before the table, insert footnotes (*12*), (*13*), and (*14*) to read as follows:

(*12*) To authorize the addition of a specifically designed trailer van configuration (Delta II Transporter) for a shipment of rocket motor, class B explosives.

(*13*) To authorize specifically designed polyethylene containers, used to transport certain Class B poisons, to have pump and other attachments connected unless the transportation distance exceeds 500 miles.

(*14*) To authorize the addition of DOT specification 112A400W tank cars for shipment of a corrosive material.

BILLING CODE 1505-01-D

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 35a

[T.D.8248]

Imposition of Backup Withholding Due to Notification of an Incorrect Taxpayer Identification Number and the Due Diligence Exception to the Imposition of a Penalty for a Missing or an Incorrect Taxpayer Identification Number

Correction

In rule document 89-8040 beginning on page 14341 in the issue of Tuesday, April 11, 1989, make the following correction:

§ 35a.3406-1 [Corrected]

On page 14345, in the 3rd column, in § 35a.3406-1(b)(5)(i)(B), in the 17th line, "section 34D6(a)(1)(B). 1n" should read "section 3406(a)(1)(B). In".

BILLING CODE 1505-01-D

federal register

Tuesday
May 2, 1989

Part II

Environmental Protection Agency

40 CFR Parts 122 et al.

National Pollutant Discharge Elimination System Sewage Sludge Permit Regulations; State Sludge Management Program Requirements; Final Rule

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 122, 123, 124, and 501

[OW-FRL-3500-7]

National Pollutant Discharge Elimination System Sewage Sludge Permit Regulations; State Sludge Management Program Requirements

AGENCY: Environmental Protection Agency.

ACTION: Final rule.

SUMMARY: On February 4, 1986, the Environmental Protection Agency proposed rules at 51 FR 4458 that would have required States to develop sludge management programs. The February 4, 1986, proposed rule, commonly referred to as Part 501, provided requirements for approvable State sludge management programs, for their submission, and for their review and approval by EPA. The Part 501 regulatory program was designed to ensure the environmentally sound use and disposal of sewage sludge and assure that the federal standards for sludge use and disposal promulgated under section 405(d) of the Clean Water Act and other federal statutes would be met.

On March 9, 1988, EPA reproposed the Part 501 State sludge management program rules and also proposed revisions to the National Pollutant Discharge Elimination System (NPDES) permit requirements and procedures (Parts 122, 123, and 124) to integrate sludge permitting and State program requirements into the NPDES program (53 FR 7642). EPA took this action to implement significant changes in the sludge management provisions in Section 405 of the Clean Water Act made by the Water Quality Act of 1987. Today, EPA is issuing a final rule which establishes State sludge management program requirements and procedures for non-NPDES State programs (Part 501) and revises the NPDES permit requirements and procedures (Parts 122, 123, and 124) to incorporate sludge permitting and State program requirements.

DATES: The effective date of this regulation is June 1, 1989.

In accordance with 40 CFR Part 23 (50 FR 7268, February 21, 1985), these regulations shall be considered issued for purposes of judicial review at 1:00 p.m. eastern time on May 16, 1989.

In order to assist EPA to correct any typographical errors, incorrect cross references, and similar technical errors, comments of a technical and nonsubstantive nature on the final regulation may be submitted on or before July 3, 1989. The effective date of these regulations will not be delayed by consideration of such comments.

ADDRESS: Comments of a technical or nonsubstantive nature should be addressed to Debora Clovis, Permits Division (EN-336), Environmental Protection Agency, 401 M Street SW., Washington, DC 20460. The record for this rulemaking, including all public comments on the proposals, will be available for inspection and copying at the EPA Public Information Reference Unit, Room 2402. The EPA public information regulation (40 CFR Part 2) provides that a reasonable fee may be charged for copying.

FOR FURTHER INFORMATION CONTACT: Debora Clovis at the above address (telephone: (202) 475-7052) or Martha Kirkpatrick, Permits Division (EN-336), Environmental Protection Agency, 401 M Street SW., Washington, DC 20460, (202) 475-9529.

SUPPLEMENTARY INFORMATION:

I. Background
II. February 4, 1986 Proposed Rule
III. Water Quality Act of 1987
  A. New Permit Program for Sludge Management
  B. Sludge Technical Standards (40 CFR Part 503)
  C. Interim Implementation Strategy
IV. March 9, 1988 Proposed Rule
V. Discussion of Today's Final Rule and Response to Comments
  A. General: Purpose and Scope
  1. State and Federal Sludge Management Program
  2. Organization of Discussion
  B. Relationship Between Today's Final Rule and the Sludge Technical Regulations (Part 503)
  1. Description of Part 503
  2. Timing
  3. Part 503 Issues Raised in Comments
  C. Relationship to Other Programs
  D. Regulated Universe
  1. Sewage Sludge
  2. POTWs and Other Treatment Works Treating Domestic Sewage
  3. Users and Disposers of Sewage Sludge
  E. EPA's Authority under Section 405(d)(4) of the CWA
  F. Permitting Requirements (Part 122)
  1. General
  2. Specific Revisions
  G. Permitting Procedures (Part 124)
  1. General
  2. Specific Revisions
  H. State Program Requirements: General
  1. Need for Regulations and EPA Approval of State Programs
  2. Required Scope of Approved State Programs
  3. Mandatory v. Optional Programs
  4. Partial Programs
  5. Mixed Programs
  6. Small Generators
  7. Indian Tribes
I. Part 501: Non-NPDES State Programs
  1. Purpose, Scope, and General Program Requirements
  2. Development and Submission of State Programs
  3. Program Description (Section 501.12)
  4. Attorney General's Statement (Section 501.13)
  5. Memorandum of Agreement (Section 501.14)
  6. Permitting Requirements and Procedures (Section 501.15)
  7. Compliance Evaluation Program (Section 501.16)
  8. Enforcement Authority (Section 501.17)
  9. Sharing of Information Between States and EPA (Sections 501.19 & 501.20)
  10. Program Reporting to EPA (Section 501.21)
  11. Program Approval, Revision, and Withdrawal (Sections 501.31-501.34)
  J. Part 123: NPDES State Sludge Management Programs
  1. General
  2. Specific Revisions
  K. Miscellaneous
VI. Executive Order 12291
VII. Paperwork Reduction Act
VIII. Regulatory Flexibility Act

I. Background

Implementation of the Clean Water Act (CWA) has resulted in greater levels of treatment of and pollutant removal from wastewater before discharge to surface waters, and the generation of large quantities of residual sewage sludge as a by-product of wastewater treatment. Proper management of ever-growing amounts of sewage sludge is becoming increasingly important as efforts to remove pollutants from wastewater have become more effective. In the United States, the quantity of municipal sewage sludge has almost doubled since the enactment of the Clean Water Act in 1972. Municipalities currently generate over 7.7 million dry metric tons of wastewater sludge per year, or approximately 64 pounds per person per year (dry weight basis). This volume is expected to double by the year 2000.

An important means of dealing with the pressing problem of disposing of vast quantities of sewage sludge is through beneficial use and recycling projects. Sewage sludge is a valuable resource. The nutrients and other properties commonly found in sludge make it useful as a fertilizer and a soil conditioner. Sludge has been used for its beneficial qualities on agricultural lands, in forests, for landscaping projects, and to reclaim strip-mined land. EPA seeks to encourage such practices. In addition to supporting a number of long-term research and demonstration projects and the development of detailed design guidance for various land application practices, EPA has supported and

promoted pretreatment and source-control programs to improve sludge quality and such technologies as composting and lime stabilization. The Agency has also supported the development of improved dewatering systems, chemical fixation, digestion, pyrolysis and other technologies to help improve energy recovery from thermal conversion systems, methane recovery from anaerobic stabilization systems, and the recovery of various potentially marketable by-products from sludge.

At the same time, sewage sludge may present an environmental concern because of contamination by harmful pollutants. Greater focus on surface water toxics control, as well as Resource Conservation and Recovery Act (RCRA) provisions such as the ban on land disposal of certain hazardous wastes (section 3004(d)) and the exclusion of discharges into municipal sewers from RCRA requirements (section 1004(27)), may result in increased volumes of toxic and hazardous pollutants that reach publicly owned treatment works (POTWs) and consequently may adversely affect sludge quality when these pollutants are removed from the wastewater.

Proper disposal of sewage sludge is important because contaminated or improperly handled sludge can result in pollutants in the sludge re-entering the environment, and possibly contaminating a number of different media through a variety of exposure pathways. Improper sludge management could lead to significant environmental degradation of land and air. Failure to dispose of sludge properly could also have serious effects on surface and ground water and wetlands, as well as human health. For example, sewage sludge disposed on land where there is minimal depth to ground water is of concern because contaminants in the sludge may leach out and reach a potential potable water source. Concern for air quality necessitates proper controls over sludge incineration. The interrelationship among these media requires a tightly coordinated, comprehensive approach that closes environmental loopholes, helps assure that solving problems in one media will not create problems for another, and encourages the beneficial reuse of sludge.

Prior to the enactment of the Water Quality Act of 1987, the federal authorities and regulations related to the use and disposal of sewage sludge were scattered among various statutes and programs and did not provide States and municipalities with comprehensive guidelines on which to base sludge management decisions. For example, section 405 of the Clean Water Act required the development of sludge standards by December 1978, but did not specify how the standards were to be implemented. Standards developed pursuant to section 405 have been promulgated for cadmium, PCBs, and pathogens only when sludge is land-applied (40 CFR Part 257). In addition, sludge is regulated under a number of other programs, such as new source performance standards and national emissions standards for hazardous air pollutants under the Clean Air Act, requirements for solid waste landfills under Subtitle D (and Subtitle C if the sludge is hazardous) of the Resource Conservation and Recovery Act, ocean dumping requirements under the Marine Protection, Research, and Sanctuaries Act (MPRSA), and PCB controls under the Toxic Substances Control Act. These regulations often use different methodologies and approaches to controlling sludge management practices.

Concerns about the potential environmental problems created by improper sewage sludge use and disposal and the lack of a comprehensive legislative framework governing sludge management led to the establishment of an intra-Agency Sludge Task Force by EPA in early 1982 to conduct a study and make recommendations for Agency actions in the sludge management area. The Sludge Task Force, with representatives from EPA's Offices of Water, Air, and Solid Waste, approached sludge management from a multi-media perspective. The Task Force developed the Agency's "Policy on Municipal Sludge Management" (49 FR 24358, June 12, 1984). The purpose of the policy was to establish a consistent approach to sludge management across all environmental media and all management practices and to establish the appropriate roles of the federal, State and local governments in sludge management.

The "Policy on Municipal Sludge Management" established several important principles which continue to guide the Agency's approach to sludge management. It states, in part:

> The U.S. Environmental Protection Agency (EPA) will actively promote those municipal sludge management practices that provide for the beneficial use of sludge while maintaining or improving environmental quality and protecting public health. To implement this policy, EPA will continue to issue regulations that protect public health and other environmental values. The Agency will use all available authorities to ensure that States establish and maintain programs to ensure that local governments utilize sludge management techniques that are consistent with Federal and State regulations and guidelines. Local communities will remain responsible for choosing among alternative programs, for planning, constructing and operating facilities to meet their needs, and for ensuring the continuing availability of adequate and acceptable disposal or use capacity. 49 FR 24358 (June 12, 1984).

II. February 4, 1986 Proposed Rule

On February 4, 1986, EPA proposed State Sewage Sludge Management Program Regulations (51 FR 4458). These proposed rules would have required States to develop sludge management programs to assure that the use and disposal of sewage sludge complies with existing as well as planned federal sludge use and disposal standards. These regulations were proposed pursuant to recommendations of the Agency's Sludge Task Force, which concluded that the best approach for sludge management would be to require each State to prepare a program to implement the sludge standards, which would then be reviewed for sufficiency by EPA. The regulations were proposed under the legal authorities of the Clean Water Act, the Resource Conservation and Recovery Act, the Clean Air Act, the Toxic Substances Control Act, and the Marine Protection, Research, and Sanctuaries Act.

Under the proposal, States would submit to EPA for review and approval a description of their existing sludge management programs with plans and schedules for improving them as necessary to meet the added requirements of the proposal. The proposal set forth minimum requirements for approvable sludge management programs and provided the procedural requirements for submitting, approving, revising and withdrawing approval of such programs. EPA postponed finalizing the Part 501 rules pending the expected enactment of amendments to the Clean Water Act.

III. Water Quality Act of 1987

A. New Permit Program for Sludge Management

Section 406 of the Water Quality Act of 1987 (WQA), which amends section 405 of the Clean Water Act, sets forth for the first time a comprehensive program for reducing the environmental risks and maximizing the beneficial use of sludge. The basis of the program to protect public health and the environment from any adverse effects from sewage sludge is the development of technical regulations for sludge use and disposal, and the implementation of

these requirements through permits. The WQA requires promulgation of sludge standards establishing acceptable levels of toxic pollutants in sewage sludge and management practices in two stages, discussed more fully below.

After the technical standards have been promulgated, the amendments direct that any permit under section 402 of the Act (NPDES permits) issued to a POTW or any other treatment works treating domestic sewage shall include the sludge technical standards, unless such requirements have been included in a permit issued under subtitle C of the Solid Waste Disposal Act, Part C of the Safe Drinking Water Act, MPRSA, or the Clean Air Act, or under State permit programs approved by the Administrator, where the Administrator determines that such programs assure compliance with any applicable requirements of section 405. Section 405(f)(1). The amendments further provide that the Administrator may issue separate permits that implement the sludge requirements to treatment works which are not subject to section 402 of the Act (NPDES) or to any of the other listed permit programs or approved State programs. Section 405(f)(2). Such permits are referred to in this preamble discussion as "sludge-only" permits.

The 1987 amendments give new direction for the regulation of sludge management activities on several fronts. First, section 405 now clearly requires that NPDES permits contain conditions implementing the sludge technical standards to be promulgated by the Agency, unless those standards have been included in a permit issued under one of the listed Federal programs or under a State program approved for administering a section 405(f) sludge permitting program. Therefore, a State which seeks EPA approval to administer a sludge permitting program may choose to regulate sludge through its NPDES program or through another permitting program (e.g., solid waste programs), as long as the permit implements the sludge technical standards promulgated under section 405. Second, the amendments establish that the requirement to include conditions implementing the sludge technical standards in permits applies to any treatment works that treats domestic sewage. This expands the universe of treatment works that are required to obtain permits from earlier draft amendments, which would have limited the permitting requirement to publicly-owned treatment works (POTWs) and treatment works that treat primarily domestic sewage. In addition, the 1987 amendments authorize the Administrator to issue permits to treatment works solely to implement the sludge technical standards even if the treatment works are not otherwise required to obtain NPDES permits. Another important change brought about by the 1987 amendments concerns the responsibility of users and disposers for complying with the technical standards for sewage sludge. Prior to the Water Quality Act, section 405(e) only required *POTWs* to use or dispose of sewage sludge in accordance with the technical standards. In the 1987 amendments to section 405(e), Congress extended this requirement to any person. The reason for this change is explained in the legislative history:

> Section 405(e) is amended to expand the applicability of the 405(d) sludge use and disposal regulations to "any person" * * * The purpose of this * * * change is to impose the regulations on those that actually dispose of the sludge, which may not be the treatment works' owner or operator." U.S. Senate Committee on Environment and Public Works, Report No. 99–50, May 14, 1985.

Section 405(e), as amended, now prohibits any person from using or disposing of sludge from a POTW or other treatment works for any use for which regulations have been established except in accordance with such regulations. This means that any person, regardless of whether or not they are required to obtain a permit, who uses or disposes of sludge by one of the practices for which technical standards have been established is required to comply with such standards.

Note: Because section 405(f) requires treatment works treating domestic sewage to obtain permits that implement the technical standards, today's rule provides a definition of "treatment works treating domestic sewage." This definition specifically excludes septic tanks and portable toilets, which arguably could be considered treatment works, from its scope. EPA has excluded septic tanks and portable toilets from the permitting requirement because Congress indicated its intent that the section 405 technical standards apply only to septage treatment and processing, not generation. S. Rep. No. 99–50 on S. 1128 at 47 (1985). It follows that if the standards apply only to treatment, and not generation, it would serve no useful purpose to require permits for the 22 million homeowners with septic tanks or for portable toilets. However, because septic tank pumpings and portable toilet pumpings are within the definition of "sewage sludge," use or disposal of these substances is regulated under 40 CFR Part 503. Disposers of septic tank and portable toilet pumpings must comply with applicable requirements of that Part.

The 1987 amendments also strengthen the provisions for enforcing against violations of section 405 or of permits implementing regulations promulgated under section 405. Congress amended section 309(c) of the CWA to provide, for the first time, criminal penalties for negligent or knowing violations of section 405 or permits implementing the requirements of section 405. The Administrator's new authority to assess administrative penalties for violations of the CWA also covers violations of section 405 and implementing regulations and permits. Section 309(g).

In addition, section 308 of the CWA, which establishes the Administrator's authority to require monitoring, reporting, and recordkeeping, and to inspect and sample to determine compliance with the CWA, has been amended to specifically reference section 405. (*See* section 308(a)(4), as amended by section 406(d) of the WQA.) Other provisions amended by section 406(d) of the WQA include section 505(f) (citizen suits for violations of regulations under section 405(d)) and section 509(b)(1)(E) (judicial review of regulations promulgated under section 405).

B. Sludge Technical Standards (40 CFR Part 503)

The key elements of the sludge permit program established by the 1987 amendments are the technical regulations for sewage sludge use and disposal. The CWA of 1977 directed EPA to develop regulations containing guidelines for the utilization and disposal of sewage sludge. The regulations were to: identify uses for sewage sludge, including disposal; identify factors to be taken into account in the use or disposal of sewage sludge; and specify concentrations of pollutants which would interfere with sewage sludge use or disposal. The 1987 amendments imposed additional requirements: EPA is to identify toxic pollutants which may be present in sewage sludge in concentrations that may adversely affect public health or the environment, and establish numerical limits and management practices for those pollutants. CWA section 405(d)(2). Where promulgation of numerical limits is infeasible, the regulations may specify a design, equipment, management practice or operational standard. CWA section 405(d)(3). The numerical limits and management practices are to protect public health and the environment from any reasonably anticipated adverse effects of the pollutants. The Act provides for promulgation of the technical standards in two phases, with periodic review by EPA to determine if

additional pollutants need to be regulated.

C. Interim Implementation Strategy

The 1987 amendments also provided for immediate regulation of sewage sludge use and disposal. Section 405(d)(4) provides that:

> Prior to the promulgation of the regulation required by (section 405(d)(2)), the Administrator shall impose conditions in permits issued to publicly owned treatment works under section 402 of this Act or take such other measures as the Administrator deems appropriate to protect public health and the environment from any adverse effects which may occur from toxic pollutants in sewage sludge.

In response to this directive, EPA has developed a "Strategy for Interim Implementation of Sludge Requirements in Permits Issued to POTWs." Under the Interim Strategy, EPA and the States have begun to include sludge requirements in permits for POTWs as they are reissued. A few minimum conditions are to be included in all POTW permits. Site-specific limits are to be developed for "priority POTWs," on a case-by-case basis using best professional judgment. To assist with developing interim limits, EPA recently published a draft "Guidance for Writing Case-by-Case Permit Requirements for Municipal Sewage Sludge." Although the focus of the Interim Strategy is on POTWs, section 405(d)(4) gives EPA authority to take appropriate action to address other sludge use or disposal problems. Until promulgation of the final Part 503 technical standards, the Interim Strategy will be the mainstay of EPA's sludge management program.

IV. March 9, 1988 Proposed Rule

EPA originally proposed Part 501, State sludge management program regulations in February 1986, prior to the February 1987 amendments to the CWA. Because they were proposed before the 1987 CWA amendments, these proposed Part 501 regulations did not require that States have a permitting program to implement the sludge standards. As discussed above, this situation changed with the Water Quality Act of 1987, which specified that EPA promulgate sludge technical standards and implement them either through an NPDES permit, or through a permit issued under one of the Federal permit programs listed under amended section 405(f)(1), or through permits issued pursuant to an approved State sludge program. To implement this and other changes to section 405 of the Clean Water Act, on March 9, 1988 EPA reproposed the February 4, 1986 State sludge management program regulations and also proposed revisions to the National Pollutant Discharge Elimination System (NPDES) regulations to integrate sludge controls into the NPDES permit program (53 FR 7642).

The purpose of the March 9, 1988 proposal was to establish a national program for sludge use and disposal under the authority of the Water Quality Act of 1987. It addressed permit requirements and procedures and State program requirements, and contained four principal sections. First, revisions to 40 CFR Part 122 were proposed to address when and how sewage sludge use and disposal would be regulated through NPDES permits. Second, revisions to 40 CFR Part 123 were proposed to include requirements for States that wish to implement an approved sludge management program as part of an NPDES program. Third, revisions to 40 CFR Part 124 were proposed to add procedural requirements for EPA-issued permits with sludge conditions. Finally, a new Part 501 was proposed to establish the requirements and submission procedures for approving State sludge management programs that are not part of a State NPDES program.

V. Discussion of Today's Final Rule and Response to Comments

A. General: Purpose and Scope

1. State and Federal Sludge Management Program

Consistent with the directions set forth in the 1987 amendments to the CWA, today's final rule establishes the legal and programmatic framework for a national program for sludge use and disposal. Today's final rule establishes the requirements and procedures for addressing sludge management in permits issued by EPA or an approved State and State program requirements and approval procedures. While most of today's rule addresses the long-term permitting program to implement technical standards for sewage sludge use and disposal called for in section 405(f) of the CWA, it also codifies various aspects of EPA's authority to take interim measures prior to the promulgation of those standards to protect public health and the environment from the adverse effects that may occur from toxic pollutants in sewage sludge.

Two major considerations directed the development of today's final rule. First was the goal of developing a program which would encourage beneficial use while ensuring the safe use and disposal of sewage sludge. Sewage sludge should be viewed as a resource rather than as a disposal problem. To accommodate this goal, EPA has sought to develop permitting requirements and procedures that are compatible with beneficial reuse projects such as agricultural land application. Second, EPA sought to encourage States to assume responsibility for implementing the sludge permitting program. This goal is consistent with the general policy direction established in section 101(b) of the Clean Water Act and reiterated by the Agency's Sludge Task Force. Many States have effective sludge management programs and today's final rule attempts to minimize disruption to these programs, while ensuring minimum consistency. Unlike the 1986 proposal, however, EPA will not rely exclusively on States for implementation of the Federal technical sludge standards. Where States do not have an approved program under Section 405, EPA will be responsible for implementing the technical standards.

In developing the final rule, EPA carefully considered public comments received on both the February 1986 and March 1988 proposals. In total, EPA received 114 comments from 87 commenters. More than half (50) of all commenters were State agencies. EPA also received comments from 24 POTWs and municipalities, six industries and trade associations, three commercial sludge handlers, three environmental groups, and one commenter whose interest in the rulemaking was not identified. EPA's response to comments will be included as part of the discussion of the final rule.

2. Organization of Discussion

The discussion of the final rule is organized to address three principal aspects of the new sewage sludge program: (1) Scope of the national program, (2) permitting requirements, and (3) State programs. The first topic covers issues that define who and what is regulated under the sludge program, and EPA's authority under section 405 of the Clean Water Act. The second topic covers requirements and procedures for regulating sludge use and disposal through permits. This consists mainly of a section-by-section discussion of revisions to Parts 122 and 124, (which also are relevant to the permitting provisions in Part 501). Most issues discussed under this topic concern both Federal and State permitting programs, although a few issues are unique to the Federal program. The final topic addresses only issues that involve minimum requirements for approvable State programs and the procedures for EPA approval, oversight, revision, and

withdrawal of State sludge management programs. Discussions of each issue or regulatory provision will address the 1986 and the 1988 proposed rule (where applicable), public comments, the final rule and response to comments.

B. Relationship Between Today's Final Rule and the Sludge Technical Regulations (Part 503)

A major purpose of today's rulemaking is to establish the administrative framework for implementing the technical standards for sewage sludge use and disposal required by section 405(d) of the CWA. As noted above, the Act requires promulgation of at least two rounds of technical standards. The first round of standards is now under development as part of a separate rulemaking, which will be codified at 40 CFR Part 503. EPA published the proposed rule for these standards on February 6, 1989 at 54 FR 5746. All references to the technical or Part 503 standards or regulations in today's notice refer to those standards in their final, not proposed, form.

1. Description of Part 503

The Part 503 regulations propose to establish technical standards only for use and disposal of non-hazardous sewage sludge. Accordingly, the permitting program established by today's rulemaking applies only to the use or disposal of nonhazardous sludge. Sludges which are considered hazardous wastes under Subtitle C of RCRA in accordance with 40 CFR Part 261 will continue to be managed under Subtitle C alone. Disposal of hazardous sludge in accordance with the Subtitle C requirements will constitute compliance with section 405. Likewise, sewage sludge found to contain greater than 50 parts per million (ppm) of polychlorinated biphenyls (PCBs) will continue to be regulated under 40 CFR Part 761, rather than Part 503.

Ocean dumping of sewage sludge already is regulated under Title I of the MPRSA (33 U.S.C. 1401 *et seq.*), and the Agency has promulgated technical regulations under the MPRSA which govern this practice (40 CFR Parts 220 through 228). Ocean dumping of sewage sludge currently is limited to nine municipal authorities in the states of New York and New Jersey, and takes place at a site approximately 106 miles offshore. Recent amendments to the MPRSA (Pub. L. 100-688) prohibit ocean dumping of sewage sludge after December 31, 1991, and also prohibit any new dumpers from beginning this practice in the meantime. MPRSA sections 104B(a) (1)(B) and (2). The MPRSA amendments further envisage that within 270 days of the date of enactment (November 18, 1988), EPA is to enter into compliance and enforcement agreements for the termination of ocean dumping of sewage sludge and is to issue permits under the MPRSA to regulate the existing ocean dumpers. MPRSA section 104B(a)(1)(A). Given the existence of MPRSA technical regulations applicable to ocean dumping of sewage sludge and the recent MPRSA amendments prohibiting ocean dumping of sewage sludge after December 31, 1991, EPA does not intend to embark on developing technical regulations under Part 503 for the ocean dumping of sewage sludge.

The proposed Part 503 standards include numerical limits on certain pollutants that may interfere with the safe use or disposal of sewage sludge (or equations for calculating those pollutant limits); management practices to minimize adverse effects on public health and the environment from pollutants in sludge; monitoring requirements (including methodologies); recordkeeping and reporting requirements; and other requirements that prescribe the level of management control over sewage sludge. The standards focus on the ultimate use or disposal of sewage sludge rather than on treatment processes. In setting the standards, the Agency has taken into account the various ways that a pollutant may reach an individual, plant, or animal, including, but not limited to, groundwater, surface water, air, and the food chain.

The first round of the proposed Part 503 standards addresses the following use or disposal methods: land application (including various end uses such as agriculture, silviculture, and land reclamation), distribution and marketing of sludge and sludge-derived products, disposal in sludge-only landfills ("monofills"), disposal on surface disposal sites (with residence time greater than one year), and incineration in sludge-only incinerators. In addition, the disposal of sewage sludge in municipal solid waste landfills that accept other solid waste ("co-disposal landfills" or "MSWLFs") will be governed by separate regulations promulgated under the joint authority of Section 405 of the CWA and Subtitle D of RCRA. These regulations will be codified at 40 CFR Part 258. (*See* 53 FR 33313, August 30, 1988) for the 40 CFR Part 258 proposed rule.) Therefore, references to Part 503 in today's rule include Part 258.

The Regulatory Impact Analysis prepared for the Part 503 proposed rule indicates that the most commonly used POTW sewage sludge method is disposal in MSWLFs. EPA estimates that 6,664 POTWs send 3,162,345 dry metric tons (DMTs) of sludge, or 41 percent of the total annual POTW sludge production, to MSWLFs. One hundred sixty-nine POTWs (operating 282 sewage sludge incinerator units) incinerate 1,615,416 DMTs, or 21.4 percent, annually. Another 2,623 POTWs land apply, to agricultural and non-agricultural lands, a total of 1,202,158 DMTs, or 15.6 percent, of sewage sludge produced per year. There are 106 POTWs that distribute and market 705,485 DMTs, or 9.1 percent, of sewage sludge. Forty-nine POTWs dispose of 101,375 DMTs (1.3 percent) of sewage sludge in monofills. EPA estimates that approximately 2395 POTWs dispose 197,510 DMTs (2.6 percent) of sludge in surface disposal sites. Another 694,377 DMTs (9.0 percent) of sludge are disposed of by other means (including ocean dumping).

Certain practices and sludges that fall within the purview of section 405 are not covered in the first round of the Part 503 standards. As previously mentioned, standards for sewage sludge disposed of in MSWLFs were developed as part of the RCRA Subtitle D proposal and will be codified in Part 258 rather than Part 503. Similarly, the co-incineration of sewage sludge with other materials will not be covered, except possibly where the only other material is a fuel. The Agency is studying how best to regulate facilities co-firing sewage sludge with municipal solid waste. (*See*, Advance Notice of Proposed Rulemaking, 52 FR 2599, July 7, 1987.)

Part 503 proposes to regulate the ultimate use or disposal of sewage sludge. Therefore, the proposed rule does not cover sludge placed in pits, ponds, lagoons, and similar surface impoundments which traditionally have been considered either part of the wastewater treatment train or as temporary storage facilities. Sludge placed in a surface impoundment for less than one year is assumed to be part of the treatment train. On the other hand, sludge that is held for more than one year in a surface impoundment would be regulated under the proposed Part 503 regulations because it is assumed that after a year, the surface impoundment has become a disposal site. In addition, sludge that is physically removed from the treatment train and does not reenter the treatment train will be regulated under the appropriate use/disposal practice standard. For example, Part 503 does not propose to regulate the sludge that accumulates in wastewater treatment

lagoons (or the treatment lagoon itself), but if that sludge is removed from the wastewater treatment lagoon and applied to land, it would be regulated under the Part 503 land application requirements. Thus, the proposed Part 503 regulations focus on ultimate disposal, i.e., when the sludge reenters the environment.

The first round of the Part 503 standards would apply to sewage sludge generated at POTWs and other treatment works treating domestic sewage, such as privately-owned sewage treatment plants. It would not apply, however, to sewage sludge generated or treated at industrial or commercial facilities which treat domestic sewage with other wastewaters generated at the facility. (What constitutes "domestic sewage" and related issues are discussed more fully below in section V.D.II.) Until the Agency collects additional information on the characteristics of the sludge generated at such facilities, the sludge will continue to be regulated under rules promulgated under Subtitle D of RCRA as a nonhazardous solid waste (40 CFR Parts 257 and 258), or under Subtitle C as a hazardous waste (40 CFR Parts 261 through 268), as the case may be. EPA proposed in a separate rulemaking that industrial facilities notify the States and EPA of the volume of their sludge and the disposal methods and locations used (*see* 53 FR 33313, August 30, 1988). Once these and other data (e.g., viscosity, density, moisture content, and the organic carbon content of industrial sludge with a domestic sewage component) have been collected, the Agency will determine whether the Part 503 regulations should apply or whether additional regulations should be developed for industrial facilities that co-treat domestic sewage with industrial wastewater. The Agency anticipates that any additional requirements for industrial facilities treating domestic sewage along with industrial waste and wastewater would be developed under the joint authorities of sections 4004 and 4010 of RCRA and section 405(d) of the CWA.

Neither today's final rule nor the proposed Part 258 or Part 503 rule affect the status of existing federal regulations that apply to sewage sludge use and disposal, such as 40 CFR Part 257. Those requirements will remain in effect until specifically revised or rescinded by rulemaking. For example, the proposed Part 503 rule specifies that Part 257 will no longer apply to sewage sludge covered by the final Part 503 standards. Similarly, the proposed Part 258 rule, upon final promulgation, will remove the applicability of Part 257 to facilities covered by Part 258. However, until those rulemakings are final, the 40 CFR Part 257 requirements will remain in effect and will be implemented, where applicable, by means of the permit program established by today's rule. (Also see the discussion of EPA's "Strategy for Interim Implementation of Sludge Requirements in Permits Issued to POTWs" in section III.C.)

2. Timing

Numerous commenters on both the 1986 and 1988 proposed rules opposed the promulgation of State sludge management program rules (commonly referred to as "Part 501") in advance of the technical sludge regulations. Most opposition came from States and focused on the difficulties of planning for State sludge management programs (e.g., budget, legal authorities, organization) without knowing what the technical standards will require. For these reasons, several States expressed an unwillingness to commit themselves to seeking program approval until they knew more about the scope and content of the Part 503 standards. Several commenters stated that they could not comment intelligently on the Part 501 proposed rule in the absence of the Part 503 standards. Two commenters even were concerned that promulgation of the Part 501 rules would foreclose opportunity to comment on the Part 503 proposed rule. (In a related vein, one commenter said EPA should delay Part 501 until the "Process to Significantly Reduce Pathogens" (PSRP) standard is revised since the current requirement in 40 CFR Part 257 is unsound.) One commenter objected that this reversed the sequence of the UIC, NPDES, and RCRA programs. Another commenter stated that it would be more logical to "delegate" State programs after promulgation of Part 503 since Part 503 will probably result in changes to pretreatment standards as well. Finally, one commenter asserted that Congress did not intend that EPA promulgate Part 501 until after promulgation of Part 503.

EPA is promulgating a final rule for State sludge management programs and permitting requirements before final promulgation of the Part 503 technical standards. The 1987 amendments called for promulgation of State program approval procedures by December 15, 1986, nearly nine months before the first round of technical regulations were to be promulgated. Therefore, EPA disagrees that Congress intended that promulgation of the Part 501 regulation occur after promulgation of the technical standards. In addition, while EPA does not dispute all of the reasons advanced in opposition to this approach, the need to go forward with today's final rule outweighs the advantages in delaying promulgation for several reasons.

First, although today's final rule is closely related to the sludge technical standards, it is not dependent on it. Today's rule addresses primarily procedural and programmatic issues, which are unaffected by the technical standards. (Similarly, any revision of categorical or other pretreatment standards as a result of the promulgation of sludge standards can proceed independently of today's final rule. The relationship between the sludge and pretreatment programs is explained more fully in section V.I.1. of this preamble.) EPA recognizes that the full impact of the sludge permitting program under Section 405 will not be known until promulgation of the sludge technical standards. This will always be the case, since the CWA calls for subsequent rounds of technical standards which may impose new requirements and update old standards. Contrary to the comment that this reverses the sequence of other federal environmental permitting programs, the same was and is true in the NPDES and pretreatment programs, where the technical standards implemented through those programs were promulgated in numerous, separate rulemakings over a 15-year period. Significantly, nearly all the effluent guidelines for the NPDES program were promulgated after promulgation of the State program and permitting requirements. Since the process of promulgating technical standards is an ongoing one, delaying the State program and permitting requirement regulations merely delays implementation of the program. This would be contrary to clear Congressional intent.

Second, quick and effective implementation of the technical standards once promulgated will depend on having the administrative aspects of the permitting program in place. This is particularly critical for State programs. EPA will be responsible for issuing permits that implement the standards in the absence of approved State programs. State programs cannot be approved before promulgation of State program regulations. Therefore, EPA intends to strongly encourage States to seek program approval as soon as possible so as not to disrupt those programs and create a dual permitting scheme upon promulgation of the technical standards.

EPA recognizes that States may not be able to determine whether program approval is feasible or desirable until they know the contents of the Part 503

standards. Under today's rule, State programs are not mandatory (as they would have been under the 1986 proposed Part 501), so promulgation of today's rule will not impose the unknown upon States as many seem to fear. In addition, the technical standards in proposed form were made publicly available at about the same time as promulgation of the State program rules. Therefore, States will not have to make decisions about seeking program approval in the total absence of any information as to the scope and content of the technical sludge standards. In addition, waiting until promulgation of the Part 503 standards before promulgating the State program regulations would unnecessarily delay approval of programs in States that are willing to go forward despite uncertainties about Part 503.

Today's promulgation of a final rule that establishes State program and permitting requirements and procedures does not in any way affect the opportunity to comment on the Part 503 proposed rule. This will include an opportunity to comment on pathogen reduction requirements. Therefore, the commenters' concerns that promulgation of the Part 501 regulations would foreclose their opportunity to comment on the technical regulations is unfounded.

3. Part 503 Issues Raised in Comments

Although the Part 503 technical standards will be the subject of a separate rulemaking, several commenters raised issues related to technical standards. These comments are briefly addressed below. Any final decisions regarding issues related to the technical standards will be resolved in the context of the Part 503 rulemaking.

Several commenters, mostly POTWs, commented that the deadlines for compliance with technical standards (within one year after promulgation; two years if the regulations require major construction) are unrealistic and unreasonable. Since these compliance deadlines are established by statute, EPA cannot disregard them in regulations.

A few commenters urged that the Part 503 technical standards be issued as guidance rather than as regulations so that implementation of the standards would be flexible and take into account regional variations. In contrast, another commenter stressed the need for legally binding regulations to assure adequate protection of public health and the environment even though needs of industry might conflict.

Again, the Clean Water Act does not give the Agency much discretion in this matter. Section 405(d) requires promulgation of regulations. Section 405(e) makes those regulations directly enforceable against any person who uses or disposes of sewage sludge in a manner inconsistent with the provisions of the regulations. However, because the technical standards will be regulations, rather than non-binding guidance, does not mean they will be inflexible. In fact, the proposed Part 503 standards have been structured to take into account variations in the local environment and the different risks posed by the various use and disposal practices.

Several States requested that the regulations allow variances from the Part 503 standards for research and demonstration projects. Accounting for site-specific variations will be allowed in certain circumstances, but only within the Part 503 regulatory framework, as those rules will be designed to ensure protection of public health and the environment as required by the statute. There are no acceptable deviations from this standard and any method of sludge use and disposal must conform to this requirement. Concerns about the appropriateness of a particular standard are properly addressed during public comment on the proposed Part 503 rulemaking.

C. Relationship to Other Programs

The establishment of a new sludge permitting program in today's final rule does not supplant other existing, federal environmental programs that may have a direct or indirect bearing on sewage sludge use or disposal. Instead, the new sludge permitting program will provide a mechanism for implementing federal technical requirements and filling in gaps left by other media specific regulatory programs. The role of integrating cross-media environmental concerns and technical standards under the various existing programs will be fulfilled primarily by the sludge technical standards. For example, the Agency has adopted a Ground Water Protection Strategy which includes Guidelines for Ground-Water Classification. This classification divides ground water into three classes: Class I—Special ground waters that are highly vulnerable, ecologically vital or irreplaceable as a drinking water source; Class II—current or potential sources of drinking water; and Class III—ground waters not a source of drinking water and of limited beneficial use. Requirements for sludge applied over a Class I irreplaceable source may well be more stringent than for sludge applied over a Class III ground water which is not a drinking water source and has limited beneficial use.

D. Regulated Universe

This section discusses who and what is to be regulated under section 405 and how they are to be regulated. Much of the discussion consists of defining key terms.

1. Sewage sludge

The proposed rules defined sewage sludge to mean "any solid, semi-solid, or liquid residue which contains materials removed from municipal or domestic wastewater during treatment, including primary and secondary solids, septage, and portable toilet waste." The definition did not include grit, screenings, scum, or sewage sludge incinerator ash, as explained in the preamble to the 1986 proposal, because of the relatively small volumes, different characteristics, limited management practices, and general lack of public exposure to these materials. In the 1986 proposal, EPA specifically solicited comments on this point.

EPA received over 25 comments on various aspects of the sewage sludge definition in response to the 1986 proposal and approximately 15 comments in response to the 1988 proposal. Commenters focussed on two major issues: (1) Whether the definition should include grit, screenings, scum or ash; and (2) whether septage should be included in the definition. In addition, commenters raised various other questions about the definition of sewage sludge (such as the inclusion of portable toilet wastes and sludge-derived products) as well as the definition of septage.

Today's final rule defines "sewage sludge" to mean "any solid, semi-solid, or liquid residue removed during the treatment of municipal wastewater or domestic sewage. Sewage sludge includes, but is not limited to, solids removed during primary, secondary, or advanced waste water treatment, scum, septage, portable toilet pumpings, type III marine sanitation device pumpings (33 CFR Part 159), and sewage sludge products. Sewage sludge does not include grit or screenings, or ash generated during the incineration of sewage sludge." In addition to the reasons discussed below, today's definition of "sewage sludge" is designed to be consistent with the approach proposed in the Part 503 technical standards.

Grit, screenings, scum, and ash. The definition of sewage sludge in the final rule is the same as the proposed rule in that it excludes grit, screenings, and the ash generated during incineration of sewage sludge, primarily for the reasons

stated in the preamble to the 1986 proposal. For purposes of clarification, today's definition of sewage sludge specifically excludes these materials. These materials are still considered to be solid wastes and will continue to be regulated as such under RCRA. Today's definition of sewage sludge differs from the 1986 and 1988 proposed rules, however, by including scum in the definition of sewage sludge. Today's final definition also includes minor editorial changes to specify that it includes residues from advanced wastewater treatment (as well as from primary and secondary treatment).

Nearly all commenters on the issue (17 State agencies and 8 POTWs or municipalities) supported EPA's decision to exclude grit and screenings from the definition of sewage sludge. Screenings are relatively large pieces of solid material that are caught on screens at the headworks of the treatment plant. Grit is the material that settles out before primary treatment such as sand, small pebbles, and similar material. In addition to the reasons cited by EPA in the preamble, commenters favored exclusion of these materials because they were being adequately regulated under existing State programs, the additional administrative burden of regulating them would not be justified by environmental results, and exclusion of grit and screenings from the sewage sludge program would encourage public acceptance of land-based management options for sewage sludge from POTWs.

In response to the original proposal, five commenters favored regulating grit and screenings under sewage sludge management programs. Two States said they should be included because they could be adequately regulated under the Part 501 sewage sludge management programs (one noting that these materials should not be forgotten). One POTW favored regulating these materials under the sewage sludge program as an alternative to regulating them under a separate program. Another POTW said they should be included because they are mixed, and therefore disposed of, with sewage sludge.

EPA agrees with the commenters that favor excluding grit and screenings from the definition of sewage sludge. These commenters confirmed EPA's rationale that these wastestreams are small (in one case, comprising only one percent of all wastestreams "generated" at the treatment plant), that they have vastly different properties from sewage sludge generated during wastewater treatment, that they are usually separately handled and disposed of, and are adequately regulated under solid waste programs. Because grit and screening are already regulated as solid wastes under subtitle D of RCRA, EPA disagrees that regulating these materials separately from the sewage sludge program would require duplication of effort. EPA neither agrees nor disagrees with the commenter who favored including grit and screenings in the definition of sewage sludge because they are mixed and disposed of with sewage sludge. The evidence suggests that grit and screenings are more likely to be handled separately from sewage sludge, which is a major reason for not including them in the definition of sewage sludge. If however, these materials are mixed with sewage sludge and then disposed, they would be considered sewage sludge under today's definition (as a sewage sludge product).

Most commenters who favored excluding grit and screenings from the definition of sewage sludge also favored excluding scum from the definition. Scum is the material that floats upward and must be skimmed off the top of the wastewater treatment tanks. The fate of scum is more varied. Several commenters said it is handled the same as grit and screenings. As noted by one commenter, it can be concentrated and returned to sludge digesters. Sometimes it is mixed and disposed of with the primary sludge. However, unlike grit and screenings, scum shares many characteristics with the other residues generated during waste water treatment and is typically disposed of with other sewage sludge. Therefore, it is being included in the definition of sewage sludge.

The ash generated during incineration of sewage sludge is not included in today's definition of sewage sludge. Again, most commenters favored exclusion of ash from the definitions for the reasons EPA gave in the preamble to the 1986 proposed rule. However, in response to that original proposal, two States argued that the large volume of incinerator ash justified regulation under the sewage sludge program. One POTW favored regulating ash under a sewage sludge program as a means of coordinating regulation of POTWs under one program. While the amount of sludge incinerator ash compared to other sewage sludge may be relatively high at POTWs which incinerate sludge, overall the amount of incinerator ash still appears to be relatively small. More importantly, as one commenter noted, incinerator ash is like other ash material (sterile and dry), and not like sludge. Accordingly, like other ash, it is typically disposed of in landfills, and consequently is regulated under existing solid waste programs. Consolidating regulation of POTWs under one program is a desirable goal but does not provide technical justification for treating incinerator ash the same as sewage sludge.

Sewage sludge incinerator ash is a solid waste and therefore, the Agency will continue to regulate it like other solid wastes (and other incinerator ashes) under RCRA (i.e., under Subtitle D if it is non-hazardous and under Subtitle C if it constitutes a hazardous waste). If, however, incinerator ash is mixed and disposed of with sewage sludge (for example, in land application), it will be regulated as sewage sludge.

Two States expressed a middle position on the question of whether grit, screenings, and ash should be regulated under the sewage sludge program, stating that some degree of monitoring and reporting of these materials was necessary, but extensive procedures should not be required. This approach is consistent with the Agency's decision not to regulate these materials under the sewage sludge management program, but rather to continue to regulate them under solid waste program requirements. Moreover, today's final rule does not preclude States from regulating grit, screenings, and ash as stringently as they think appropriate under State programs.

Septage. Public comments on the issue of including septage in the definition of sewage sludge were more divided. Supporters of the proposed definition, which would include septage in the definition of sewage sludge, included States, POTWs, and one environmental group. The most common reason given was that septage is a significant source of domestic sewage treatment waste and therefore needed to be addressed under the sewage sludge program. In a similar vein, one commenter noted that septage should be included because it is a residual of sewage treatment like other sewage sludge. Several commenters who supported covering septage addressed only septage that was discharged to POTWs, noting that regulation of septage should or could be an integral part of a pretreatment program.

More commenters opposed including septage in the definition of sewage sludge than favored it. Most opposition came from States. Some simply disagreed with EPA's reasoning that septage exhibits similar properties as sewage sludge and requires similar constraints on its use and disposal. In many cases, opposition centered on the different regulatory approach many

States used to regulate septage and the significant number of small entities potentially within the scope of such a program, particularly as balanced against the environmental benefit of regulating a relatively small amount of material. Other commenters objected because septage regulation historically has been the concern of local health authorities.

Under today's final rule, septage will be considered sewage sludge, just as it has been under preexisting federal regulations. However, as stated in the preamble to the proposed rule, only septage that is used or disposed of by one of the use or disposal methods regulated under the Part 503 regulations will be regulated under the Section 405 sludge management program. (EPA, however, retains authority under section 405(d)(4) to take appropriate action to protect public health and the environment in the absence of Part 503 regulations. See discussion in section V.E. below.) Thus, septage that is applied to land will be considered a part of the sludge management program. Septage that is discharged or hauled to POTWs is not covered by today's program (although it may be subject to the POTW's pretreatment program) because there are no Part 503 standards planned at this time for this disposal practice. However, such septage will be regulated indirectly under the Part 503 program through requirements on the use or disposal of the sludge generated by the POTW (which would be derived from septage and any other material introduced into and consequently removed by the treatment works). Also, for those septage and portable toilet wastes introduced into the POTW, EPA expects the POTW to exercise its pretreatment program authorities to verify the source and composition of the wastes, and the compatibility of the wastes to ensure NPDES permit compliance.

EPA recognizes that certain differences exist between sewage sludge generated at POTWs and other treatment works and the residues pumped from septic tanks. However, they pose similar threats to the environment when disposed improperly. EPA proposed in Part 503 that the requirements for the use and disposal of sewage sludge also apply to septage. Thus, including septage within the scope of today's rulemaking is appropriate. This does not mean that EPA intends to regulate septage through permits issued to the generators (i.e., the owners and operators of septic tanks) as will be the case with POTW sewage sludge. As explained below, the definition of "treatment works treating domestic sewage" specifically excludes septic tanks.

In today's final rule, septage is separately defined. (Under the proposed rule septage was separately defined under Part 501 but not under Part 122.) The final rule also includes several minor changes to the definition of "septage", made in response to comments. First, "holding tanks" has been added as a receptacle in which septage can be found. Although they serve a different purpose from septic tanks (collecting and holding sewage rather than treating it), the residues that accumulate at the bottom of holding tanks are similar to the accumulated residues from septic tanks. The change to the proposed rule clarifies EPA's intent to treat the septage from both types of tanks the same.

Second, the words "or maintained" have been added to the end of the definition of "septage." This is in response to a comment that the word "cleaned" is ambiguous and that "maintained" would be clearer. EPA intends the settled material in septic tanks and similar receptacles which is removed for any reason be covered by the definition. Therefore, both words have been used in the definition to ensure that the definition is read broadly.

EPA did not amend the definition of septage to include "similar aerobic and anaerobic material." This suggested addition came from a commenter who was concerned that pumped out material from small domestic aerobic package plants which do not have sludge storage tanks might be excluded under the proposed definition. It is not necessary to specifically include this material because, like sewage sludge generated at most POTWs, it clearly falls under the definition of sewage sludge as a "residue removed during the treatment of municipal wastewater or domestic sewage."

Portable toilet wastes. The proposed definition of sewage sludge included "portable toilet wastes." Today's final rule is the same in this regard. In addition, the final definition specifies that pumpings from Type III marine sanitation devices (as defined in 33 CFR Part 159) are included (when brought to shore for disposal). These pumpings are included because they are often applied to land and present some of the same environmental and health concerns as other sewage residues applied to land (e.g., the potential for ground and surface water contamination, pathogens).

EPA received several comments specifically addressing portable toilet pumpings. One commenter supported including portable toilet wastes because, among other reasons, the chemicals sometimes used for treatment could be of concern. Other commenters, however, stated that portable toilet wastes were fundamentally different from treatment plant sludge because they are raw, untreated sewage and therefore should not be included. EPA disagrees. As noted by the other commenter, these wastes are sometimes chemically treated. In any case, lack of treatment is a reason for including, rather than excluding, these materials to ensure that reintroducing them to the environment does not threaten public health or the environment. Like septage, however, portable toilet pumpings taken to POTWs for treatment (rather than directly re-entering the environment) are not covered under the sewage sludge program except as a component of the sludge generated at the POTW or other treatment works. Likewise, portable toilets or Type III marine sanitation devices, like septic tanks, are not "treatment works treating domestic sewage" and owners or operators would not be required to obtain a permit.

One commenter asked that EPA clarify whether pumpings from vault latrines, like those used in recreational areas and roadside restrooms, are within the scope of the regulations. Although these facilities seem to be immobile rather than portable, the wastes collected in them are similar to portable toilet wastes. Therefore, they would be handled the same under today's final rule, i.e., they are not covered by the sludge program if they are introduced into a POTW, but they are covered by the sludge program if they are used or disposed of by a method regulated under Part 503.

One commenter asked EPA to define portable toilet wastes to exclude moveable toilets such as those on trains, buses, airplanes, and private recreation vehicles. The final rule does not adopt this suggested change. The pumpings from these facilities are no different than those from other portable toilets. However, as noted above, although the collected wastes will be subject to the technical standards (and thus must be regulated under a State's program), the owners and operators of the portable toilets are not required to obtain a permit under today's final rule.

Sludge-derived products. The proposed definition of sewage sludge did not distinguish between sludge in its original form and sludge that has been somehow processed or altered for

purposes of creating a marketable product. EPA received comments questioning whether the definition would or should include sludge that has been composted or sludge that has been "high-heat dried." To clarify the intended scope of the definition, the final definition specifically states that sewage sludge includes sewage sludge products. A sewage sludge product is any mixture of sewage sludge and other material.

One commenter expressed concern that unless sewage sludge compost was considered sewage sludge and therefore governed by the regulations, potentially harmful material could escape regulation. (A related comment that composted sludge should be regulated like other sludge, unless contaminant levels have been reduced below a certain level, is addressed below.) EPA shares this concern, and therefore, composted sewage sludge will be regulated. The potential risks posed by pollutants in sewage sludge do not necessarily disappear because the sludge has been mixed with other materials or undergone certain treatment.

Another commenter argued that its sludge, which has been "high-heat dried" and packaged should be excluded from the definition of sewage sludge because it does not present the risks that were of concern to Congress (i.e., ocean dumping, incineration) when it enacted section 405. In fact, the argument continues, "high-heat dried" sludge reduces the need for landfills, incinerators, and ocean dumping and therefore exempting it from the new sludge permitting program would advance Congressional goals and the public interest.

EPA disagrees. Congress may have highlighted concerns about particular sewage sludge disposal methods, but it did not specifically exclude any practice or limit section 405 to any particular group of practices. Instead, it directed EPA to identify the uses, including disposal, that should be regulated. Moreover, as noted above, some pollutants in sewage sludge may continue to be of concern (for example, heavy metals) even though the sludge has undergone various processes or has been mixed with other materials. Further, while heat treatment may be effective in reducing or eliminating pathogen concerns, toxicity problems with the sludge may remain. Therefore, EPA has determined that it is necessary to regulate sludge-derived products.

Other. One commenter said that the regulation of sewage sludge under the Part 501 and Part 503 rules would conflict with existing regulations (i.e., 40 CFR Part 257) that define sewage sludge as a solid waste. Congress clearly intended EPA to develop new regulations that specifically focus on sewage sludge use and disposal. Therefore, the existence of existing regulations governing sewage sludge is not an obstacle to new regulations. The Part 503 rulemaking will delineate the scope and coverage of the Part 503 regulations, and propose revisions to 40 CFR Part 257 to exclude from coverage of Part 257 that sewage sludge regulated under Part 503. This will eliminate duplicate regulation of sewage sludge.

One commenter requested that sewage sludge be defined to include only sewage sludge generated by POTWs since (1) many State programs regulate only POTW sludge; and (2) this is the only sludge likely to be covered by the first round of technical standards. Another commenter on the earlier proposal made a similar suggestion based on resource concerns. Limiting the definition as suggested would be contrary to the plain meaning of the statute and Congressional intent. While it may have been possible to argue that only POTW sludge should be regulated under section 405 before the 1987 amendments, Congress foreclosed that option by requiring that the same sludge technical standards apply to sludge from POTWs and from other treatment works treating domestic sewage, and by prohibiting the use and disposal of sludge generated by these facilities except in accordance with the technical standards.

How soon treatment works treating domestic sewage will be subject to the Part 503 technical standards is a separate question. Contrary to the commenter's assumption, the first round of Part 503 technical standards is proposed to cover more than POTW sludge and will apply to all sludge generated at treatment works treating domestic sewage (see discussion of "domestic sewage" below), except those facilities treating domestic sewage along with process wastewater. Therefore, the first round of Part 503 will cover sewage sludge from privately owned treatment works. Consequently, under section 405(f) of the CWA, EPA will require that permits issued to privately-owned treatment works implement the Part 503 technical standards. However, as discussed below, facilities not covered by the first round of the technical standards may not have to be permitted until standards applicable to them have been promulgated. This will allow phased-in regulation, and thus alleviate concerns about the immediate resource demands that an expanded program would create for some States.

2. POTWs and Other Treatment Works Treating Domestic Sewage.

The requirement to include conditions in permits to implement the Part 503 technical standards under section 405(f) of the CWA applies to POTWs and "any other treatment works treating domestic sewage." Since these terms define the core of the basic permitting program, they generated numerous comments. EPA has thoroughly considered these comments, as well as the legislative history, in developing a final definition which best addresses the goals of section 405 and establishes a workable and effective permitting program. This has resulted in some changes from the proposed rule, as explained below.

Treatment works. The 1986 and 1988 proposals contained a definition of the "treatment works" derived from Section 212 of the Clean Water Act. It was defined to mean "any devices and systems used in the collection, storage, treatment, recycling, and reclamation of municipal sewage waste of a liquid nature, including land dedicated for the storage, treatment and disposal of sewage and resulting sludge." This broadly worded definition was designed for purposes of the construction grant program, principally to designate the type of projects potentially eligible for federal funding. "Treatment works" as used in section 405(f), however, serves a much different purpose, that is, to define entities which are required to obtain permits that implement the technical sludge standards promulgated under section 405(d). There were numerous commenters who apparently assumed that each process, piece of equipment, or land that came into contact with sewage or sewage sludge would be subject to separate permits. This is absolutely *not* the case; the definition is inclusive to make it clear that these devices are all part of the overall system. In most cases, one permit would be issued to the facility, covering the devices and systems used to collect, store, treat, recycle and reclaim sewage and sewage sludge.

Today's final rule adopts the proposed definition of "treatment works." However, it is now referred to as "treatment works treating domestic sewage" to clearly identify treatment works subject to regulation under section 405(f) of the CWA, which may or may not fall within the definition of "treatment works" as used in other programs such as NPDES and pretreatment. The basic purpose of this definition is to include facilities that generate sewage sludge or otherwise effectively control the quality of sewage

sludge or the manner in which it is disposed (and hence its effect on the environment). This definition includes facilities that treat sewage sludge such as incinerators. The definition of "treatment works treating domestic sewage" in today's final rule encompasses facilities that may process sewage sludge as would a generator, but that are separate from the generator's facilities. Thus, "treatment works" includes, for example, commercial sludge handlers which process sewage sludge from POTWs for distribution and sale. (It would not, however, include a commercial handler which distributes the sludge but does not alter the sludge before distribution.) These are the facilities for which permits are needed to effectively implement the technical sludge standards now under development. Permits will be issued to owners or operators of disposal facilities such as monofills, dedicated land disposal sites, and surface disposal sites, as these are "lands dedicated to the disposal of sewage sludge." However, under the Federal program, permits will not be required for owners or operators of land where sludge is beneficially reused such as farm lands and home gardens.

Part 122 contains a second part to the definition of "treatment works treating domestic sewage." It provides that the Regional Administrator may designate a particular facility as a "treatment works treating domestic sewage" for the purpose of CWA section 405(f) where necessary to protect public health and the environment from poor sludge quality, use, handling or disposal practices, or to ensure compliance with 40 CFR Part 503. This enables the Regional Administrator to carry out the intent of Congress to ensure that all persons subject to the standards for sludge use and disposal (e.g., persons who handle sewage sludge but who do not generate or treat sewage sludge) operate in compliance with such standards, and that adverse effects on the environment resulting from poor sludge quality, use, handling or disposal can be minimized. The authority to designate facilities as "treatment works treating domestic sewage" on a case-by-case basis is not required for either NPDES (Part 123) or non-NPDES (Part 501) State programs. Under today's final rule, States are required to have a program that requires permits for POTWs and other treatment works as defined in § 501.2, but are free to develop any appropriate program to regulate other users and disposers of sewage sludge to ensure compliance with the technical standards.

Septage treatment and disposal systems. As discussed above, the definition of sewage sludge includes "septage," the residues pumped from septic tanks during cleaning or maintenance. When Congress first considered expanding section 405 beyond POTWs to also cover treatment works treating primarily domestic sewage, its intent, in part, was to make the section 405(d) standards applicable to "septage treatment and disposal systems." (Sen. Rep. No. 99–50 on S. 1128 at 47 (1985)). EPA reads this language to refer to facilities where septage is collected for treatment prior to disposal (e.g., centralized septage treatment works such as lime stabilization units).

Under today's final rule, only "septage treatment and disposal systems"—not individual septic tanks—are considered treatment works treating domestic sewage and thus will be required to obtain permits after promulgation of applicable Part 503 technical standards. Permits are only required if the septage will be disposed of by one of the practices covered by 40 CFR Part 503. EPA estimates that approximately one-third of all septage is taken to POTWs for further treatment or mixture with the POTW's sludge. In fact, some States require that septage be taken to POTWs. As explained above, this practice will not be separately covered by 40 CFR Part 503. Instead, this septage would be regulated as a component of the POTW's or other treatment works' sludge.

Individual septic tanks are not considered "septage treatment and disposal systems" under today's final rule. To clarify this intent, the final definition specifically excludes septic tanks from the definition of "treatment works treating domestic sewage." EPA never intended to require permits for individual septic tanks, as reflected in the proposed rule by the specific exclusion of individual household septic tanks from the definition of "generator" (and, by reference, from the definition of "treatment works"). According to the 1980 census data, nearly 22 million households are served by septic tanks. To regulate individual septic tanks (whether serving one or several households) obviously would be extremely difficult and inefficient. It would also be impractical in terms of achieving environmental results since the owners and operators of septic tanks have no effective control over the actual disposition of septage pumped from their tanks (i.e., they cannot control the entities who pump and dispose of the septage).

Septage pumpers and haulers are not considered "treatment works treating domestic sewage" or "septage treatment and disposal systems" under today's final rule. Accordingly, these pumpers and haulers (and those who pump other sewage residues from portable toilets, Type III marine sanitation devices, and similar devices) are not required to obtain permits under section 405(f) of the CWA and today's final rule. Pumpers and haulers are considered "users and disposers" of sewage sludge, however, and therefore will be subject to the Part 503 regulations. See section 405(e) of the CWA. (See discussion of section 405(e) of the CWA, section III.A. above.)

Domestic sewage. Before the 1987 amendments, section 405(d) of the CWA applied only to "POTWs." The preamble to the February 1986 Part 501 proposal explained EPA's interpretation:

> EPA believes that section 405 of the CWA was intended to regulate sludges that derive from (POTWs) or other treatment works that treat *primarily* domestic sewage.
>
> Therefore, neither the Part 501 regulations nor the Part 503 regulations will apply to privately owned treatment works operated in conjunction with industrial manufacturing and processing facilities. Such sludges are, however, regulated by EPA under the authority of RCRA." (51 FR 4459, February 4, 1986). (Emphasis added.)

Most commenters on the 1986 proposal (21 of 26) supported regulating sewage sludge from privately-owned treatment works that treat primarily domestic sewage the same as that from POTWs. The few commenters who opposed this position were concerned about resource burdens of regulating these facilities or questioned EPA's legal authority to regulate privately-owned treatment works.

In the 1987 amendments to the Clean Water Act, Congress expanded the universe of entities requiring a permit to include any treatment works treating domestic sewage, without qualification as to the amount of domestic sewage in the treatment works' total flow. The intended effect of the change in language, according to the legislative history, was to include what previously had been excluded, i.e., privately-owned treatment works operated in conjunction with industrial manufacturing and processing facilities that treat domestic sewage. *See* Conf. Rep. No. 99–1004, 99th Cong., 2d Sess. (1986) at 160. Accordingly, in the 1988 proposed rule, EPA included a permit requirement for "POTWs and any other treatment works that treat domestic sewage." Neither the Act nor the proposed rule defined "domestic sewage," however. This

omission resulted in comments from industries and industry trade associations urging EPA to define "domestic sewage" in such a way as to exclude industrial treatment works that treat site-generated sanitary sewage. Two States also asked EPA to clarify what is meant by "domestic sewage" and how it expected industrial sludges to be regulated.

Today's rule defines "domestic sewage" (for purposes of defining "treatment works treating domestic sewage") to mean "waste and waste water from humans or household operations that are discharged to or otherwise enter a treatment works." Thus, any treatment works which treats, in whole or in part, human-generated or household type wastes as part of its waste water treatment is within the purview of section 405(f) and the requirement to obtain a permit that implements applicable Part 503 standards. This includes industrial treatment works that treat site-generated sanitary wastes along with process or other wastes generated at the site. It does not however, apply to treatment works that generate sludges which constitute hazardous waste. As previously indicated, for purposes of section 405 regulation, requirements for sludges that fall within the definition of "hazardous waste" (40 CFR 261.3), regardless of their source, will continue to be those established under Subtitle C of RCRA.

Although industrial treatment works that treat domestic sewage and generate non-hazardous sludge will be regulated under section 405(f) of the CWA and today's final rule, the Agency does not plan at this time to cover these facilities in the first round of the Part 503 technical standards. EPA does not yet have sufficient information on these sludges to promulgate standards. Under the March 1988 proposed rule, permit conditions controlling sludge use and disposal from these facilities would have been developed on a case-by-case basis using "best professional judgment." EPA has determined that because so little is known about the sludges generated at these facilities (as compared to the data base for sludges from treatment works treating primarily domestic sewage) and because there are potentially thousands of facilities in this category, it is very difficult to find a defensible technical basis for routine case-by-case permitting of these facilities. Because these sludges are subject to regulation under RCRA, it is not clear that pursuing case-by-case permitting now rather than after applicable technical standards have been developed would result in significantly greater environmental benefits. Accordingly, under today's rule, these facilities will not be required to obtain permits under the sewage sludge program established by today's rule until EPA promulgates technical regulations applicable to the sewage sludge generated at such works, unless EPA determines that a permit or other measure is appropriate in a particular instance to "protect public health and the environment from any adverse effects which may occur from toxic pollutants in sewage sludge" pursuant to section 405(d)(4) of the CWA. Disposal of sludge from these facilities also will continue to be regulated under RCRA. As discussed in section V. B. of this preamble, the Agency is gathering additional information about the sludges from industrial facilities to determine whether additional regulation should be pursued. One commenter asked whether coverage of industrial treatment works treating domestic sewage under section 405(f) would mean that the sludge disposal options available to domestic treatment works are also accessible to industry. Generally, the availability of disposal options will be determined by whether the sludge constituents and the manner in which the sludge is used or disposed meet the technical requirements in Part 503. However, as noted above, until more data on industrial sludges with a domestic sewage component is gathered and analyzed, the Agency is not in a position to say whether those sludges can be used or disposed of in the same manner as other sewage sludge. In the meantime, the use and disposal of industrial sludges will continue to be regulated under existing federal regulations (e.g., Subtitle D of RCRA for land application and landfilling of non-hazardous sludge; Subtitle C of RCRA for sludge constituting a hazardous waste).

Commenters who said that industrial facilities should be excluded from regulation under section 405(f) advanced several different reasons for their position: (1) Congress did not intend that these facilities be regulated under section 405(f); (2) the dictionary meaning of "domestic" means "from a home or household" and therefore does not include industrial facilities; (3) it does not make sense to regulate sludges which are primarily industrial the same as sludges which are generated during municipal waste water treatment; (4) there is no need to regulate these facilities under section 405(f) because they are regulated under Subtitle D of RCRA and existing State programs; (5) sanitary wastes typically are only a minuscule part of sludge at industrial facilities; and (6) such an approach would force costly segregation of sanitary wastes at industrial facilities which was not intended by Congress or considered by EPA in terms of economic impact.

The commenter who said that EPA's position was contrary to Congressional intent (despite reference in the legislative history to include coverage of privately owned treatment works even if they do not "primarily" treat domestic sewage) argued that Congressional intent to vastly expand coverage of section 405 would have been more clearly indicated in the statute and legislative history; instead Congress intended to include industrial treatment works that treated on-site generated sanitary wastes within the scope of section 405(f) only if those facilities also treat significant amounts of off-site generated household waste.

EPA disagrees. Nothing in the statutory language suggests such a narrowly defined scope. Further, Congress did clearly state its intent to significantly expand the scope of section 405(f). Congress not only made section 405 applicable to any treatment works treating domestic sewage (as opposed to an earlier version that applied to treatment works treating primarily domestic sewage), but it also specifically deleted an exclusion for industrial treatment works. The Conference Report explains:

> The conference substitute modifies the Senate provisions by deleting an exclusion of privately owned treatment works operated in conjunction with industrial manufacturing and processing facilities. Such treatment works are covered * * * and their sludge is to be regulated by the same criteria as sludge from [POTWs]. Similarly, the Conference substitute regulates any treatment works treating domestic sewage, not just treatment works treating "primarily" domestic sewage.

Conf. Rep. No. 99–1004 at 160. This strongly suggests that Congress intended section 405 to be read broadly with regard to industrial treatment works treating domestic sewage.

The argument that industrial sludges should not be regulated under section 405 because they are already controlled under RCRA Subtitle D and State programs is not persuasive because POTW sludge is also a solid waste under RCRA and in many cases is regulated under State programs. If Congress intended EPA to regulate these activities, the fact that they may also be regulated under RCRA and State law is not reason enough to eliminate them from coverage under section 405.59.

In response to the comment that it does not make sense to regulate sludges that are primarily industrial the same as sludges generated during municipal wastewater treatment, it must be pointed out that many POTWs treat vast quantities of industrial waste. Also, as noted above, EPA is gathering additional information to determine if sludge from POTWs and industrial facilities are too dissimilar to be regulated under the same standards.

EPA will be establishing requirements for industrial sludges in the future, when there is sufficient information about the pollutants of concern in industrial sludges. It is possible that these standards may be co-promulgated under RCRA authority as well as under CWA section 405, and may apply to purely industrial sludges as well. If this is the case, no benefit would be derived by segregating industrial and sanitary wastes at industrial facilities.

One commenter asked EPA to clarify whether sludges such as those from brewery and poultry processing operations whose characteristics resemble domestic sludge, and pumpings from septic tanks serving mortuaries are covered under the definition. The sludges are covered by today's definition of sewage sludge if the treatment works generating the sludge also treats domestic sewage. However, assuming that the generating facilities are not POTWs, under proposed Part 503, these treatment works would be considered "industrial treatment works" and therefore not covered by the first round of Part 503 technical standards. Likewise, as with other industrial treatment works treating domestic sewage, these facilities would not be required to obtain a permit under today's rule before applicable Part 503 regulations have been promulgated, unless the permitting authority determined, under section 405(d)(4) or a comparable State authority, that a permit was needed earlier to protect public health and the environment.

It is important to note the definition of "domestic sewage" in today's final definition of treatment works treating domestic sewage is limited to the sludge management program under section 405 of the CWA and is designed specifically to carry out clear legislative intent with regard to that program. It does not alter or affect the definition of "domestic sewage" under other statutory provisions or regulations, such as section 1004(27), the domestic sewage exclusion under RCRA.

Municipality. The proposed rule adopted the definition of "municipality" from section 502(4) of the CWA. (The reference to section 502(4) has been deleted in the final rule as unnecessary.) One commenter noted that public schools, State parks, and the like were not considered municipalities under State law and asked whether they would be considered municipalities under the proposed rule. Strictly speaking, public schools and State parks are not considered "municipalities." "Municipalities" refers to particular political subdivisions of a State, not particular types of facilities. However, public schools and State parks could be owners or operators of "POTWs" and thus would be subject to the new sludge permit program.

Facility. The 1986 and 1988 proposals defined "facility" to mean "all land and structures, other appurtenances, and improvements on the land used for the treatment, storage, processing, utilization, or disposal of sewage sludge." One commenter to the 1986 proposal asked that EPA clarify whether "facility" includes private lands on which sludge is applied. Seven commenters on the 1988 proposal objected to the definition because it could be read to include sites on which sludge is applied, and consequently would require that each land application site be the subject of a separate permit action. This was not and is not EPA's intent. To ensure that there is no confusion on this point, today's final rule does not include a separate definition of "facility" in Part 501. Similarly, the proposed revision to the definition of "facility" in Part 122 is not in the final rule. This definition is unnecessary because other terms in today's final rule, such as "treatment works treating domestic sewage" adequately define the entities subject to the permitting requirements established by the regulations.

One commenter asked whether there was a difference between "facility" in proposed § 501.2 and "sludge management facility" in proposed revisions to § 124.10(d)(1) (vii). This question is now moot because the definition of "facility" has been dropped. New language appears in today's final revisions to § 124.10(d)(1)(vii). The phrase, "sludge management facility and disposal or use practice," which appeared in the proposed rule has been replaced by "sludge treatment works treating domestic sewage and use or disposal sites."

Note: Other changes to § 124.10(d)(1)(vii) are explained below in section V.G.2.

Similar editorial changes have been made in final revisions to the definition of "facility or activity" in § 124.2.

Sludge-only facilities. Section 405(f)(2) authorizes the Administrator to issue a permit "solely to impose requirements for the use and disposal of sludge that implement [the Part 503 technical regulations]" to "a treatment works described in Paragraph (1) that is not subject to section 402 of this Act and to which none of the other above listed permit programs nor approved State permit authority apply." Facilities needing a permit under this section are called "sludge-only facilities." Today's final rule expands the NPDES permit program to cover these facilities for which permits are required under section 405(f)(2). A treatment works that applies its effluent to land, rather than discharging it to surface waters is an example of a treatment works that might fall into the category of "sludge-only" facilities. Here, although the treatment works would not need an NPDES permit for surface water discharges, it may generate sewage sludge subject to regulation under section 405 and thus would require a sludge-only permit under today's rule.

EPA received very few comments on expanding the NPDES permit program to incorporate a program for regulating sludge use and disposal. One commenter specifically endorsed EPA's use of the permit program under Part 122 as the vehicle for issuing "sludge-only" permits authorized by section 405(f)(2). Another commenter, however, objected to using NPDES permits for "sludge-only" facilities that do not have surface water discharges, and argued instead that these facilities should be issued permits under solid waste programs. EPA disagrees. There is no existing Federal solid waste permitting program which the Administrator could use for issuing permits to "sludge only facilities." Using an existing permitting program, such as NPDES, is more efficient than establishing a new permit program. While the NPDES program traditionally has focused on effluent discharges from wastewater treatment plants, sludge generation and disposal is also an integral facet of wastewater treatment and therefore represents a natural extension of the NPDES program, regardless of which sludge use or disposal option is used. Congress clearly thought so when it provided for the expansion of traditional NPDES jurisdiction to include regulation of sewage sludge use and disposal.

Another commenter said that providing for "sludge-only" permits under NPDES when the treatment works is subject to permits under RCRA, SDWA or CAA would lead to confusion and possible unnecessary enforcement

against facilities which are otherwise in compliance with their dominant permit requirements. This situation should not arise under today's rule (and under the CWA) because "sludge-only" permits will be issued only when the Part 503 technical standards have not been included in a permit issued under RCRA Subtitle C, SDWA Part C (UIC program), CAA, MPRSA (ocean dumping permits), or an approved State sludge management program.

3. *Users and Disposers of Sewage Sludge*

The Water Quality Act of 1987 contains two provisions with respect to compliance with the technical standards. First, the Act requires that, where POTWs and other treatment works treating domestic sewage are concerned, the standards for sludge use and disposal are to be implemented through permits. CWA section 405(f)(1). In addition, the Act provides that "* * * it shall be unlawful for any person to dispose of sludge from a publicly owned treatment works or any other treatment works treating domestic sewage for any use for which regulations have been established pursuant to subsection (d) of this section, except in accordance with such regulations." CWA section 405(e). Thus the law requires that all persons disposing of sludge do so in accordance with applicable technical standards, even though the statute does not explicitly require such persons to obtain a permit implementing those standards.z

In the March 9, 1988 proposed rule, EPA solicited comments on the best means to regulate users and disposers; specifically, when would permits be appropriate. EPA also asked for comments on the appropriate scope of the generator treatment works' permit when the user or disposer of its sludge is covered by a permit.

There were 31 commenters who responded to this issue: 16 State agencies, eight municipalities, three commercial sludge handlers, one environmental group, one association, and one member of the general public. The commenters primarily focused on what a State would have to do to have its sludge management program approved, rather than the approach EPA should take where it is the permit authority.

Three State commenters felt that the requirements should be flexible: various regulatory options should be available to the State, and the State would decide whether to issue permits to the treatment works (generator) or to the disposer. One State commenter stated that EPA should require only that the State prohibit use and disposal of sewage sludge except in accordance with CWA section 405(d). One commenter expressed the view that States be given the authority to grant permits to other than sludge generators on a case-by-case basis. Six commenters felt that EPA should require that the treatment works' generator permit address sludge quality, and then the State would decide how to address requirements that apply at the disposal site, whether in the treatment works' permit, in a site permit, through rules of general applicability, general permits, or some other means, depending on the disposal mechanism. These commenters felt that where the sludge generator was not using or disposing of its sludge, its responsibility should be limited to sludge quality. However, another commenter questioned whether the generator's liability could be so limited, given other legal precedents. Two State commenters thought that issuing joint permits to all persons involved—generator, hauler, site owner—with responsibilities of each spelled out in the permit, would be appropriate.

Two commenters (one State and one environmental group) felt that all requirements should be in the treatment works' generator permit. These commenters felt that this was the best means of ensuring that the sludge would be disposed of in accordance with the technical standards, thus making the generator responsible for the ultimate disposal of its sludge. These commenters recommended that a process similar to the pretreatment program be established, so that the treatment works would regulate users of its sludge as it now regulates industrial users that discharge effluent to its headworks.

Several commenters expressed the view that to require permits for users and disposers, such as farmers, would discourage their participation and thus inhibit beneficial reuse of sludge. One commenter stated that a permitting program for beneficial users of sludge and sludge products is too rigid to meet the response times of beneficial land needs, which are quite volatile due to crop cycles, etc.

Seven commenters addressed the specific question of how to regulate the users of distributed and marketed sewage sludge. Two commenters expressed the view that users should be informed of requirements through labels, and should be required to comply with labeling instructions. One commenter stated that because of the numerous small users of distributed and marketed sludge and sludge products, it would be more efficient to regulate the producer of the product. Four other commenters also opposed requiring individual permits for users of sludge or sludge products. Two commenters expressed concern about the interstate commerce implications of distributed and marketed sludge products. One of these commenters recommended that national standards be developed for sludge products distributed in interstate commerce, and that these standards preempt State and local law. Another commenter asked if generators would have to obtain permits in every State in which its product is distributed and marketed.

There are many circumstances where the sludge generator may not dispose of its own sewage sludge. One of the more common examples is where treated sewage sludge is applied to land, by a farmer or by a private contractor, as a soil conditioner and fertilizer. It is clear that Congress intended section 405(e) to make the technical standards applicable to such users and disposers:

> Section 405(e) is amended to expand the applicability of the 405(d) sludge use and disposal regulations to "any person" * * *. The purpose of this * * * change is to impose the regulations on those that actually dispose of the sludge, which may not be the treatment works' owner or operator." U. S. Senate Committee on Environment and Public Works, Report No. 99–50, May 14, 1985.

The question then becomes: what is the best means of ensuring that the sludge will be used or disposed of by these other parties in accordance with the technical standards? This is one of the most complex problems of the sludge program.

One means of regulating these users and disposers is to rely on the direct enforceability of the technical standards. This has been the primary means of enforcing the current land application requirements contained in 40 CFR Part 257. It is clear from the legislative history on Section 405 that Congress intended that the technical sludge standards be self-implementing, i.e., all users and disposers are subject to them, whether or not they have a permit, and the standards may be enforced directly against users and disposers in such instances: "Notwithstanding the issuance of a permit that implements a section 405(d) guideline, the guideline itself would remain directly enforceable under sections 309 and 405(e) of the Act." (132 Cong. Rec. H10577, October 15, 1986.) (This is in contrast to the effluent guidelines, which are not self-implementing. The discharge limitations must be in the discharger's permit in order for the discharger to be subject to them. Enforcement actions are based on

the permittee violating the conditions of the permit.) Thus, since enforcement actions may be taken directly against violators, even in the absence of a permit, one means of ensuring compliance by users and disposers is simply to rely on this authority to take enforcement actions where necessary.

However, total reliance on this general authority may not result in effective implementation of the program in many instances. For example, some of the technical standards, as proposed, rely on site-specific factors, e.g., the concentration of pollutants in a particular sludge would have to be known before the sludge application rate can be calculated. Thus, simply referring to the technical standards would not be enough for the user to know how much sludge can be applied to land. The treatment works would need first to provide information on sludge quality, and then would need to factor in other site-specific considerations, such as whether sludge had been applied to the same land in previous years. Further, in the absence of a permit, it is often difficult for the regulatory agency to know who is using or disposing of sludge and whether they are doing so in accordance with federal and State requirements. Thus, an effective sludge program should utilize the permit mechanism to ensure adequate safety of the sludge use and disposal practices, without discouraging beneficial reuse and recycling.

EPA has decided not to adopt an approach requiring the generator to regulate users or disposers analogous to the pretreatment program. First, where the treatment works is, in effect, the recipient of a service (someone else is disposing of its sludge), it is not in the same position to regulate users of its sludge, as it is in the pretreatment context, where it is the provider of a service. The user of the sludge may simply refuse to accept it, thus inhibiting reuse and restricting the POTW's disposal options. Further, there are likely to be more multi-jurisdictional problems than there are with pretreatment, due to the fact that sludge is readily transportable and is often used or disposed of in a different county or State from where it is generated, and where the treatment works may not have any regulatory authority over the user.

Usually the requirements of 40 CFR Part 503 will be contained in the generator treatment works' permit. The Part 503 regulations and today's final rules are designed so that the generator treatment works' permit can serve as the primary implementation mechanism for ensuring compliance with the sludge technical standards. This approach also ensures the necessary link to the pretreatment program, so that the tools of that program (e.g., local limits) can be brought to bear on industrial users in order to improve the quality of the treatment works' sludge. However, there may be instances where the generator's permit coverage may be limited to the specific activities conducted by the generator. The availability of such approaches will vary, depending on the method of sludge use and disposal.

Today's rule includes sludge monofills, sludge incinerators, and dedicated land disposal sites (such as surface disposal sites) within the definition of "treatment works treating domestic sewage." This means that such facilities, even when privately owned or not connected to a POTW, are required to get a permit. Where the receiving facility is subject to a permit implementing the Part 503 standards, the generator's permit need not address the requirements in the recipient's permit regarding the operation of the recipient's facility. For example, if the sludge generator treatment works is sending its sludge to an incinerator, the generator's permit could contain requirements as to sludge quality, and any other information pertaining to the agreement between the generator and the incinerator (e.g., information on the incinerator's emission limits where such limits may drive sludge quality requirements). The incinerator's permit could contain emission standards and other requirements pertaining to the operation of the incinerator, such as feed rate, combustion temperature, etc. (Again, this incinerator permit may be an air permit, NPDES permit, one of the other permit programs listed under CWA section 405(f)(1), or an approved State program permit. Whatever the mechanism, it must implement the applicable Part 503 sludge standards for incinerators.) Thus, all applicable requirements would be in either the sludge generator's or the incinerator operator's permit. Another option would be to make the generator and the operator co-permittees. (Please note that, in today's rule, incinerator ash is not within the definition of sewage sludge. Therefore, users and disposers of incinerator ash are not subject to the sludge technical standards. However, since incinerator ash is a solid waste, such persons are subject to RCRA.)

Another instance where a generator's permit may be limited is where the generator sends its sludge to a monofill (a landfill that accepts only sludge), for reasons similar to those for incineration. Sludge sent to a sludge monofill will be regulated under Part 503. Part 503 will contain contaminant limits for sludge going to a monofill, and operation standards for the monofill. Where the treatment works generating the sludge operates the monofill, all of the monofill requirements would be in the treatment works' permit. Where the treatment works sends its sludge to a monofill that it does not own or operate, requirements regarding sludge quality could be in the generator's permit, as well as other information such as the nature of the agreement between the generator and the monofill. Requirements regarding operation of the monofill could be in the monofill operator's permit. (The monofill is a treatment works because it is used for sludge disposal.) Thus, in this case, as with incineration, all requirements would be implemented through a permit, either issued to the generating treatment works or the receiving treatment works. This is another instance where it may be appropriate to make the two parties co-permittees.

Sludge sent to a municipal solid waste landfill (a landfill that accepts other types of solid wastes as well as sludge) is another disposal practice where the generator's permit conditions would apply to the quality of the sludge generated, rather than to the operation of the landfill facility. Municipal solid waste landfills (MSWLFs) will be regulated under 40 CFR Part 258, rather than under 40 CFR Part 503. The 40 CFR Part 258 regulations were proposed in the Federal Register on August 30, 1988 at 53 FR 33313 under the joint authority of RCRA and section 405(d) of the Clean Water Act. Where the generator sends its sludge to a MSWLF that it does not own or operate, the permit issued to the sludge generating treatment works must at a minimum contain provisions requiring the generator to comply with the 40 CFR Part 258 criteria regarding the characteristics of sewage sludge that must be met if the sludge is placed in an MSWLF. Under 40 CFR Part 258 as proposed, this would mean that the generator treatment works' permit would prohibit the disposal in an MSWLF of sludge found to be hazardous (proposed § 258.28), and would require that the sludge pass the Paint Filter Liquids Test (proposed § 258.28). The operator of the MSWLF (receiving the sewage sludge) would be responsible for complying with the landfill design, operation, and closure requirements in 40 CFR Part 258, which would be implemented through the RCRA Subtitle D program. Thus, the requirements as to sludge quality (in this case, that it is non-hazardous and not too liquid) would

be in the sludge generator's permit, and the requirements as to landfill operation would be imposed on the landfill operator under RCRA Subtitle D. In addition to these requirements, the proposed Part 503 regulations require that the generator treatment works send its sludge to an MSWLF that has a State-issued Subtitle D permit. (*See* proposed § 503.4(d)(2), 54 FR 5746, 5878, February 6, 1989.) This means of reconciling the two programs for comprehensive but not duplicative coverage is discussed in the preamble to the proposed Part 258 regulations, at 53 FR 33383 (August 30, 1988) and in the proposed Part 503 regulations at 54 FR 5746, 5794 (February 6, 1989).

The most complex area for regulating non-permitted users and disposers of sludge arises with the land application of sewage sludge. Often, the treatment works will give away or sell its sludge to farmers to be used as a fertilizer or soil conditioner. It would be cumbersome and counter-productive for EPA to require all farmers and other users of sewage sludge to obtain permits, and might also have the very undesirable result of discouraging beneficial use and recycling. The Part 503 regulations propose that sludge applied to agricultural or non-agricultural land must either be applied by the treatment works itself, or the treatment works must have a contract or similar mechanism that spells out the Part 503 requirements with the person who is applying the sludge. This is one means of putting the recipient of the sludge on additional notice as to Federal requirements regarding use and disposal. The treatment works would be responsible for the proper use of its sludge by maintaining appropriate sludge quality, and specifying appropriate application rates and other management practices through agreements with the users (or with contractors who have agreements with the user). As stated earlier, the Part 503 regulations can be enforced directly against any user or disposer regardless of whether the user or disposer has a permit. Records of these agreements kept by the treatment works would inform the regulatory agency of who is using the sludge and what the requirements are.

While EPA will not require that recipients of sewage sludge for beneficial reuse on land obtain a permit, because they are not considered "treatment works treating domestic sewage," many States currently regulate sludge by permitting the site where the sludge is used or disposed. As long as the State program imposes the sludge quality and other applicable Part 503 requirements on the treatment works through its permit, ensures compliance with the technical standards, and meets the other requirements of Part 123 or 501, a State program taking this approach can be approved.

Another difficult situation for regulating other users and disposers is where the sludge is distributed and marketed. For example, a sludge compost or heat-dried sludge product may be sold to a nursery chain where it is purchased in small quantities (in bags or bulk) by consumers and applied to home lawns and gardens. While these end users are subject to the technical sludge standards, as a practical matter it is not possible or desirable to regulate all of the end users through a permit. Further, EPA seeks to encourage such reuse practices where appropriate. The proposed Part 503 regulations recognize that such end uses cannot be directly controlled, and therefore the contaminant limits for sludge products that are distributed and marketed must generally meet higher standards of quality. The Part 503 regulations also propose that labels be affixed to the product or leaflets containing information about the quality of the sludge and its appropriate uses accompany the product. The treatment works' permit would require that the treatment works' sludge meet limits regarding sludge composition and related conditions, and that the treatment works provide information to users through leaflets or labels accompanying the product regarding appropriate uses of its sludge, or require, through a contact, that the distributor provide the appropriate labels or leaflets. The user of the product would remain responsible for complying with the instructions provided in such leaflets and labels.

In addition to the agreement with the generator treatment works proposed in Part 503, the Agency may also regulate the distributor through a permit, particularly a distributor who accepts sludge from several treatment works and prepares it to be sold, possibly mixing the sludge with other sludges or other materials when producing products to be marketed. Where such "distributor" alters the sludge quality, it is a "treatment works treating domestic sewage" and is required to obtain a permit. Permitting these distributors is appropriate for three reasons: (1) To more effectively ensure that relevant information regarding sludge quality and appropriate uses is passed on to the end users; (2) to ensure that the quality of the end product, which may change from that of the sludge as a result of mixing with other materials, meets Part 503 requirements; and (3) the distributor may be located in a different State or county from the treatment works, where the State or county laws are more stringent than those where the treatment works is located. Again, it may be appropriate to make the treatment works and the distributor co-permittees.

In response to comments that federal regulations for distributed and marketed sludge preempt local law, EPA does not feel that this approach would be in accordance with section 405, which expressly provides that the decision of the appropriate use and disposal method is a local one (section 405(e)) or with CWA section 510, which provides that States are free to set more stringent standards. One commenter also asked whether a sludge distributor would be required to obtain a permit in every State where its product was sold. This is not a requirement under today's rules. However, the distributor must comply with whatever State law requires for distribution and/or sale of sludge or sludge products in that State.

Today's rule gives the EPA Regional Administrator the authority to designate a user or disposer as a "treatment works or other treatment works treating domestic sewage" where he or she deems it is necessary to protect public health and the environment from potential adverse effects of sewage sludge pollutants or poor practices, or to ensure compliance with the technical standards. Thus, the permit mechanism can be employed to help guarantee that sludge will be used or disposed of safely. Making the authority discretionary enables the permit authority to take this approach where warranted, rather than imposing a permit requirement on all sludge handlers, which EPA believes would be unworkable and undesirable. Where the Regional Administrator finds that such designation as a "treatment works treating domestic sewage" is necessary, he or she shall notify the user/disposer, who has 120 days to submit a permit application. The reasons for designating a user or disposer as a treatment works should be stated in the permit's supporting documents, such as the fact sheet or statement of basis. This designation authority applies only when EPA is responsible for administering the sludge program. States have some flexibility in developing appropriate means of regulating users and disposers of sewage sludge.

Note: The Part 503 standards are independently enforceable even if no permit is issued.

In summary, under today's rule, in general the generator treatment works' permit is the primary vehicle for implementing the technical standards. However, the generator's permit may be limited in some circumstances. All permits issued by EPA (i.e., in unapproved States) to POTWs or other treatment works treating domestic sewage would, at a minimum, contain conditions as to sludge quality, including monitoring, recordkeeping, and any other requirements necessary to ensure that concentrations of pollutants in sewage sludge and other requirements concerning sludge composition meet federal standards, including information as to agreements with the recipients of the sludge. In the case of incineration and disposal in monofills, the requirements could be divided between the generator treatment works' and the receiving treatment works' permit. In the case of sludge sent to a MSWLF, the generator treatment works is responsible for sludge quality and for sending its sludge to a facility which is State-permitted under RCRA Subtitle D. The landfill operator is directly subject to RCRA Subtitle D. With land application, proper use by recipients of the sludge is assured through contracts or similar mechanisms between the treatment works and contractors, and between contractors and the user. Requirements for sludge that is distributed and marketed are generally more stringent, because EPA, through permits, or the POTW, through contracts, cannot effectively control how the product is used. The generator treatment works is responsible for providing information as to appropriate uses; the user is responsible for complying with the instructions in the accompanying leaflets or labels. In special circumstances, someone who does not fit within the definition of "treatment works treating domestic sewage" may be designated as a treatment works and required to obtain a permit for its sludge use or disposal activities.

With regard to State programs, today's rule requires that States: (1) At a minimum, prohibit all use and disposal of sewage sludge that does not comply with federal standards, and (2) issue permits to POTWs or other treatment works treating domestic sewage which, at a minimum, require the permittee to comply with applicable Part 503 requirements regarding sludge composition and requirements for contracts with other persons handling the sewage sludge in the case of application to land and distribution and marketing. Today's rule gives flexibility to the States to devise appropriate means of regulating other users and disposers, such as site permits, general permits, rules of general applicability, etc.

E. EPA's Authority Under Section 405(d)(4) of the CWA

The revisions to Part 122 promulgated today codify the requirement in the 1987 amendments directing the Administrator, prior to the promulgation of the technical sludge regulations to "impose conditions in permits issued to [POTWs] * * * or take other measures as the Administrator deems appropriate to protect public health and the environment from any adverse effects which may occur from toxic pollutants in sludge." This provision provides the basis for EPA's interim sludge permitting strategy, discussed elsewhere in this preamble.

EPA reads section 405(d)(4) also to require EPA to protect public health and the environment after promulgation of the Part 503 technical standards including, where necessary, the development of permit conditions to control sludge use or disposal on a case-by-case or "best professional judgment" (BPJ) basis. This is in addition to the requirement to impose conditions in NPDES permits that implement the requirements of Part 503 (the technical standards) and applies whenever a technical standard in Part 503 does not address a particular pollutant or practice which EPA determines is of concern. Similarly, section 405(d)(4) authorizes imposition of interim sludge requirements in permits issued to non-POTWs (e.g., privately-owned treatment works treating domestic sewage, sludge incinerators unconnected to a facility treating domestic sewage) if necessary to protect public health and the environment prior to the promulgation of applicable Part 503 requirements.

In sum, in section 405(d)(4) Congress requires EPA to take action now to protect the environment and to utilize whatever mechanism is necessary, including the issuance of permits, to effect this protection. In the preamble to the proposed rule, EPA solicited comments on whether, pursuant to Section 405(d)(4), it should also write permit limits on a case-by-case, best professional judgment basis when an applicable Part 503 standard is outdated and therefore may no longer be adequately protective. This would enable EPA to use new information to write limits that implement the statutory standard without waiting until the completion of a new technical rulemaking, which can take several years to develop and finalize.

Numerous commenters, including States, POTWs, industries, and an environmental group, commented on various aspects of EPA's authority under section 405(d)(4). The main topics addressed in the comments included: (1) Appropriateness of writing BPJ sludge permit conditions in the absence of promulgated technical standards; (2) appropriate scope of BPJ conditions; (3) the status and effect of interim, BPJ sludge limits when an applicable Part 503 standard is promulgated; and (4) using BPJ limits in lieu of an applicable, but outdated, Part 503 standard.

Two commenters expressed general support, based on the statutory language, for writing BPJ sludge permit conditions in the absence of applicable Part 503 standards. Another commenter, however, said there was no need for such broad authority and that relying on the technical standards should be sufficient. Relying solely on the technical standards would ignore the language in section 405(d)(4) which provides for the development of permit conditions or other appropriate measures to prevent possible adverse effects of toxic pollutants in sewage sludge "prior to" the promulgation of technical standards. The legislative history also refutes the position that reliance on technical standards is sufficient by indicating that EPA's BPJ authority applies after promulgation of the first round of technical standards. Conf. Rep. No. 99-1004, 99th Cong., 2d Sess. at 160 (1986). Today's final rule merely codifies in § 122.1(b)(3) and § 122.44(b)(2) the authority granted by section 405(d)(4) to develop "interim" conditions and does not require individually developed sludge conditions in every NPDES permit. When such limits might be needed is generally a case-by-case determination. EPA has, however, published guidance and policy which explains how EPA is implementing section 405(d)(4). (See above discussion about EPA's Interim Implementation Strategy in section III.C.)

One commenter opposed the use of BPJ limits unless there would be an "opportunity for standard correction that is not preempted by anti-backsliding provisions." Under EPA's interim program and today's final rule, the basis for BPJ limits must be explained in the fact sheet that accompanies the draft permit. As with other permit terms, BPJ limits are subject to administrative and judicial review. Finally, as explained below in section V.F.2, the "anti-backsliding" provisions in the NPDES program do not apply to interim sludge limits. Therefore, the

concerns of the commenters in this regard are inappropriate.

Some commenters disagreed with EPA's interpretation of the proper scope of BPJ limits. One commenter stated that EPA's authority under section 405(d)(4) encompasses only "best management practices" (BMP) conditions, not limits on toxic pollutants in sludge. The commenter offered several arguments to support this interpretation: Congress used the words "conditions" in section 405(d)(4) rather than "limits," a distinction maintained throughout the Act; Congress did not intend imposition of toxic limits prior to the careful evaluation required to develop such limits through rulemaking (i.e., such limits would be contrary to the regulatory scheme of the Act); and imposing toxic limits now could potentially upset the balance between environmental and economic concerns by requiring capital expenditures that may not be necessary to meet subsequently promulgated technical standards. In contrast, another commenter said that EPA could develop BPJ limits only for those pollutants identified pursuant to section 405(d)(2) for POTWs prior to the adoption of final regulations under section 405(d)(2).

EPA disagrees that Congress intended the authority under section 405(d)(4) to be so precisely limited as suggested by commenters. There is no significance to the use of the words "conditions" rather than "limits" in describing EPA's authority with regard to the contents of permits. "Conditions" is a generic term that refers to a broad range of requirements, including numeric limits on sludge quality and best management practices, imposed on permittees through the terms of a permit. The legislative history supports this broad interpretation. The conference report on the 1987 amendments explains that "the conference substitute directs the Agency to impose conditions in individual 402 permits incorporating criteria and limitations on sludge or use or disposal or take other appropriate measures to protect public health and the environment. * * * until the Agency implements the regulations required by paragraph (2)." Conf. Rep. No. 99-1004, 99th Cong., 2d Sess. at 160 (1986). One reason for this provision was "* * * recognition of the fact that some compliance deadlines for toxic contaminants in the second phase of regulation may extend to late 1989. * * *" *Id.* at 159. While this supports Congressional intent to authorize permit conditions addressing pollutants identified pursuant to section 405(d)(2), it does not support the argument that only those pollutants that have been identified could be limited by "interim" conditions in permits or other appropriate measures.

EPA's interpretation of section 405(d)(4) is consistent with the regulatory scheme as explained in the legislative history. Still, EPA is sensitive to the problems that may arise if "interim" conditions significantly differ from those that will be required by the technical regulations. Thus, in developing its interim permitting strategy the Agency has sought to adopt approaches which are consistent with the anticipated direction of the technical standards. In addition, a primary emphasis of the interim strategy will be ensuring compliance with existing federal requirements, such as 40 CFR Part 257. Generally, additional limits will be required only for POTWs with known or suspected sludge use or disposal problems. The recommendations for additional limits are based on existing federal guidance and State requirements, and consist in most cases of best management practices, rather than numerical limits. EPA has adopted this approach in recognition that such measures are interim only. EPA's primary objective under section 405(d)(4) remains the protection of public health and the environment.

In a similar challenge to the scope of EPA's authority under section 405(d)(4), one commenter argued that the statutory deadlines in section 405(d)(2) mean that Congress intended the authority under section 405(d)(4) to expire by August 1988 (the statutory deadline for compliance with the first round of technical standards) and that EPA's interpretation of section 405(d)(4) as a continuing grant of authority "to further delay development of this program" is contrary to Congressional intent.

This argument is without merit. Nothing in the statute or legislative history suggests that EPA's authority under section 405(d)(4) expires by a date certain. (In contrast, the statute clearly states that authority to approve removal credits expires by August 1987, the deadline for promulgating the first round of technical standards.) Congress is undeniably impatient for promulgation of comprehensive sludge technical standards because of the potential environmental and public health impacts of disposing of contaminated sewage sludge. Congress' impatience and the focus of its concern are reflected in its decision to require interim measures in section 405(d)(4). To interpret EPA's authority under section 405(d)(4) to expire by a certain date regardless of the status of the technical standards totally ignores the purpose of interim limits to protect public health and the environment. Indeed this purpose, together with a statutory requirement to continually review, revise, and develop additional technical standards even after promulgation of the second round of regulations, argue for a continuing responsibility to impose interim conditions in the absence of technical regulations.

EPA received mixed comments on whether BPJ limits would be appropriate as substitutes for applicable technical regulations when those regulations were outdated and no longer were sufficient to protect public health and the environment. States, a POTW, and an environmental group all supported the general concept of using BPJ in lieu of an applicable, but outdated, Part 503 standard. Most commenters, however, expressed reservations or conditions, sometimes contradictory, as to the appropriate authority for taking such action. For example, two commenters said States should have the authority to supplant Part 503 standards to take into account local conditions or needs, while two other commenters (also States) said EPA must carefully control BPJ authority in this situation to avoid confusion, inconsistent application, and immediate State imposition of alternate BPJ limits upon promulgation of Part 503. Several supported this option only if the alternate standards would be subject to scientific review in addition to public review. One commenter said alternate limits that were less stringent than existing Part 503 regulations should also be available. On the other hand, three commenters, all regulated parties, opposed the use of BPJ limits in lieu of Part 503 standards as contrary to the scheme under the CWA for promulgating and regularly updating the technical standards.

Technical standards may become outdated. However, as noted by even the supporters of a broad BPJ authority, determining when a standard has become outdated and therefore not sufficiently protective of public health and the environment for any particular pollutant would be difficult. Moreover, the statute contemplates regular updating of the technical standards, through promulgation of new regulations, and requires EPA to see that accurate, up-to-date standards are in place. This scheme, and the integrity of existing technical standards, could be undermined by the use of BPJ limits to supplant regulations promulgated according to the Act's requirements. In any event, the potential need for interim

limits in lieu of "outdated" regulations is many years away. For these reasons, today's rule does not provide for the development of BPJ standards in lieu of an existing Part 503 standard. (Note, however, that EPA can develop BPJ limits for pollutants, management practices, etc., which are not regulated by the Part 503 standards applicable to the use or disposal method used by the permittee.)

F. Permitting Requirements (Part 122)

1. General

Part 122 establishes the essential requirements for NPDES permits issued pursuant to section 402 of the Act by EPA or an approved State. It establishes the scope of the NPDES permit program, general requirements governing the administration of the program, application requirements, required permit conditions, and permissible causes for modifying or terminating NPDES permits. Before today's final rule, these regulations specifically addressed sludge requirements for NPDES permittees in a very limited way. The NPDES regulations provided that sludge may not be discharged to waters of the United States and more generally required that NPDES permits contain any conditions required by section 405 of the Act regarding the disposal of sewage sludge from POTWs (§ 122.44(o)). Part 124 contains the procedural requirements for issuing NPDES permits and similarly lacked specific provisions for sludge.

The WQA of 1987 requires that the Part 503 technical sludge regulations be implemented through permits and designates NPDES permits as the primary implementation mechanism, unless the Part 503 requirements are implemented through permits issued under other Federal programs (Subtitle C of RCRA, Part C of the Safe Drinking Water Act, MPRSA, or the Clean Air Act) or State programs approved pursuant to section 405(f). See section 405(f)(1). Accordingly, today's final rule amends Part 122 to establish requirements for including in NPDES permits any terms and conditions necessary to implement the sludge standards in Part 503 as well as any others which may be necessary to protect human health and the environment pursuant to section 405(d)(4).

In addition, EPA is amending Parts 122 and 124 to make the permitting program established under those parts the vehicle for EPA issuance of "sludge-only" permits under section 405(f)(2) of the CWA. That section authorizes EPA to issue permits which implement the sludge technical standards to any treatment works that treats domestic sewage where the treatment works is not otherwise subject to NPDES and is not subject to sludge requirements that implement section 405 contained in other Federal permits or permits issued under an approved State program. A treatment works that applies its effluent to land or uses an evaporation pond rather than discharging it to surface waters is an example of a treatment works that might be a "sludge-only" facility. Here, although the treatment works would not need an NPDES permit for surface water discharges, it may be a "treatment works treating domestic sewage" under section 405(f) and thus would require a permit under the final rule.

The revisions to Parts 122 and 124 promulgated today apply to all NPDES permits for treatment works treating domestic sewage which are issued by EPA and by States which choose to administer an approved sludge management program as part of their NPDES programs. These revised permitting requirements and procedures are also the basis for the permit requirements that must be followed by States which choose to administer an approved sludge program independently from an NPDES program, i.e., under Part 501. Part 501 separately lists the permit requirements and procedures applicable to non-NPDES State programs. The discussion of comments and changes from the proposed rule relating to those requirements, however, are included in the discussion below on specific revisions to Parts 122 and 124.

2. Specific Revisions

Purpose and Scope. Several revisions § 122.1 reflect the expanded scope of the NPDES program to include requirements for sludge use and disposal pursuant to section 405 of the CWA. These include: updating the citation for the Clean Water Act in § 122.1(a)(1) to include Pub. L. 100–4, the Water Quality Act of 1987; adding a new paragraph (a)(3) which states that the permit program established under Part 122 applies to the use and disposal of sewage sludge by owners or operators of any treatment works treating domestic sewage (whether or not they would otherwise be required to obtain an NPDES discharge permit) unless all requirements implementing section 405(d) regulations have been included in a permit issued under one of the Federal permit programs listed in section 405(f)(1) or an approved State program; in paragraph (d)(2), adding the Part 503 technical sludge regulations to the list of separate regulations which the NPDES permit program is designed to implement; including in paragraph (g) the provisions from the amended section 405 that address the inclusion of sludge conditions in NPDES and "sludge-only" permits and the authority for approved State programs under section 405(f).

Sludge-only facilities. Today's final rule expands the scope of Part 122 to cover "sludge-only" permits (§ 122.1) and to indicate where the requirements for "sludge-only" permits differ from the requirements applicable to other NPDES permittees (e.g., § 122.21(c)(2)), specifying when a "sludge-only" facility would have to apply; § 122.21(d)(3)(ii), specifying the information a "sludge-only" facility must submit with its application; § 122.44(j)(2), requirement for pretreatment programs when necessary to assure compliance with Section 405 requirements). No one commented on the proposed revisions to specify requirements applicable only to "sludge-only" facilities; accordingly, they will be promulgated as proposed. The general requirements applicable to NPDES permittees would also apply to "sludge-only" permittees except where the requirements, by their own terms, apply only to discharges to surface waters. Comments on expanding the NPDES permit program to incorporate a program for regulating sludge use and disposal are discussed in Section V.C. above.

By definition, "sludge-only facilities" are unique to an EPA-administered sludge program, i.e, they are facilities not covered by an approved State sludge management program. There is some confusion on this point. One State read the proposed rule to mean that it would have to establish an NPDES program for purposes of regulating facilities that apply their effluent to land rather than regulating these facilities through an existing non-NPDES program. That is not the case. Although the State sludge program will apply to all "treatment works treating domestic sewage"—those that currently are subject to NPDES permits as well as those that are not (e.g., non-discharging facilities)—the State may continue to regulate the non-dischargers through an existing non-NPDES program as long as it meets the requirements of Part 501. "Sludge-only facilities" will have the same requirements as other "treatment works treating domestic sewage"; the only difference is that with the "sludge-only facilities" the sludge requirements are not being implemented through an existing permit issued under another program. Therefore, a State may continue to regulate, through a program approved under Part 501, those facilities

which would be considered "sludge-only facilities" if EPA were the permit-issuance authority. In fact, to be approved under Part 501, the State must regulate all POTWs and other treatment works treating domestic sewage, regardless of whether these facilities have surface water discharges.

In response to comments, today's final rule includes several editorial changes to the definition of "sludge-only facility." First, the final definition refers to the defined term "treatment works treating domestic sewage" to clarify that only those facilities which fall within that definition can be "sludge-only facilities." Second, the final definition deletes reference to the term "sludge use or disposal practices." Commenters erroneously interpreted this reference to mean that, for example, access points to the collection system, septic tanks, farmers, and homeowners would be included within the definition of "sludge-only facility" and thus would be required to obtain a permit. This is not EPA's intent and therefore the phrase has been eliminated. Instead, the definition now refers to "sludge use or disposal method(s) * * * subject to regulations promulgated pursuant to section 405(d) of the CWA." This means only those treatment works whose use or disposal methods are regulated by Part 503 are included in the definition of "sludge-only facility."

Permit as a shield. Consistent with the language in section 402(k) of the Act and the 1987 amendments to section 405, EPA proposed to amend § 122.5, the "permit as a shield" provision, to exclude section 405(d) from the scope of that provision. Thus, under the proposed revision to § 122.5, compliance with a permit would not necessarily constitute compliance with section 405(d). The proposed rule retained "permit as a shield" coverage for section 405 (a)–(b) because those sections concern EPA's authority to require NPDES permits and establish effluent limitations for disposal of sewage sludge to surface waters to the same extent as for other pollutant discharges regulated through NPDES permits, and thus were unaffected by the 1987 amendments to Section 405.

At the same time, EPA explained that it did not read the CWA to prohibit limited protection for permittees who comply with their permit in certain situations. Accordingly, it solicited comments on two alternative ways to provide some protection to permittees from enforcement actions when they are in compliance with permit conditions designed to implement a Part 503 (i.e. section 405(d)) standard. One suggested approach was to adopt a limited affirmative defense which a permittee could assert in an enforcement action if it were in compliance with a permit condition developed to implement the Part 503 standard allegedly violated. The defense would not be available if the permit did not address the requirement allegedly violated or for compliance with interim limits developed on a case-by-case basis pursuant to section 405(d)(4) if the pollutant or other parameter in question were subject to a subsequently-promulgated requirement in Part 503 that addressed that pollutant or parameter. Under the second proposed approach, EPA would promulgate a regulation that deemed permit conditions which implement particular Part 503 standards to be Part 503 standards. Under this option, compliance with those permit conditions would be compliance with Part 503 and hence, compliance with section 405(d) requirements. The reasoning behind both approaches was that: (1) It would be unfair to subject a permittee to an enforcement action for a violation of section 405 when the permittee was in compliance with permit terms specifically designed to implement the Part 503 standard allegedly violated; and (2) providing protection to the permittee in this case reinforces the integrity of the permitting system and acknowledges the permittee's good faith efforts to comply with the section 405(d) regulations by complying with its permit.

Several commenters took issue with EPA's interpretation of the section 402(k) and its applicability to section 405(d) standards. The one commenter who objected to EPA's "limited affirmative defense approach" asserted that providing such protection would be a blatant circumvention of Congressional intent. Instead, the commenter argued, EPA should rely on its enforcement discretion in appropriate situations. At the other extreme, several commenters asserted that section 402(k) of the CWA does include section 405(d), i.e., the proposed revision to § 122.5, which would delete permit as a shield protection for section 405(d), was unnecessary and unauthorized. In support of this position, these commenters argued that: failure to revise section 402(k) was an oversight or was unnecessary because section 405 already falls within the scope of section 402(k) via § 122.5; section 405(a)–(c) make section 402 procedures and requirements applicable with equal force to permits issued under section 405; if Congress had intended to exclude section 405(d) from section 402(k) protection it would have done so explicitly (as in the case of section 307(a)); the Agency's interpretation is contrary to Congressional intent that section 402(k) was designed to assure that mere promulgation of limitations will not subject a permittee to prosecution until limitations are made conditions of a permit; and the Administrator has ample authority to reopen permits if necessary to protect public health and the environment.

EPA disagrees that the CWA proscribes one position or the other. Congress created an ambiguous situation by not revising section 402(k) to give the same "permit-as-a-shield" protection for compliance with permits which implement section 405(d) standards as it did for other standards under the CWA, but at the same time requiring that section 405(d) be implemented through permits, including section 402 permits. The statute also requires, without exception, compliance with regulations promulgated pursuant to section 405(d) within one year after promulgation of the regulations, whether or not the standards have been included in a permit, and Congress clearly intended that the regulations be directly enforceable. Conf. Rep. No. 99–1004, 99th Cong. 2d Sess., printed in 132 Cong. Rec. H10577 (October 15, 1986). The fact that section 402(k) does not specifically exclude section 405(d) from its scope as it excludes section 307(a) adds to this ambiguity. EPA therefore must use its judgment in determining which course can best further Congressional goals. In this case, EPA has determined that those goals can best be served by promulgating a regulation that protects a permittee who complies with a Part 503 standard in the limited circumstances described above under the first proposed alternative. Further, EPA believes that such protection is warranted in the case of citizen suits brought under Section 505 of the CWA as well as for EPA enforcement actions. Therefore, it is necessary to establish this protection for permittees in the regulations, rather than by exercising enforcement discretion. Today's rule is consistent with the CWA because it does not protect against liability for a failure to comply with the statutory deadline (i.e., compliance with interim permit limits would not insulate a permittee from liability for failing to comply with Part 503 standards by the statutory deadline).

Despite disagreements about the rationale for and appropriate scope of protection, commenters overwhelmingly supported the general concept of

providing protection against enforcement to a permittee who complies with its permit for the reasons stated in the preamble to the proposed rule. Both alternatives discussed above received approximately the same amount of support, although commenters generally did not explain why they preferred one over the other. One commenter suggested that the need to provide such protection could be avoided by making the Part 503 standards advisory guidance rather than binding regulation. This alternative is not available under the CWA because the statute clearly requires that the Part 503 standards be in the form of regulations and that those regulations be directly enforceable.

In today's final rule, EPA is promulgating the first alternative, which establishes an affirmative defense to an enforcement action for violating the Part 503 regulations (i.e., section 405(d)) based on compliance with permit conditions designed to implement a particular Part 503 standard. EPA chose this approach rather than the second alternative, because the affirmative defense approach is more tailored to the narrow purpose of protecting permittees who are in good faith compliance with their permits against enforcement actions. The second proposed approach could have been read more broadly to establish an alternative standard-setting mechanism.

Permittees may assert the affirmative defense only in limited circumstances. It would apply when the permittee can demonstrate compliance with a permit condition that was developed to implement a particular Part 503 standard. One commenter said that the defense should cover both permitted and unpermitted conditions (covered by Part 503) to avoid confusion and frustration for the permittee and Agency. EPA agrees as long as the "unpermitted condition" is addressed in the applicable Part 503 standard and the permittee can demonstrate that it was not limited in the permit because it was determined not to be of concern (e.g., through documentation in the fact sheet). The defense would not apply, however, where a Part 503 standard is not included in the permit because the permittee failed to submit all relevant information requested during the application process or pursuant to its duty to update or supply missing information. Compliance with permit conditions implementing Part 503 standards is not a blanket shield, however. Compliance with permit conditions implementing Part 503 standards that apply to one disposal option would not be a defense to an action based on violating standards applicable to another disposal option. Likewise, it would not protect the permittee from liability for complying with subsequently promulgated or revised Part 503 standards applicable to the permittee's sludge use or disposal practices. Providing a defense in this situation would be contrary to the statutory deadlines in section 405(d)(2) for complying with the technical standards.

Under today's rule, compliance with interim limits developed on a case-by-case basis pursuant to section 405(d)(4) of the Act would not shield the permittee from an enforcement action for violating a subsequently promulgated Part 503 standard that was more stringent or broader than the interim limit. A few commenters specifically suggested that any defense should apply in this situation. Other commenters similarly argued that interim limits should protect a permittee from permit modifications to implement a Part 503 standard promulgated after permit issuance. For example, one State said that such protection is necessary because State law prohibits permit modification for ten years. Here again, providing a defense based on compliance with interim limits would be contrary to the statutory deadlines for complying with the technical standards in section 405(d)(2). (Note also that a ten-year permit is contrary to today's final rule. *See* § 122.46 and § 501.15(a)(5).) It is also important to note that today's final rule creates an affirmative defense to enforcement actions. It does not create a bar to permit modification for cause. Today's final rule has been revised to specifically provide for reopening and modifying permits to incorporate Part 503 standards which are promulgated after permit issuance.

One commenter argued that compliance with the permit should be a complete defense for each pollutant limited in the permit for all pathways of exposure including those regulated under other laws; otherwise excessive and unnecessary burdens would be imposed on small entities and their ability to compete, especially if liability reaches small entities like landscapers and garden shops. Limiting liability in this way is not possible since the CWA does not give EPA the authority to preclude liability under, or preempt, other laws (Federal, State, or local). (*See* sections 405(d)(5) and 510 of the CWA.) Any additional liability imposed on small entities has been imposed by the other statutes referred to by the commenter, not by these regulations. In fact, today's final rule creates a defense to liability (to the extent authorized by the CWA) when there has been good faith compliance by a permittee. Therefore, EPA disagrees that today's rule places an unnecessary, excessive, or unfair burden on small entities.

The affirmative defense created today applies only to a permittee's liability under the CWA (i.e., enforcement actions brought under Federal law). As noted above, EPA cannot in these regulations provide defenses to liability imposed under other laws, particularly State and local laws. Therefore, States with approved programs that wish to provide a similar defense under State law to permittees would have to do so separately. EPA would examine any defense under State law to ensure that it is not at odds with the limited defense available under Federal law.

Application procedures. Section 122.21 establishes application requirements for NPDES permittees. EPA proposed revisions to this section both for "traditional" NPDES permittees and "sludge-only" permittees. Today, the Agency is finalizing those revisions with the changes explained below.

The first revision to § 122.21(a), addresses who must apply for a permit. EPA proposed to revise this paragraph to state that, in addition to "any person who discharges or proposes to discharge pollutants," any person who owns or operates a "sludge-only facility" also has a duty to apply for a permit. EPA received no comments on this proposed revision. Therefore, the final rule is the same as the proposed rule.

The proposal also specified *when* sludge-only facilities would be required to apply: existing facilities within 120 days after promulgation of 40 CFR Part 503 (or earlier if necessary to protect public health and the environment); new facilities that commence operation after promulgation of 40 CFR Part 503, at least 180 days prior to the date proposed for commencing operation. This proposed revision has been changed to clarify more precisely when sludge-only facilities must apply, and, in response to comments, to address when other treatment works treating domestic sewage (i.e., those already covered under the NPDES program) must apply. Under today's final rule, States seeking program approval under Part 501 must also be able to implement requirements concerning when various parties must apply equivalent to those in today's final revisions to § 122.21. (*See* § 501.15(d)(1).)

Today's final revisions addressing when the application requirements must be submitted appear in a new paragraph

§ 122.21(c)(2). Under § 122.21(c)(2)(i), POTWs with currently effective NPDES permits must submit the required sludge information (explained below) with their next application or within 120 days after promulgation of an applicable Part 503 standard, whichever occurs first. POTWs are addressed separately because the 1987 amendments to the CWA provide for the immediate regulation of POTWs with NPDES permits. Under EPA's interim sludge permitting strategy, sludge permit conditions are to be considered for each POTW as its permit is reissued. Therefore, POTWs are required by today's final rule to submit information about sludge use and disposal with their next applications. Today's final rule also provides for a POTW to submit a new application if, during the permit term, a Part 503 standard applicable to the POTW is promulgated.

Sections 122.21(c)(2) (ii) and (iii) apply to non-NPDES POTWs, as well as all other treatment works treating domestic sewage, i.e., those facilities not specifically targeted for immediate regulation under section 405(d)(4) of the CWA. These include privately-owned treatment works treating domestic sewage and sludge-only facilities. As in the proposal, application information must be submitted by an existing facility within 120 days after promulgation of an applicable standard or earlier if the Director determines that a permit is needed to protect public health and the environment. Facilities that commence operation after promulgation of an applicable standard must submit the application information at least 180 days before the date proposed for commencing operation. Today's final rule is different from the March 1988 proposed rule in two respects. First, it has been rephrased to apply to privately-owned treatment works treating domestic sewage as well as to sludge-only facilities. Second, under the proposed rule, the duty to apply was triggered by promulgation of "40 CFR Part 503." This could be interpreted to require submission of application information upon the promulgation of the first round of the 503 standards even if those standards did not apply to the applicant's sludge use or disposal. Today's final rule clarifies that the duty to apply for a permit is triggered by promulgation of Part 503 standard that is applicable to the facility's sludge use or disposal methods. Therefore, facilities not covered by the first round of Part 503 standards (e.g., industrial manufacturing and processing or commercial facilities that treat domestic sewage along with process wastewater) generally will not be required to submit sludge application information until promulgation of Part 503 standards applicable to them. In all cases, however, the permitting authority could require any facility to submit information earlier when necessary to take interim measures to protect public health and the environment pursuant to section 405(d)(4) of the CWA or equivalent State authority.

Applicants are required to send their applications to "the Director." Under the NPDES regulation, "Director" means the Regional Administrator when EPA is the permit-issuing authority and the State Program Director in the case of an approved State NPDES program. One commenter asked that EPA revise the regulation to allow applications to be sent to "authorized administrators under the Director." Nothing in today's rule precludes States from requiring applicants to submit applications to authorized representatives of the Director. Therefore, a revision is not necessary. (Today's rule does, however, limit who may be authorized to make final decisions on permit actions. See the discussions on assignment of program responsibilities in section V.I.1 and on the conflict-of-interest standard for State permitting boards in section V.I.6 of this preamble.)

Today's rule does not require applicants to submit the required information about their sludge use and disposal practices on a particular form. One commenter said that EPA should require uniform national application forms to enable EPA and the States systematically to evaluate and use data from permit applicants. EPA agrees that these objectives are worth pursuing. EPA is in the process of updating the permit application forms for municipal dischargers, and expects to incorporate the sludge information required by today's final rule. The part of the form requesting sludge information should also be useful for obtaining information from non-municipal dischargers.

Application requirements. The March 1988 proposed rule also specified the application requirements for both sludge-only permittees and NPDES permittees that are POTWs or other treatment works treating domestic sewage in a proposed revision to § 122.21(d)(3). This revision provided that these permit applicants submit the information required under 40 CFR 501.15(a)(2). General information requirements included name, address, and location, and an identification of the activities which bring the facility under the jurisdiction of section 405. The applicant must also identify whether it is subject to any of the listed environmental permit programs. This is important in order to provide notice of the sludge permit to other affected programs and to determine whether some Part 503 requirements are already included in other permits.

More specific information requirements under the proposal included a topographic map of the treatment works property depicting the location of any sludge management facilities, including on-site disposal sites. Applicants also would have to describe their sludge use and disposal practices since use or disposal options will be the basis on which limits are established under Part 503.

Under the proposed rule, the description of sludge use and disposal practices would include a specific identification of the sites where the applicant proposes to transfer sludge for treatment and/or disposal, as well as the names of applicators, distributors, or other contractors that will handle the disposal of the applicant's sludge. In the case of sludge or sludge products (e.g., compost) which are distributed and marketed to the general public, the permit applicant would identify the distributor, if different from the applicant. This information will be important for purposes of tracking the sludge to ensure that it is properly managed as provided for in applicable Federal standards. (Whether persons other than the applicant (e.g., a contractor) must obtain a permit is discussed in section V.D.3 above.) Applicants must also state their annual sludge production volume.

The proposed rule also contained general requirements to submit available data on sludge quality and groundwater monitoring, to provide the permit writer with any additional information needed to ascertain compliance with the Part 503 standards, and to submit any other information the Director may reasonably require to assess the sludge use and disposal practices, for example, where permit conditions are developed on a case-by-case basis. In such circumstances, the permit writer may decide that groundwater factors at the disposal site, such as distance to water supply wells, water table fluctuations, and proximity to wetlands, should be considered in developing permit conditions.

The final rule includes two major changes to the proposed application requirements, which were adopted in response to comments. The first involves the use of approved land application plans for establishing requirements applicable to individual

land application sites identified after permit issuance (in lieu of the usual procedures for submitting application information and developing or modifying permit conditions). The second concerns the requirements to submit a topographic map. Each of these changes are explained in more detail below. In other respects, the final rule is substantially the same as the proposed rule.

Under the proposed rule, applicants would be required to identify on their permit application the location of all off-site sludge disposal sites. New sites identified after permit issuance would have to be first brought to the attention of the Director and the permit modified to approve specific application sites, following the usual procedures for permit modification.

A number of commenters, all State agencies, opposed requiring individual permit actions for land application site approvals because of the need for public notice and associated permit issuance procedures. Commenters asserted that the decision whether to provide notice for every site should be left to States or to local jurisdictions. Commenters also asserted that permitting procedures would be too burdensome if required for every site. One commenter noted that such procedures were not compatible with the need to issue land application approvals in coordination with crop growth cycles and suitable periods for sludge application. Two commenters asserted that requiring public notice for each site would discourage beneficial reuse because of public misunderstanding about risks. Two of the commenters proposed an alternative approach which is used by several States: rather than requiring individual permit actions for each approval of a land application site after permit issuance, the Agency should require POTWs (or other sludge generators) to submit a land application plan which would be subject to public notice and comment when the permit is issued.

After reviewing the comments on this issue, EPA has decided to modify its proposal so as not to unduly discourage beneficial reuse of sewage sludge. Today's rule adopts a variation of the commenters' alternate approach of requiring submission of a land application management plan. Under today's rule, an applicant that intends to apply its sludge to land must either: (1) Identify each land application site that will be used during the life of the permit on the permit application; or (2) submit a land application plan. Land application plans are not required for the land application of sludge that meets requirements for distribution and marketing of sewage sludge.

The application plan must, at a minimum, describe the territory covered by the plan, detail how the applicant or its agent will select and manage individual application sites, provide for advance notice of new land application sites and a reasonable opportunity to object to the permitting authority, and provide for public notice of new sites as required by State or local law, but in all cases, must require at least notice to adjacent or abutting land owners and occupants.

Additional details of the plan would be developed on a case-by-case basis, using guidance and any applicable Part 503 standards. For example, site selection criteria should address such conditions as slope of appropriate sites, any runon/runoff control measures, ground-water monitoring, and access control that may be needed at high use-rate sites, buffer strips around surface waters, drinking water wells and dwellings, minimum depth to usable ground water, and how an evaluation of site soil texture and parent geologic material will be factored into site selection. (These two factors influence permeability, infiltration, and drainage. Highly permeable soils such as sand and highly impermeable soil such as clay may present special design and operational problems.) Site management guidelines which should be addressed include sludge application rates, control of loadings of heavy metals (these pollutants tend to accumulate at application sites), seasonal limitations, and how compliance with important site selection factors (e.g., adequate buffer strips, slope limitations) will be maintained as the site is used.

Note: EPA's Process Design Manual for Land Application of Municipal Sludge is an excellent resource for permit writers to consult when reviewing land application plans.)

The applicant must submit its land application plan with its permit application. The land application plan would be subject to public notice and comment as part of the permit. Thereafter, approval of individual land application sites by the permitting agency is required, but the permitting procedures that normally would apply to permit modification (i.e., preparation of a draft permit, public notice, etc.) would not be required. Instead, approval of a new land application site (pursuant to an approved land application plan) would follow the procedures established in the plan. Minimally, the plan would require advance notice to the permitting authority and a reasonable opportunity to object, and notice to neighbors if not already required by State or local law. These are minimum requirements. The permit writer could determine that more extensive notice requirements are appropriate.

Today's rule also revises § 122.62 to provide for land application plans to be approved separately or revised as a permit modification.

EPA chose to provide for land application plans as an alternative to requiring identification of, and permit conditions for, all potential land application sites at the time of permit issuance because of the large number of land application sites that POTWs and other sludge generators use, and the impracticability of requiring full-scale permitting procedures before using any site that was not specifically identified at permit issuance. EPA considered, and rejected, requiring applicants to only apply sludge to sites identified in the permit application. As noted by commenters, this would severely restrict the flexibility of the applicant in managing reuse of its sludge, particularly for use on agricultural lands, and therefore discourage beneficial use, contrary to Agency policy and Congressional intent.

At the same time, EPA does not agree that public notice of sludge use and disposal is incompatible with beneficial reuse. In fact, public notice and education are necessary for building and maintaining public acceptance which will be critical for establishing viable beneficial reuse programs. Today's final rule provides for public notice without sacrificing the expedited procedures critical to programs for beneficial reuse of sludge on agricultural lands. Public notice is provided initially when the land application plan is developed as part of the permit. The public will have an opportunity to comment on the guidelines the POTW or its agent will follow in selecting and managing land application sites and on the notice procedures that the permittee must follow when it proposes to apply sludge to a site not identified in the plan. The requirement that permitting authorities approve individual sites gives the authority an opportunity to determine if the site is appropriate for sludge reuse under the criteria approved in the land application plan. State or local jurisdictions may choose at their discretion how much public notice should be required for each site identified after plan approval, but in all cases the permittee will be required to notify site neighbors.

To ensure that the public has a meaningful opportunity to comment on

the land application plan, today's final rule requires that the public notice of the permit reaches areas within the territorial scope of the land application plan. (See § 501.15(d)(5)(ii)(B) and § 124.10(c)(2)(i).) The public notice must indicate that the permit includes a land application plan (§ 501.15(d)(5)(iii)(a)(3) and § 124.10(d)(1)(vii)). In addition, a fact sheet must be prepared (§ 501.15(d)(4) and § 124.8(a) and the fact sheet for the draft permit must briefly describe the contents of the land application plan (§ 501.15(d)(4)(i)(C) and § 124.56(e)). The fact sheet should clearly explain that the land application plan will establish the public notice procedures that must be followed before applying sludge to future sites not known at the time of permit issuance. The other significant change to application requirements contained in today's final rule concerns the requirement to submit a topographic map. The March 1988 proposed rule would have required that all permit applicants submit a topographic map (or other map if a topographic map is unavailable) extending one mile beyond the property boundaries of the source, depicting the location of the sludge management facilities (including disposal sites).

Three State agencies, three POTWs or municipalities, and one POTW trade association provided comments on the topographic map requirement. Three commenters recommended deleting the topographic map requirement, leaving it for States to require at their discretion. Another commenter objected to the requirement for a one-mile radius and also recommended State discretion. One commenter read the proposal to require topographic maps for all sludge management sites and asserted that such a requirement was unreasonable and unnecessary for small sites. Two commenters recommended strengthening the requirement. One asked that topographic maps be required for all sites and not just sources, as most agronomic sites are more than one mile from the wastewater treatment plant. The others recommended that applicants be required to mark the location of all water bodies, water courses, wells, seeps and springs within a one mile radius of the perimeter of the site (not the source).

Today's final rule establishing map requirements differs from the proposed rule in one major way. The map must show the location of all water bodies and wells used for drinking water, in addition to the location of all sludge management facilities at the treatments works' site. Information about drinking water wells is needed only within a one-quarter mile radius beyond the property boundaries. Further, only information about drinking water wells listed in public records or otherwise known to the applicant must be submitted. Limiting the information about drinking water wells to existing information is consistent with similar requirements in the NPDES and RCRA programs. (*See* 40 CFR 122.21(f)(7) (NPDES); 40 CFR 270.13(1) (RCRA).)

Today's rule does not require all applicants to submit maps identifying all off-site (i.e., beyond the treatment works boundaries) sludge use or disposal sites it proposes to use. EPA agrees that maps may be necessary for some off-site locations, such as where large quantities of sludge are used or disposed of (e.g., landfills, sludge surface disposal sites, dedicated land disposal sites and incinerators) or where such information is necessary to develop adequate permit limits. Maps of disposal sites may indicate proximity to ground water recharge areas or surface waters, which may suggest the need for special permit limits to protect those areas from contamination. However, under today's rule whether maps for off-site use and disposal site would be appropriate is left to the discretion of the permitting authority. Today's final rule requires the applicant to submit this type of additional information when requested.

As proposed, today's final rule sets a minimum requirement for map dimensions (to which one commenter objected), but retains the size of the required map. A one mile radius has been determined by the Agency to provide sufficient information about potential environmental impacts from on-site activities on adjacent lands to determine appropriate permit conditions. In response to one comment, the Agency has added the requirement that maps depict water bodies (including surface waters, seeps, springs, etc.) and known drinking water wells within one-quarter mile of the property boundaries because sludge use and disposal may adversely affect surface water quality and nearby ground waters that may directly affect human health. As noted earlier, this makes the map requirements for sludge similar to requirements in other EPA programs. Indeed, since most treatment works affected by today's final rule are subject to the NPDES program, they will be able to meet most of the mapping requirements with the maps they prepare for the NPDES permit program (§ 122.21(f)(7)). Applicants would need only to add information not already specifically required, i.e., the location of on-site sludge management facilities. As with NPDES map requirements, applicants should use a standard U.S. Geological Survey map where available (7½ minute series; 15 minute series if the 7½ minute series is unavailable).

The final rules on application requirements also include two minor changes from the proposal. First, § 501.15(a)(2)(v), which requires a listing of all environmental permits, has been expanded to specifically require submission of any local sludge permits. (See paragraph (a)(2)(v)(I).) Second, proposed § 501.15(a)(2) (vii) would have required the applicant to submit any sludge monitoring data it had which was "representative of normal operating conditions at the facility * * *." In the final rule, the phrase "which is representative of normal operating conditions at the facility" has been deleted. EPA agrees with the commenter who said that all monitoring data, including data gathered under adverse conditions, should be reviewed before determining appropriate permit conditions. When submitting the monitoring data, the applicant should of course indicate the conditions under which the data was gathered.

As noted by one commenter, the requirement to submit monitoring data, "including available groundwater monitoring data with a description of well locations" does not mean that groundwater monitoring wells are required at all beneficial land application sites that receive sludge. Whether groundwater monitoring wells are required at any particular site will be determined either by the Part 503 technical standards or by the permitting authority using best professional judgment. When the applicant already has groundwater wells and monitoring data, the final rule requires the applicant to submit that data. In response to a comment, the final rule clarifies that the type of available groundwater data that an applicant may have, and thus must be submitted, includes approximate depth to groundwater. The commenter also suggested that drilling log data also would be useful for review purposes. When the applicant has such information, it must be submitted with the application.

Today's final rule, in a revision to § 122.21(p), requires that permit applicants must retain all sludge-related application data for five years, or longer if required by 40 CFR Part 503. This revision parallels § 501.15(a)(3) and is explained in section V.I.6. below.

General permits. Section 122.28 allows general permits to be issued to

cover a category of discharges within a specified geographic area when all sources: (1) involve the same or substantially similar type of operations; (2) discharge the same types of wastes; (3) require the same effluent limitation or operating conditions; (4) require the same or similar monitoring; and (5) in the opinion of the Director, are more appropriately controlled under a general permit than under individual permits.

Under the circumstances described in § 122.28 for NPDES, general permits have the potential to reduce significantly the administrative burden of issuing individual permits without sacrificing control over the regulated activities (and thus environmental quality). To provide the same advantages for regulating sludge use and disposal, EPA proposed to amend § 122.28 to allow general permits to cover sludge use or disposal practices under the same type of circumstances as permits for effluent discharges. Under the proposal, for example, a general permit could be written to cover all facilities that use the same disposal method and are subject to the same sludge quality requirements and management practices. It would not be necessary that all facilities covered by the sludge general permit also qualify for a general permit covering their effluent discharges. Thus, it would be possible for a facility to be covered by an individual NPDES permit which regulates its discharges and by a general permit which regulates its sludge practices.

Six commenters addressed the proposal to allow general permits for sludge. Only one commenter, a POTW, objected to general permits on the basis that sludge regulation typically calls for site-specific conditions. The commenter correctly notes that general permits are not useful when permit conditions would need to vary from site to site to implement the applicable standard correctly. Under the final rule promulgated today, general permits would not be allowed unless all entities covered by the general permit are subject to the same or similar permit conditions. Thus, where the sludge regulations require site-specific conditions that vary for each permittee, general permits would not be appropriate and individual permits would be required. While general permits may be useful for sludge regulations only in a limited number of situations, EPA thinks that the advantages they offer should nonetheless be available. For example, several commenters suggested using general permits for small treatment works in response to the Agency's solicitation of comments on the question of regulating small generators.

Three commenters endorsed the use of general permits for sludge regulation. One commenter, however, objected to allowing general permits for Class I facilities (i.e., pretreatment POTWs) because the reasons for designating a facility Class I (influent, size, complexity) militate against uniform requirements necessary for general permits. This objection is similar to the one discussed in the previous paragraph, as is the response. The rules describing when general permits may be used are sufficient to preclude use of general permits when they are inappropriate due to different conditions at the facilities. Therefore, there is no need for the rule also to prohibit general permits for a particular class of facilities.

One commenter asked whether EPA intended general permits to be available for similar land application projects, on similar soils, and which use sludge that is of similar quality. Since permits are not required for land application sites under today's rule, general permits for land application sites would not be appropriate. However, the concept of regulating multiple land application sites through one permit issued to the sludge generating treatment works is embodied in today's final rule through a provision for approved land application plans, discussed above in section V.F.2 of this preamble.

Permit boilerplate and conditions. Section 122.41 establishes "boilerplate" conditions which must be included in all NPDES permits, while § 122.44 establishes requirements for developing individual limits for each permit. The proposed rule contained several revisions to these sections to accommodate the need to include sludge-related conditions in permits.

Three of the proposed revisions related to the "permit as a shield" issue and the fact that under the CWA, compliance with an existing permit would not "shield" a permittee from having to comply with an applicable Part 503 standard by the statutory deadline. Several commenters objected to these revisions generally because it would be unfair to require a permittee to comply with new or additional conditions regarding sludge use or disposal in the middle of a permit term. However, as explained in the above discussion on "permit as a shield," the statute compels compliance with the Part 503 standards by set deadlines without exception. At the same time, the statute requires that the Part 503 standards be included in permits. To implement these directives, EPA is promulgating the following revisions in final form.

The first revision addresses the permittee's liability under the Clean Water Act for compliance with the Part 503 regulations. Section 122.41(a)(1) is revised to state that the permittee has a duty to comply with standards promulgated pursuant to section 405(d) (i.e., Part 503) whether or not the permit has been modified to incorporate the standard. Including this provision in all permits clearly notifies permittees of their potential liabilities under the Act for violations of section 405.

Two other revisions address the modification or revocation and reissuance of permits during their terms to incorporate Part 503 standards. Section 122.44(b) has been revised to authorize the permitting authority to modify the permit when Part 503 standards are promulgated after permit issuance if the standards are more stringent than existing permit limits. Similarly, § 122.44(c) is revised to require the permitting authority to include in permits a "reopener" clause, stating that the permit may be reopened to incorporate new section 405 standards under the circumstances described in § 122.44(b).

The final revision to § 122.44(b) differs from the proposed rule in that it authorizes, but does not require, the permitting authority to reopen a permit to incorporate subsequently promulgated Part 503 standards. Ideally, all permits will be modified or revoked or reissued upon promulgation of a Part 503 standard applicable to the permittee's sludge use or disposal practice, as the most effective way to assure that compliance will be achieved by the statutory deadlines. However, the permitting authority is not likely to have the resources to modify all permits at the same time. Creating a mandatory duty to reopen all permits could therefore be meaningless, and could delay giving attention to permittees which present pressing environmental problems. Today's final rule allows the permitting authority flexibility to establish priorities for permit modifications to address the most pressing concerns first. This approach was supported by State and regulated party commenters. In all cases, incorporation of an applicable Part 503 standard in permits would have to occur no later than at reissuance of the NPDES permit. Although permitting authorities have flexibility under today's rule, permittees would still be liable for compliance with Part 503 regulations by the statutory deadline.

Another group of revisions to §§ 122.41 and 122.44 relate to permittee monitoring requirements. The proposed revisions covered monitoring methodologies, frequencies, and reporting forms.

As explained in the preamble to the proposed rule, current regulations generally require that all monitoring be conducted in accordance with Part 136. However, Part 136 methods do not comprehensively address sludge monitoring and analysis. Therefore, to supplement Part 136, the Part 503 standards may specify required monitoring methodologies where Part 136 methods are inappropriate. Accordingly, EPA proposed to revise §§ 122.41(j)(4), 122.41(l)(4)(ii), and 122.44(i)(1)(iii) to state that sludge monitoring methodologies shall be as specified in Part 503, as well as Part 136. The one comment on this issue supported these proposed revisions. They remain unchanged in the final rule.

The more controversial issue raised by the proposed rule concerned required monitoring frequencies. Current NPDES regulations require that permits contain requirements for permittee reports of monitoring results at a "frequency dependent on the nature and effect of the discharge, but in no case less than once a year." § 122.44(i)(2). EPA proposed to revise this section to include reporting for sludge monitoring. Thus, the frequency of reporting sludge monitoring results which must be specified in the permit would be based on the nature and effect of the permittee's sludge use or disposal activity. How frequently reporting is appropriate would be determined by the permit writer's best professional judgment, but must be required no less than once a year.

The preamble to the proposed rule explained that the Part 503 standards may also specify recommended or required monitoring frequencies for various parameters and practices and that Part 503 was to be followed whenever applicable. The proposed Part 503 standards would establish minimum monitoring frequencies. In all cases, appropriate monitoring frequencies would be determined by the permit writer using his or her best professional judgment (i.e., in the absence of Part 503 standards or where the permit writer determines that monitoring should be more frequent than the minimum required by an applicable Part 503 standard).

EPA solicited comments on alternative approaches to setting monitoring frequencies. Specifically, the Agency asked commenters to address whether the regulations should establish minimum monitoring frequencies, and if so, whether the frequencies should be annually, quarterly, or monthly. EPA acknowledged the advantages of different approaches and explained that in establishing requirements, the Agency would balance the value of frequent monitoring for all permittees at regular intervals (early detection of violations and thus, potentially greater protection of the environment, and additional support for enforcement actions) against the cost burden imposed by monitoring requirements on the permittee and the need for monitoring frequencies tailored to the circumstances of the particular sludge generator.

Twenty-three commenters responded to EPA's solicitation of comments on the question of monitoring frequencies in the 1988 proposal. (Two commenters on the 1986 proposal also requested that EPA establish a minimum monitoring frequency.) One commenter said that the question of appropriate monitoring frequencies was a technical issue and therefore should be addressed in the Part 503 regulations rather than in this rulemaking. About half (mostly States) of the commenters directly or indirectly favored the approach embodied in the proposed rule which would leave the question of appropriate monitoring frequencies to the permit writer's best professional judgment. One commenter said that monitoring frequencies should be determined in the MOA. The most commonly cited reason for a flexible approach was that various factors should be taken into account in making this kind of determination. Among the alternatives for a minimum monitoring frequency (with additional monitoring as necessary on a case-by-case basis) discussed in the preamble, five (mostly POTWs) favored annual monitoring, one favored quarterly monitoring, one favored monthly monitoring, and one favored a tiered approach that would require Class I facilities to monitor monthly, and non-Class I facilities to monitor quarterly. Commenters also suggested various factors that should be considered in establishing appropriate monitoring frequencies such as the size of the facility, the type of disposal option used, and the cost to the permittee.

After careful consideration of all comments, EPA is promulgating a final rule which leaves monitoring frequency to the discretion of the permit writer, but requires at a minimum that monitoring be conducted annually. In addition, today's rule follows the proposal by requiring that the permittee report monitoring results at least annually (§ 124.44(i)(2)). Thus, there would always be at least one monitoring event during the reporting period. This helps ensure that the information is reasonably current without burdening the permittee.

EPA disagrees that the question of appropriate monitoring frequencies is solely a technical issue and therefore is an inappropriate subject for today's final rulemaking. Today's rule establishes a framework for a permitting program that implements the goals of section 405 and accordingly established many generic requirements for permit conditions. Today's rule requires that the appropriate monitoring frequencies be addressed in the permit. EPA agrees that monitoring requirements often involve technical questions. The Part 503 regulations propose minimum monitoring frequencies. To clarify this point and EPA's intent as discussed in the preamble to the proposed rule, today's rule specifically states that permits must include, at a minimum, any applicable monitoring requirements in Part 503, but in no case is monitoring to be conducted less frequently than once a year. Other proposed revisions requiring permit conditions to implement Part 503 standards would accomplish the same result. However, to avoid any confusion or question about this point, EPA has decided to restate the requirement in the regulation specifically addressing monitoring requirements.

Note: The final rule addresses sludge monitoring requirements separately from effluent monitoring to avoid confusion.

Beyond requiring compliance with applicable Part 503 requirements, and, at a minimum, annual monitoring, today's rule leaves the question of monitoring frequency to the permit writer's judgment. The final rule, in § 122.44(i)(1)(iii), clarifies that the permit must contain any monitoring requirements that are determined to be necessary on a case-by-case basis. The clear message of the comments was that numerous factors affect the appropriate monitoring frequency in any given situation. This supports a flexible approach. It does not mean that a more frequent schedule of monitoring to detect violations is no longer considered a valid goal of permittee self-monitoring requirements. However, nothing suggested in the comments succeeded in convincing EPA that it could establish a greater monitoring frequency in regulations that would be appropriate for the broad variety of situations and facilities. Guidance would be more appropriate for this purpose.

Monitoring requirements in permits should yield data that are representative

of the monitored activity (see § 122.48(b)). Size and the potential for a permittee's sludge quality to vary will be critical factors in establishing an appropriate frequency. For example, monthly monitoring might be appropriate for some large POTWs with complex influent.

Two commenters stated that an annual priority pollutant scan would be too costly a burden to place on smaller communities. Similarly, another commenter expressed concern that an "excessive" number of parameters (at an "excessive" frequency) would be required in the absence of the Part 503 technical standards. Nothing in the proposed or final rule establishes which pollutants should be monitored. Comments addressing the priority pollutant scan apparently refer to a recommendation in EPA's draft interim sludge permitting strategy. This strategy provides guidance on developing permit conditions, including monitoring conditions, prior to the promulgation of the Part 503 technical regulations, and accordingly would provide guidance for implementing today's final rule requiring monitoring conditions in permits that reflect the nature and effect of the regulated activity. EPA's Interim Strategy recommends annual priority pollutant scans to establish baseline data on sludge quality, and as a means to identify potential use and disposal problems prior to development of the technical standards. However, the Strategy also included exceptions to this recommendation which recognized that less extensive data might serve as well in two situations typical of small facilities: Use of wastewater treatment lagoons, and the absence of industrial influent. In addition, it must be remembered that the Interim Strategy serves to help identify potential problem facilities, and gives such facilities priority attention. Thus, the approach defers lesser problems. With the promulgation of the Part 503 technical standards, all facilities to whom the standards apply must comply with the standards, regardless of their size, number of industrial users, or other site-specific factors. With regard to monitoring parameters, permittees would, at a minimum, monitor for the pollutants limited in the Part 503 regulations that apply to that permittee's use or disposal method. Of course, the permit writer would use his best professional judgment to determine if monitoring for additional pollutants should be required in the permit.

Two commenters suggested that in some situations, for example, small privately-owned treatment works without industrial influent, research or literature analyses of sludge composition should be accepted as a substitute for actual monitoring at individual facilities. EPA disagrees with this approach. Research or literature analyses on sludge from particular sources can be useful tools for determining appropriate monitoring frequencies. However, literature values are not useful for compliance monitoring purposes. Actual monitoring results are needed to establish compliance status. Relying on literature values would also preclude detection of potentially serious, but unpredictable, problems such as sludge contamination caused by illegal dumping of hazardous wastes or by household or other non-industrial hazardous wastes. For these reasons, EPA is requiring that monitoring results must be based on actual monitoring.

The proposed rule also addressed how monitoring must be reported. The Agency proposed to revise § 122.41(1)(4)(i) and (ii) to state that monitoring of sludge use and disposal practices should be reported on forms specified by the Director (rather than on the DMR form, which is required for effluent data reporting under the NPDES program). EPA explained that it was not requiring use of a uniform reporting form because it had not yet developed a uniform reporting form for the results of permittee monitoring of sludge activities. Under the proposed rule, the Director (EPA or an approved State) would be expected to develop forms to elicit the relevant data from the permittee based on the monitoring and other conditions in the permit. Alternatively, the Director could specify other appropriate forms for reporting monitoring information, such as the forms used by the laboratory to report results of its analyses.

EPA received two comments on this proposed revision. A POTW supported it. The other commenter opposed letting Regions and States develop their own forms and strongly encouraged EPA to develop national reporting forms for sludge because they would improve the national database for sludge and promote equitable compliance enforcement and removal credit analysis. EPA agrees that uniform reporting forms could enhance the effectiveness of data collected. Accordingly, it is planning to study whether national forms are feasible for the sludge program (which has reporting requirements much more varied than those in the NPDES program). Once it is decided that such forms should be developed, they would be proposed for public notice and comment. However, EPA is not requiring reporting on such forms at this stage.

One commenter objected to § 122.41(1)(4)(ii), which requires the permittee to include on self-monitoring reports the results of monitoring done more frequently than required by the permit. The commenter expressed concern that this requirement could discourage voluntary monitoring. This is not the intent. The requirement to submit all monitoring has been an established requirement of the NPDES program for over ten years. It assures that self-monitoring reports are representative of the monitored activity and do not represent selected results. The March 1988 proposed rule merely proposed that this requirement apply as well to sludge monitoring reports (using sludge monitoring methods established or approved in 40 CFR Part 503). Since self-monitoring of sludge and related activities fulfills the same function as self-monitoring under NPDES, there is no apparent reason for the requirement to be different for sludge monitoring. Accordingly, the final rule is the same as the proposed.

EPA proposed minor wording revisions to various provisions to establish that the activity or requirement addressed by Part 122 regulations includes sludge use and disposal activities as well as effluent discharge activities (e.g., § 122.41(d), "duty to mitigate"; § 122.64(a)(4), termination of permit when permittee ceases regulated activity). EPA received no adverse comments on these proposed revisions and therefore is promulgating them in final form.

Another proposed revision concerned the compliance schedule provisions in § 122.47 (and an analogous provision in § 501.15(a)(6)). Section 122.47(a)(3)(i) was proposed to be revised to specify that interim progress reports on compliance with sludge standards must be required at least every six months. This called for less time between interim milestones than for NPDES compliance schedules because of the relatively short deadlines in the CWA for compliance with the sludge standards. Today's final rule is the same as the proposed.

EPA received one comment supporting the compliance schedule provision. Two commenters opposed this provision on the grounds that the compliance deadlines are unrealistic. One commenter suggested that States be given authority to determine compliance schedules for individual POTWs on a case-by-case basis. As explained in section V.B.3 above, the deadlines for compliance with the Part 503 technical standards were established by Congress

in the CWA. Therefore, EPA cannot establish different deadlines through regulations. Where compliance with a Part 503 standard is not an issue (for example, where the permit establishes case-by-case "interim" limits), the permitting authority would have more flexibility in establishing a compliance deadline. However, under today's final rule, compliance must be required as soon as possible.

As explained in the preamble to the proposed rule, where the existing provision in the NPDES regulations was broad enough to include a permittee's sludge activities as well as its discharge activities, it would apply to both unless specifically limited. Thus, no revisions to the existing language in those provisions were proposed because they were not necessary. This includes "need to halt or reduce activity not a defense" under § 122.41(c); "proper operation and maintenance" under § 122.41(e); duty to provide information" under § 122.41(h); "inspection and entry" under § 122.41(i). (Comparable requirements were proposed to be included in the Part 501 regulations and have been included in the final rule.)

In response to this proposal, a POTW said the boilerplate requirement stating that the need to halt or reduce the regulated activity would not be a defense to noncompliance (§ l22.41(c); § 501.15(b)(4)) would leave POTWs with no alternative, and asked EPA whether it planned to provide technical assistance to POTWs for permit violations beyond the POTW's expertise. This provision does not impose additional liability on permittees. It merely notifies the POTW that it will be held to strict compliance with its permit, even if it means that the POTW has to cease a particular activity in order not to violate the permit. In other words, the POTW cannot argue that it violated its permit because the only way it could avoid a violation was to cease or reduce the activity. A permittee will be expected to halt or reduce the regulated activity if it is the only way to achieve compliance. Otherwise, the permittee will be in violation of its permit and the CWA.

EPA cannot guarantee technical assistance to POTWs but generally expects to include technical assistance as a component of the national sludge program. In the meantime, POTWs should take full advantage of whatever assistance is available to develop new, or strengthen existing, pretreatment programs.

Commenters also offered suggestions for adding other permit requirements, based on the NPDES regulations, to the Part 501 regulations. One suggested addition was a "duty to reapply" analogous to § 122.41(b). EPA agrees that this provision would be useful to include in non-NPDES permits and therefore is adding it to § 501.15(b)(14).

Another suggested addition was a provision specifying when the noncompliance reports required by § 501.15(b)(12)(iv) must be submitted, using as models § 122.41(l) (6) and (7). EPA agrees with the general idea of specifying when required reporting must be submitted. However, § 122.41(l) (6) and (7) are generally tailored to specific types of noncompliance found in the NPDES program and therefore are not the most appropriate models for the sludge program. Instead, the final rule requires that any instances of noncompliance must be reported with the permittee's next scheduled self-monitoring report or as required by Part 503. See § 501.15(b)(12)(iv).

The final category of permit regulations discussed in the proposed rule was existing provisions which were intended to continue to apply exclusively to the permittee's discharge activities (i.e., were not intended to apply to sludge permit or sludge condition in permits). In some cases, revisions were unnecessary to achieve the intended results because the provision, by its own terms, is limited to effluent discharges (e.g., bypass and upset defenses (§ 122.41(m), (n)); new sources and new dischargers (§ 122.29)). However, in other cases EPA proposed, and today is finalizing, minor revisions to some provisions to clarify that they apply to discharge activities only (e.g., § 122.44(l)(1), reissued permits; § l22.45(b)(1), production-based limits).

The most significant provision in this category of regulations that do not apply to sludge use and disposal activities is § 122.44(l)(1), commonly known as the "antibacksliding" provision. This means that if the permit contains requirements developed on a case-by-case basis (i.e., based on the permit writer's best professional judgment) under EPA's interim sludge permitting strategy (discussed in section III.C. of this preamble) which are more stringent than subsequently promulgated Part 503 standards, the reissued permit may include requirements based on the less stringent Part 503 standard rather than the more stringent case-by-case interim limit. This would be true not only for pollutant concentration limits, but also for monitoring or testing requirements or management practices in Part 503. Because the Part 503 standards (and permit conditions implementing them) must protect public health and the environment from reasonably anticipated adverse effects, "backsliding" from more stringent interim requirements should not result in significant public health or environmental effects.

Permit modifications. Under NPDES, permits may be modified or revoked and reissued only for cause. Section 122.62 lists the causes for which permit modification or revocation and reissuance is deemed permissible. EPA proposed two revisions to this section related to sludge. Both are being promulgated as final.

First, § 122.62(a)(1) is revised to clarify that a permit may be modified (or revoked and reissued if the permittee agrees) when there is a change in the permittee's sludge use or disposal practice after permit issuance which would justify the application of different or additional limits. This revision directly relates to a corresponding revision to require a permittee to notify the Director of any significant change in sludge use or disposal practices under § 122.41(l)(1)(iii) (also promulgated today). These revisions are intended to cover situations where the permittee decides to switch to a different sludge use or disposal practice different from the one(s) described in the permit application and covered by the permit. It would not cover situations where the permittee alternates sludge practices (e.g., depending on the season) and the permit addresses each alternative.

Two commenters objected to requiring permit modifications when the permittee wants to change sludge use or disposal methods. One commenter said permit modification is unnecessary when the permittee is merely sending its sludge to a different disposal site permitted under a solid waste program. The commenter also suggested that minor modifications be used if no significant impact to the environment occurs. The other commenter argued generally that permit modifications for changes in sludge use or disposal methods was incompatible with well-designed sludge management plans and facilities that employ a variety of use or disposal methods.

EPA disagrees with the underlying assumption of the comments that sludge use and disposal standards need not be implemented through permits. Congress clearly provided otherwise. EPA also disagrees that minor modification procedures are appropriate because whether a particular method may significantly affect the environment cannot be determined in advance and without knowledge about the permittee's particular situation. However, both situations described by the commenters can be addressed at the time of permit issuance rather than

through permit modification. Nothing in today's final rule precludes addressing more than one sludge use or disposal method in the permit, whether employed on a regular basis or as a "back-up" method when the primary means of sludge use or disposal is unavailable.

One commenter said that requiring a permittee to notify the Director of changes in its sludge disposal practice was unnecessary since any deviation from permit terms would be an obvious violation of the permit. The purpose of the notice provision is not to excuse permit noncompliance, as the commenter seems to assume. Instead, it allows the permittee the flexibility to change use and disposal practices if it chooses, but requires the permittee to notify the permitting authority about any anticipated change in activity which may require changes in the permit. Based on this information, the permitting authority would then have to determine whether or not to require modification of the permit in order for the planned activity to occur (i.e, modification would be needed to avoid noncompliance). Therefore, the notification requirement serves a useful purpose, both for the permitting authority and the permittee.

An analogous notification provision in the proposed Part 501 rule specified that changes that must be reported included sending sludge to additional disposal sites not reported during the permit application process. This phrase (with a minor editorial change) has been added to the final revisions to § 122.41(l)(1)(iii) as well, with the caveat that notification is not necessary when additional sites are reported pursuant to an approved land application plan. As discussed elsewhere in this preamble, the final rule allows treatment works to seek approval of a land application plan for beneficial reuse projects, in lieu of requiring permit modification each time the sludge is sent to a previously unidentified site. This caveat appears in both the Part 122 and Part 501 notification provisions and is intended to complete other changes made to the final rule to allow for approval of land application plans.

The second revision would allow permit modification whenever required by a reopener clause to incorporate limits based on new standards for sludge use and disposal promulgated in 40 CFR Part 503. (In related revisions promulgated today, permits may be modified when the new standards are more stringent than existing permit limits (§ 122.44(b)) and the permit must contain a "reopener" clause to this effect under § 122.44(c)(4).) This revision authorizes the permitting authority to revise a permit to include Part 503 standards. As noted in earlier discussions, a permittee must comply with any applicable Part 503 standard by the statutory deadline even if its permit had not been revised to incorporate the standard. This revision also gives the permittee a basis for requesting modification of the permit to eliminate uncertainty about how the standard applies to the permittee's particular situation, when this is not readily apparent on the face of the regulation. Another advantage to obtaining specific limits implementing a Part 503 requirement is that it would provide the permittee with a basis for asserting the affirmative defense as provided in § 122.5.

In addition, EPA is revising § 122.62 by adding a new paragraph (a)(18) to provide for a permit modification to approve a new land application plan or revise an existing one. Land application plans are discussed in more detail above in the discussion about application requirements.

One commenter suggested that the regulations also provide for permit modification when there are changes in the permittee's influent "which result in a change to the applicable sludge regulations." The applicability of a particular sludge regulation depends on the use or disposal practice used by the POTW rather than on the characteristic of its influent. Therefore, it is unclear why a modification would be needed in this situation. A change in influent can affect sludge quality and consequently determine whether or not the permittee is able to comply with its permit limits and continue its chosen sludge practice. However, a separate provision to allow modification in this instance is not necessary because § 122.62(a)(1) (major or substantial alterations or additions to the permitted activity) would cover this situation.

Finally, one commenter noted that some of the permit regulations EPA expected to apply to sludge activities as well as discharge activities were being challenged in a pending lawsuit. The commenter, a party to that lawsuit, asked that it be given an additional opportunity to comment if any of the challenged rules were set aside and remanded. That lawsuit has since been decided. *See NRDC* v. *EPA*, 859 F.2d 156, 28 ERC 1401 (D.C. Cir. 1988). The only NPDES regulation remanded for further Agency action does not apply to sludge use or disposal activities. Therefore, additional revisions to today's final rule are not necessary as a result of that litigation.

G. Permitting Procedures (Part 124)

1. General

Part 124 establishes the procedural requirements for issuing, modifying, and terminating permits under several Federal programs, including NPDES. EPA proposed to have the procedural requirements in Part 124 that apply to NPDES permits apply as well to "sludge-only" permits authorized by section 405(f)(2) of the CWA. EPA also proposed revisions to Part 124 based on the incorporation of requirements addressing sludge conditions in NPDES permits. Today's rule finalizes proposed revisions to Part 124 with only minor changes from the proposal as described below.

2. Specific Revisions

"Sludge-only" permits. To make the Part 124 procedures apply to permits issued by EPA to "sludge-only facilities," EPA proposed revisions to several sections, including § 124.1 (purpose and scope), § 124.3 (application for a permit), § 124.71 (applicability of Subpart E governing evidentiary hearings) and § 124.111 (applicability of Subpart F governing non-adversary panel proceedings). EPA did not receive any comments on these proposed revisions. Therefore, the final rule will be the same as the proposed. As explained in the preamble to the proposed rule, EPA intends these revisions, together with the revisions to Part 122 described above, to serve as the requirements and procedures for EPA issuance of permits under section 405(f)(2) of the CWA to treatment works treating domestic sewage where the Part 503 standards have not been included in any of the permit programs listed in section 405(f)(1).

NPDES permits. The other proposed changes to Part 124 addressed the expanded content of NPDES permits to include requirements for sludge use and disposal. Among those proposed changes were revisions to the definitions of "applicable standards and limitations," "facility or activity," and "general permit." The definitions of "applicable standards and limitations" and "general permit" remain unchanged from the proposed rule. The definition of "facility or activity" has been revised slightly in the final rule to refer to "treatment works treating domestic sewage" rather than "treatment works," consistent with revisions to the same definition in Part 501.

Note: The preamble to the proposed rule erroneously stated that a new definition of "Class I sludge management facility" was proposed to be added to Part 124. A new

definition was not proposed since all definitions in § 501.2, including the definition of "Class I sludge management facility," were proposed to be adopted in Part 124. Today's final rule incorporates by reference in Part 124 all definitions in Part 501. Therefore, a separate definition of "Class I sludge management facility" in Part 124 is not needed.

Draft permits. A proposed revision to § 124.6(d)(4) would have required that draft permits include conditions necessary to meet the requirements of standards for sludge use and disposal and any other conditions related to sewage sludge required under §§ 122.41, 122.42 and 122.44. EPA received no comments on this proposed revision. Today's final rule is the same as the proposal.

Fact sheets. EPA proposed two changes to the rules governing the preparation of fact sheets to establish how sludge conditions were to be addressed. First, a proposed revision to § 124.8 would require that fact sheets be prepared for "Class I sludge management facilities." A similar requirement appeared in the Part 501 proposed rule (§ 501.15(d)(4)).

One State, commenting on Part 501, said generally that fact sheets and draft permits are unnecessary and cause delays. EPA disagrees. The purpose of draft permits and fact sheets is to inform the public and the regulated party (and EPA in the case of State-issued permits) of the restrictions that will be placed on sludge use and disposal practices and the basis for those limits. This information is needed so that interested parties can comment intelligently on what the agency proposes. The fact sheet also documents the agency's rationale for its actions on the permit, and therefore plays a critical function if the permit is subsequently challenged. Preparing the draft permit and fact sheets undeniably takes time in the short term. However, it can save time over the long term by minimizing questions, objections, and challenges to permits. Therefore, EPA is adopting a final rule that is the same as the proposed rule. A fact sheet must be prepared for Class I sludge management facilities, (i.e., POTWs required to have an approved pretreatment program under 40 CFR 403.8 or any other treatment works treating domestic sewage classified as such because of its potential to affect public health and the environment adversely).

The second proposed revision would require that fact sheets explain how "conditions or standards for sludge use and disposal" were derived (§ 124.56(a)) and where the regulated activity or facility is located (§ 124.56(c)). The purpose of the revision to § 124.56(a) was to require that the fact sheet contain an explanation of how sludge limits or conditions were calculated, whether based on the technical sludge standards (Part 503) or on the permit writer's best professional judgment. However, the proposed regulatory language was unclear in this regard and could be read to refer only to sludge limits and conditions based on the Part 503 technical standards. To clarify that EPA intends the fact sheet to address BPJ conditions as well, the final rule also includes a revision to § 124.56(b) to specifically reference conditions developed on a case-by-case or BPJ basis pursuant to section 405(d)(4) of the CWA.

Public notice. Section 124.10 governs when and how public notice of permit actions must be made. In the March 1988 proposal, EPA proposed two revisions to the public notice requirements. EPA is finalizing the first revision unchanged from the proposal since it received no public comments objecting to the proposed rule. This revision to § 124.10(c)(1)(ii) requires the permit authority to mail the public notice of a permit action to any agency known to have issued or be required to issue a sludge management permit or ocean dumping permit for the same facility or activity.

The second proposed revision to § 124.10 would require the public notice to describe the location of each sludge management facility (including disposal sites) and disposal or use practice (§ 124.10(d)(1)(vii)). Commenters on similar provisions in Part 501 objected to requiring public notice of each agricultural land application site where sludge is beneficially reused either because those sites may not be known at the time of the permit issuance or because subsequent notice for each site would jeopardize a land application program through delays which would interfere with crop cycles and other circumstances affecting agricultural use.

In response to these comments, today's final rule specifies that only use or disposal sites known at the time of permit application must be described in the public notice.

As discussed in section V.F.2. above, today's final rule also provides for land application plans where the sludge generator is unable to identify all future beneficial use sites that will be used during the permit term. Today's rule establishes minimum procedural requirements for land application plans, but does not require full-scale permit modification procedures for each new land application site. The land application plan itself, developed as part of the permit, would establish the procedures that must be followed before sludge could be applied to previously unidentified sites. To ensure that the public has a meaningful opportunity to comment on all aspects of the land application plan, today's final rule includes several revisions to Part 124 (and corresponding provisions in Part 501). First, § 124.8(a) has been revised to require a fact sheet whenever a permit includes a sewage sludge land application plan. (See also § 501.15(d)(4).) Thus, where a non-"Class I sludge management facility" has a land application plan, there must be a fact sheet. Second, the publication of the public notice must be co-extensive with the geographical area covered by the land application plan (§ 124.10(c)(2)(i); § 501.15(d)(5)(ii)(B)). Third, the public notice must indicate that a land application plan is a part of the proposed permit (§ 124.10(c)(2)(i); § 501.15(d)(5)(iii)(A)(3)). Fourth, the fact sheet must briefly describe how each required element of the land application plan listed in § 501.15(a)(2)(ix) is addressed in the proposed permit (§ 124.56(e); § 501.15(d)(4)(i)(C)).

Some commenters objected to any public notice because it could trigger a "not-in-my-back-yard" or "NIMBY" public response which could defeat attempts to beneficially reuse sewage sludge, no matter how environmentally safe it might be. EPA is aware that public opposition to beneficial reuse may not always be justified by environmental risks. However, EPA does not view withholding information as an appropriate response to public concerns about sewage sludge use and disposal. Instead, as noted by several commenters, public education concerning the potential benefits and risks of sludge reuse is needed.

Permit termination after approval of State programs. Finally, EPA today is revising § 124.5(d) to allow EPA to terminate a permit in the course of transferring permit responsibility to an approved State under § 501.14(b)(1) without having to issue a notice of intent to terminate (and without following the procedures applicable to draft permits). (Note: Although the preamble to the proposed rule indicated that this revision to § 124.5(d) was being proposed, the proposed revised language was inadvertently omitted from the March 9, 1988 notice.) No comments were received on the proposed revision. Accordingly, the final rule is the same as the proposed rule.

H. State Program Requirements: General

Today's final rule establishes the minimum requirements for approved State sludge management programs and procedures for approving, revising, and withdrawing approval of State programs. As proposed, a State may administer an approved sludge management program as part of an NPDES program or as a non-NPDES program. State programs are optional. If a State does not obtain program approval, EPA will be responsible for ensuring that the technical sludge standards are implemented through permits issued to POTWs or other treatment works treating domestic sewage in that State.

In developing the final rule, EPA relied on the authority and program direction provided in the Clean Water Act amendments of 1987. Except in very general terms, the 1987 amendments do not give EPA much direction on fashioning State program procedures and requirements. However, Congress provided some clearly articulated general principles. In section 405(f)(1), Congress directed EPA to promulgate procedures for approving State programs that "assure compliance with any applicable requirements of (section 405 of the CWA)." The legislative history further states that "approved programs must have substantive standards at least as stringent as those contained in the 405(d) guidelines." Sen. Rep. No. 99–50 at 47 (May 14, 1985). *See also* 132 Cong. Rec. H10576 (October 15, 1986).

EPA's expectations for approvable State programs are contained in Part 501, which applies to non-NPDES State programs. EPA used the February 1986 proposed rule as the basis for much of the March 1988 Part 501 proposal. For the permitting requirements and procedures which became necessary after Congress determined that the sludge technical regulations were to be implemented through a permit, EPA used the NPDES program regulations as the model for two reasons. First, those regulations reflect over fifteen years of experience and growth in a successful program. Second, the Act provides for implementation of the technical sludge standards through NPDES permits and approved State NPDES permit programs. Equity and consistency support similar requirements for non-NPDES programs.

A State sludge program may be administered as part of an existing State program (e.g., the State solid waste management plan) or it may be a separate section 405 sludge program, so long as it meets the requirements of the Part 501 regulations. States are, of course, free to adopt more stringent or more extensive requirements under section 510 of the CWA. State programs will be reviewed for their ability to meet the requirements of the Act and to ensure that there are no State provisions which may undercut or hinder implementation of the program, such as provisions authorizing variances from Federal technical standards.

Today's final rule also establishes the additional requirements that approved NPDES State programs would have to meet to be approved under section 405(f). The requirements are contained in the revisions to 40 CFR Part 123. Today's rule adds relatively few new requirements for States with existing NPDES programs. This assumes that the existing Part 123 requirements are broad enough to cover sludge requirements. Therefore, an NPDES State which seeks approval under section 405 would have to demonstrate through an application for program modification that its program covers implementation of sludge requirements to the same extent as other NPDES permitting activities and also covers activities unique to sludge management.

Although a State may choose to seek approval of its sludge management program under Part 123 (as part of its NPDES program) or Part 501 (as a non-NPDES program), the basic requirements for approval under either Part are the same. Maintaining consistency among State program requirements will help ensure that minimum standards apply nationwide, regardless of which program a State chooses for its sludge management program. The purpose of the program requirements under both parts is to produce programs which adequately ensure compliance with section 405(d) and meet the Congressional goal of approving State programs which are no less stringent than the Federal program.

The State program discussion first examines general issues, followed by a section-by-section analysis of Part 501 and revisions to Part 123.

1. Need for Regulations and EPA Approval of State Programs

Regulations establishing minimum requirements applicable to all States that administer an EPA-approved sludge program are necessary to ensure that the environmental goals of the program as envisioned by Congress will be met nationwide. These regulations provide for consistency and uniformity among programs, which promotes equitable treatment for regulated parties and integrity of the national program. Meeting these objectives demands a fairly rigorous approval process and close scrutiny of the State's program.

One commenter suggested that instead of requiring States to obtain program approval, that all sludge use and disposal be regulated through existing CWA programs: NPDES States would simply include sludge conditions into NPDES permits, while non-NPDES States would use the section 401 certification process to integrate their sludge programs into CWA programs. This suggested approach is not supported by the CWA. First, section 405(f) clearly provides for approved State programs. (A similar argument that NPDES States must revise their NPDES programs to include sludge regulation is discussed below in section V.H.3.) Second, the purpose of the section 401 State certification process is to advise EPA of conditions that are needed to implement State water quality criteria and standards so they can be incorporated into EPA-issued discharge permits. Congress did not amend section 401 to provide for sludge use and disposal as contemplated by the commenter. Further, it is unclear how the section 401 certification process, which addresses State requirements, would be useful for implementing the section 405(d) technical standards as required by the CWA. (For similar reasons, another commenter's suggestion that both NPDES and non-NPDES States should be able to incorporate State sludge requirements into federally-enforceable permits is inappropriate.)

A consortium of State sludge management agencies commented that EPA approval of State programs was important only for States without existing effective State sludge management programs, and that for States with effective programs, EPA's role should be that of facilitation, technical and financial assistance, research support, and information gathering. This commenter did not suggest reliable means or criteria for determining into which category a State would fall. Indeed, that is a major purpose of the approval process established in today's regulation. To obtain approval, States are asked to demonstrate that they have effective programs and that they can implement the Federal standards. EPA cannot responsibly fulfill its obligations under the Clean Water Act to approve State programs that assure compliance with section 405 without such information. For similar reasons, the "diversion" of resources from regulatory activities to undertake the approval process that

some commenters noted, is largely unavoidable.

Some commenters suggested alternatives to the formal approval process set forth in the proposed rule, that shifts the burden of information gathering and synthesis from the States to EPA. One commenter said that the adequacy of State programs could be determined through audits and oversight rather than through formal submissions (again for those States with existing effective programs). Another suggested that EPA undertake field audits and use checklists to gather information about State programs rather than requiring the State to submit documentation of their programs to EPA. Another suggested "self-certification." These methods, while useful, are more suited to ensuring that approved State programs continue to implement adequate programs than to determining whether such programs are adequate at the outset.

Shifting the entire burden of gathering information of the State's program to EPA would be inefficient. States are in the best position to gather information about their programs, especially if their sludge program is scattered among several agencies. Similarly, the State's Attorney General is the most authoritative source on State law. Even though EPA believes that States must continue to bear the major burden of documenting the adequacy of their programs, EPA will try to streamline the process and develop model documents to minimize time spent on developing program submission. In addition, the Agency plans to undertake informal program reviews to assist States in evaluating their programs to determine what changes would be needed to meet the approval requirements. Finally, EPA also has made numerous changes in specific requirements like the inventory (often cited as the most resource intensive of the requirements) and the list of bans and prohibitions to ease the burden on States.

2. Required Scope of Approved State Programs

Section 501.1(d) requires that States have authority to regulate all sludge management activities that may be practiced in the State (except that disposal of sewage sludge considered to be a hazardous waste under Subtitle C of RCRA need not be a part of a State's program under today's rule). This includes a range of sludge treatment and processing activities (plus related activities such as transportation and storage) and specific sludge use and disposal practices (e.g., land application, landfill, distribution and marketing, incineration, and any other sludge use and disposal practices, other than ocean dumping, as may be covered by federal regulations). For related activities, such as transportation and storage, the State need not demonstrate a comprehensive regulatory scheme. For example, States are not expected to have a manifest system for the transportation of sewage sludge. What is needed, however, is a showing that the authority exists to regulate these activities, as needed, to protect public health and the environment.

Unlike the proposed rule, today's final rule does not attempt to list all sludge management activities or practices that future federal regulations may address and that a State must be able to regulate. Instead, the final rule simply retains the general reference to "sludge treatment, processing and short term storage practices as may be covered by federal regulations." In some cases this section covers activities which will not be covered by the first round of the Part 503 technical standards (e.g., transportation, storage, treatment). However, States are still required to have the authority to regulate these activities in the event that subsequent rounds of Part 503 may regulate them, and because even in the absence of applicable Part 503 standards, States must have authority to take appropriate measures to protect public health and the environment from the adverse effects of sludge use or disposal comparable to EPA's authority under section 405(d)(4) of the CWA (§ 501.1(c)(4)).

Consistent with section 313(a) of the CWA, the State's approved program must also apply to federal facilities to the same extent as to other entities within the State. This requirement was stated explicitly in the 1986 proposal (proposed § 501.15(b) introductory language), but was inadvertently omitted in the 1988 proposal. (The reference to federal facility compliance in § 501.1(c)(i) clearly signalled the Agency's intent, however.) To clarify that federal facilities are covered, the final rule reinstates the explicit requirement that "The State sludge management program shall also be applicable to all federal facilities in the State."

Note: State NPDES programs are already required to cover federal facilities within the State.

In addition, the definition of "treatment works treating domestic sewage" in §§ 501.2 and 122.2 has been revised to specifically include federal facilities.

One commenter on the 1986 proposal said that the federal facility requirement was inadequate, given problems States have encountered in gaining access to federal facilities (particularly military installations which resist on national security grounds), and argued that the regulations should require States to demonstrate workable procedures to ensure access to federal facilities, guarantee federal facility compliance with all permitting, monitoring, and reporting requirements, and be subject to the same enforcement actions as non-federal facilities. The commenter further stated that EPA should assume responsibility for enforcement whenever States encounter resistance from federal facilities. EPA disagrees that additional regulations are necessary because today's final rule already requires that federal facilities be covered under an approved State program to the same extent as other entities. To require more, as suggested by the commenter, would be essentially meaningless and would not be an appropriate way to deal with the situations described by the commenter.

Although States will be required to have general authority to regulate these types of activities, they would not be expected to have specific regulations or the program capacity necessary to carry out such regulations until after the sludge technical regulations have been promulgated. Requiring States to have broad legal authority at the outset, however, minimizes the need for subsequent statutory changes, which may take up to two years (see § 501.32), in order to have authority to implement new federal regulations. Minimizing delays in State programs' ability to implement new federal sludge use and disposal requirements is particularly important because the CWA requires compliance with any new regulations within one year after promulgation (or within two years if the regulations require construction).

3. Mandatory v. Optional Programs

Under today's final rule, State sludge management programs are optional. All NPDES permits must contain the sludge standards mandated by CWA section 405(d) unless they are addressed under another Federal permit or a permit issued pursuant to an approved State sludge program. If the State does not have an approved program, EPA will implement the standards either through an NPDES permit (when it is the NPDES permit authority) or through a "sludge only" permit authorized by section 405(f)(2) of the CWA.

Giving States the option to choose whether to seek program approval represents a significant departure from the February 4, 1986 proposal which

would have required States to develop and submit sludge programs to EPA for approval as part of the continuing planning process required under section 303(e). EPA abandoned the mandatory program approach because in the 1987 amendments to the Clean Water Act Congress authorized, but did not expressly mandate, that States develop section 405 sludge programs. In contrast, when Congress amended the Clean Water Act in 1977 and added requirements to develop pretreatment programs, it expressly mandated that States with existing NPDES programs modify those programs to add pretreatment authority. EPA interprets this failure to require States to obtain EPA approval of their sludge programs to mean that Congress intended State programs to be optional.

At the time of the 1986 proposed rule, State programs were the only available vehicle for implementing a comprehensive sludge management program since the Federal statutes that established technical requirements for sludge use and disposal did not specify Federal implementation mechanisms. This too, changed with the 1987 amendments to the Clean Water Act authorizing EPA to issue permits in the absence of approved State programs. This scheme establishing Federal and State roles in the sludge management program is similar to the NPDES program where State programs are also optional. This is another reason for concluding that State sludge management programs under section 405(f) should be optional. However, as stated in EPA's 1984 "Policy on Municipal Sludge Management," it is EPA's policy that sludge management is a local concern and thus should be handled at the State and local level, within the context of broadly-established national objectives and standards. Section 101(b) of the CWA also encourages States to play a primary role in the implementation of the CWA programs. Therefore, EPA will encourage the States to develop approvable sludge programs, through such mechanisms as the continuing planning process and section 106 work program development.

Most commenters on this issue supported optional, rather than mandatory, State programs. Reasons given for supporting optional programs included the unreliability of Federal and State funding for State sludge programs, uncertainty about what the technical standards will require, questionable legal basis for mandating State programs under the CWA (particularly before the 1987 amendments), and the importance of handling sludge at the State and local level.

Support for mandatory State programs was similarly varied. One State supported mandatory programs, contingent upon availability of Federal funding. Unfortunately, EPA cannot guarantee this. One commenter supported mandatory State programs because "States are more familiar with facilities and regional concerns than EPA." EPA agrees that State programs are preferable for this reason but does not think it provides a sufficient basis for making State programs mandatory. Another commenter said State programs should be mandatory because "States require guidance and minimum standards for compliance monitoring." EPA agrees that establishing minimum standards for approvable State programs is necessary, but again does not think that this provides a sufficient basis for mandating State programs. Where States are unable or unwilling to meet the minimum standards, the standards will be met through the Federal permitting program.

One commenter, an environmental group, argued that EPA must require all States to have sludge management programs to plan for sludge use and disposal throughout the State pursuant to section 303(e), even if sludge permitting programs under section 405(f) were not mandatory. Essentially, the commenter argues that EPA cannot abandon the rationale for requiring State programs which it used as the primary basis for proposing State program regulations initially in 1986, i.e., that sludge management programs would be a part of the continuing planning process required of all States under section 303(e). EPA disagrees. In 1986, section 303(e) was the strongest basis available for establishing State programs and it did not readily adapt to an optional approach. The 1987 amendments, however, contained comprehensive provisions for sludge management and provided a more explicit basis and different approach for establishing State sludge management programs. In this context, EPA thinks it is appropriate to follow the Congressional lead in the 1987 amendments and make State sludge programs optional. Nothing in the 1987 amendments suggested that Congress intended to distinguish between management and permitting programs.

Because EPA has decided to make State programs optional, rather than mandatory, several provisions from the 1986 proposal are no longer applicable. Accordingly, EPA has not responded to comments on these provisions in promulgating the final rule. These provisions include one specifying a two year deadline for States to apply for program approval and a waiver for "quasi-States" (e.g., the District of Columbia).

The same commenter that argued that all States must be required to have EPA-approved sludge management programs also argued that States with approved NPDES programs must be required to obtain approval of their sludge permitting programs. The commenter offered three basic reasons in support. First, control over sludge use and disposal is an integral part of the pretreatment program and thus of NPDES permits. Therefore, States which issue NPDES permits must be able to regulate sludge use and disposal. Second, the 1987 amendments reinforce this interpretation in section 405(f)(1) by stating that " 'any permit issued under section 402 * * * shall include requirements for the use and disposal of sludge that implement the regulations established pursuant to subsection (d) * * *' " and that exceptions to this requirement are to be narrowly defined. Finally, the commenter argued that the CWA has always required sludge use and disposal to be addressed in NPDES permits under section 405 (a)–(c). The rationale behind these arguments appears to be that using NPDES permits to implement sludge requirements is the most sensible way to integrate sludge and pretreatment requirements.

EPA agrees that using the NPDES permit that also contains pretreatment requirements to control sludge use and disposal is a logical way to coordinate these closely linked activities. However, it does not follow that this is the only approach allowed under the Clean Water Act. On the contrary, the CWA embodies a flexible approach with regard to sludge permitting. Section 405(f)(1) requires conditions to implement the sludge technical standards in NPDES permits only if those standards have not been included in permits issued under certain other programs, including State programs that have been approved by the Administrator as adequate to assure compliance with section 405. Thus, the Act recognizes that the sludge requirements could be in a variety of permits and designates NPDES permits as the "backup" permit implementation of the sludge standards.

POTWs that are required to have approved pretreatment programs will still be required to comply with the sludge standards and to develop local limits or take other measures as part of their pretreatment program to assure

compliance with those standards regardless of what kind of permit the State uses to implement the sludge technical standards. Coordination may be more difficult when these related activities are regulated through different programs, but flexibility for state programs and minimizing disruption to existing non-NPDES programs are equally important goals.

A few commenters asked for clarification about EPA's role when an approved NPDES State does not have an approved sludge management program under section 405(f). One State commenter feared that undue disruption to existing State sludge and NPDES programs would result if EPA were to issue and enforce sludge permits in an approved NPDES State. Another State commenter, however, specifically endorsed this approach as nondisruptive to existing State NPDES programs because it would allow them to continue issuing NPDES discharge permits even if the State does not have an approved sludge program. A POTW expressed concern that its ability to continue disposing of sludge would be jeopardized if its State did not have an approved program and that it may be required to obtain both State and Federal sludge permits.

In the absence of an approved State sludge program, EPA will be responsible for issuing permits to treatment works treating domestic sewage that implement the sludge technical standards even if the State has an approved NPDES program. This approach follows from determining that Congress intended EPA-approved State sludge programs to be optional, even in NPDES States. Therefore, dual permitting under State and Federal programs is possible. While this may be perceived by some as disruptive to existing State programs, the alternative of making State sludge programs mandatory was viewed by EPA (and implied by commenters who favored the optional approach) to be more disruptive.

Permittees' liability for compliance with the sludge technical standards issued pursuant to section 405(d) of the CWA will be the same regardless of whether EPA or an approved State issues the permit. The CWA does not prohibit sludge disposal without a permit (as it does for effluent discharges), so a treatment works' ability to continue disposing of sludge should not be jeopardized by the absence of an approved State program or by the lack of a permit. However, under today's rule, treatment works must apply for a permit within the time frames established by today's rule (see §§ 122.21(c)(2) and 501.15(d)(1)(ii)) and must comply with any technical standards applicable to its sludge use or disposal method(s) by the compliance deadlines established in the technical regulations.

4. Partial Programs.

In the proposed rules, EPA asked for comments on whether partial State sludge programs should be allowed where a particular State agency had responsibility for regulating a particular use or disposal method, and the State only sought to administer this portion of the program (for example, the State Air office regulating sludge incinerators, but no other sludge use and disposal method). The 1988 proposal did not provide any regulatory language addressing partial program approvals, stating that the regulatory language would be included in the up-coming proposal to revise the NPDES regulations.

A similar, somewhat analogous provision appeared in the earlier, February 4, 1986 proposed rule. In that notice, EPA proposed to allow a State to request program approval for less than a complete sludge management program if the State submitted a general plan and schedule to implement a complete program within five years of the effective date of the regulation. There were nine commenters on this phased-in approval approach: seven States, one environmental group, and one association. It is important to note that the 1986 proposal would have *required* States to develop and obtain approval of a sludge program (whereas under the 1988 proposal, State sludge programs would be optional). It is within the context of requiring sludge programs that the commenters responded. Six of the nine commenters supported the phase-in approach. One supporter (a State) added a condition that compliance monitoring and reporting be included as minimum program elements. Another State added a caveat that the largest generators should be controlled first, and that the elements of a State program which comply with federal requirements should be the minimum components necessary for immediate implementation. Three commenters opposed the phased-in approach, expressing concern that the regulation provided an unreasonably long schedule for program development and thus there would be no incentive for State compliance. One State expressed concern that funding would drop out after the first two years.

There were six commenters on partial program approvals in response to the March 1988 proposal: five States and one environmental group. The five States all recommended that EPA allow partial State program approvals, on the basis that it provides greater flexibility in adapting the new federal regulations to existing State programs, and enables the State to target limited resources. Two of the States recommended that the issue be dealt with in the Part 501 regulations, rather than in the general NPDES proposal. One State commenter suggested that a State be allowed to seek delegation of the sludge program for existing NPDES effluent permittees, but that EPA be allowed to issue "sludge-only" permit. Another State commenter expressed the view that partial program approval should be allowed if a particular State agency has responsibility for regulating a particular sludge use and disposal method. This approval should be based on whether the particular State agency has the authority and resources to regulate the sludge management facilities under its jurisdiction consistent with the relevant provisions of the 40 CFR Part 503 technical regulations when promulgated.

The remaining commenter opposed allowing partial State sludge programs, principally on the basis that section 402(n) of the Clean Water Act allows partial programs, under certain conditions, for programs regulating discharges to navigable waters, not for the use and disposal of sewage sludge. This commenter expressed the view that State sludge programs should only be allowed as part of an NPDES program, on the basis that sludge regulation cannot effectively occur without NPDES and pretreatment integration. Therefore, sludge programs should be partially delegated only as a required element of a State NPDES program. With regard to circumstances where an alternative permitting program was used (such as the Clean Air Act), the appropriate provision would be proposed § 501.3, which would provide for coordination among the various permit programs to protect against duplicative permit coverage. The commenter also expressed the view that the "major category" of dischargers to navigable waters would cover all POTWs and other treatment works treating domestic sewage, and that the program must cover in a complete fashion all such facilities.

The preamble discussion to the proposed rule stated that the issue of partial sludge programs would be discussed in the proposed revisions to the NPDES regulations. Also, the March 1988 proposal did not contain any regulatory language for partial sludge

programs. Thus, while it would be simpler and faster to simply finalize the partial program issue in today's notice, EPA feels that this might unfairly compromise those individuals who were relying on having additional opportunity to comment when the general revisions to the NPDES regulations are proposed. Accordingly, today's notice contains only one provision addressing partial programs: Section 501.1(d)(1) provides that a State seeking approval of its sludge program pursuant to section 501 (i.e., the State is not using NPDES authority) may submit a partial program to be approved by EPA to the same extent as a State seeking approval of its sludge program under Part 123 (i.e., as a modification of its NPDES program). The proposed revisions to the NPDES regulations will contain a specific discussion and proposed regulatory language for Part 123 on partial sludge programs that will therefore apply to 501 sludge programs as well. Comments received from both the March 9, 1988 and February 4, 1986 proposed rules on the issue of partial sludge programs will be considered again and addressed in the rule revising the NPDES regulations.

5. Mixed Programs

Because the proposed regulations provided for approval of NPDES and non-NPDES State sludge programs (as well as the potential for partial program approval), several commenters raised questions about "mixed" programs (i.e., combinations of NPDES and non-NPDES programs in one State), and asked for clarification on how "mixed" programs should be implemented. One State read the proposed rule to require both NPDES and non-NPDES State program approvals where the State's NPDES program does not currently cover non-discharging POTWs (or where such facilities are regulated under another State program). Similarly, one State asked whether a State with an approved NPDES program would have to seek separate (non-NPDES) program approval for facilities such as land disposal sites not currently regulated under the State's NPDES program. Another State generally asked whether a State could regulate different required State program elements under different programs, such as NPDES and RCRA. A group of POTWs specifically endorsed this approach.

As explained in the above discussion about optional versus mandatory State programs, EPA has attempted wherever possible to provide flexibility to States, particularly with regard to the organization of State programs. EPA has also sought to minimize the differences between the Part 501 and Part 123 requirements so that States can choose freely an approach that best suits their existing organization and needs. Whether a State should seek approval of an NPDES or non-NPDES sludge program is left to the State's discretion. With very few exceptions, such as the conflict-of-interest standard for NPDES permitting bodies mandated by section 304(i) of the CWA and the requirement that all State agencies administering the NPDES program have statewide jurisdiction over a class of activities in § 123.22(b), the requirements would be the same.

Because the sludge permitting requirements will apply to many treatment works that now have NPDES permits, EPA expects that States with existing NPDES programs would find modifying their existing NPDES program and authorities the most sensible approach. To accomplish this modification, NPDES States would have to amend their NPDES legal authorities to include provisions for sludge management regulation that ensure compliance with section 405 requirements, in much the same way as EPA has in today's final revisions to Parts 122 and 124, and submit modifications of existing NPDES program documents to meet new requirements in revisions to Part 123. Where a State chooses to use a non-NPDES program to regulate sludge, it must follow the approval procedures in Part 501. The difference between using Part 123 or Part 501 is critical primarily in ascertaining how much documentation a State must submit to show that its program satisfies section 405 and the program requirements in today's rule.

Theoretically, separate approved Part 501 and Part 123 sludge programs could co-exist in a State only if each program receives approval as a partial program. Although EPA agrees that flexibility is an important goal, the fragmentation of sludge regulation and increased number of State programs to oversee that would result from allowing separate approved Part 501 and Part 123 sludge programs argues against this approach as potentially inefficient and confusing to the regulated community. As discussed above, the question of partial programs under both programs will be considered together in forthcoming regulations (including whether and how partial sludge programs should be allowed).

6. Small Generators

The March 1988 proposal solicited comments on alternative ways to permit numerous small facilities (for example, non-discharging, privately-owned domestic sewage treatment works) not previously regulated under any existing State or Federal program other than through individual permits so as to minimize the additional resources that would be needed to fulfill the permitting requirement. EPA also encouraged States to submit any data they have on the number of such facilities in their States and the amount and kind of sludge they produce.

One commenter argued that EPA should not even consider alternative ways to regulate small facilities, such as general permits or rules of general applicability, without a complete inventory of these facilities and data on their sludge quality. The commenter's concern was that by proposing alternative approaches, the Agency assumed that these facilities posed little or no risk. This is not the case. Whether an alternative, such as a general permit, is appropriate in a particular situation would depend on the facts in that particular situation. Seven State agencies also submitted comments on this issue, suggesting different ways to approach regulating small entities. Three States suggested that EPA should provide a *de minimis* exemption for small generators. Without clear statutory authority to provide such exemptions, however, the Agency prefers to avoid this approach. Also, as noted above, the Agency does not take the position, absent data, that small facilities pose no risks. Therefore, the Agency cannot justify adopting this approach. However, it should be noted that many small generators who send their sludge to POTWs for treatment (i.e., small package plants) will not be subject to the Part 503 standards and therefore would not be required to have a permit to implement those standards. Also, as discussed in section V.D.2, owners and operators of septic tanks are not required to obtain permits under today's final rule because septic tanks are not considered to be "treatment works treating domestic sewage" for purposes of section 405(f) of the CWA. This answers the concerns of one State which anticipated a significant resource burden if permits were required for single family residences.

Two commenters suggested tailoring permit conditions and procedures to the size of the facilities to minimize the burden on small facilities. This is possible under today's final rule. As one commenter noted, the NPDES permit program is already flexible in this regard by allowing testing and monitoring requirements to be determined according to site-specific conditions such as the size of the facility. The same flexibility is a part of the sludge

permitting program under today's final rule. Other requirements, such as application information that must be submitted, are also likely to be less for small facilities than for larger facilities, because the systems are less complex. Similarly, certain permit procedures apply only to Class I Sludge Management facilities, which are likely to be larger facilities.

One commenter suggested phasing-in coverage of the program, beginning with municipalities and then addressing the small industrial or sewage treatment package plants. This occurs in two ways under today's final rule. First, permits generally will not be required for non-POTWs until a Part 503 standard applicable to the facility has been promulgated. Thus, industrial facilities which treat domestic sewage and industrial wastes together will not be required to obtain permits (or have sludge conditions included in existing permits) immediately because, under current Agency plans, sludge from these facilities will not be covered by the first round of Part 503. (Permits or other measures could be required, however, on a case-by-case basis if the Director determines that the facility's sludge may adversely affect public health or the environment under the authority of section 405(d)(4) of the CWA. These sludges would also be subject to RCRA regulations as solid wastes, as they are under existing law.) More generally, today's final rule gives the permitting authority discretion to establish permitting priorities (based on potential harm to public health or the environment) in determining when to incorporate Part 503 standards once those standards have been promulgated. (See the discussion below on permit reopeners.)

One commenter suggested that general permits be used for "boilerplate type situations" that require minimum review, such as lime stabilization units for treating septage and portable toilet pumpings prior to land application. Another commenter also suggested the use of general permits in limited situations. General permits allow similar facilities requiring similar requirements to be covered by one general permit rather than by individual permits. Whether they are appropriate in any given case, of course, cannot be determined in advance. However, EPA agrees that general permits may be a useful tool in the sludge permitting program. Accordingly, revisions to the NPDES general permit regulations to allow for their use to regulate sludge use and disposal have been adopted as a part of today's final rule and are discussed in section V.F.2 above. States may also be approved to issue general permits for sludge use and disposal.

7. Indian Tribes

In the 1987 amendments to the CWA, Congress authorized Indian Tribes to be treated as States for purposes of administering an approved NPDES program. See section 518. (This would include NPDES programs that include sludge management programs approved under 40 CFR Part 123 as adequate to assure compliance with section 405 of the CWA.) Regulations to implement this authorization are being developed in a separate rulemaking.

In the March 1988 proposal, EPA proposed to authorize Indian Tribes to be treated as States for purposes of administering *non*-NPDES sludge management programs under section 405 as well. Thus, the March 1988 proposal created a potentially larger role for Indian Tribes than the February 4, 1986 proposed rule. (That proposal would have provided that EPA and a tribal government could develop, on a case-by-case basis, an appropriate role for the tribal government in carrying out a sludge management program on Indian lands where the federal government administers the program. See proposed § 501.19, 51 FR 4468.)

In the 1988 proposal of Part 501, EPA proposed treating Indian Tribes as States for purposes of *non*-NPDES section 405(f) sludge management programs even though section 518(e), which addresses the status of Indian Tribes under the CWA, does not specifically list section 405 as a program for which EPA may treat an Indian Tribe as a State. EPA reasoned that omission of section 405 from section 518 was the result of oversight, not of deliberation. EPA advanced two basic reasons in support of this position. First, section 518 authorized treating Indian Tribes as States for other sludge management activities, e.g., Title II (construction grants) and section 303 (water quality standards and implementation plans). Second, section 518 would clearly allow Indian Tribes to be treated as States for purposes of administering an approved NPDES program (including sludge management) and there is no reason why Indian Tribes should not be similarly treated for purposes of administering a non-NPDES program that regulated the same activities.

Accordingly, EPA proposed to include in the definition of "State" in § 501.2 an "Indian Tribe which is eligible for treatment as a State under regulations promulgated under section 518 of the CWA." The March 1988 proposal did not include a proposed rule addressing how Indian Tribes would establish eligibility for treatment as States. Instead, it expressed EPA's plans to address this issue in a separate rulemaking that would apply to various programs under the CWA, since the requirements were not expected to differ significantly among the programs.

The one State commenter on this issue argued that EPA does not have authority to treat Indian Tribes as States for purposes of section 405(f) because section 518(e) of the CWA does not list section 405. For the reasons stated in the preambles to the proposed rule and today's rule, EPA disagrees. Therefore, the final definition of "State" in § 501.3 is the same as the proposed definition. As discussed in the preamble to the proposed rule, the regulations addressing how Indian Tribes may be treated as States for purposes of the sludge program will be proposed separately as part of a regulation treating Indian Tribes as States under the NPDES program.

Where an Indian Tribe does not have an approved State program, EPA expects to be the permitting authority for facilities on Indian lands because States usually do not have authority to administer and enforce their environmental programs on these lands. In this situation, EPA will work with the tribal government and other interested agencies in the development of an appropriate role for the tribal government in administering the sludge program on Indian lands (consistent with the 1986 proposal and the practice under other federal environmental programs).

I. Part 501: Non-NPDES State Programs.

The following is a section-by-section analysis of Part 501, which establishes program requirements and procedures for States that use programs other than NPDES to administer an approved sludge management program (i.e., States without NPDES programs and States with approved NPDES programs which choose to implement a sludge program separate from their NPDES program).

1. Purpose, Scope, and General Program Requirements.

Subpart A consists of three sections. Section 501.1 explains the purpose and scope of Part 501 and generally what requirements State programs must have in order to be approved under section 405(f) of the CWA. In the final rule this section has been slightly reorganized. The paragraph explaining assignment of program responsibilities, which appeared as paragraph (e) in the proposed rule, now appears as

paragraph (1). The other two sections in Subpart A include § 501.2 which defines key terms used in the regulations and § 501.3 which discusses coordination with other programs.

Authority (§ 501.1(a)). As discussed above, EPA's primary authority for promulgating State sludge management program regulations comes from section 405(f) of the CWA, which was added by the 1987 amendments. EPA also has general authority to "prescribe such regulations as are necessary to carry out [the Administrator's] functions under this Act." CWA section 501(a). section 101(e) also supports today's rulemaking (measures to promote public participation). Finally, section 518(e) authorizes the Administrator to promulgate regulations for purposes of treating Indian tribes as States (see discussion on this issue above). Since the authority provided in these sections is broad enough to promulgate regulations to implement specific provisions of the CWA, citation to other Clean Water Act sections have been dropped in the final rule. For this reason also, EPA disagrees with the commenter who argued that EPA must list as authority all CWA provisions which might be implemented or assisted through approved State sludge management programs (e.g., section 405(d), section 307(b)).

Scope. Section 501.1(c) of the final rule sets forth the general requirements for EPA to approve State sludge programs as adequate to implement CWA section 405. Consistent with Congressional intent, States that seek to administer a State sludge program in lieu of the federal program must have authority generally as broad as EPA's to regulate sludge use and disposal. This would include the legal authority and programmatic capability to implement a permit program for the use and disposal of sewage sludge, to implement and enforce the Part 503 technical standards and any other federal sludge standards (e.g., 40 CFR Part 257), and generally to take action to protect the public health and environment from adverse effects of toxic pollutants in sewage sludge. One commenter said that approved State programs must be equally as broad as EPA's programs, not "generally" as broad as stated in the preamble to the proposed rule. This suggestion is inappropriate because, as explained elsewhere, States may not have authority to regulate in certain instances, for example, on Indian lands or in the ocean. The required scope of State programs is also discussed above in section V.H.2.

Section 501.1(c) establishes these basic requirements for approved State programs. The final rule is substantially the same as the proposed rule. States must be able to assure compliance with the Federal sludge technical standards; issue permits to POTWs and other treatment works treating domestic sewage that apply and assure compliance with Federal standards and requirements under section 405 (including conditions developed on a case-by-case basis to protect public health and the environment when there are no applicable technical regulations); regulate use and disposal of sewage sludge by nonpermittees; take actions to abate violations of the State sludge programs (including civil and criminal penalties); and generally to take actions to protect public health and the environment from the adverse effects that may occur from toxic pollutants in sewage sludge.

Although this paragraph has not changed substantially from the proposed rule, minor editorial changes have been made to clarify EPA's intent. First, paragraph (c)(1) was revised to state that States must have authority "to require compliance by any person who uses or disposes of sewage sludge with standards for sludge use or disposal issued under section 405(d) of the CWA * * *" (new language underlined). The first underlined change tracks statutory language and clarifies that compliance must be required of any person that handles sewage sludge, not just generators. As explained in the discussion about users and disposers above in section V.D.3, States have some flexibility in how they regulate users and disposers. The second change to this paragraph substitutes a term defined in § 501.2 for the previous language without changing the meaning.

Second, paragraph (c)(2), which was phrased in terms of a prohibition against the use and disposal of sewage sludge not in compliance with a permit that implements federal requirements, now clearly states that States must have authority to issue permits that apply, and assure compliance with, Federal standards. Again, this more closely tracks statutory language. As noted in the preamble to the proposed rule, this is the most important requirement for an approvable State sludge program under Section 405 because the CWA requires State sludge programs to implement sludge standards through permits issued to POTWs and other treatment works treating domestic sewage. The permit requirement in the 1988 proposal superseded two provisions in the 1986 proposal relating to sludge management oversight: The requirement for provisions for project-specific approvals and the requirement to describe the processes and procedures to be used for reviewing the planning, design, construction and operation of sludge management facilities.

Section 501.1(d) describes the types of sludge use or disposal practices that States must be able to regulate. This paragraph is discussed in detail above in section V.H.2. In addition, EPA received a comment saying that the proposal was confusing because it required States to be able to regulate ocean dumping of sewage sludge under § 501.1(d)(1)(B)(v), while stating elsewhere in Part 501 that such regulation is precluded by the Marine Protection, Research, and Sanctuaries Act. EPA agrees, and therefore has dropped ocean disposal from the listing of practices that States must be able to regulate.

As discussed in the preamble to the Feb. 4, 1986, proposal (51 FR 4461), MPRSA sections 106 (a) and (d) generally exclude States from regulating or permitting ocean dumping. While the States are precluded from regulating ocean dumping by the MPRSA, States with POTWs that currently ocean dump sewage sludge should continue to work with EPA and the dumpers in identifying and implementing suitable land-based alternatives. State involvement in the area of land-based alternatives is especially important in light of the MPRSA amendments prohibiting sewage sludge ocean dumping after December 31, 1991, and those amendments recognize the need for active State involvement with regard to land-based alternatives. *See,* H.Rep. 100–1090 at pg. 29. In particular, those MPRSA amendments specifically provide that States are to participate in the negotiations of plans to cease ocean dumping through the implementation of alternatives (MPRSA sections 104B(c)(2)(A) and (3)(A)), establish a State Clean Oceans Fund to provide financial assistance to dumpers in implementing alternatives to ocean dumping (MPRSA section 104B(c)(5)), and report on progress being made in implementing alternatives to ocean dumping (MPRSA section 104B(h)). While MPRSA sections 106 (a) and (d) preempt States from regulating ocean dumping, EPA encourages States with POTWs that ocean dump sewage sludge to participate in the development and implementation of land-based alternatives to ocean dumping in furtherance of the MPRSA's new requirements for the termination of ocean dumping of sewage sludge.

More stringent State or local laws. The 1986 proposed rule (in § 501.15(d)) also acknowledged that section 510 of the CWA does not preclude States or their political subdivision from enacting laws governing sludge use or disposal that are more stringent than Federal law. However, to further encourage beneficial reuse of sludge, the 1986 proposal also provided that "State or local agencies should not ban or unreasonably restrict any sewage sludge management practice unless local circumstances require such restrictions." The 1988 proposed rule (in § 501.1(j) also codifies section 510 of the CWA and preserves the rights of States and local jurisdictions to adopt and enforce more stringent or more extensive requirements than those required under Federal law. The 1988 proposal, however, did not retain the sentences addressing beneficial use and unreasonable local bans or restrictions on sludge management practices.

Seven commenters, all State agencies, responded to the 1986 proposal, all addressing the status of more stringent local laws. Three commenters said that EPA should not state in the regulations that local jurisdictions can enact stricter laws because such laws (1) are *de facto* bans; (2) conflict with State law; and (3) cause costly delays and litigation. Similarly, two other commenters supported the sentence which advises local agencies against bans or unreasonable restrictions on sludge management practices. One of these commenters suggested further that the regulations require that any local law be consistent with Federal and State requirements and not ban practices allowed by State or Federal law. In a related vein, the only commenter on the 1988 proposal expressed concern that more stringent State and local laws would unduly burden its sludge handling activities, which often crossed State lines. The commenter urged, therefore, that EPA, in effect, preempt this area of regulation. In contrast, two commenters opposed the admonition against unreasonable bans or restrictions because it was not an appropriate subject for Federal regulation and because State law would determine the "reasonableness" of any local law.

Today's final rule on the status of stricter State and local laws is the same as the 1988 proposal (although now it is codified at § 501.1(i)). Section 510 of the CWA clearly states that nothing in the CWA precludes more stringent State and local laws. Similarly, section 405(d)(5) of the CWA states that: "Nothing in this section is intended to waive more stringent requirements established by this Act *or any other law*" (emphasis added). Although section 510 of the CWA would apply in any event, restating it in the regulations serves important notice to the regulated community and other interested parties that section 510 applies in the sludge use and disposal context as well. Commenters who objected to this provision because they objected to the local laws (or State laws in the case of interstate sludge activities) themselves erroneously assume that EPA can through regulation prohibit stricter local laws or preempt this area of regulation. This is clearly contrary to the CWA. For this reason also, EPA deleted the sentences addressing beneficial use and unreasonable local bans or restrictions. EPA's policy of encouraging beneficial use has not changed. Consistent with this policy, EPA's discourages unreasonable restrictions on sludge use and disposal. However, EPA agrees that admonitory provisions in the regulations are not the most appropriate means of implementing the goal of maximizing beneficial use. (It also apparently mislead commenters into thinking that EPA had authority to dictate local law or preempt State and local law where no such authority exists.) With respect to concerns about interstate sludge activities, many States have expressed a general willingness to following EPA's lead on technical standards for sludge use and disposal. Therefore, EPA expects that differences among State standards and requirements will decrease after promulgation of the Part 503 standards. EPA also expects that promulgation of Federal standards will encourage public acceptance of beneficial use of sludge, which should further reduce the number of local restrictions thought necessary to protect public health.

Paragraph (j) of this section states that nothing in Part 501 prohibits a State from administering a more extensive program than what is required for EPA approval. However, the additional coverage under the State program would not be considered a part of the EPA-approved State program. The Attorney General's statement, described below, would identify the additional coverage.

MPRSA preemption. Federal law does preempt State or local law in one important area. This preemption is noted in § 501.1(k), which states that sections 106 (a) and (d) of the Marine Protection, Research, and Sanctuaries Act generally preclude States from regulating or issuing permits for ocean dumping. Approval of a State program under Part 501 does not change this preemption.

Effect of EPA approval. EPA will approve State programs that meet the requirements of Part 501 (§ 501.1(e)). Upon approval, EPA generally will cease issuing those permits implementing sludge standards to permittees that will be within the jurisdiction of the approved State program and make arrangements to turn over responsibility for EPA-issued permits to the State. In some cases, such as a permit subject to a pending appeal action, EPA may retain jurisdiction. Section 501.1(f) addresses how this situation is to be handled. This paragraph parallels § 123.1(d) which addresses the same logistics of transferring responsibility for the NPDES permit program.

Section 501.1(g) explains that approval of a State program does not affect EPA's authority to take enforcement actions for violations of section 405. This provision appeared in both the 1986 and 1988 proposals. One commenter on the 1986 proposal objected to this statement of federal enforcement authority, claiming that State enforcement authority is adequate to control domestic waste water sludge. Under the CWA, EPA has the authority to take enforcement actions for violations of the CWA even where the State has similar authority. Section 501.1(g) notifies the State and the public of its authority and intent to use this "backup" enforcement authority to ensure compliance with the CWA where the State fails to take appropriate enforcement actions. EPA did not receive comments on either of these paragraphs (§ 501.1 (f) and (g)) in response to the 1988 proposal and therefore is promulgating a final rule that is the same as the proposed rule.

Assignment of program responsibilities. The March 1988 proposal contained a provision specifically to allow States to assign program responsibilities to local agencies (other than field offices of the State agencies) under certain circumstances. This provision was included in recognition that local agencies, such as local health departments and soil conservation or agricultural extension offices, may play a significant role in carrying out various sludge management activities in some States. The purpose of the proposal was to allow decentralized administration of State sludge programs to continue and thus minimize disruption to existing State programs. EPA also reasoned that because proper sludge disposal may often depend on local conditions and disposal site characteristics, the knowledge and proximity of local

agencies to regulated activities could enhance efficient and effective administration of program responsibilities.

The proposed rule was carefully limited. It did not allow separate approval of local programs (by the State or EPA) or relieve the approved State agency of overall responsibility for program administration. It prohibited a State from assigning program responsibilities to a local agency under control of a political subdivision that also owns or operates a POTW or other facility that treats or disposes of sewage sludge, so as to avoid a conflict of interest inherent in a situation in which the local agency plays dual roles of regulator and regulated party. Beyond these broad parameters, the proposed rule did not specify the extent to which a State agency could use local agencies to carry out program responsibilities.

The proposed rule required that any assignment to local agencies be well documented and supported in the State's submission for program approval. States were also expected, through provisions in the MOA, to assume oversight responsibilities to ensure that the assignment is carried out properly. In addition, to assure that EPA could effectively carry out its oversight responsibilities in local delegation situations, the lead State agency would remain responsible for all program reporting and other activities related to EPA oversight of the State's approved program (e.g., submission of proposed permits for EPA review). Finally, State agencies would be required to retain all necessary authority to carry out program responsibilities so that they could step in where local agencies fail to carry out assigned functions adequately.

EPA solicited comments on whether additional limitations should be established to guard against potential problems such as inconsistent application of program requirements within the State. Also, because of concerns about potential conflict of interest situations (i.e., where local agencies executing sludge responsibilities are part of the same political subdivision or other governmental entity with authority over POTWs or other sludge treatment or disposal facilities), EPA solicited comments regarding the roles of local agencies in existing State sludge programs, including the various functions they perform (e.g., permitting, compliance monitoring, enforcement), the extent to which they are the final decision-makers, and their relationships to State agencies, POTWs, and other sludge treatment and disposal facilities.

EPA received nearly 15 comments on this section from the whole range of commenters. Approximately two-thirds of the commenters generally supported the proposal for reasons similar to those discussed in the preamble to the proposed rule; a few supported with reservations; and only one commenter said assignment to local agencies should not be allowed. Most States which commented on the proposal generally supported it. Responses from POTWs was more divided.

The commenter most opposed to the proposal said that local delegation could complicate permitting and administration for POTWs with facilities in different local jurisdictions. The commenter suggested that if local delegation were allowed, the State must be designated as the lead agency and the local agency assigned program functions must be larger than the POTW it regulates (specifically, a city, county, or township should not regulate a multi-county sanitary district). Now that EPA has clarified in the final rule that permits will not be required for each "facility" at which the POTW's sludge is used or disposed, it is not clear how extensive the problem referred to by the commenter would be. In any event, nothing in proposed rule was intended to dictate relations between the various political subdivisions of the State. That is best left to State law. No changes to final rule are needed to accomplish this.

Commenters expressed several reservations about allowing local agencies to carry out program responsibilities. One State agency said it should be allowed if the State can assure quality control, e.g., minimum standards, program reviews, joint inspections. These are the types of State oversight activities that should be addressed in the MOA under § 501.15(1)(4).

Two commenters addressed local agencies' capabilities for carrying regulatory activities. One commenter said local agencies may lack authority and expertise to implement pretreatment standards that will be needed to meet the Part 503 technical regulations. This comment confuses activities expected of the sludge management program with those already required by the pretreatment program and therefore is unfounded. A POTW commented that stringent limitations are needed because local agencies may not have the technical expertise to regulate adequately. In this case, assignment of program responsibilities would be clearly inappropriate. The purpose of this provision is to allow local agencies which currently regulate sludge use and disposal and hold the expertise in this area to continue this role under an approved State program. To clarify that any assignment must be to an agency that is competent, the final rule has been changed in two respects. First, the introductory section has been rephrased to state that "the Administrator may allow a State to assign portions of its program * * *" (rather than "A State may assign * * *"). This clarifies EPA's intent that whether assignment to local agencies should be allowed is discretionary with EPA. To help make this determination, the final rule requires the State's program description, in addition to what was required in the proposed rule, to describe the capabilities of the local agency to carry out assigned functions.

On a more general level, one commenter stated that in all cases, the lead State agency must have final decision-making authority because delegation to local agencies or field offices often results in inadequate regulation and enforcement. Similarly, another commenter said that local delegation should be prohibited unless the State agency can demonstrate legal authority and resources to exercise direct control over local agencies involved in sludge management, i.e., a "genuine" statewide program is needed to meet the requirements and purposes of the Act. The final rule addresses these concerns by requiring the State agency to "retain full authority and ultimate responsibility for administering all aspects of the State's approved program * * *" (§ 501.1(l)(6)) and to include in the MOA provisions for adequate State oversight of local agencies to which it has assigned program responsibilities (§ 501.1(l)(4)).

Only two commenters, both State agencies, specifically addressed the question whether additional restrictions were needed to ensure consistent application of State requirements. One said the proposed rule contained adequate restrictions because States should determine the role of local agencies. The other commenter suggested that any additional requirements to ensure consistency could be incorporated into the MOA as needed. EPA agrees that this is a reasonable and flexible approach for ensuring program consistency.

Several commenters addressed the potential conflict-of-interest problems that could occur when a State assigned program functions to a local agency that was also a regulated party. Two conflict-of-interest provisions in the proposed rule affect assignment to local agencies: (1) § 501.1(e)(1), which

prohibited assignment to a "local agency under the jurisdiction of a political subdivision which owns or operates a POTW or other facility that treats or disposes of sewage sludge;" and (2) § 501.15(a)(7), which prohibits membership on any board or body that approves permits from including any person who receives a significant portion of his or her income from a permittee or applicant for a permit.

Note: This provision was specifically endorsed by one commenter, an industry.

Three commenters, all addressing the sludge program in Washington State, said the proposal was too restrictive because it would effectively prohibit assignment of program responsibilities. The commenters considered this result inappropriate because local agencies responsible for protecting public health and the environment would not knowingly violate federal or State laws designed to protect public health and the environment and that any perceived conflict of interest could be remedied by sending all permits to the State agency for review, and if necessary, veto.

Since nearly all political subdivisions own or operate a waste water treatment works, the conflict of interest provisions in the proposed rule effectively prohibit assignment of program responsibilities to local agencies, contrary to EPA's intent. Therefore, the final rule contains two changes to allow for assignment to local agencies while still protecting against potential conflicts of interest. First, § 501.1(l)(1) (which appeared at § 501.1(e)(1) in the proposal) has been amended to prohibit assignment to any local agency which also owns or operates a POTW. This prohibits direct conflicts-of-interest, i.e., a POTW regulating itself. Unlike the proposed rule, however, it would allow assignment to a local agency which does not own or operate a POTW but which is part of a political subdivision which owns or operates a POTW.

The second change affects the conflict-of-interest provision that applies to any board or body that approves permits. Although addressed to State permitting bodies, it would apply to any local board or body that has been assigned permit issuance responsibility. As proposed, it prohibits any person receiving a significant source of income from a permit holder or applicant from being a member of the board or body that approves permits. This would effectively prohibit assignment to any local agency because the decision makers of local agencies in nearly all cases include at least one person who is employed by or receives a significant source of income from a permit holder or applicant (i.e., the municipality or other political subdivision).

Under the final rule, the Administrator may waive this stringent conflict-of-interest standard if the board or body can certify that it meets a "conflict-of-interest standard imposed as part of another EPA-approved permitting program or an equivalent standard" (§ 501.15(f)(ii)). The only conflict-of-interest standard EPA is aware of that would provide such an alternative is the one found in section 128 of the Clean Air Act, 42 U.S.C. 7428. That section requires that a board or body that approves permits shall have "at least a majority of members who represent the public interest and do not derive any significant portion of their income from persons subject to permits * * *" and that "any potential conflicts of interest by members of such board or body or the head of an executive agency with similar powers be adequately disclosed." As discussed more fully below, the Agency believes it is important to make this alternative standard available for non-NPDES State sludge programs. Today's final rule also makes this standard (or the equivalent) available in the case of assignment of permit issuance responsibilities to local agencies. In all cases, however, the approved State agency must be able to exercise direct control over permits issued as part of the approved program.

One commenter said that a POTW that receives sludges from other POTWs should regulate the incoming waste since it is the receiving POTW's discharge permit which will be affected. EPA agrees. However, this situation is different from that envisioned in the proposed rule. Generally, today's rule does not establish requirements for sludges discharged (through the sewer, hauled by truck, or transported through another conveyance) for treatment to POTWs. Like other incoming waste and influent, this is more the province of the pretreatment program. The sludge program will focus instead on the ultimate disposal of sludge when it enters the environment. Nothing in today's final rule concerning conflict of interest precludes a POTW or other permittee from regulating incoming wastes.

Similarly, nothing in today's rule governing assignment of responsibilities to local agencies prohibits a POTW or other treatment works from controlling the end use of its sludge when handled by another entity. In fact, as discussed in detail in section V.D.3 of this preamble concerning the regulation of users and disposers of sewage sludge, sludge generators may be required to control end use of their sludge by others in some situations.

One commenter asked whether a local agency to which permitting responsibilities has been assigned would also be required to have the civil and criminal enforcement authorities required of State agencies under Part 501 if the State had these authorities. Today's final rule does not require that assignment of program responsibilities be allowed only when the local agencies have all authorities required of States. Therefore, a local agency that conducted permitting activities for the responsible State agency need not also have the enforcement authorities required by Part 501 (unless, of course, it had also been assigned enforcement responsibilities). In all cases, the State must have authority to carry out all program requirements. Thus, a State would be expected to have the enforcement authorities required by Part 501 even if a local agency had similar authority (i.e., a State cannot meet Part 501 requirements by showing that a local agency has the required authority).

Definitions. Section 501.2 defines key terms used in Part 501. Several of the proposed definitions, including "sewage sludge," "treatment works treating domestic sewage," and "septage" have undergone changes in the final rule and are discussed above in section V.D. This section addresses changes to other definitions in Part 501.

A key definition in Part 501 is "Class I sludge management facility." Under the regulations, "Class I sludge management facilities" ("Class I facilities") are expected to receive priority attention from approved States and are subject to more intensive EPA oversight. The February 1986 proposal defined "Class I facilities" as any POTW required to develop a pretreatment program under 40 CFR 403.8. EPA received only one major objection to this definition by a municipality which stated that continued focus on major POTWs diverted attention away from other serious sources of environmental problems such as agricultural and non-point sources. The two other commenters representing States on this issue, however, favored the proposed definition because it focused the program on the largest sludge generators.

The March 1988 proposal took a different approach by defining "Class I sludge management facility" to be any sludge facility classified as such by the Regional Administrator in conjunction with the State Director, analogous to NPDES "major facilities" (see 40 CFR 122.2). The purpose of the 1988 proposal

was to allow priority facilities to be determined through a negotiated process between the Region and the State administering an approved program. This would allow flexibility for targeting efforts on areas of specific concern to the State (e.g., disposal on or near ecologically sensitive areas such as estuaries) and on particular facilities with known or suspected problems with their sludge. The preamble further explained that EPA could, based on available information and national concerns, issue guidance on Class I determinations. Examples of potential Class I candidates included sludge incinerators (because available information suggests that these facilities may have greater potential to threaten the environment) and major POTWs required to have pretreatment programs under 40 CFR 403.8 (because facilities are so classified on the basis of their size and industrial contribution). EPA specifically invited comment on the process for identifying Class I facilities contained in the proposed definition of "Class I sludge management facility."

EPA received 19 comments on the 1988 proposed definition of "Class I sludge management facility." Two States and one individual supported the proposed definition because of the flexibility it offered. One supporter noted that national guidance for designating Class I facilities still would be needed. Most commenters opposed the proposed definition because it was too flexible. Minimally, these commenters wanted the definition to include acceptable criteria for designating Class I facilities.

Reasons for wanting more specificity in the definition included promoting consistency among State programs, discouraging automatic designation of large municipalities as Class I facilities, and ensuring more objectivity. Commenters also suggested a wide range of criteria for inclusion in the definition, based on specific types of facilities (e.g., disposal-only facilities, pretreatment POTWs, and NPDES majors), specific use or disposal practices (e.g., incineration, ocean dumping), general characteristics (e.g., amount of sludge produced, design flow), and general effect (e.g., potential for a significant impact on the environment).

Today's final definition of "Class I sludge management facility" borrows from both proposals and the comments asking for more specificity. It is defined as "any POTW identified under 40 CFR 403.8(a) as being required to have an approved pretreatment program (including such POTWs located in a State that has elected to assume local program responsibilities pursuant to 40 CFR 403.10(e)) and any other treatment works treating domestic sewage classified as such by Regional Administrator in conjunction with the State Director because of the potential for its sludge use or disposal practices to adversely affect public health or the environment." Most significantly, the definition now directly and indirectly articulates the overriding goal of section 405 to protect public health and the environment from unsafe sewage sludge use and disposal.

Under the final definition, any POTW required to develop a pretreatment program under § 403.8 will be considered a "Class I facility." This means not only POTWs that currently have approved pretreatment programs, but also any POTW falling within the definition of § 403.8(a), including those POTWs located in States that have chosen to exercise the option to assume local responsibilities under § 403.10(e). At a minimum, the definition of "Class I Facility" includes these POTWs. Pretreatment POTWs will be considered "Class I sludge management facilities" regardless of their status under the NPDES program as "major" or "minor" facilities. As one commenter noted, the possible reasons for requiring a POTW to develop a pretreatment program—size, complexity, industrial influent, and recurring problems with sludge contamination—also support treating these POTWs as priorities under the sludge program. Currently, 1,485 POTWs are required to have local pretreatment programs. They account for approximately 78 percent of all sludge generated by POTWs and 87 percent of industrial flow to POTWs. Although only a few commenters responding to the 1988 proposal specifically endorsed designating § 403.8(a) POTWs as Class I facilities, many of the other categories or criteria suggested by commenters for designating Class I facilities are included within the pretreatment classification, e.g., size, sludge production, use of ocean dumping or incineration, and potential to adversely affect public health and the environment.

Treatment works other than pretreatment POTWs also can be designated as Class I sludge management facilities under the final definition. As in the 1988 proposal, the designation would be made by the Regional Administrator in conjunction with the State Program Director. Designation of Class I facilities, however, would still be subject to negotiation between the Regional Administrator and State Program Director. Thus, the definition is intended to preserve flexibility to accord priority status to facilities which are of particular concern to States or which may pose significant risks. The final definition states that this discretionary category is to be based on the potential to adversely affect public health and the environment. This criteria was added in response to requests for more specificity and is not intended to minimize flexibility.

Shortly after promulgation of today's rule, EPA will initiate a process for identifying "Class I Sludge Management Facilities," similar to the one used to classify NPDES major facilities. As part of this process, EPA will be working with the States and the regulated community to best define those facilities that should be accorded priority status. The identification of § 403.8(a) POTWs in today's rule is a bare minimum and serves to ensure that at least these facilities are covered until the final criteria are established. A State or Region may of course, designate an individual facility as a "Class I" at any time, based on that facility's potential to adversely affect public health and the environment.

One commenter suggested that all NPDES "major" facilities be designated as Class I sludge management facilities. EPA disagrees.

Note: Contrary to one commenter's interpretation, the proposed rule did not say that all NPDES "majors" would be considered "Class I sludge management facilities."

"Majors" are targeted for priority treatment under the NPDES program, usually based on the potential for their discharges to adversely affect receiving water quality. The criteria for determining which facilities should be majors do not necessarily correlate with the criteria for determining which treatment works should be given priority treatment under the sludge program. Therefore, there is no basis for automatically assuming that NPDES "majors" should also be "Class I facilities" for purposes of sludge regulation.

Two commenters objected to providing for Regional and State negotiation in designating Class I facilities. One State said that EPA involvement was unnecessary and did not add to the overall program, particularly given the goal of having State and local governments responsible for sludge management. Conversely, an industry commenter said that EPA headquarters should have sole

responsibility for designating Class I facilities to avoid inconsistency, unpredictability, and confusion; States could address specific problems of local interest in other ways such as more stringent State laws under section 510 of the CWA. EPA continues to believe that both States and EPA should play a role in defining program priorities.

The proposed rule included definitions for the terms "distributor," "generator," "use" or "utilization practice," and "users" which were expected to be in forthcoming technical regulations (40 CFR Part 503). Those definitions are no longer being used as general definitions in the technical regulations and serve no useful purpose in Part 501. Accordingly, they have been deleted in the final rule.

The proposed rule also included a definition of "facility" that has been deleted in the final rule. As explained above in the discussion of revisions to Part 122, the use of the broadly defined word "facility" created confusion particularly with regard to requirements which EPA intended to apply only to entities required to obtain permits under section 405(f), and not necessarily to all "facilities." Therefore, it has been deleted. In several instances throughout the regulations, "facility" has been replaced with "treatment works treating domestic sewage" to further clarify when a particular requirement applies to entities required to obtain permits under section 405(f) (e.g., § 501.14(c)(2); § 501.15(a)(2)(ii)).

The final rule includes several definitions that were not in the proposed rule. In all cases, these definitions were defined elsewhere and are being added to Part 501 because they are frequently used in the regulations. These definitions are: "CWA;" "POTW;" "Publicly owned treatment works;" and "Standards for sludge use or disposal."

Finally, the definition of "approved program" has been changed to "approved State program" in response to a comment that use of "approved program" and "approved State" in the regulations was confusing. For purposes of Part 501, "approved State program" means a State program approved by EPA pursuant to Part 501. Conforming changes have been made throughout the final rule by inserting "approved State program" anywhere "approved program" or "approved State" previously appeared.

Coordination with other programs. The 1988 proposed rule included a provision authorizing coordination of permit issuance under the approved State program with permit issuance under other Federal or State environmental permit programs that may affect the same facilities or regulate activities related to sludge management. This provision remains unchanged in the final rule. Since sludge use and disposal occur in different environmental media, coordination with other programs may be very important to promote consistency and efficiency. Coordination with the issuance of NPDES discharge permits (whether issued by EPA or another State agency) may be particularly appropriate since a facility's sludge operation is closely linked to its wastewater treatment processes and, in the case of POTWs, its pretreatment program. Similarly, ground water impacts are an important consideration for several sludge use and disposal practices (e.g., monofills, land application). In these cases, consulting with the agencies or offices responsible for implementing such programs as wellhead protection and sole-source aquifer programs can be useful.

Today's final rule on coordination among sludge-related programs differs from the coordination provision in the 1986 proposed Part 501. The earlier proposal would have required a State to have provisions for coordination among a wide range of State and local programs including regulatory, technical, and financial assistance, and public education programs that may affect sewage sludge use and disposal. (*See* proposed § 501.15(a)(9) at 51 FR 4466, February 4, 1986.) EPA dropped this detailed requirement in the 1988 proposal so as to maximize State flexibility in program areas not directly related to assuring compliance with federal technical sludge standards. (However, the State must still explain in the program description coordination among programs and offices where State program responsibility is divided among various programs.) Nonetheless, EPA agrees with one commenter on the 1986 proposal that coordination is important to POTWs whose various sludge activities are regulated under different programs. Coordination can also enhance the effectiveness of the various State programs.

A majority of commenters on the 1986 proposal raised questions about the relationship between the sludge and pretreatment programs that are still relevant under today's final rule. One commenter argued that the regulations must require integration of the sludge, NPDES, and pretreatment programs. As discussed elsewhere, EPA interprets the CWA as providing more flexibility for State programs than this approach would allow, even though integration of these programs would be a sensible organization. Under today's final rule, States must determine how best to organize their agencies to meet requirements for program approval.

The same commenter who argued for mandatory integration with the pretreatment program also argued that the regulations should (1) indicate when and how local pretreatment limits must be revised when the POTW is unable to comply with new sludge technical standards; and (2) commit the Agency to reevaluating categorical pretreatment standards to take into account promulgation of new technical standards under section 405(d) of the CWA. Other commenters requested clarification about the relationship between the two programs, including how different program goals and objectives are affected; how procedures are implemented, including reporting to EPA and enforcement mechanisms; how NPDES and non-NPDES States should implement the two programs; and how the sludge technical standards should be used in local pretreatment programs to allocate wasteloads among industrial users (IUs). The following discussion briefly addresses each of these issues.

A major determinant of sludge quality is the composition of wastewater entering the treatment works. The pretreatment program under sections 307 and 402(b)(8) of the CWA is intended to control pollutant discharges to POTWs. It imposes pollution controls (known as the national categorical pretreatment standards and prohibited discharge standards) on industrial and commercial facilities which discharge to POTWs (IUs), and requires certain POTWs (e.g., those with a design flow greater than 5 mgd or small POTWs with a significant industrial flow) to establish local pretreatment programs to regulate IUs. These local programs include the development of local discharge limits for IUs. Reducing pollutant loadings to a POTW through pretreatment typically reduces pollutant loadings to the POTW's sludge.

A POTW's pretreatment requirements are included in its NPDES permit, and are enforceable to the same extent as other permit conditions. Among the goals of the pretreatment program is the prevention of interference. The definition of "interference" includes a POTW's inability to comply with regulations governing its chosen sludge use or disposal methods due to contamination caused by industrial user discharges to the POTW. (40 CFR 403.3(i)(2)). When national categorical pretreatment standards do not reduce pollutant loadings to a POTW sufficiently to prevent pass through and interference, the POTW must develop and enforce "local limits" applicable to

its IUs or take other measures to prevent pass through and interference. In addition, IUs are prohibited from discharging pollutants to POTWs that would cause interference. Thus, there is both a practical and regulatory connection between the pretreatment and sludge programs.

Despite the direct links with the sludge technical standards, the pretreatment program is a separate regulatory program. The Agency believes that establishing new requirements for the pretreatment program in today's rule, particularly a requirement to reevaluate national categorical pretreatment standards in light of new sludge standards, is unnecessary. First, the Clean Water Act, including the 1987 amendments, already provides for regular reevaluation of the categorical standards and effluent guidelines (sections 307(b) and 304(m)). In response to section 304(m), the Agency recently proposed plans for reviewing and revising existing effluent guidelines and categorical pretreatment standards and promulgating new guidelines and standards for discharges of toxic and nonconventional pollutants. Examining possible effects on sludge quality will be a part of this effort. *See* 53 FR 32584, August 25, 1988. Second, under the pretreatment program, local limits may play a more important role than national categorical standards in achieving compliance with sludge technical standards because sludge quality requirements may vary depending on site-specific factors. Local limits are more efficient in dealing with such site-specific situations.

In addition, sludge quality is only one of several factors that must be considered for local limit requirements and, in some cases, for compliance with sludge technical standards. Thus, promulgation of new sludge technical standards will not necessarily lead to revised local limits, although the promulgated technical sludge standards likely will lead to at least a reevaluation of existing local limits. Local limits may already be more stringent than necessary to comply with sludge standards, because they are based on stringent effluent discharge limits or other requirements. Also, a POTW may be able to comply with sludge standards by modifying its sludge management practices (e.g., by decreasing the amount of sludge applied to a given parcel of land), rather than through "cleaner" sludge. Moreover, a POTW may decide to switch to another sludge use or disposal method, rather than improving the quality of its sludge through revised local limits. Congress clearly provided for this option in section 405(e) of the CWA. The feasibility of each option can be determined through a local limit analysis. Guidance for conducting this analysis and for allocating the "waste load" among IUs is contained in the "Guidance Manual for the Development and Implementation of Local Discharge Limitations under the Pretreatment Program," EPA Office of Water Enforcement and Permits, December 1987.

The regulations for the pretreatment program at 40 CFR Part 403 already address how POTWs must adjust their pretreatment programs in response to changes such as promulgation of sludge technical standards. (*See*, e.g., § 403.5(c) (development of local limits) and § 403.18 (modification of POTW pretreatment program) (53 FR 40562, October 17, 1988)). (*See also* proposed revisions to § 403.5(c) which clarify POTWs' continuing responsibility to develop and enforce local limits. 53 FR 47652, November 23, 1988).

The requirements for sludge use and disposal applicable to a particular POTW (e.g., interim sludge conditions in permits and, when promulgated, the sludge technical standards) serve as one of the environmental criteria which "drive" the POTW's pretreatment program requirements. Therefore, the approval authority for the POTW's pretreatment program (either EPA or NPDES States with approved pretreatment programs) needs to know what those sludge requirements are. Although this does not require that the same regulatory authority administer both programs, it does require coordination among the programs.

2. Development and Submission of State Programs

Section 501.11 summarizes the basic components of a program submission, each of which is described in greater detail in subsequent sections. The essential components of a program submission are: a letter from the Governor requesting program approval, a description of the State's sludge management program, a statement of the State's legal authority to implement the program from the Attorney General, and a Memorandum of Agreement (MOA) between the Regional Administrator and the State Program Director. In addition, this section requires States to submit copies of "all applicable statutes and regulations, including those governing State administrative procedures. § 501.11(a)(5). The 1986 proposal included similar requirements.

In response to the 1986 proposal, two States objected to the requirement that the program submission include copies of the statutes and regulations governing the State's program. The commenters said this requirement was unnecessary or redundant. EPA disagrees. Copies of statutes and regulations are needed, in conjunction with the Attorney General's Statement, to determine whether the State has adequate legal authority to carry out an approved program. Requiring a State to submit these documents with its program submission helps to ensure that EPA has complete and up-to-date authorities when reviewing the State's submission. Therefore, the final rule is the same as the proposed.

EPA did not receive any other major comments affecting this section as presented in the March 1988 proposal. Instead, commenters addressed their concerns in comments on the separate sections establishing the requirements for each program submission component. Therefore, the final rule will be substantially the same as the proposed rule. The only change in the final rule for this section is a format change. All requirements related to approval procedures (most of paragraphs (b) through (d)) have been moved to § 501.31, which specifically addresses procedures for review and approval of State programs. Material which was redundant has been deleted.

A State's application for program approval is not considered "submitted" until EPA determines that the submission is complete. Under § 501.11(b) EPA will notify the State whether its submission is complete within 30 days after EPA receives the State's submission. If the submission is incomplete, EPA will identify the information needed to complete the submission. A complete submission triggers the review and approval procedures described in § 501.31.

EPA received one comment in response to the 1988 proposal related to a requirement for the State to submit a "responsiveness summary" with its program submission, and to undertake other public participation activities before submitting its program to EPA for review. These requirements were in the 1986 proposal but were dropped in the 1988 proposal. The commenter objected to deleting these requirements. A responsiveness summary describes public participation activities related to the State's application for program approval, public comments received on the State's program and a response to those comments. The responsiveness summary was to have been prepared by the State after it made its program submission available for public comment and conducted other public

participation activities. EPA dropped the responsiveness summary and related requirements imposed on the States in the 1988 proposal but still provided for all necessary public participation activities through approval procedures to be undertaken by EPA Regional offices (see § 501.31 described later in section V.1.11). The effect of this change is to eliminate redundant requirements (as requested by several commenters on the 1986 proposal), not to reduce the public's opportunity to participate in EPA's decision on State program approval.

It is also important to note that public participation procedures undertaken by EPA as part of the State program approval process are not substitutes for procedures States may be required by State law to follow in adopting regulations or other program requirements. Therefore, EPA expects that interested persons will have had at least one previous opportunity to comment on State regulations. (They also will have a separate opportunity to comment on federal regulations from which State regulations may be derived.) The focus of public comment on the State's program submission then is whether the State's program meets EPA requirement for approvable programs. For this purpose, the minimum 45 day comment period provided in § 501.31(c)(1) should be adequate. Although a longer comment period may be provided at the discretion of the Regional Administrator, EPA does not agree with a commenter on the 1986 proposal that a 60 or 90 day comment period is needed to allow regulated parties time to review and comment on the technical regulations that apply to the various use or disposal methods which may be used by a treatment works.

3. Program Description. (Section 501.12)

This section provides a detailed discussion of the nature and contents of the program description. The program description explains how the State intends to administer its sludge program. While the legal authorities define the scope of the State's intended implementation, the program description is a narrative description of scope, structure, coverage and processes of the State's program. The program description should explain how the program is adequate to meet the essential requirements of CWA Section 405: to implement the technical standards through permits and to protect public hea1th and the environment from adverse effects from pollutants in sewage sludge.

When first proposed in February 1986, the requirements for the program descriptions elicited general comments from several States that the requirements were too detailed. However, EPA must have a very clear understanding of how a State's program works to evaluate it for approval, and after approval, to work with the State on an on-going basis. The program description is also the primary document for explaining the State's program to the public and regulated community, which helps to ensure that they have a meaningful opportunity to comment on the State's application for approval. Therefore, detailed information is needed and serves a critical purpose. At the same time, EPA has carefully evaluated the need for specific information, and in several cases described below, has reduced or eliminated information requirements.

An important feature of the program description is designation of a lead agency when more than one State agency will be responsible for administering the approved program. The lead agency requirement was in both the 1986 proposal (§ 501.12(a)) and the 1988 proposal (§ 501.12(b)). A majority of commenters on this issue supported the lead agency requirement as necessary to assure consistency, provide common direction to regulated parties, and to simplify the working relationship between EPA and the approved State program. EPA agrees that having a lead agency serves an important purpose and therefore has retained in the final rule the requirement that the program description designate a lead agency when more than one State agency will be responsible for administering an approved program. The final rule differs from the 1988 proposed rule in that it no longer requires each involved State agency to have statewide jurisdiction over a class of activities. This is intended to provide more flexibility to States.

In response to the 1986 proposal, three commenters objected to the lead agency requirement. One commenter said the designation should be optional with the State. The other two commenters objected because they read the lead agency provision to require reorganization of State agencies or even statutory amendments to consolidate all program activity under one agency. This reflects a misunderstanding about the lead agency requirement. It does not require agency reorganization, but instead requires that one of the agencies responsible for program administration serve as the lead contact for working with EPA on issues relating to the approved State program. Thus, the lead agency would be responsible for coordinating program approval (e.g., submit documents to EPA, serve as a contact for inquiries from the public, negotiate necessary changes) and serving as the State contact for EPA oversight activities (e.g., permit reviews, semi-annual noncompliance reporting, and annual program reports). Fulfilling this coordination role may require additional work on the part of the lead agency, but it provides an alternative to reorganizing State agencies to achieve the same purpose. Designating only one agency to act as liaison with EPA is also an efficient use of resources for both EPA and the State.

Section 501.12(b) requires the description to include an explanation of the organization and structure of the agency or agencies that will administer the program, including the number and general responsibilities of the employees. This must be accompanied by an organizational chart for all agencies which will be responsible for administering the program. One State commented that submitting the organization chart was unnecessary. This requirement is included because EPA needs to know how the State agency is structured. Organization charts display often complex relationships in an easy-to-understand form and therefore are very useful in describing the agency's structure. Most agencies have organization charts readily available; submitting them with the program description should not be unduly burdensome. Therefore, the final rule retains the requirement to submit an organization chart for each involved agency.

The 1988 proposal required States, as part of the program description, to submit a discussion on estimated costs and available resources necessary to implement the program. These requirements were more extensive than what was proposed on February 4, 1986, because additional information was deemed necessary to evaluate whether State resources are adequate to implement the program. In the 1988 proposal, EPA specifically solicited comments on whether cost and resource factors are appropriate measures to consider in determining whether to approve the State's program.

Two commenters on the 1986 proposal stated that the cost and resource requirements were too cumbersome and detailed, and therefore should be deleted, while one State supported the requirement. In contrast, all but one of the commenters on the 1988 proposal said that cost and resources are

appropriate measures to gauge the adequacy of State programs. In fact one commenter said that more detailed information on program funding is needed to evaluate the adequacy of the State program. EPA agrees and in the final rule requires greater detail on the costs and resources of the State program in the program description.

In the final rule, § 501.12(b)(2) has been revised to specify an initial two year time period for which the State must provide the estimated costs of establishing and administering the program after approval. The proposed rule did not specify what period of time the information must cover. Requiring information for the first two years of a program should establish what resources are necessary to begin and implement a program. One commenter suggested that these requirements be annual. EPA's intent is to ensure a State can establish and support a program for purposes of approving the program. Annual reporting is more appropriately addressed through program oversight and grant negotiations.

Proposed § 501.12(b)(3) required an estimate of resources available for program implementation. Under the final rule, States must submit an estimate of the sources, as well as the amounts of funding needed for the first two years after program approval. This estimate will allow EPA to consider start-up activities as well as initial implementation activities in determining whether a program is viable. A comparison of the resources needed for program establishment and implementation against the sources and amounts of available funding will help make this assessment.

Another comment addressed the difficulty of estimating costs until the technical regulations are published. EPA understands that in the absence of technical standards, program planning cannot be precise. EPA proposed the technical standards (40 CFR Part 503) on February 6, 1989 (54 FR 5746). Therefore, States will have the proposed Part 503 rules as a source of information upon which to base estimates of resources needed to administer an approved program. Moreover, today's final rule requires a general estimate of costs and resources needed to develop and administer State programs. EPA seeks information that is sufficient to evaluate the State's ability to implement a program.

The program description must include a description of applicable State permitting, administrative, and judicial review procedures. This includes a description of any administrative review or appeal procedures and criteria, as well as procedures and criteria for any variances available under State law, to allow EPA to review these for consistency with the requirement of section 405 to comply with the sludge technical standards. The program description must also contain copies of application and reporting forms. EPA disagrees with a State which commented that submitting forms is unnecessary. The requirement to submit forms is particularly critical for the sludge management program since EPA has not yet developed uniform national forms. Therefore, EPA will need to review State forms to see if they require the information required by this Part.

A major part of the program description is the facility inventory (§ 501.12(f)). The March 1988 proposal required the State to submit a complete list of all POTWs or other treatment works treating domestic sewage, i.e., all facilities required to obtain sludge permits, as a precondition to program approval. (The March 1988 proposal was considerably pared down from the February 4, 1986 proposal, which would have required an inventory of all sewage sludge generators and sewage sludge disposal facilities in the State, including firms which pump and service septic tanks and portable toilets, and an inventory of known violations.) Under the March 1988 proposal, the States would still be expected eventually to complete an inventory of all generators and disposal facilities and sites and were required to explain in the program description how and when the inventory would be completed and the State's plan for maintaining the inventory. However, only a partial inventory of generators was required as a precondition to program approval.

The inventory requirement in both proposals generated numerous comments. Most commenters on the 1986 proposal focused on the requirement to inventory firms which pump and service septic tanks and portable toilets. Nearly all opposed that requirement as unnecessary (as, for example, where State law requires septage to be discharged to POTWs) or too burdensome. Several States commented generally that overall the inventory requirement was too burdensome and would take too much time and expense to compile. One State recommended requiring only a list of the sludge generators and sludge management facilities. Another commenter suggested that the inventory be phased-in, beginning with Class I generators.

All the commenters on the 1986 proposal to provide an inventory of known violation of sludge requirements were opposed to such an inventory. They questioned the need for the information for EPA review of a State program. One commenter stated that such an inventory would be difficult to compile until there was an operational State program. The requirement to submit an inventory of known violations was dropped in the 1988 proposal. Also, based in part on comments, EPA dropped the requirement for the inventory to include all firms that pump and service septic tanks and portable toilets in the 1988 proposed rule. This requirement also is not a part of today's final rule.

The inventory requirement in the final rule is basically the same as that in the March 1988 proposal in that it retains the phased-in option. The rule has been expanded to specify: (1) Which facilities must be included in the initial inventory and which can be included later; (2) what type of information about each facility must be included in the initial inventory and what information can be submitted later; and (3) a deadline for completing any partial inventories.

The purpose of requiring an inventory as part of the State's program submission is to ensure that the State has identified which facilities will need permits before taking on the task of issuing permits. Later, the inventory also will serve as a planning tool and compliance monitoring and tracking system and thus needs to provide a comprehensive picture of sludge use and disposal in the State. Ultimately, the inventory will include all POTWs, non-industrial treatment works treating domestic sewage, industrial treatment works treating domestic sewage, and all sewage sludge disposal and use sites not included as a treatment works. However, the initial inventory need only include all facilities that are or will be required to obtain a permit upon promulgation of 40 CFR Part 503, i.e., all POTWs and non-industrial treatment works treating domestic sewage. These are the facilities that come under the first round of permitting either because they are POTWs (and hence are subject to section 405(d)(4) of the CWA), or because they are privately-owned treatment works covered by the first round of the Part 503 technical regulations (including 40 CFR Part 258). States would have to expand their inventories later to include industrial treatment works treating domestic sewage and use and disposal sites not included under another category, before final promulgation of Part 503 standards applicable to these facilities. One State commented that since "treatment works" included land for storage,

treatment and disposal of sludge, no apparent difference existed between the initial and later inventories. As explained above, each component of a treatment works is not considered a separate treatment works. Therefore, there is a difference between treatment works and off-site use or disposal sites. In addition, beneficial use sites such as farms, home gardens, etc., do not fall within the definition of "treatment works treating domestic sewage" in today's rule. The reference in the definition to land used for storage, treatment or disposal refers to monofills, surface disposal sites, etc. (See discussion of definition of "treatment works" in section V.D.2 above). Therefore, an inventory of the beneficial use sites is not required with the program submission.

In the 1988 proposed rules, the information about each facility required in the inventory was listed in the § 501.21 provision requiring a State to update the inventory as part of an annual report. The relationship between the two inventory requirements was not clear from the face of the regulation and therefore created considerable confusion. For example, one commenter said the inventory requirement was too vague and needed to specify what information was expected. Another said the inventory was unnecessary because the information was already required in the annual report. To remedy this problem, § 501.12(f)(1) now also specifies required inventory information, including: (1) Name, location, and ownership status; (2) sludge use or disposal practice(s); (3) annual sludge production volume; (4) other environmental permit numbers; and (5) compliance status. This list does not include influent characteristics, as suggested by a commenter. Influent characteristics can help predict sludge characteristics and therefore may be useful information, particularly for identifying potential sludge (and other environmental) problems. For this reason, POTWs with pretreatment programs are required to review and evaluate influent characteristics on a regular basis. However, this type of detailed information is not suitable for the inventory of sludge facilities, which is designed to provide general data about the regulated community, not as the basis for developing site-specific requirements.

In addition, § 501.12(f)(2) requires that the inventory include all sewage sludge disposal and use sites not included as part of the inventory of treatment works. Information about each site would include name, location, permit number (if any), and source of sewage sludge. Keeping track of the source of the sludge is important so that, if necessary, POTWs records of metals loadings to a particular site can be traced. Today's final rule clarifies that site information is *not* required for the end use of sludge that meets distribution and marketing requirements (e.g., home gardens).

The initial inventory submitted with the program application must include for each facility the information in the first two categories (i.e., § 501.12(f)(1) (i) and (ii)). The remaining information can more easily be gathered through program implementation activities and therefore would be submitted as part of the annual report. These phased-in information requirements basically follow the suggestion of a State commenter to the 1986 proposal.

Note: For similar reasons, the March 1988 proposal dropped a requirement from the 1986 proposal that would have required States to submit an inventory of "known violations."

One commenter said that the regulation should specify a deadline for completing the inventory. EPA agrees. Therefore, the final rule requires a State that submits only a partial inventory with its application for program approval to also submit a detailed plan showing how the State will complete the inventory of treatment works within five years after approval of the State's program. EPA did not adopt the commenter's suggested deadline of "one year after applications are due under section 405(d)(2)(D)." First, the CWA does not specify an application deadline. Second, today's final rule ensures completion of the inventory in a reasonably timely manner by requiring annual inventory updates (§ 501.21) and completion of the inventory by the end of a full permit cycle.

EPA also received several other comments on the inventory requirement. One commenter said that in addition to requiring an inventory, EPA should require States to use it to devise a rational overall plan for sludge use and disposal. The purpose of the inventory requirement, together with other requirements in Part 501, is to make sure that a State program has certain elements which are necessary to assure compliance with Part 405. Beyond this, it would not be appropriate to direct States in the regulations how to use the required information.

Some States said that, however desirable, the inventory would require considerable resources and that additional funding would be needed to compile them. These comments were submitted mostly in response to the 1986 proposal. EPA recognizes that compiling a comprehensive inventory is a major undertaking, but it will be essential for administering the regulatory program envisioned in section 405. For the past few years, EPA has encouraged States, often through Section 106 grants funds, to compile inventories. In fact, several States responding to the March 1988 proposal reported significant progress in compiling inventories.

Finally, one commenter suggested that EPA develop a uniform reporting format for inventories to prevent redundant State efforts and to provide a uniform data base. In response to similar requests from States in comments on the February 1986 proposal, EPA is developing a computer software package for this purpose called the Sludge Inventory Database (SID). SID is designed to provide assistance to States and other potential users in compiling detailed inventory information on: (1) The identities and locations of POTWs and other treatment works treating domestic sewage; (2) the sludge treatment processes used by these facilities (including production data for each treatment process); and (3) the sampling and analysis data which reflect the chemical constituent of the sewage sludge. EPA is also working on a system to integrate SID data into various EPA mainframe data bases to facilitate the development of a national inventory of sewage sludge generators, processors, and disposers.

Another requirement for the program description contained in the March 1988 proposal was an identification of any separate State programs for regulating septage disposal. The February 1986 proposal would have required a more extensive description of the State's septage disposal program. EPA opted for less extensive requirements in the 1988 proposal because how a State regulates septage would be significant for the purposes of its section 405(f) sludge program only in that its program must ensure that the use and disposal of septage is adequately regulated as contemplated by the proposed technical standards. For this reason, EPA would need know whether there was a separate State program for septage use and disposal.

Several commenters said this requirement was unnecessary if EPA would not be regulating all septage disposal. As long as septage is considered sewage sludge for purposes of Part 503 (and hence, of Part 501), it will be important for States to inform EPA about which State agency regulates septage that is applied to land or disposed of by one of the other practices

regulated under Part 503. However, EPA agrees that the requirement in the proposed rule to identify separate septage programs is redundant and therefore has deleted it in the final rule. Under § 501.12(b), the program description must describe each State agency that will be responsible for administering the approved program and delineate the responsibilities of each agency. Therefore, the program description already requires the State to identify any separate septage use and disposal program (to the extent that program regulates use or disposal that comes under Part 503 regulations).

Under both the 1986 and 1988 proposals, States were asked to submit separate documentation of any State or local bans or prohibitions against particular sludge use or disposal practices. No commenters explicitly supported this requirement. Two commenters said it was redundant with regard to stricter State laws because another provision already required submission of all State statutes applicable to the State's sludge management program. Other State commenters objected to the requirement as unduly burdensome (apparently because local bans or prohibitions can be widespread), particularly if, as one commenter feared, it entailed documentation of all local zoning decisions. Finally, one State said such documentation was useless because in its State many local bans or prohibitions were legally questionable and did not interfere with the State's sludge management program.

The requirement to document State or local bans or prohibitions has been dropped in the final rule. It is not essential for purposes of evaluating the adequacy of the State's program because the reasonableness of bans or prohibitions is not a requirement for approving State programs. In fact, the CWA specifically reserves the right of States and local governments to adopt and enforce stricter laws under section 510, and section 405(e) states in part that "the determination of the manner of disposal or use of sludge is a local determination." Also, as commenters pointed out, compiling the list could require considerable resources. Given the lack of compelling need, EPA agrees that the potential burden of compiling a separate document is not justified as a generic requirement for State program approval. States still must submit copies of all State statutes and regulations that govern their program. Moreover, EPA still expects that in discussing the State's legal authority, the Attorney General's Statement will identify where State laws are stricter or have broader coverage than Federal law.

Although today's rule does not make the "reasonableness" of State or local restrictions a factor in determining whether to approve a State program, EPA encourages States to evaluate carefully whether such restrictions are justified by environmental and public health concerns and to encourage local jurisdictions to do the same. The validity or status of a local prohibition is typically a matter of State law. Therefore, to facilitate local sludge management and planning, EPA encourages States to clarify and publicize the status of local bans and prohibitions under State law.

4. Attorney General's Statement (Section 501.13)

In the Attorney General's Statement (AGS), the State documents its legal authority to carry out the program implementation requirements set forth in Part 501. With the AGS, the Attorney General (AG) certifies that, in his or her opinion, the laws of the State provide adequate authority to carry out the program. The AGS discusses the State's legal basis for conducting each aspect of the program with citations to the specific statutory and regulatory provisions that authorize each program element, and an explanation of how each provision provides the requisite authority. It also addresses any significant difference between State and federal law. All referenced State statutes and regulations relied on in the AGS must be in full force and effect by the time the program is approved.

The 1986 and 1988 proposals regarding the Attorney General's Statement were the same except in one minor respect. Under the February 1986 proposal, the AGS could be signed by the Attorney General "or other appropriate State legal counsel." In the March 1988 proposal, EPA explained that this language was not specific enough in requiring that the legal counsel signing the AGS have full authority to represent the State agency. To remedy any ambiguity, the Agency proposed to adopt the language used in the NPDES State program regulations, § 123.23. No commenters objected to this proposed change and therefore it has been included in the final rule.

Under today's final rule, the AGS must be signed by the Attorney General or a representative of the AG who is authorized to sign and can bind the State by so doing. Alternatively, the Statement may be signed by an independent legal counsel. To qualify as an independent legal counsel, the signatory must have full authority to represent the State agency in court on all matters pertaining to the State program, including defending actions against the State and bringing actions to enforce against program violations.

5. Memorandum of Agreement (Section 501.14)

The Memorandum of Agreement (MOA) is a binding agreement between EPA and the State which establishes the basis for cooperation and coordination between them and for ensuring that the State program is administered in an effective manner consistent with the objectives of the Clean Water Act. The MOA defines the State/EPA relationship and the responsibilities of each party, charts the procedures EPA and the State will follow in carrying out these various responsibilities, and generally defines the manner in which the sludge management program will be administered.

The main body of the MOA consists of a listing of the responsibilities and procedures which will be used to ensure coordination between the State and EPA. Under the March 1988 proposed rule, these included provisions for transferring permit applications and other program information from EPA to the State; provisions that establish the frequency and content of reports the State will submit to EPA; an agreement that the State will allow EPA routinely to review relevant State records, reports and files; provisions on the State's compliance monitoring and enforcement program, such as coordination with EPA on inspections and on enforcement activities; and procedures for modifying the MOA.

Basic provisions regarding MOA requirements were essentially the same in the 1986 and 1988 proposals. Three States and one environmental group submitted general comments on the 1986 MOA proposal. One State objected to an MOA as redundant to having an acceptable program. Another State said an MOA was unnecessary since no funds were involved. The third State said the MOA requirements were too specific and inflexible. In contrast, another commenter argued that the MOA requirements were not specific enough, particularly with regard to the frequency and content of reports and information States are required to submit to EPA.

EPA disagrees with the comments. The MOA is necessary to establish the roles and responsibilities of EPA and the State in administering the sludge program and to detail how these activities will be carried out in the particular State. This agreement about

the fundamentals of program administration is independent of grant agreements or other funding agreements. Reaching this agreement in advance reduces ambiguity and confusion as to expectations between the State and EPA as to how the program will be run. While the regulations establish what must be addressed in the MOA (which may encompass requirements established in other parts of the rule such as the semi-annual and annual reports) EPA and the State have flexibility in negotiating specific details (for example, the schedule for submitting required reports, whether the reports will be submitted separately or as an addition to existing reports, procedures for conducting joint inspections, etc.). EPA believes that the final rule represents a reasonable balance between specificity and flexibility.

These basic requirements of the MOA were not challenged further by commenters on the 1988 proposal and therefore the final rule remains substantially the same as the 1988 proposal. Minor changes and comments on specific provisions are discussed below.

Two States objected to provisions in the 1986 proposal to allow federal agency access to State records (similar to § 501.14(b)(5) in the 1988 proposal)—one for no stated reason, and the other because the requirement was too specific or would duplicate other State submittals. EPA disagrees. Providing for EPA access to State records is not too specific because it is critical that the State and EPA reach agreement on this issue. EPA is unaware of other State submittals that duplicate this requirement. If a separate agreement exists, the MOA simply could incorporate the agreement by reference.

A major aspect of the MOA addressed by commenters concerned the procedures for EPA review of State permits. The proposed rule required EPA and the State to specify the classes or categories of permits that will be sent to EPA for review and comment, and the classes of permits for which such review will be waived. The proposed rule provided that EPA could waive review for any class of sludge permits except for Class I sludge management facilities. It also specified that the MOA must also provide for termination of the waiver, for individual permits and classes of permits, at the written direction of the Regional Administrator.

One commenter recommended that EPA waive review of all permits except those issued to Class I facilities, i.e., facilities that can significantly affect the environment. Similarly, another commenter opposed mandatory review except where there is a reasonable concern that the facility could adversely affect public health and the environment. Because the definition of a Class I facility is designed to focus on the permittees most likely to adversely affect public health and the environment, limiting mandatory review to Class I facilities is consistent with these comments. Today's final rule does not categorically waive review of all non-Class I permits as the one commenter suggested, but it does allow Regional Administrators, at their discretion, to do so when negotiating MOAs with the States. The appropriateness of waiving review of a particular type or class of non-Class I facilities will vary, depending on local conditions and other factors. For purposes of ensuring that State programs can assure compliance with section 405, it is important that EPA retain the ability to review any category or type of permit.

One commenter objected to this provision of the proposed rule on the grounds that, under section 402(f) of the CWA, EPA cannot waive review of permits except by regulation; therefore, deciding on the scope of the waiver in the MOA would be inappropriate (since the MOA is not a regulation and thus is not subject to public notice and comment). EPA disagrees for several reasons. First, the State program regulations in Part 501 that affect the permitting aspects of the program are modelled on comparable provisions in the NPDES program which, in turn, are governed by Section 402 of the CWA. However, EPA's authority for implementing the non-NPDES State program regulations is section 405(f) of the CWA. Therefore, what may or may not be required under section 402(f) of the CWA is irrelevant, since this provision implements section 405(f), not section 402(f). Unfortunately, the proposed rule may have been misleading in this regard because it referred to section 402(d)(3), (e), or (f) of the CWA. This was inadvertent and the citation has been omitted in the final rule. In any event, EPA is in fact establishing by regulation the category of permits for which it may waive review, i.e., all non-Class I facilities. What may be addressed in the MOA is the extent to which EPA will actually exercise its waiver. Finally, the MOA, along with other elements of the State's program submission, is subject to public notice and comment, upon initial program approval (see § 501.31) and whenever a State's program is revised (see § 501.32(b)) (except in cases of nonsubstantial revisions).

EPA proposed that the procedures and requirements in § 123.44 governing EPA review of State-issued NPDES permits (including the authority to object to, and, where necessary, veto permits that are outside the guidelines and requirements of the CWA) generally apply as well to permits issued under State programs approved under Part 501. As explained in the preamble to the proposed rule, based on past experience in other programs, EPA believes that the ability to veto State-issued permits which do not adequately implement Federal standards is an important tool for effectively assuring that State programs implement Federal requirements. This approach is also consistent with the NPDES program where EPA has authority to veto State-issued NPDES permits that are not in accord with the guidelines and requirements of the Act (including those implementing sludge standards). There is no reason why the availability of a veto authority should depend on whether a State sludge program is approved under the NPDES program in Part 123 or separately under Part 501. Therefore, the final rule is the same as the proposed rule.

One commenter argued that without specific authority in the CWA, EPA cannot extend its existing NPDES veto authority to non-NPDES permits. As discussed above, EPA is not relying on an expanded interpretation of veto authority over State-issued NPDES permits in section 402 as the basis for asserting similar authority over non-NPDES State-issued permits with inadequate sludge provisions. Instead, it relies on the authority in section 405(f) to establish State program requirements as necessary to assure compliance with section 405 requirements and its general rulemaking authority under section 501(a) of the CWA. The authority to review, object to, and veto State-issued permits is a reasonable and necessary means to assure compliance with sludge standards under section 405.

The commenter also objected to the proposed rule because it provided for an EPA veto based on the permit's failure to include case-by-case limits necessary to fulfill the statutory standard in section 405(d)(4) of the CWA (i.e., in the absence of an applicable Part 503 technical standard, conditions necessary to "protect public health and the environment from the adverse effects that may occur from toxic pollutants in sewage sludge"). (Note: This provision appears as a revision to § 123.44(c)(6), which is incorporated by reference into § 501.14(b)(2)). In addition to denying that EPA has veto authority over non-NPDES permits, that

commenter argued that section 402 limits EPA's veto authority to instances where the State issues a permit that does not follow the guidelines and requirements of the Act, and that guidelines and requirements do not include unpublished, *ad hoc* determinations of EPA, citing in support case law interpreting section 402 of the CWA. Moreover, the argument continues, EPA's authority under section 405(d)(4) expired in August 1988.

It is important to emphasize that EPA expects that vetoes based on the permit's failure to include conditions "to protect public health and the environment from the adverse effects that may occur from toxic pollutants in sewage sludge" would be extremely rare. Such limits rely for their development on the permit writer's "best professional judgment" based on the facts in a particular case and therefore warrant considerable deference. However, it is necessary that EPA have the authority, in egregious cases, to veto a State-issued permit when it fails to protect public health and the environment.

EPA agrees that veto authority over State-issued permits cannot be unlimited. However, it disagrees that the proposed rule exceeds EPA's authority under the CWA. "Guidelines and Requirements of the Act" includes requirements under section 405(d)(4) of the Act. Recently, the U.S. Court of Appeals for the D.C. Circuit upheld the NPDES veto authority regulation under these criteria. *NRDC* v. *EPA*, 859 F.2d 156, 187, 28 ERC 1401, 1426 (D.C. Cir. 1988). In addition, EPA has published a guidance document called the "Guidance for Writing Case-by-Case Permit Requirements for Municipal Sewage Sludge" (USEPA, Permits Division, September 1988) which explains how it intends section 405(d)(4) to be implemented. Also, as explained in section V.E. above, EPA interprets the directive to take appropriate measures to protect public health and the environment under section 405(d)(4) (including the authority to develop permit conditions on a case-by-case basis and to veto a State-issued permit that does not adequately protect public health and the environment) as a continuing responsibility that applies in the absence of an applicable Part 503 technical regulation. Therefore, it disagrees that its authority under section 405(d)(4) expires on any certain date, regardless of when applicable technical standards are promulgated.

One commenter stated that EPA oversight should be limited to POTWs and should consist of on-site evaluation of the State's program for purposes of approving the program. This suggests that EPA oversight of individual State permits should be eliminated. EPA disagrees for the reasons stated above. This does not mean that EPA should or will maintain the same level of oversight after program approval regardless of State performance. The purpose of EPA's oversight is to assure that an approved State continues to administer a program that adequately implements Federal standards and meets minimum program requirements. As with program approval, EPA cannot determine when less oversight might be warranted on an on-going basis in the absence of information about the State's performance.

One commenter said that § 501.14(c)(2), which governs EPA receipt of final State permits, was inadequate because EPA must routinely receive copies of final permits so that it has a basis for determining whether to rescind its permit waiver, consistent with the current NPDES program requirements. Section 501.14(c)(2) requires States to send EPA copies of final permits (i.e., permits as they are finally issued after the public and EPA comment periods) for all Class I facilities, but requires submittal of final permits for non-Class I facilities only upon request by EPA. This differs from the corresponding NPDES provision, which requires submittal of all final permits. In Part 501, EPA limited the routine submission of final permits to Class I permits to reduce the paperwork burden on EPA and the States and because, as a practical matter, these are the only permits likely to be reviewed in any detail. Requiring States to submit all final permits therefore does not serve any significant purpose. EPA agrees that routinely receiving all final permits would provide readily available information for determining whether to rescind its permit review waiver. However, it is not the only basis for this determination and State permits always remain fully accessible to EPA. In fact, nothing in the final rule precludes EPA from requiring routine submission of all final permits. Whether such submission is necessary is left to the discretion of the Regional Administrator.

Two States objected to the 90-day period for EPA review of State draft permits. One said that it would interfere with a State requirement that permits be issued within six months of a completed application; further, the information could be outdated by the time of permit issuance, and in any event, EPA could not meaningfully review site-specific permits without site inspection and familiarity with the permit application. The other commenter said that the 90-day review period was incompatible with issuing permits for land application sites which are numerous, frequently not identifiable in advance, and cannot wait for lengthy periods of time. This State also said that it issued new permits every year and therefore a 90-day review period could cripple its permitting program.

Ninety days is a reasonable time for EPA review. It should be noted that EPA may waive review for a large number of permits. In some cases, States may have to adjust their permitting procedures to accommodate EPA review. Generally, however, the 90-day review period should not interfere with the commenter's six-month requirement except where there is a problem with the permits. EPA should have sufficient information to determine whether or not the permit is within the guidelines and requirements of the Act since the basis for permit limits should be explained in the fact sheet.

The requirements for EPA review of individual permits assume that permits are reissued every five years. States which choose to reissue permits more frequently will have to decide whether such frequent reissuance is desirable in light of the 90-day EPA review period. In addition, as explained elsewhere, EPA has provided alternate procedures for covering individual land application sites that do not require issuance of separate permits for each land application site when the generator's permit includes an approved land application program. This should significantly reduce the number of permits (e.g., site permits) which must be submitted to EPA for the 90-day review period and consequently minimize the concerns raised by the commenter.

6. Permitting Requirements and Procedures (Section 501.15)

General. This section was added to the proposed Part 501 in the March 1988 proposal in response to the 1987 amendments to the Clean Water Act, which required a permit program as the primary mechanism for implementing the technical standards for sludge use and disposal.

In developing the regulations to implement this requirement, the NPDES permitting program was used as the basis for the specific provisions proposed in Part 501. The proposal set forth the specific requirements for ensuring effective permitting programs and was divided into four principal subsections. Paragraph (a) specified

general requirements the State must be able to implement and standards for program implementation. Paragraph (b) listed boilerplate provisions which all permits must contain. Paragraph (c) contained provisions for permit actions such as transfers, modification, revocation and reissuance, and termination. Paragraph (d) contained procedures for permit issuance. In addition, paragraph (e) listed optional program provisions.

Overall, the final rule is substantially the same as the proposed rule. The section has been slightly reorganized, however, by creating a new paragraph (f) at the end of this section which now contains the conflict-of-interest standard for State permitting boards (§ 501.15(a)(7) in the March 1988 proposal). Most of the provisions in this section have counterparts in the revisions to Parts 122 and 124, also promulgated today, and have been discussed in the context of those revisions. Discussion of those provisions will not be repeated in this part of the preamble. The provisions not already discussed elsewhere in the preamble are addressed below.

Public access to information. Section 501.15(a)(1) deals with confidentiality of information and requires the State to deny claims of confidentiality for: (1) The name and address of the permittee, and (2) permits, permit applications and effluent data. The State may protect other information claimed as confidential. This proposal is consistent with the confidentiality rules in the NPDES program (§ 122.7), which are mandated by sections 308 and 402(j) of the Clean Water Act. The final rule is the same as the proposed rule.

EPA received only one comment on this section. The commenter generally requested that the regulations ensure that citizens have access to public records and the "standard be rigid and not subject to State or local interpretation * * *." As a preface to this comment, the commenter reported difficulty with obtaining records directly from the regulated party and being told by a State agency that it would be charged for the actual cost of obtaining requested public records.

Today's final rule balances the public interest in access to information and the permittee's interest in confidentiality. It does not require a permittee to respond directly to public requests for information, but instead requires the permittee to submit necessary information to the permitting authority. This permitting authority must make the information listed in § 501.15(a)(1) available to the public. States are not precluded from charging "actual costs" for providing copies of public records. EPA believes this is a reasonable requirement. (In fact, EPA's own rules regarding public access to information allow the Agency to charge "reasonable fees." See 40 CFR Part 2.)

Permit application information. Section 501.15(a)(2) lists the information States must be able to obtain from a permit applicant. These information requirements have undergone changes from the proposal which are explained in the discussion about revisions to § 122.21, the NPDES permit application section. In addition, also as explained in that discussion, a new paragraph has been added to Part 501 (§ 501.15(d)(1)) to specify when permit applications must be submitted.

Paragraphs (a)(3) and (a)(4) in the proposed rule addressed retention of permit application data and who must sign permit applications. The final rule on signatory requirements is the same as the proposed rule, since the Agency received no comments on this issue.

The final rule concerning record retention (paragraph (a)(3)) requires that records be retained five years rather than three years as proposed. The Agency had proposed that monitoring and application information must be retained for three years by permit holders and sought comment on whether permit holders should be required to retain records for five years to coincide with the term of the permit. Nine State agencies, one POTW, one industry trade association, one environmental group and one member of the public provided comments. Five commenters recommended that EPA require that records be retained for three years. They counseled that three years was adequate, appropriate and consistent with other Federal environmental programs such as NPDES and RCRA, and that there would be no advantage to a five-year term as regulators can require that records be kept longer than three years when needed for an enforcement action. One noted that while permit holders should be required to retain records for only three years, States should keep records for a longer period.

Eight commenters supported requiring that permit holders retain records for five years or for a longer period. One commenter noted that a five-year period would be consistent with the Federal statute of limitations for Clean Water Act violations. Several commenters recommended that records of sludge loading rates at land application sites and of sludge quality analyses for sludges reused at these sites should be kept indefinitely. One commenter recommended that, at a minimum, records should be retained for the life of the facility. One commenter noted that POTWs must have records to document any potential limitations or liabilities for their past, present, and future sludge management programs.

After considering these comments, EPA has decided to require that permit holders retain records for a period of five years, or longer where required by the Part 503 technical regulations. EPA chose to require a five-year period because the Federal statute of limitations for CWA violations is five years.

Note: Records may not be destroyed during an enforcement action.

A five-year period also coincides with the maximum permit term and ensures that all records will be available when the application for a new permit is submitted and reviewed. EPA recognizes that a five-year record retention period is longer than is currently required for NPDES and RCRA recordkeeping; nevertheless, the Agency finds the arguments for a five-year period in the case of regulating sewage sludge to be compelling. (For this reason also, today's final rule revises § 122.21(p) to specify that sludge application data must be retained five years or longer if required by Part 503.) In many cases, permittees may have cumulative limits in their permits, so that it will be important to track sludge information over longer periods of time. The Agency considered the additional burden the five-year retention time might impose on permittees, but determined that this burden would be less than other alternatives, such as requiring the permittee to summarize and "rollover" information every three years, which would be necessary if permittees were required to retain records for only three years. Tying the record retention time to the permit term facilitates the carryover of this information on cumulative loadings from permit to permit, easing the burden for both permittees and permitting authorities.

While EPA will not set such a requirement in today's rule, as a matter of guidance, the Agency believes that it is prudent for States to require that permit holders retain records of cumulative heavy metal loadings to land application sites longer than five years. Records of heavy metal loadings should be retained as these compounds tend to accumulate at sites with little diminution over time. In contrast, organic pollutants tend to break down due to microbial action and exposure to climate. The proposed Part 503

regulations will include limits based on cumulative heavy metal loadings. Thus, there needs to be a way to ensure that these loadings are not exceeded beyond a five-year timeframe. This may be accomplished by having the permittee or the State retain the records. An alternative approach would be to require that a summary of heavy metal loadings to land application sites be prepared every five years and signatures attached attesting to the accuracy of the information. The summary could be retained for five years, revised before the next round of records for land application sites is disposed, and the new summary retained. Another option might be to take soil samples. The choice is up to the State. In the program description, the State must describe how it plans to ensure that metals are not being applied to the land in excess of the requirements.

Permit duration. Under the proposed § 501.15(a)(5), sludge permits could be issued for a term of up to five years. The preamble discussion to the proposed rule explained that because many of the requirements will be new, a longer permit term would be inappropriate. The State may, of course, write permits for a shorter term.

Two States and one POTW questioned the need to limit permits to five years. One State noted that the Act does not limit the permit term. Another said that a five-year term would conflict with the Paperwork Reduction Act. Comments suggested that ten year permits are used in at least two States.

As explained in the preamble, many of the requirements in the permits will be new. Therefore, it is important to periodically review the permit. Five years is a reasonable term and is consistent with the maximum term for NPDES permits. Nothing in the Paperwork Reduction Act governs permit duration and therefore fixing a permit term in today's regulation does not conflict with that statute.

Many of the commenters' concerns may reflect a misunderstanding of who will be required to obtain permits. Today's rule would require maximum five year permit terms only for facilities required to have permits under federal law, i.e., treatment works for whom Part 503 standards have been promulgated. The five-year limit would not necessarily apply, however, to State-issued permits required under State law for individual land application sites or sludge treatment processes. Where States use permits that are not mandated by the CWA or this Part, they may set permit terms they deem appropriate. The only requirement would be that the permit requirements and procedures could not interfere with the State's ability to require compliance with the Part 503 technical standards by the statutory deadline.

Compliance schedules. Paragraph (a)(6) provides that schedules of compliance may be used (but are by no means mandatory), except that a State may not issue a permit with a compliance schedule which goes beyond the statutory deadline. CWA section 405 mandates that compliance with the Part 503 technical standards be achieved by one year from the date of their promulgation, except where the standards would require major construction, in which case the permittee has up to two years to achieve compliance. Where a compliance schedule goes beyond one year, this section would require interim requirements and reporting to ensure that the permittee is on schedule.

Given the relatively tight statutory deadlines (even assuming the technical regulations require major construction), some commenters questioned the utility of compliance schedules. Obviously, compliance schedules in permits will have a more limited application in the sludge program than has been the case in the NPDES and other programs. However, EPA believes the prudent course is to provide for compliance schedules in the regulations now, rather than wait until their need appears more widespread.

Permit conditions. Section 501.15(b) is the second principal subsection, and sets forth the permit conditions all State permits would need to contain in order for the program to be approvable. These provisions are important because they put the permittee on notice as to the applicability of Clean Water Act provisions, and identify the effect of the permit with regard to compliance and non-compliance with the Clean Water Act for enforcement purposes.

The first paragraph of § 501.15(b) requires that the permit include requirements (which may vary from permittee to permittee and therefore need to be developed individually for each permit) necessary to comply with the Part 503 sludge standards and generally the requirement in CWA section 405(d) to protect public health and the environment. This includes requirements as to sludge quality, monitoring frequency, management practices, etc.

The final rule has been changed from the proposed rule to specify that permits for POTWs and other generators required to obtain a permit under section 405(f) must contain conditions addressing at least sludge quality and related conditions (monitoring and reporting). However, as explained in the discussion about users and disposers above in section V.D.3 of this preamble, the generator's permit need not contain Part 503 technical standards applicable to its sludge use or disposal option that address site limitations if those limitations have been included in a permit issued to the site owner or operator.

Paragraph (b) also requires that States be able to include a number of "boilerplate" permit conditions in permits. Several of these relate to the permittee's liability under the Clean Water Act for sludge use and disposal activities. These include provisions specifying that: The permittee must comply with all conditions, and that noncompliance with any of the permit conditions constitutes a violation of the Clean Water Act; the permittee must comply with the Part 503 technical standards, even if the permit has not been modified to incorporate them (see also discussion above concerning "permit as a shield," revisions to Part 122 regulations, and paragraph (13) of this section); and informing the permittee of the civil and criminal penalties in the Clean Water Act for permit violations and noncompliance with section 405.

This section also contains several other boilerplate permit conditions which a State must be able to include in permits issued under the approved program. These permit conditions specify that: It is not a defense in cases of noncompliance to claim that it would have been necessary to halt or reduce the permitted activity in order to comply (paragraph (4)); the permittee must take all reasonable steps to prevent sludge use or disposal in violation of the permit which has a reasonable likelihood of adversely affecting health or the environment (paragraph (5)); the permittee must at all times properly operate and maintain facilities and systems (paragraph (6)); the permit may be modified, revoked and reissued, or terminated for cause (paragraph (7)); the Director may request information to determine compliance, or whether cause exists to modify or terminate the permit, and the permittee has an obligation to furnish such information within a reasonable time (paragraph (8)); the permittee must allow the Director or an authorized representative to enter onto the premises, inspect the facility, have access to records and conduct sampling (paragraph (9)); the permittee must monitor and report monitoring data no less frequently than once a year or more frequently as specified by the Part 503 standards or where the permit writer

determines that additional or more frequent monitoring is needed, monitoring must be representative of the monitored activity, parameters for monitored information will be set forth in the permit, monitoring must be conducted in accordance with procedures established under 40 CFR Part 136 or part 503 unless others have been specified in the permit, and anyone who falsifies, tampers with or knowingly renders inaccurate any monitoring device or method or makes a false statement or representation is subject to Clean Water Act criminal penalties (paragraph (10)); the signatory requirements in 40 CFR 122.22 must be followed (paragraph (11)); the permittee must give advance notice to the Director of any planned changes in the sludge disposal practices or facilities that may justify the application of different permit conditions, or which may result in noncompliance with the permit, must also report all instances of noncompliance, and notify the Director before transferring the permit (paragraph (12)); and a reopener clause, to provide for permit modification or revocation and reissuance where more stringent technical standards than are currently in the permit are promulgated (paragraph (13)).

In most cases, these boilerplate provisions are the same as the proposed rule. Several of the provisions generated comments which have been addressed in the discussion of the final revisions to Part 122. Only three changes have been made to the final rule. The first, a minor change discussed earlier, involves specifying in paragraph (10) that the permit must include any monitoring requirements (including frequency requirements) necessary to implement Part 503 technical standards. The second involves adding a required boilerplate condition based on 40 CFR 122.41(b) that notifies the permittee of its duty to reapply for a new permit if it plans to continue the permitted activity beyond the expiration date of its current permit. (The reason for this change is explained in the Part 122 discussion above in section V.F.)

The third change involves § 501.15(b)(6) which establishes the duty of proper operation and maintenance. The proposed rule was taken directly from § 122.41(e), except that it did not include the last sentence to the paragraph which states: "This provision requires the operation of back-up or auxiliary facilities or similar systems which are installed by the permittee only when the operation is necessary to achieve compliance with the conditions of the permit." One commenter objected to the omission of this sentence in the Part 501 counterpart on the grounds that the sentence resulted from a successful industry challenge to the NPDES regulations and that it was equally applicable to the sludge situation.

EPA's authority for promulgating today's regulation is different from its authority to promulgate NPDES regulations. Therefore, EPA disagrees that any litigation or other action affecting the NPDES regulations would necessarily affect a comparable sludge regulation. Nonetheless, EPA agrees that the sentence omitted from the proposed § 501.15(b)(6) has validity in the sludge program and therefore has included it in the final rule. This sentence clarifies that back-up equipment or facilities are not required as a matter of course; instead, they are required only when necessary to maintain compliance with the permit. One situation might be where regular downtime for a particular process or piece of equipment can be reasonably anticipated and stopping operations is not a feasible alternative for maintaining compliance (e.g., back-up dewatering equipment might be necessary if all of the POTW's sludge is disposed of at a co-disposal landfill that does not accept materials containing free liquids). This provision does not require that permittees develop contingency plans (as the 1986 proposal would have required). Whether contingency plans are needed must be determined on a case-by-case basis.

It is important to note that this paragraph states a general duty of all permittees. It would not supersede or otherwise affect a specific Part 503 requirement addressing operation and maintenance requirements. It also includes a duty to operate and maintain adequate laboratory controls and appropriate quality assurance (QA/QC) procedures. Thus, permittees should keep records of QA/QC results.

Permit actions. Section 501.15(c) discusses procedures for permit actions. This covers permit transfers, permit modification, permit termination, and permit issuance.

Paragraph (1) addresses permit transfers, and sets out procedures for automatic transfer so that permit modification or revocation and reissuance can be avoided in some instances. One commenter said that the automatic transfer provision should be deleted because decisions about permit transfers may involve several factors (e.g., bonding, compliance issues). Under today's final rule, a State need not adopt the automatic transfer provision as part of the their program in order to obtain EPA approval. Editorial changes to the final rule clarify that providing for automatic transfers is discretionary. States may always choose to omit required provisions if the result is a more stringent requirement. (States must be able to prohibit transfers without prior notice, however.) Even under the automatic transfer provision, the State Director can prevent an automatic transfer simply by notifying the current permittee that he or she intends to modify or revoke and reissue the permit.

Paragraph (2) discusses permit modification, and revocation and reissuance. When permits are modified, only the provisions subject to the modification are reopened. Permits may be modified only for cause as defined in (2)(ii). For example, the promulgation of new technical sludge standards by EPA would be cause for modifying the permit. Permit revocation and reissuance is more severe; the entire permit is reopened and subject to revision and the permit reissued for a new term. Revocation and reissuance can only be done in three circumstances: (1) cause exists for termination, but the Director decides to revoke and reissue; (2) cause exists for modification only, but the permittee agrees to revocation and reissuance; or (3) the Director has received notice of a proposed permit transfer under § 501.15(b)(12)(iii). (A permit may also be modified to reflect a transfer.)

This paragraph is the same in the final rule as it was in the proposed. Most comments addressing permissible causes for modifying a permit centered on the promulgation of applicable Part 503 standards during a permit term. This issue, as well as other comments on the causes for modifying a permit, are discussed in detail in section V.F.2 above. As explained in that discussion, the final rule contains a new cause for modification to approve land applications plans.

The most severe permit action, termination of the permit, is described in paragraph (3). Permits can be terminated (or permit renewal applications denied) for four reasons: (1) Noncompliance; (2) permittee's failure to disclose all relevant facts; (3) the permitted activity endangers health or the environment and can be adequately regulated only by modifying or terminating the permit; and (4) a change in condition that requires either reduction or elimination of the permitted activity. EPA received no significant comments on this provision and accordingly is promulgating a final rule that is the same as the proposed rule.

Permit issuance procedures. Subsection 501.15(d) describes the

permit issuance procedures that the State would need the authority to administer. In addition to typical procedures for licensing type actions, this section sets forth minimum provisions to ensure adequate public participation. The State may of course provide for more extensive public involvement, e.g., by providing lengthier public comment periods, requiring more public hearings, having more extensive public notice, etc.

One commenter said generally that the permit procedures in § 501.15(d) were too cumbersome and time-consuming for "simple permits" such as for the transport of sludge from one plant to another for further processing. This comment reflects a misunderstanding about when a permit is required under Part 501. Separate permits are not needed each time sludge is transported. Permits issued to treatment works may be effective for up to five years and should comprehensively address the treatment works' method(s) of sludge use and disposal during that period. Part 503 does not propose to regulate the transportation of sludge. Whether conditions are needed in the permit to address sludge transportation would thus be decided on a case-by-case basis as necessary to protect public health and the environment. In this event, the conditions would be included in the permit at the time of issuance. Permit modifications would be necessary, however, if the permittee wants to use a sludge use or disposal method not addressed in the permit or to incorporate applicable Part 503 standards promulgated after issuance of the permit.

The first paragraph describes minimum application procedures and provides that the State Agency must not commence processing a permit until the applicant has fully satisfied the application requirements discussed in § 501.15(a)(2). It differs from the proposed rule in one important respect. The subparagraph describing when persons subject to the permitting requirement under section 405(f) (i.e., treatment works treating domestic sewage) must be required to submit their applications has been expanded to address POTWs and privately-owned sewage treatment works separately, consistent with changes made to 40 CFR 122.21, explained in section V.F.2 above. (Note: Part 501 does not address "sludge-only facilities" separately as does Part 122. "Sludge-only facilities" by definition only exist when EPA is the permit-issuing authority.) The effect of this change is to clarify that permit applications, and hence permits, generally are not required for non-POTWs until promulgation of a Part 503 standard applicable to their sludge or sludge use or disposal practice.

Section 501.15(d)(2) sets forth procedures for permit modification, revocation and reissuance, and termination. Interested persons may petition the Director to take such action by written request, or he may do so on his own initiative, provided that one of the reasons specified in § 501.15(c) exists. No comments addressed these procedures. The final rule is the same as the proposed rule.

Paragraph (3) requires draft permits to be prepared where the Director tentatively decides to issue the permit, and whenever the permit is modified, revoked and reissued, or terminated. A draft permit must include all of the conditions required to be in the permit under the provisions of § 501.15 (which includes conditions required for compliance with Part 503). Today's final rule on when draft permits must be prepared is the same as the proposed rule. Additional revisions to this paragraph for land application plans are discussed in section V.F.2 above.

One State suggested that draft permits be required only when public hearings are held and also expressed the view that draft permits are generally unnecessary and cause delays. EPA disagrees. Draft permits inform interested persons (including the permit applicant) about what the permitting authority proposed to require of the permittee during the term of the permit and thus provide the basis for comments on the permits (and for determining whether to request a public hearing). This allows potential problems with the permit to be identified and, if appropriate, resolved before final issuance. Draft permits are a key element of the permitting issuance process. The importance of this process is explained in the more detail above in section V.G.2.

Paragraph (4) discusses fact sheets. Under today's final rule, State programs must prepare a fact sheet for permits issued to any "Class I Sludge Management Facility," or when the permit contains conditions developed on a case-by-case basis to protect public health and the environment. The purpose of the fact sheet is to explain the basis for any permit condition and thus allow meaningful public comments on the draft permit. Accordingly, the fact sheet is required to set out the significant factual, legal, methodological, and policy questions considered in preparing the draft permit, including a brief description of the facility and the use and disposal practices, and an explanation of how the limits and conditions for sludge use and disposal were derived. Fact sheets also must be prepared whenever a permit includes a land application plan, and must explain how each required element of the land application plan is addressed.

The requirements governing fact sheets in this section are the same requirements applicable to fact sheets in the NPDES program. Changes in the fact sheet requirements made in response to comments on the proposed rule are explained in the discussion of revisions to Part 124 in section V.G.2 above.

Public notice and comment procedures are the subject of paragraph (5). Under today's final rule, the State program must require that the Director give public notice of the draft permit and if a public hearing has been scheduled. The public notice must identify the name and address of the processing office, the name and address of the applicant, a brief description of the activity described in the permit application (e.g., sludge incineration), whether the permit includes a land application plan, and a description of the procedures for submitting comments. The notice must provide for no less than a 30-day comment period during which any interested person may submit written comments and request a public hearing. Where the notice is for a public hearing, the notice must designate the date, time, and place of the hearing, and specify its nature and purpose.

One State, commenting generally on the public notice procedures, urged EPA to reconsider requiring these procedures for all States, even though its State already had public notice procedures comparable to those in the proposed rule. This commenter explained that, in the State's experience, responding to public comments demanded a great deal of time and effort on the part of the technical staff. In a related vein, another commenter remarked that in its experience public participation resulted in decisions not to issue permits because of public misperceptions about sludge. EPA recognizes that public participation may place additional demands on State programs. Some of this demand may result from public misunderstanding. However, encouraging public participation in permit and enforcement actions is an important goal of the CWA. EPA views public involvement as supportive of implementing the requirements and goals of the CWA. While demanding resources in the short term, it ultimately benefits the sludge

program by helping to educate the public about sludge use and disposal. As recognized by the State commenter, public awareness and understanding is critical to public acceptance of sludge use and disposal, particularly beneficial reuse of sludge.

Two States and one POTW submitted comments opposing public notice for draft permits. One State said that the regulations should not require public notice; instead, State requirements should prevail. EPA believes that minimum procedural requirements are important to provide consistency among State programs and to provide for public participation in the permitting process. See section 101(e) of the CWA.

One State recommended that instead of requiring public notice of the draft permit, that EPA allow public notice of permit applications so that the public comment period would run concurrently with the State review of the application and also would allow public comments to be incorporated into the review letter. Without more information, it is not possible to determine whether this alternative scheme is functionally equivalent to that in the proposed rule. The purpose of the public notice is to allow public participation on the issue of whether or not the conditions in the permit ensure compliance with the CWA, not just whether the permit applicant has submitted complete and accurate information. Therefore, unless the permit application under the State's program is essentially the same as the draft permit under Part 501 (i.e., it sets out how the permittee will comply with applicable requirements, including those required by Parts 501 and 503), public notice of the application would be of limited value.

Another suggested alternative was to allow public notice of the disposer permit (which allows for consideration of site-specific concerns) to suffice. Again, without more information EPA cannot determine this would be an acceptable alternative. However, under today's final rule, permits for the sludge generator generally will be required regardless of whether permits for disposers are also required. Public notice of the draft permit for the generator would be required under today's final rule.

One commenter asked that the regulations be revised so that they do not require a separate public notice for sludge management plans when the plan is a part of a permit and the permit reissuance process already provides for public notice. Nothing in today's final rule requires a separate or duplicative public notice in this situation. The public notice requirements can be met through existing public notice procedures as long as they meet the minimum requirements established in § 501.15(d)(5) of today's rule regarding when notice is required, how and to whom it must be given, and what the notice must contain. As the commenter noted, this may be easily accomplished by revising existing permit reissuance procedures.

One commenter, who generally supported the public notice requirements for individual permit actions, suggested that § 501.15(d)(5)(ii)(B) be revised to indicate the public notice requirements for Class I sludge management facilities in that paragraph are in addition to the public notice requirements in § 501.15(d)(5)(ii)(A), which apply to all permits. This suggested revision clarifies the Agency's intent and accordingly has been adopted in the final rule.

Several other commenters addressed public notice in the context of permits for land application of sewage sludge. This issue is discussed at length in the earlier discussion about land application plans. (See section V.F.2 of this preamble). Briefly, today's proposed rule establishes special rules for land application programs to meet the special needs of that use option and thus to encourage beneficial reuse of sludge.

The State regulations must specify that public comments will be considered before making a final decision; that significant comments will be responded to in writing and made available to the public; and that any provisions in the final permit which differ from the proposed permit will be noted and explained in the written response to comments.

Under today's rule, State-issued general permits will not be subject to review by EPA's Office of Water Enforcement and Permits, as § 123.44(a)(2) provides for NPDES general permits, but would be reviewed by the EPA Region to the same extent as other State-issued sludge permits (i.e., minimally, all permits for Class I facilities must be reviewed by the Region). States considering the use of general permits for sludge should so indicate in their program description and Attorney General's Statement, and make sure that State law would allow issuance of general permits.

Optional permitting provisions. Section § 501.15(e) lists optional program provisions. These provisions, which the State is not required to adopt, are currently in the NPDES program and generally make the program less stringent or easier to administer. If the State decides to adopt general permits, permit continuation, or minor modification of permits for sludge, its provisions must be no less stringent than the corresponding Federal provisions identified in paragraph (e). EPA received no comments on this section.

The final rule includes a new provision, however, listing the newly created affirmative defense in § 122.5. Although this provision, a modified "permit as a shield" protection for compliance with Part 503-based permit limits, applies as a matter of Federal law, it would not necessarily apply under State law. States, however, may determine that the affirmative defense would be important for their programs for the same reasons as EPA. As with other provisions listed in this paragraph, States may, but need not, adopt these provisions as part of an approved program. However, if the State decides to adopt one, it must be no less stringent than the provisions referenced in this section.

Conflict of interest standard for permitting authority. In the 1988 proposal, the Agency proposed to use the conflict-of-interest rules that applied to NPDES State programs (§ 123.25(c)) for non-NPDES sludge management programs. Section 123.25(c) requires that no member of a board or body which approves a permit receives or has for the past two years received income from permit holders or applicants. Since the NPDES standard for conflict-of-interest is considered relatively stringent, EPA solicited comments on whether another standard would be more appropriate. In particular, the Agency discussed an alternative which would allow a State that used a program approved under another Federal statute as the basis for its sludge program under Part 501 to comply with the conflict-of-interest provision applicable under the other Federal statute (e.g., section 128 of the Clean Air Act, 42 U.S.C 7248).

The proposed rule addressing conflict-of-interest generated few comments. Three commenters, including two States, supported adopting the NPDES standard. One commenter, however, said that rather than prohibiting membership, EPA should instead require recusal in cases of direct conflict-of-interest. However, recusal only for individual instances of actual conflict-of-interest offers little assurance that the integrity of the permitting program will be protected. Adopting such a standard also would create a significant disparity in requirements between NPDES and non-NPDES sludge management program that would be difficult to justify. Therefore, EPA has decided to issue a final rule that adopts the NPDES conflict-of-interest standard.

The final rule also would allow an alternative standard used in other EPA-approved State programs or the equivalent of such a standard. The only alternative standard EPA is aware of is the conflict-of-interest standard established in section 128 of the Clean Air Act. This standard is described in section V.I.1 above.

Note: NPDES State sewage sludge management programs would have to meet the conflict-of-interest requirements in § 123.25(c), which are mandated by section 304(i) of the CWA. The alternate confict-of-interest standard is available only for non-NPDES State sludge management programs.

Under the conflict-of-interest regulations promulgated today, State agencies or departments are not considered "permit holders or applicants for a permit." Section 501.15(f)(1). Without this exemption, many States could not administer an approved program because State agencies often hold permits. A similar exemption for federal agencies or departments is being considered and may be addressed in the forthcoming proposed revisions to the NPDES regulations. It is not a part of today's final rule, however.

Municipalities, on the other hand, may be "permit holders or applicants for a permit." Under the proposed rule, employees of a municipality that owns or operates a facility required to obtain a permit could not sit on the board or body that approves all or portions of sludge permits issued in an approved State. One commenter noted that this proposed rule would prohibit municipalities that own or operate POTWs required to obtain permits from regulating septage disposal within their jurisdiction, as is often the case. Under the final rule, this conflict-of-interest requirement has been relaxed somewhat so as to allow for assignment of program responsibilities to local agencies if an alternative conflict-of-interest standard can be met by the permit issuing board or body. This change is explained in more detail in section V.I.1. above.

One commenter suggested that because municipalities and counties often regulate septage disposal, the conflict-of-interest provision should be incorporated into the MOA. Thus, a State which currently has conflict-of-interest regulations could be allowed to use these regulations in its sludge management program. This comment is unclear. However, to the extent that the commenter is suggesting the State be allowed to negotiate in the MOA for a conflict-of-interest standard that would allow municipal regulation of septage disposal to continue despite the conflict of interest standard in Part 501, EPA declines to adopt such an approach as it has too much potential for inconsistent requirements among programs.

7. Compliance Evaluation Program (Section 501.16)

This section would require that States have requirements and procedures for compliance monitoring and evaluation. The proposed rule adopted by reference 40 CFR 123.26. (The 1986 proposal also used § 123.26 as the basis for compliance monitoring program requirements). Section 405 of the Clean Water Act makes it unlawful for any person to use or dispose of sewage sludge except in accordance with the Part 503 standards. Thus, it is important that the State's compliance monitoring program cover non-permittees (e.g., disposal sites) as well as permittees.

Most comments on this section were received in response to the 1986 proposed rule rather than on the March 1988 proposal. Several States objected to this section as being too detailed, depriving States of program flexibility, and therefore requested that it be deleted. Flexibility is an important goal, but it is not a sufficient reason in itself to leave an entire, critical component of the sludge management program to individual States' discretion. As noted by another commenter, minimum uniform standards for State programs are just as important in the area of compliance monitoring as in other areas of approved State programs. Accordingly, EPA proposed requirements that in its experience are the "bare essentials" for an adequate compliance monitoring program. Comments on specific aspects of the proposal are considered below.

One comment addressed the requirement that the State use procedures for handling samples that would allow those samples to be admissible in court, i.e., employ chain of custody procedures. (*See* 40 CFR 123.26(d).) The commenter said that although there were sound reasons for requiring "litigation quality" samples, the extra expense was not worth it in all cases. The commenter suggested that instead, this subject be addressed in guidance to allow States to better allocate financial resources.

Chain of custody procedures ensure that samples are not altered between the time they are taken and the time they may be needed as proof of violations in an enforcement action. When such procedures are not followed, it may be difficult to establish the integrity of the sample and get the results admitted as evidence. Therefore, the regulations require chain of custody procedures when samples are taken for purposes of determining compliance. In EPA's experience, chain of custody procedures add minimal costs to sampling programs. Generally, chain of custody procedures merely require that a log to record basic information about the sample (e.g., date and place collected) and certification by handlers that the sample has not been altered be kept as the sample is moved from one place or person to the next. Certainly, following these procedures costs less than would the alternative of resampling where noncompliance has been detected (but where chain of custody procedures were not used) in order to establish an evidentiary basis for the enforcement action.

One commenter suggested that compliance evaluation programs be required to specifically address potential effects of synthetic organic chemicals in sewage sludge which may be disposed of in landfills or applied to food chain crops. This suggestion is based on concerns about the suspected carcinogenic, mutagenic, and teratogenic effects of synthetic organic chemicals that are being detected in sewage sludge from treatment facilities in highly industrialized areas. Nothing in the proposed or final rule would preclude States from addressing this particular concern. Generally, which chemicals must be monitored in sludge will be addressed in the technical regulations under Part 503. Whether additional pollutants of concern in particular areas should be regularly monitored, however, is best left to the discretion of the States and permit writers.

An important element of a State's compliance evaluation efforts is a program to verify the accuracy of self-monitoring reports (§ 123.26(b)). EPA received four comments on this subject. Two States, in response to the 1986 proposal, requested that the requirement for procedures to verify self-monitoring reports be deleted. In contrast, two citizen groups (one in response to the 1986 proposal and one in response to the 1988 proposal) expressed concern about reliance on self-monitoring, implying that additional State monitoring should be required instead. As noted by one of the citizen group commenters, a State monitoring and inspection program is particularly critical where most monitoring is done by the regulated parties. Therefore, the final rule retains the general requirement for States to have a program to verify self-monitoring reports.

States must also be able to determine, independent of self-monitoring reports, the compliance status of regulated

parties. In particular, the 1988 proposed rule contained a requirement that States inspect "all Class I sludge management facilities where applicable at least annually" (§ 123.26(e)(1), incorporated by reference in § 501.16). The 1986 proposal recommended, but did not require, annual inspections of Class I sludge management facilities. One commenter on the 1986 proposal specifically endorsed establishing the annual inspection as a requirement. Another commenter on the 1986 proposal however, a State, requested that it be allowed to continue inspections on a two-year cycle because it had limited resources and the facilities were widely scattered among a large area. Five commenters, all State agencies, provided comments on the 1988 proposed requirement. The commenters generally supported annual inspection of Class I sludge management facilities, except for sites where sludge is applied to land. Several commenters asserted that annual inspection of privately-owned agricultural landspreading sites used by Class I facilities would be burdensome and proposed instead that the frequency of these inspections be left to State discretion, or that inspections only be required prior to site approval. One commenter asserted that annual inspections would be impractical (manpower demand would be seasonal, inspections would have to be performed at the time of application to have any value, inspectors would have to visit unused fields as permittees should be encouraged to have numerous sites available whether or not the sites are used). One commenter requested that EPA clarify what is meant by "inspection." Another one noted that whether annual inspections would be appropriate would depend on the definition of "Class I" and "facility."

After considering these comments, EPA has decided to retain the 1988 proposed language in today's final rule: compliance evaluation programs must include inspections of "all Class I sludge management facilities where applicable at least annually." EPA did not adopt the suggestion to require inspections every two years rather than annually. While this may require some States to devote additional resources to their inspection program, EPA believes that limiting the annual inspection requirement to "Class I sludge management facilities" appropriately balances State resource concerns and the need to establish minimum State program requirements that ensure compliance with Section 405 requirements. EPA encourages States, where possible, to combine sludge inspections with other inspections, such as pretreatment inspections, to more efficiently use resources.

Although the final rule retains the same language as the proposed rule, it does not require annual inspection of all beneficial reuse land application sites. As set forth at § 501.2 in today's rule, the definition of "Class I sludge management facility" has been revised to include any POTW meeting the criteria in § 403.8(a) and any other treatment works treating domestic sewage classified as such by the Regional Administrator in conjunction with the State Program Director because of its potential for adversely affecting public health and the environment. Thus, beneficial reuse land application sites are not themselves Class I management facilities by definition, and compliance evaluation programs are not required to inspect all beneficial reuse sites receiving sludge from Class I sludge management facilities annually. (Note: The definition of "facility" has no significance for the annual inspection requirement. Also, as discussed elsewhere in today's preamble, EPA has dropped the definition of "facility" from today's rule, primarily because it created too much confusion.)

EPA does not address a minimum frequency for inspection of land application sites receiving sludge from Class I sludge management facilities in today's rule. Neither does the Agency define "inspection." Instead, the Agency will address these issues as it has in the NPDES program and prepare compliance evaluation program guidance. Addressing these issues in guidance rather than regulation provides both EPA and the States with important flexibility in responding to particular fact situations and changing program priorities.

Similarly, today's final rule does not establish a minimum inspection frequency for non-Class I sludge management facilities. One commenter on the 1986 proposal asked that States be required to do periodic inspections of non-Class I facilities. EPA expects that State inspection programs will include non-Class I facilities, but the appropriate frequency and other details concerning these inspections will be left to negotiation between the State and EPA in the MOA or other program agreements. The same commenter also requested that the regulations require a thorough inspection of each non-Class I facility as soon as the sludge technical regulations are promulgated to determine whether the facility is properly classified as a non-Class I facility, since "Class I designation" is based in part on evidence of a pretreatment problem, which in turn may depend on the technical sludge regulations. EPA disagrees that mandatory inspections of non-Class I facilities upon promulgation of the technical standards are necessary for this purpose. Whether a particular treatment works requires a pretreatment program under § 403.8(a) (and hence will be considered a Class I sludge management facility under today's rule) is adequately addressed by the pretreatment regulations at 40 CFR Part 403. Moreover, State inspections are only one means of determining compliance. Non-Class I facilities will still be expected to meet the self-monitoring requirements that apply to all permittees.

8. Enforcement Authority (Section 501.17)

General. The proposed rule required States to have adequate enforcement authority in their State statutes, including the ability to enjoin violations and bring both civil and criminal actions for any violations of permits, the permit program, or the sludge use and disposal standards set forth in 40 CFR Part 503. The March 1988 proposal differed in two respects from the February 1986 proposal. First, the March 1988 proposal did not provide for alternative civil penalties, which would allow the Regional Administrator and State Program Director to agree to a lesser civil penalty authority if sufficient to deter violations. This provision was deleted to minimize inconsistency among State programs regarding fundamental enforcement authorities. The March 1988 proposal also differed in that it required States to have authority to seek criminal fines. This requirement was added because the 1987 amendments to Clean Water Act made knowing violation of section 405 subject to the criminal penalties of the CWA.

Today's final rule is essentially the same as the March 1988 proposed rule. States may, of course, have other enforcement authorities than those required by this section, but these would be considered additions to, not substitutes for, the required enforcement authorities. Similarly, States cannot provide additional defenses or rights not authorized by federal law. Thus, a State could not allow a permittee to challenge its permit limits in an enforcement proceeding, and State law that provided such an option would be inconsistent with the federal requirements. Similarly, a State could not restrict its enforcement

by limiting the use of information in an enforcement action.

States must be able to immediately restrain unauthorized activity which is endangering or causing damage to public health or the environment. (§ 501.17(a)(1)). This requirement can be met through authority to issue administrative cease and desist orders or to seek temporary restraining orders in court. (States need not have both authorities as feared by one commenter.) In response to this provision in the 1988 proposal, one commenter said that States should be required to have authority to enjoin authorized as well as unauthorized activities which are endangering or causing harm to public health or the environment. The commenter's suggested revision is unnecessary for purposes of ensuring that States have adequate authority to ensure compliance with section 405 of the CWA and for protecting public health and the environment. "Authorized activity" in this case means sludge use or disposal activities undertaken in compliance with sludge permit conditions and the technical requirements promulgated under section 405(d) of the CWA. It is reasonable to assume that authorized activities will not threaten or cause harm to public health and the environment.

Note: This required enforcement authority also parallels what is required of approved NPDES States in § 123.27(a)(1).

Consistent with section 405(e), States must be able to enforce against violations of the Part 503 technical standards by any person who uses or disposes of sewage sludge, not just permittees. Thus, the same enforcement authorities required by this section must be available against non-permittees as well as permittees. As requested by a commenter, this has been clarified in the final rule with minor editorial changes to § 501.17(a)(3). Where a State's program is broader than the Federal program, however, the penalties that apply to additional coverage would not be considered in determining the adequacy of the State's program.

State penalty authority must allow the State to seek civil penalties in the amount of at least $5,000 per day of violation. Four States supported the $5,000 amount as appropriate to provide adequate enforcement authority. Several commenters opposed the $5,000 because it would be excessive in some situations. Similarly, other commenters said that penalties should be determined at the discretion of the States based on the type and severity of the violation. In contrast, one State said automatic fines imposed upon owners for significant permit violations would help improve public perception and confidence in the ability of regulatory agencies to control sludge management activities.

These comments reflect a misunderstanding about the required penalty authority. Today's rule does not mandate a minimum $5,000 penalty for all violations and therefore does not disturb traditional enforcement discretion (including a policy requiring automatic fines in certain situations). Instead, it requires the State to have the authority to seek at least up to $5,000 per day of violation. Thus, for a particular violation, a State might decide that $1,000 per day is an appropriate penalty. This would be allowed under today's final rule. Section 501.17(a)(3)(i) requires that the State must be able to seek at least a $5,000 per day penalty if appropriate to the violation.

Under today's rule, the State must be able to seek injunctive relief in two instances. First, it must be able to restrain immediately any unauthorized activity endangering the public health or the environment. Second, it must have authority to sue to enjoin any threatened or continuing violations without first revoking the permit.

States must be able to seek criminal fines (for willful or negligent violations) in the amount of at least $10,000 per day of violation, and seek criminal fines for knowingly making false representations or certifications, or knowingly rendering monitoring devices inaccurate, in at least the amount of $5,000 for each instance of violation. No commenters specifically addressed the question of criminal fines.

Today's required penalty authorities parallel those in the NPDES program. (*See* § 123.27(a)(3)(i); § 123.27(c).) (As noted by one commenter, this means that States which are unable to obtain NPDES approval because they lack the required penalty authority would be unable to obtain approval of a separate State sludge program.) This does not mean they are redundant and should be deleted, as suggested by one State. They would be redundant only if the State will be regulating sludge through its existing NPDES program (and the State's enabling statute authorized penalties for violations of sludge requirements and permit conditions), in which case the Part 501 regulations would not apply. One commenter specifically endorsed parity between the penalty authorities required of NPDES and non-NPDES programs, but argued that the CWA also required parity with EPA's penalty authority (although States could leave $10,000 per day civil penalties intact). EPA has never interpreted the CWA to require States to have the same penalty authority as does EPA and therefore disagrees. The U.S. Court of Appeals for the D.C. Circuit recently upheld EPA's interpretation. *See NRDC* v. *EPA*, 859 F.2d 156, 178, 28 ERC 1401, 1420 (D.C. Cir. 1988).

One commenter stated that it is inappropriate for one government agency to fine another government agency resulting in "the people" fining themselves. Instead, States should be able to rely on other enforcement measures to achieve compliance by other government agencies. Apparently, the commenter, a POTW, objects to requiring States to be able to seek penalties against POTWs. Conversely, another commenter recounted a situation where a State allegedly failed to seek fines against a POTW despite six years of non-compliance. This commenter asked that the regulations require States to seek fines against POTWs in this situation and also against the industrial users of the POTW that are the source of the problem. Under the Clean Water Act, POTWs are treated the same as other regulated parties with regard to penalties. State programs likewise should be required to treat POTWs the same as other regulated parties. Fines may also be necessary to bring POTWs into compliance. However, as discussed above, EPA does not intend to dictate in the regulations how States should exercise enforcement discretion. EPA will oversee the State's enforcement program and may, in particular cases where it believes the State's enforcement response to be inadequate, file its own enforcement action in accordance with the CWA and the MOA.

EPA noted in the preamble to the proposed rule that the minimum penalty ceiling required of approved State programs may be raised for the NPDES program and that similar increases would follow in Part 501. To date, the Agency has taken no action to raise the minimum penalty ceiling. Therefore, any such increase will be addressed in a future rulemaking. Any State program approved under this Part before the minimum ceilings are raised would be given sufficient time to enact new legislation (i.e., up to two years).

One State asked that EPA provide guidance and develop specific standards and criteria for assessing fines based on the nature and severity of the violation. In particular, the State noted a problem with seeking fines in the absence of a documented water quality impact. EPA is in the process of examining what

guidance will be needed as the sludge program moves into a more active implementation phase. Enforcement guidance is a likely candidate. However, it is important to emphasize that the environmental effects of concern to the sludge program as established in the CWA and these regulations goes beyond water quality impacts. Therefore, whether or not to seek fines for a particular violation should not depend solely upon a documented water quality impact. EPA would consider such a narrow approach inadequate.

Public participation in enforcement (§ 501.17(d)). EPA proposed to require State programs to provide for public participation in the enforcement process. Proposed § 501.17(d) would allow States to choose from two options. The first option is for State law to provide for intervention as of right in any enforcement action (§ 501.17(d)(1)). States choosing this option may not place restrictions on this right. Alternatively, where State laws allow permissive intervention in State civil or administrative actions, the State could agree not to oppose such intervention in any enforcement proceeding. Under this option, the State would also have to agree to investigate and respond to citizen complaints and publish all settlement agreements for a public comment period of at least 30 days (§ 501.17(d)(2)).

EPA received only one response to this section, from a State which raised several concerns. First, the commenter suggested that the right to intervene under § 501.17(d)(1) should be limited to adjacent property owners, municipalities, and counties in the case of land application, i.e., require a demonstration of standing before intervention is allowed. EPA does not object to the general concept of limiting intervention to those who have standing, but only when standing is broadly defined, i.e., that which is allowed under Article III of the U.S. Constitution. This intent is reflected in the phrase "any citizen having an interest which is or may be adversely affected." State statutory limits on standing that are narrower than such Constitutional privileges are insufficient for purposes of § 501.17(d)(1). (See 45 FR 33383, May 19, 1980, which discusses the NPDES provision on which § 501.17(d) is based.)

With regard to § 501.17(d)(2) (the second option), the same commenter questioned whether telephone responses would be an adequate substitute for written responses as a means to reduce the burden of responding to all complaints. That section requires a State to provide assurance that it will "investigate and provide written responses to all citizen complaints submitted pursuant to procedures specified in § 123.26(b)(4)." This referenced section requires all States, as part of a compliance monitoring and evaluation program, to have "procedures for receiving and *ensuring proper consideration* of information submitted by the public about violations" (emphasis added). Read together, these sections do not seem to require written responses in all cases, but would allow States to respond by telephone when the complaint clearly does not warrant a more extensive response, e.g., a phone request asking whether a particular facility has obtained a required permit. However, the State should have procedures and guidelines for determining the appropriate level and type of response to various types of complaints of violations, which EPA would consider in determining whether the requirements of § 501.17(d)(2)(i) are met.

Finally, the commenter said that providing a 30 day comment period on any enforcement action would unnecessarily delay the enforcement process and could allow environmental damage to continue during the comment period. Section 501.17(d)(2)(iii) would require notice only for proposed settlement actions, not for the resolution of all enforcement actions. Therefore, the 30-day comment period should not interfere with seeking immediate injunctive relief to abate an immediate threat to public health or the environment. Similarly, the requirement does not apply to enforcement actions not required as a part of an approved State program, e.g., actions to recover damages to natural resources. In other cases brought for violations of the program, the potential for accumulating substantial penalties should provide violators with sufficient incentive to cease violation and thus prevent further harm to public health or the environment.

9. Sharing of information between States and EPA (Sections 501.19 and 501.20)

Section 501.19 incorporates 40 CFR 123.41, which requires that the State make available to EPA upon request, any information obtained or used in the administration of a State program. (A similar provision appeared in the 1986 proposal as a requirement for the MOA.) This section also provides procedures for the sharing of information, allows EPA to make any nonconfidential information available to the public, and also requires EPA to furnish to the State nonconfidential information in its files which the State needs to implement the approved program. Two commenters on the 1986 proposal objected to a similar requirement for EPA access to State records. As noted in the discussion about the State/EPA MOA, EPA disagrees with the commenters that EPA access to State records is unnecessary and redundant. Therefore, this section remains unchanged in the final rule.

Section 501.20 incorporates § 123.42, which addresses the transfer of relevant information collected by EPA to the State agency upon program approval. Under that section, the MOA between the State and the Regional Administrator must provide for: (1) Transfer of all copies of pending permit applications and other relevant information to the State, and (2) procedures to ensure that the State Director will not issue a permit on the basis of any application received from the Regional Administrator which the Regional Administrator has identified as incomplete until the Director receives information sufficient to correct the deficiency. In the absence of significant comments, this section too remains unchanged in the final rule.

10. Program reporting to EPA (Section 501.21)

This section contains the requirements for semi-annual and annual reports to be submitted to EPA. These reports are important for tracking the State program and evaluating compliance monitoring and enforcement performance.

The 1986 proposal required the States to submit quarterly reports on "substantial" noncompliance of Class I facilities. In addition, annual reports containing inventory updates, lists of "substantial" noncompliance by Class I facilities, and summaries of instances of "substantial" noncompliance by non-Class I facilities were required. The 1988 proposal incorporated two changes. First, substantial noncompliance was no longer defined as "noncompliance which may adversely affect public health and the environment," and second, the States were no longer required to report the "unexplained presence of elevated levels of toxic or hazardous substance(s) in a facility's sewage sludge." EPA deleted the above annual reporting requirements in response to comments that these requirements were too general, would unnecessarily duplicate the requirement to report significant noncompliance with the Part 503 technical standards, and would encompass virtually all noncompliance.

Today's final rule is basically the same as the March 9, 1988 proposed rule. The annual reporting requirements

remain unchanged. However, the final rule does include major and minor changes to the quarterly reporting requirements in response to comments. Also, in the final rule the term "substantial compliance," which was used in both the 1986 and 1988 proposals, was changed to "noncompliance." The word "substantial" was deleted as unnecessary and to avoid potential confusion with the NPDES term "significant." Thus, the semi-annual and annual reporting requirements in § 501.21 which previously read "substantial noncompliance" now read "noncompliance." The change in terminology does not affect the types of "noncompliance" that must be reported in § 501.21(a)(1), as described below.

Sixteen individuals commented on the February 4, 1986 proposed rule and nine commenters provided comments on the March 9, 1988 proposed rule. Almost all comments were received from the States. Thirteen States commented on the 1986 proposal and eight States commented on the 1988 reproposal. In addition, two POTWs/municipalities and one environmental group commented on the 1986 proposal and one POTW/municipality commented on the 1988 proposal. The two major issues most commenters focused on were: (1) The frequency of State reporting; and (2) the content of the semi-annual and annual reports.

Note: See discussion below regarding the change from quarterly to semi-annual reports. Comments addressing the promulgation of the Part 503 technical standards are addressed above in the discussion on timing.

Semi-annual reports. Section 501.21(a) details the incidents of noncompliance by Class I sludge management facilities which shall be reported in the Semi-annual Sludge Violation Reports.

Note: Much of the information for semi-annual reporting is based on permittee self-monitoring reports now required.

These reports provide EPA with permittee information identifying the noncomplying facility and other information such as the date and type of noncompliance and actions taken to achieve compliance. In addition, instances of significant failure to comply with Part 503 standards and permit conditions, failure to complete construction of essential elements of a sludge facility (as provided in a compliance schedule or as otherwise necessary to meet permit and/or Part 503 standards), and failure to provide adequate monitoring or other reports, are also required to be reported in the semi-annual reports.

The majority of commenters strongly opposed quarterly reports. Commenters objected that they are overly restrictive, unnecessary and divert resources from active sludge management. Several States commented that they would not have the resources to produce the required reports. Two commenters noted that quarterly reports are more appropriate for continuous discharges than for intermittent sludge discharges and that annual reports would be adequate. Several commenters also questioned the utility of quarterly reports. After reviewing this requirement, EPA agrees that requiring reports on a quarterly basis does not sufficiently add to EPA oversight at this time to justify the additional costs of these reports. Instead, EPA has decided that semi-annual reports (as suggested by one commenter) will reduce reporting requirements and provide sufficient information to adequately track the State program and evaluate compliance and enforcement.

Note: All references to quarterly reports in the rest of this discussion should be read to mean the semi-annual reports now required.

One commenter suggested that the contents of quarterly reports be left up to the discretion of the State Director. Providing for this type of discretion would not ensure the uniform reporting necessary for effective enforcement and oversight. Conversely, an environmental group commented that the quarterly reports should contain the same information required in the annual reports. EPA disagrees that the information not included in the quarterly reports is necessary for program oversight. Annual reporting is sufficient for enforcement and State program oversight.

Several commenters suggested that quarterly reports be replaced by allowing the State to notify EPA of instances of substantial noncompliance as they occur rather than on a regular schedule. One of these commenters remarked that reporting only violations as they occurred would bring more EPA attention to instances of noncompliance than would inclusion of these violations in monthly, quarterly or annual reports. While this idea has weight, reporting noncompliance as it occurs will not significantly increase EPA's enforcement or oversight ability. A semi-annual report will minimize the resource drain on the States and will be sufficient to allow EPA to target problem facilities or problems with the State's enforcement program.

Annual reports. Section 501.21(b) describes the annual report which provides EPA with information necessary to evaluate permittee noncompliance and assess State Programs. EPA intends the focus of the annual report to be on significant noncompliance. The annual reports shall contain the information required in the semi-annual reports, and information to update the inventory of sewage sludge generators and disposers submitted with the program plan or previous annual reports, as well as specific and summary information on noncomplying Class I and non-Class I facilities.

Note: Comments and other issues concerning inventory requirements are addressed in the program description section.

In addition, as a component of program oversight, EPA is also requiring a summary of the results of State compliance monitoring efforts to verify self-monitoring reports in the annual report.

Two commenters found the annual reporting requirements restrictive and unnecessary. One commenter asked EPA to reduce these requirements. Annual reports update inventories, describe program changes, and summarize instances of substantial noncompliance by non-Class I facilities. This information is not covered by semi-annual reports and is necessary for program review. Another commenter stated that the information required in annual reports is supplied in other required reports. EPA has not required this information on a routine basis (although portions of the inventory requirement may have been requested as part of the State's work plans).

A number of commenters asked that EPA define in detail several terms used in the semi-annual and annual reporting requirements of the 1986 proposal. In particular, determining noncompliance was problematic for many commenters. Several commenters suggested that EPA clearly define "significant failure to comply." The accompanying Part 503 regulation will provide minimum federal requirements for sludge use and disposal. When a violation of these standards would be considered "significant" for purposes of State reporting to EPA is not defined in today's rule. Instead, this will be addressed in guidance and may, in the future, be codified. Where adequate clarification of other terms has not been provided in the final rule, the Part 503 regulation or guidance will provide additional details. The types of noncompliance which must be reported are detailed in § 501.21(a)(1) (i) through (v).

As requested by one commenter, the final rule no longer provides that "The

State Program Director and Regional Administrator may choose to include reporting incidents of substantial noncompliance by additional non-Class I facilities at their discretion." EPA agrees that because this sentence describes an optional provision and not a minimum requirement, including it in the regulation is unnecessary. Of course, the State Director and Regional Administrator are free to agree on additional reporting not specifically required by the regulation. As with other details about program administration not addressed in detail in the regulation, EPA expects that the State Director and Regional Administrator will reach agreement on these activities in the MOA and other program agreements.

An environmental group stated that reporting should be required for all noncompliance, not just for "substantial" noncompliance. Limited resources require that EPA target the most critical problems. The primary purpose of State reporting to EPA is for general program oversight. While EPA may use this information as the basis for its decisions on enforcement actions, States are not simply acting as information collection agents for EPA. The administration of a State program is primarily the State's responsibility. Therefore, reports on "substantial" noncompliance are sufficient for the purposes of § 501.21. Of course, more detailed information about any instance of noncompliance (whether by a Class I or non-Class I sludge management facility) would be available to EPA and, in the case of permittee self-monitoring reports required by the permit, to the public. Similarly, another commenter stated that reporting for non-Class I noncompliance should be the same for Class I noncompliance. The types of noncompliance that must be reported are the same for each class of permittee. What differs is the frequency of reporting.

Two comments addressed discrepancies with or replication of NPDES reporting requirements. One commenter questioned whether § 501.21(b)(4) is warranted since it requires more specific permittee information than § 123.45(c) does for NPDES minors. EPA also received a conflicting comment stating that the reporting requirements as proposed duplicate NPDES requirements. EPA has expanded the reporting requirements for non-Class I facilities because there are only a small number of Class I facilities, and the noncomplying non-Class I facilities can realistically be classified as Class I facilities which need similar attention.

Several commenters requested that EPA develop a computer software program to promote reporting uniformity and minimize duplication of effort. Another commenter suggested that EPA develop a standardized reporting format (such as questionnaires, tables, and checklists) for the same reasons. EPA is in the process of developing an information system which will assist the States in fulfilling these reporting requirements. However, such a system cannot replace formal reporting as has been suggested by one commenter because a narrative response is required in some cases (e.g., § 501.21(b)(4)(i)(D) requires States to describe steps being taken to bring noncomplying non-Class I facilities into compliance).

Finally, several commenters suggested that EPA use existing programs, such as the section 305(b) reports for State program oversight, or randomly sample existing State programs to evaluate compliance. Section 305(b) requires biannual reports to Congress which were not intended for this purpose. Other suggested alternatives to program reporting do not provide the level of detail EPA requires for compliance evaluation and enforcement.

11. Program Approval, Revision, and Withdrawal (Sections 501.31 through 501.34)

Review and approval procedures. Section 501.31 outlines the procedures for State submission and EPA review and approval of a State program that apply after EPA makes a determination under § 501.11(b) that the State's submission is complete.

Once the program is determined to be complete, EPA must provide public notice of receipt of the submission. As noted by a commenter on the 1986 proposal, notice that EPA will be considering the State's application for program approval is an important step because it informs the public about its opportunity to comment on the State's application. The notice must indicate where and when the State's submission is accessible to the public and the cost of obtaining a copy. It also delineates the fundamental aspects of the State's proposed program and must provide a minimum comment period of 45 days. Finally, the notice must state whether a public hearing has been scheduled (or how one can be requested, if none has been scheduled) and list the name of a contact person who can provide additional information.

Under the proposed rule, EPA would publish the notice in the **Federal Register**, in enough of the largest newspapers in the State to attract Statewide attention, and in individual notices mailed to all interested persons and government agencies, as well as to all permit holders and applicants subject to sludge use and disposal requirements. The Agency solicited comments on whether individual notice to "permit holders and applicants" was necessary or whether the other required forms of notice (**Federal Register**, State newspapers, and mailing lists) would be sufficient.

Comments on this issue were evenly divided. Individual notice received broad-based support (a State, an environmental group, a POTW, and an association representing POTWs), primarily because it would better inform the regulated community and give them opportunity to comment. Opponents included five States and one industry. In opposition, commenters said that money could be better spent on research, regulated parties will be subject to the same standards regardless of who issues the permits, and notice would only confuse the regulated community.

EPA has carefully considered all comments and has decided in the final rule to require individual notice to regulated parties (in addition to persons on the general mailing list of interested persons). It is important that the regulated community and other interested parties have notice and opportunity to comment on the State's program, particularly since the sludge management program is new. This can best be accomplished with widespread notice of the State's submission. The State's program could be administered differently from the federal program even though the federal technical standards will be a key feature in both programs. Likewise, the State could be reorganizing its sludge management functions or program offices as part of a plan to obtain EPA approval. Therefore, it is difficult to understand how notice would confuse the regulated community. Instead, such notice (and subsequent information activities) could help clarify critical aspects of the program's administration.

One commenter requested that State permit programs be sent to all permit holders whenever "sludge management programs" are included in an NPDES permit. This is neither feasible nor necessary. As discussed above, regulated parties will receive individual notice that EPA is considering a State program for approval and will have 45 days to comment on the State's submission (increased from 30 days in response to comments on the 1986 proposal and consistent with the NPDES regulations). Regulated parties will have sufficient opportunity to review and

comment on the State program when EPA is making the approval decision. After State program approval, permit applicants will of course have an opportunity to comment during the permit issuance process on any State permit proposed to be issued. (See § 501.15(d).)

The final rule differs slightly from the proposed rule in that it requires individual notice to "all treatment works treating domestic sewage listed on the inventory required by § 501.12(f)" rather than to "permit holders and applicants." The change serves two purposes. First, it more clearly defines the category of persons who are to be sent the notice and distinguishes this category from NPDES permit holders and applicants. Second, using the inventory of potential permittees, which the State must submit as part of its program application, minimizes the resources needed to compile the mailing list. This addresses concerns raised by some commenters about the potential burden of the notice requirements. It should also help ensure that notice will be sent to those facilities most likely to be immediately affected by State program approval. (In this regard, it should be noted that requiring individual notice for "all treatment works treating domestic sewage * * *" is intended to be a general target. In other words, failure to notify *all* treatment works (e.g., those not on the initial inventory) would not provide a legal basis for challenging EPA's approval of a State program.)

The proposed rule also would have required that the public notice "provide for a public hearing within the State to be held no less than 30 days after the notice is published in the **Federal Register**" (§ 501.31(b)(2) of the 1988 proposal). EPA solicited comments on this aspect of the approval procedures as well, particularly whether a public hearing on EPA's approval of the State program should be mandatory (as in the 1988 proposal) or whether it should be required only when public interest is demonstrated (as in the 1986 proposal).

Only two commenters, both regulated parties, supported mandatory public hearings; one without explanation, the other as a means to inform the regulated community and provide opportunity to comment. Six commenters supported discretionary hearings, with various suggestions for when a hearing should be required. Most said that hearings should be held when there was "significant" or "demonstrated" public interest. One commenter said a hearing should be held if there is a single request.

EPA agrees with the commenters opposing automatic, mandatory public hearings on State program approval. Under the final rule, a public hearing will be held "whenever the Regional Administrator finds, on the basis of requests, a significant degree of public interest in the State's application or that a public hearing might clarify one or more issues involved in the State's application." § 501.31(c)(2). Providing for public hearings only when there is sufficient public interest or other useful reason for holding a hearing efficiently uses resources without sacrificing public participation. EPA strongly encourages public hearings whenever public interest has been shown. However, it does not agree that automatic triggers, such as the single request suggested by one commenter, are needed to ensure adequate public participation. It is more appropriate to give Regional Administrators flexibility to exercise judgment in this regard.

One commenter who responded to the 1986 proposal said that the Regional Administrator should not hold any public hearings on the State's application since the State could hold any necessary hearing and EPA could participate in the State hearing if it wished. EPA disagrees. The decision whether or not to approve a State program rests with EPA and, as the decision-maker, EPA should also determine whether a public hearing is necessary.

As discussed above, the State's application will be widely noticed, including individual notice to a large segment of the regulated community. Thus, both the public and the regulated community will have ample notice and opportunity to request a hearing. If a hearing has not already be scheduled at the time of the notice required by paragraph (c)(2), that notice will include information about how to request a public hearing. If the Regional Administrator subsequently decides to hold a hearing, notice of the hearing must appear in the **Federal Register** at least 30 days before the scheduled date of the hearing, which states when and where the hearing will be held.

One commenter on the earlier proposal said the regulation should specify that the hearing be held "at a location selected by the State submitting a program" to ensure that State concerns are heard and to satisfy the intent of public hearings. EPA disagrees that further specificity in the regulation is necessary or desirable. States have ample opportunity to voice their concerns before, during, and after the public hearings. The regulation already specifies that the public hearing will be held "within the State." Under general principles, decisions such as where to hold hearings are guided by the goal of maximizing public participation and thus satisfying the intent of public hearings. (See, for example, 40 CFR 25.12(c).) Although ensuring the State's opportunity to participate in a hearing would be of paramount importance, the Regional Administrator must also consider the convenience of the hearing location to other parties who have expressed an interest. Therefore, the details of the public hearing, including location, are best left to the discretion of the Regional Administrator.

The Administrator has 90 days from the date of receipt of the complete program to approve or disapprove of the program. (§ 501.31(d).) In response to a comment, today's final rule clarifies that the 90-day review period begins only after EPA has determined that the program is complete (in accordance with § 501.11(b)). As a general rule, 90 days should be sufficient time to make this decision. Failure to make a decision by the 90-day deadline does not mean that the State's program is approved by default, however. Also, the 90-day period may be extended by mutual agreement between the State and EPA. One commenter objected to providing for an extension of the deadline without also publishing notice of, and reasons for, the extension and providing for public notice and opportunity to comment. The same commenter also objected to any extension of the comment period based on "material changes" to the State program submission. According to the commenter, extensions of the 90-day review period unnecessarily delay action on the State's program. EPA disagrees. Flexibility is needed to provide EPA with adequate time to consider changes to the State's submission made by the State or in response to problems identified during public review. In most cases, providing for extensions of the review period to accommodate "mid-stream" changes would be less time-consuming than either of the alternatives: disapproving a program at the end of the 90-day period and starting the process over again to review the changes or approving the program and considering changes through program revision procedures. Moreover, now that the CWA clearly authorizes a federal permitting program, delay in approving a State program does not necessarily delay implementation of environmental controls. In addition, EPA sees no useful reason to subject this type of interlocutory procedural decision to notice and comment. Extensions of the review periods do not diminish the

public's opportunity to comment on the adequacy of the State's program.

The Regional Office will prepare a responsiveness summary identifying the public participation activities conducted, summarizing significant comments and responding to these comments. Notice of approval will be published in the Federal Register. If the program is disapproved, the Administrator will notify the State of the reasons for disapproval and what final revisions would be necessary to make the program approvable. One commenter suggested that EPA publish a notice of disapproval as well, to inform the public of final agency action. Since the effect of disapproval would be to maintain the status quo, it is not clear what purpose such a notice would serve. Therefore, the final rule has not been revised to require notice of disapproval.

One commenter said the use of different terms to designate the authority responsible for approving State programs, such as "EPA," "Administrator," "Agency," and "Regional Offices" in this section was confusing. This commenter also suggested that such decisions be made at the Regional level "after obtaining concurrence on a case-by-case basis from headquarters based on a national flexible program emphasis." In a related vein, a commenter on the 1986 proposal urged generally that Regional Administrators be given greater control over State program approval decisions because the Regional Administrator is in a better position than EPA in Washington to determine if a State program provides adequate control over sewage sludge.

The language in this section is taken from an analogous section in Part 123, the NPDES State program regulations. The use of different terms reflects the involvement of both Headquarters and the Regional Office in State program approval decisions. Details about approval procedures are provided in additional guidance. Briefly, the Administrator or his designee is the final decision-making authority. However, the Regional Office plays the lead role in working with the State to develop an appropriate program and in processing the State's application, and in recommending final decisions. The Region's role will be established through an internal delegation of authority document rather than in the regulation. Headquarters concurs on major decisions. Although Regional Offices are more familiar with particular State programs, EPA Headquarters' involvement ensures minimum consistency among State programs nationwide. Therefore, the final rule retains essentially the same language as the proposed.

Two minor changes have been made to clarify any remaining confusion. First, the words "the Agency's" have been replaced by "EPA's" in the last sentence of § 501.31(d). Second, a definition of "Administrator" has been added to § 501.2, which includes "an authorized representative" of the Administrator as part of the definition (consistent with the definition of "Administrator" in Part 122).

Program revision. Section 501.32 addresses revision of State programs. The procedures for program revision are very similar to the procedures used in the original program approval process (and therefore, except in cases of nonsubstantial revisions, provide for public participation as requested by a commenter on the 1986 proposal). The revision procedures in the proposed rule were based on analogous provisions in Part 123. EPA received no significant comment on the proposal and therefore is promulgating a final rule that is the same as the proposed rule.

Revision may be necessary any time the State or Federal laws or programs change. Under paragraph (a), State program revisions necessitated by changes or additions to the Federal regulations governing sewage sludge use and disposal, including changes to this Part, must be made within one year from promulgation of the applicable regulations, or within two years if an amendment to a State statute is required.

Program withdrawal. Sections 501.33 (criteria for withdrawal) and 501.34 (procedures for withdrawal of State programs) incorporate 40 CFR 123.63 and 123.64, the NPDES provisions for program withdrawal. The final rule is the same as the March 1988 proposed rule.

Under these sections, withdrawal can occur voluntarily (where the State decides to transfer all program responsibilities back to EPA) or involuntarily (EPA decides to withdraw approval where the State program no longer complies with the Clean Water Act or regulations). The rule does not provide for partial withdrawal of a State's program (as would the 1986 proposed Part 501) because it would result in a piecemeal program that would be difficult to administer and oversee and could create considerable confusion. Grounds for initiating State program withdrawal proceedings include: (1) The State's legal authorities no longer meet CWA requirements; (2) the operation of the State program fails to comply with EPA regulations; (3) the State's enforcement program fails to comply with EPA regulations; or (4) the State program fails to comply with the terms of the Memorandum of Agreement.

One commenter addressed the program withdrawal criteria provision in response to the 1986 proposal (which was substantially the same as the 1988 proposal). The commenter requested that criteria for withdrawal that is based on enforcement program performance (see § 123.63(a)(3)(ii)) be revised to read: "Failure to seek adequate enforcement penalties or fines or to collect such penalties or fines," rather than "Failure to seek adequate enforcement penalties or to collect administrative fines when imposed."

The commenter did not give a reason for requesting the change in language. The final rule does not adopt the suggested change. The criteria do not address collection of judicially imposed penalties because, unlike administrative fines, the approved State agency may have little, if any, control over collection of those penalties. It would be ineffective to hold a State program accountable for an activity which they cannot control and therefore remedy any deficiencies.

The commenter also objected to a requirement that program withdrawal occur for "major or significant" failings of the State, and argued that any failing that is not purely *de minimis* means the State is no longer entitled to program approval and EPA must withdraw the program. The specific provision to which the commenter objected was not in the 1988 proposal and is not in the final rule. However, it is important to note that, as is the case under the NPDES program, EPA considers withdrawal of an approved State sludge management program a drastic remedy that should be invoked only where a State is unable or fails to take corrective action to solve State program deficiencies. *See also Save the Bay, Inc.* v. *Administrator,* 556 F.2d 1282 (5th Cir. 1977).

Another commenter, in response to the 1986 proposal, addressed program withdrawal procedures. The commenter requested that the regulation specify that any public hearings on the question of withdrawal take place "at a location selected by the State submitting the program." As discussed above, the commenter made the same request with regard to program approval hearings. The procedures governing program withdrawal are those set out in the NPDES State program regulation at § 123.64. Although those procedures do not specify where the hearings must be

held, they include well-established procedural safeguards and provide adequate opportunity for the State to present its position. Therefore, EPA has not adopted the suggested change in the final rule.

J. Part 123: NPDES State Sludge Management Programs

1. General

Part 123 establishes the program requirements and approval procedures for States which seek EPA approval to administer an NPDES permit program pursuant to section 402 of the CWA in lieu of the federal NPDES permit program. All 39 States which currently have EPA-approved NPDES programs govern, at a minimum, the discharge of pollutants to waters of the United States, including the discharge of sewage sludge to waters of the United States (see sections 405(a)–(c) of the CWA). None of these State programs, however, have been approved by EPA to administer a program which meets the requirements of sections 405(d) and (f) of the CWA for the safe use and disposal of sewage sludge (where sludge is not discharged to navigable waters).

In the 1987 amendments to the CWA, Congress directed the Administrator of EPA to promulgate procedures for the approval of State programs that assure compliance with section 405(d) of the CWA and also identified section 402 permits as appropriate vehicles for implementing section 405(d) requirements. Section 405(f). To accommodate both goals, EPA proposed to amend Part 123 to allow States to incorporate a sludge management program as part of their approved NPDES programs. Today's revisions to Part 123 are designed to "fill in the gaps" of existing NPDES requirements by adding requirements which are specific to sludge management programs.

2. Specific Revisions

Today's revisions to Part 123 apply only to those States which choose to use their NPDES program for administering an EPA-approved sludge management program. States with existing NPDES programs will not be required to obtain approval of a sludge management program in order to maintain approval of their NPDES program. Instead, sludge management programs are optional. Moreover, existing NPDES States may choose to implement an approved sludge program through an existing non-NPDES program pursuant to Part 501. Section 123.1(c) states the availability of these options.

The limited applicability of today's revisions to Part 123 addressing sludge management programs is also addressed in the introductory paragraph to § 123.25(a), which lists permitting requirements in Parts 122 and 124 applicable to the federal NPDES program, which a State must also be able to implement as part of an approved NPDES program. Today's final rule clarifies that a State which chooses not to seek approval of a sludge management program as part of its NPDES program is not required to have authority to implement the sludge-related revisions to those provisions of Parts 122 and 124 listed in § 123.25(a) which are promulgated after enactment of the 1987 amendments to the CWA. However, States that use their NPDES programs to administer an approved sludge program would have to be able to implement these revisions.

Program description. To obtain NPDES approval, States must submit a comprehensive description of the program they propose to administer in lieu of the federal program (§ 123.22). For States which seek approval of their sludge management program as part of an NPDES program, EPA proposed to revise § 123.22 to include three additional requirements: (1) An inventory of all POTWs and other treatment works treating domestic sewage, together with a plan for completing and maintaining an inventory of all sewage sludge generators and disposal facilities; (2) identification of any program for regulating the disposal of septage and portable toilet pumpings handled under a program that is separate from that for sewage sludge; and (3) a description of any bans or prohibitions imposed by State or local authorities on specific sludge management practices.

The additional requirements for the program description in today's final rule differs significantly from the proposed rule. The differences parallel those made in § 501.12 and are explained in more detail in the above discussion of Part 501. Briefly, the inventory requirement has been revised by providing more specific information on which facilities and information must be included as part of the initial program submission and establishing deadlines for submitting any remaining information. The identification of a separate program governing disposal of septage and portable toilet pumpings has been deleted as redundant, and the requirement to document separately all State or local bans or prohibitions on particular sludge management practices has been dropped as not essential.

Compliance evaluation program. The program description also must describe the State's compliance evaluation program (§ 123.22(e)). Section 123.26 establishes the minimum requirements for State compliance monitoring programs. EPA proposed two revisions to § 123.26(e) for sludge management programs: (1) Specifying in paragraph (e)(1) that the inventory of all sources covered by NPDES must include permits which implement section 405(f) of the CWA to ensure inclusion of nondischarging sludge treatment works; and (2) a requirement that the annual inspection in paragraph (e)(5) include all Class I sludge management facilities in addition to all major dischargers. Today's final rule does not include the revision to the inventory of sources requirement in § 123.26(e)(1). The proposed revision was unnecessary since two other revisions already required the same information. As discussed elsewhere, under revisions to §§ 123.22 and 123.45, States must submit and regularly update an inventory of sludge facilities. This inventory will serve as the basis for the State's compliance monitoring and tracking program.

EPA is promulgating a final rule requiring annual inspections of Class I facilities that is the same as the proposed rule (§ 123.26(e)(5)). EPA received substantive comments on this provision regarding the scope of inspection requirements, which are addressed in the above discussion about the parallel provision in Part 501. In addition, one commenter asked for clarification of the words "where applicable" in the annual inspection provision. The phrase "where applicable" clarifies that States with NPDES programs that choose to set up separate State sludge management programs (or choose not to have an approved sludge management program) do not need to inspect Class I sludge management facilities as part of their NPDES program.

Memorandum of Agreement. The Memorandum of Agreement (MOA) between the State Director and the Regional Administrator must describe which classes and categories of permits the Regional Administrator will review before issuance by the State and those for which the Regional Administrator will waive review. Section 123.24(d) lists the classes and categories of permits for which review cannot be waived. Today, EPA is revising this paragraph to add to this list the category of Class I sludge management facilities (as defined in § 501.2). Under today's rule, permits issued to these treatment works must be submitted to EPA for review and comment, and, where appropriate, objection. EPA's reasons for this

requirement and response to comments on the proposed rule are discussed above in section V.H.1.

In related revisions, EPA proposed to amend § 123.44, which governs EPA review of and objections to State permits, in two instances to reflect the broadened scope of the NPDES program to include regulation of sludge use and disposal. Both revisions concern the grounds upon which a Regional Administrator may object to a State-issued permit. The first proposed revision was to § 123.44(c)(5), which addresses the adequacy of monitoring and related requirements in permits. It added "standards for sewage sludge use and disposal" as a requirement of the CWA for which monitoring requirements must adequately assure compliance, or else be subject to objection by the Regional Administrator. Similarly, § 123.44(c)(6) was proposed to be revised to add "standards for sewage sludge use or disposal" and "sewage sludge use or disposal requirements developed on a case-by-case basis pursuant to section 405(d) of CWA" as benchmarks against which the Regional Administrator will evaluate State-issued permits. Today's final rule is the same as that proposed. EPA received one comment objecting to the revision to § 123.44(c)(6) regarding case-by-case limits, which is addressed above in section V.I.5.

The MOA also must contain provisions specifying reports and information the State is expected to submit to EPA (§ 123.24(b)(3)). Program reporting requirements are listed, in part, in § 123.45, which specifies requirements for noncompliance reporting. EPA proposed to amend § 123.45 by adding a new paragraph (e), which would require a State to submit reports on noncompliance with sludge requirements as specified in § 501.21, i.e., semi-annual reports summarizing instances of significant noncompliance and annual reports. The proposal also specified that the sludge noncompliance reports may be combined with the reports currently required under § 123.45.

Today's final rule with regard to noncompliance reporting is the same as the proposed rule. EPA did, however, make changes to § 501.21, the section which is incorporated by reference in today's final rule. Those changes are explained above in section V.I.10.

Incorporating sludge management into existing NPDES programs. States which are approved for NPDES already have in place many of the program requirements that will be required of States which seek approval under Part 501. Consequently, NPDES States need only seek modification of their existing programs under § 123.62 if they wish to implement the sludge program through their existing NPDES programs rather than submit entirely new programs. Typically, EPA expects that a program modification to incorporate sludge would require a State to submit an updated program description (including the information about sludge management activities discussed above), an addendum to the Attorney General's Statement and, where necessary, revisions to the Memorandum of Agreement. NPDES States would need to demonstrate that legal authority exists to issue NPDES permits for sludge use and disposal where there is no discharge of the sludge to surface waters, and that they have the additional authority to implement the Part 503 technical regulations. (See § 501.1.) Existing State regulatory and statutory provisions regarding inspection, monitoring, reporting and enforcement must be broad enough to include section 405 implementation. In addition, States would be expected to make any revisions to their legal authority necessary to implement "sludge revisions" to Parts 122 and 124 proposed today which are applicable to State programs (as specified in those parts).

A few commenters misread the 1988 proposal as not requiring "fully documented" programs when a State modifies its existing NPDES program to include an approved sludge program. Section 123.62(b)(1) requires a State to submit modified program documents when it seeks to revise an existing State NPDES program. Thus, States will be expected to fully document their authority and ability to administer an approved sludge program. This program revision would be similar in scope to a revision to add pretreatment to an existing NPDES program. As noted above, States with existing NPDES programs have many of the permitting requirements and procedures already in place, and therefore will not have to substantially modify their programs. But to be approved, States would have to modify their program documents to explain how the existing program applies to the new sludge component.

K. Miscellaneous

One commenter on the 1986 proposal argued that in several areas where EPA expressed an intent to issue supplemental guidance (e.g., self-monitoring frequencies, compliance inspection schedules), the Agency must promulgate regulations rather than issue guidance. In most instances noted by the commenter, the final rule is more specific in establishing minimum requirements than the 1986 proposal (e.g., minimum self-monitoring frequencies, State inspections of Class I sludge management facilities). However, EPA still expects to issue guidance documents which interpret today's final rule and provide guidance on applying general requirements to specific situations, consistent with past practice. EPA disagrees with the commenter that guidance is inappropriate in these situations.

EPA received several comments not addressed above with regard to provisions in the 1986 proposal that were not included in the 1988 proposal. A separate summary of these comments and the Agency's response to them has been included in the public record of this rulemaking.

VI. Executive Order 12291

Under Executive Order 12291, EPA must judge whether a regulation is major and, therefore, subject to the requirement of a Regulatory Impact Analysis. A major rule is defined as a regulation which is likely to result in: (1) An annual effect on the economy of $100 million or more; (2) a major increase in the costs or prices for consumers, individual industries, Federal, State, and local government agencies, or geographic regions; or (3) significant adverse effect on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.

Today's rule establishes the mechanism (permits) for implementing standards for sludge use and disposal which will be promulgated under a separate rulemaking (to be codified at 40 CFR Part 503). The potential impacts of the Part 503 standards on regulated parties and the need for a Regulatory Impact Statement will be considered in conjunction with that rulemaking. Therefore, EPA disagrees with commenters who said that the economic impacts of this rule were not properly considered in the absence of information about Part 503.

Today's rule also establishes requirements for the submission and approval of State sludge management programs. States are not required to seek program approval under these rules. In any event, the requirements relating to optional State submission of programs for EPA approval do not impose large costs upon State regulatory agencies. Therefore, the rule does not satisfy any of the criteria for a major rule as specified in section 1(b) of the

Executive Order and as such does not constitute a major rulemaking. This regulation was submitted to the Office of Management and Budget (OMB) for review.

VII. Paperwork Reduction Act

An Information Collection Request document has been prepared by EPA, which discusses reporting requirements imposed by today's final rule and estimates the annual burden to respondents (POTWs, other treatment works treating domestic sewage, and States seeking EPA approval of their sludge management programs) for complying with these requirements. This document reflects changes made to the final rule in response to public comments on the information collection requirements contained in the proposed rule. No public comments addressing the ICR itself were received. However, EPA received numerous comments on the proposed regulations which imposed information collection requirements. EPA's responses to these comments are included in the above discussion of the final rule.

The preamble to the proposed rule stated that EPA would respond in the preamble to the final rule to any comments submitted by the Office of Management and Budget (OMB) on the ICR which was prepared to accompany the proposed rule. OMB submitted three comments on the ICR.

OMB's first comment was that the ICR goes beyond the scope of the proposed rule. The ICR covers only the rules promulgated today. However, information collection requirements for the sludge program will also be established in the Part 503 technical rules. The ICR now more clearly explains the relationship between today's rule (and ICR) and the Part 503 rule (and ICR). The two offices responsible for the ICRs worked closely to coordinate their efforts. The final ICR clearly distinguishes the respective burdens imposed by the two rules.

OMB's second comment was that it would carefully consider the burdens of any minimum monitoring frequency imposed by the rule. Today's rule requires monitoring and reporting at least annually for all permittees. As discussed in the preamble, EPA has determined that, as a general rule, annual monitoring (for at least the parameters regulated in 40 CFR Part 503) is the minimum necessary to assure compliance with federal standards. More frequent monitoring may be imposed as part of the Part 503 technical standards or by the permit writer based on best professional judgment.

OMB also questioned whether State reporting to EPA needed to occur quarterly as proposed. Today's rule reduces the frequency for State noncompliance reports from quarterly to semi-annually, in response to concerns about the reporting burden imposed on States. EPA expects that semi-annual reports will be adequate for purposes of State program oversight and enforcement actions.

The information collection requests in this rule have been approved by OMB under the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.* and have been assigned OMB Control No. 2040–0128. The reporting and recordkeeping burden on the public for this collection is estimated at 200,008 hours for 16,379 respondents, with an average of 12.2 hours per response. There are two major categories of respondents with significantly different burdens. EPA expects that States seeking program approval will have an average annual burden of 664 hours per State, and treatment works treating domestic sewage (i.e., permittees) will have an average annual burden of 11.26 hours per respondent. These burden estimates include all aspects of the collection effort and may include time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, completing and reviewing the collection of information, etc.

If you have questions or comments regarding any aspect of this collection of information, including suggestions for reducing the burden, or if you would like a copy of the information collection request (please reference ICR No. 1237.03), contact Chief, Information Policy Branch, PM–223, U.S. Environmental Protection Agency, 401 M Street, SW., Washington, DC 20460 (202–382–2745); and Timothy Hunt, Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, DC 20503.

VIII. Regulatory Flexibility Act

Under the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.*, EPA is required to prepare a Regulatory Flexibility Analysis to assess the impact of its rules on small entities. No regulatory flexibility analysis is required, however, where the head of the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Today's proposed rule most directly affects State agencies. It also affects treatment works that generate and dispose of sewage sludge, by specifying that any applicable requirements promulgated under separate regulations be implemented through requirements in permits issued to the treatment works. In nearly all cases, these treatment works already are required to obtain the permits under existing federal or State programs. Accordingly, I hereby certify pursuant to 5 U.S.C. 605(b) that this amendment will not have a significant impact on a substantial number of small entities.

List of Subjects

40 CFR Part 122

Administrative practice and procedure, Confidential business information, Reporting and recordkeeping requirements, Sewage disposal, Waste treatment and disposal, Water pollution control.

40 CFR Part 123

Confidential business information, Hazardous materials, Reporting and recordkeeping requirements, Sewage disposal, Waste treatment and disposal, Water pollution control, Penalties.

40 CFR Part 124

Administrative practice and procedure, Air pollution control, Hazardous materials, Sewage disposal, Waste treatment and disposal, Water pollution control, Water supply, Indians—lands.

40 CFR Part 501

Confidential business information, Environmental protection, Reporting and recordkeeping requirements, Publicly owned treatment works, Sewage disposal, Waste treatment and disposal.

Dated: April 14, 1989.

William K. Reilly,

Administrator.

For the reasons set forth in the preamble, 40 CFR Parts 122, 123, 124, and Chapter I of Title 40 of the Code of Federal Regulations are amended as follows:

PART 122—EPA ADMINISTERED PERMIT PROGRAMS: THE NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM

1. The authority citation for Part 122 continues to read as follows:

Authority: The Clean Water Act, 33 U.S.C. 1251 *et seq.*

2. Section 122.1 is amended by revising paragraphs (a)(1) and (d)(2), by adding new paragraphs (b) (3) and (4); by redesignating paragraphs (g) (6), (7), and (8) as paragraphs (g) (8), (9), and (10); by redesignating paragraph (g)(5) as paragraph (g)(7) and revising it and by adding new paragraphs (g)(5) and (g)(6) to read as follows:

§ 122.1 Purpose and Scope.

(a) * * *

(1) These regulations contain provisions for the *National Pollutant Discharge Elimination System* (NPDES) Program under section 318, 402, and 405 of the *Clean Water Act* (CWA) (Pub. L. 92–500, as amended by Pub. L. 95–217, Pub. L. 95–576, Pub. L. 96–483, Pub. L. 97–117, and Pub. L. 100–4; 33 U.S.C.1251 *et seq.*)

* * * * *

(b) * * *

* * * * *

(3) The permit program established under this Part also applies to owners or operators of any treatment works treating domestic sewage, whether or not the treatment works is otherwise required to obtain an NPDES permit in accordance with paragraph (a)(1) of this section, unless all requirements implementing section 405(d) of CWA applicable to the treatment works treating domestic sewage are included in a permit issued under the appropriate provisions of subtitle C of the Solid Waste Disposal Act, Part C of the Safe Drinking Water Act, the Marine Protection, Research, and Sanctuaries Act of 1972, or the Clean Air Act, or under State permit programs approved by the Administrator as adequate to assure compliance with section 405 of the CWA.

(4) The Regional Administrator may designate any person subject to the standards for sewage sludge use and disposal as a "treatment works treating domestic sewage" as defined in § 122.1, where he or she finds that a permit is necessary to protect public health and the environment from the adverse effects of sewage sludge or to ensure compliance with the technical standards for sludge use and disposal developed under CWA section 405(d). Any person designated as "treatment works treating domestic sewage" shall submit an application for a permit under § 122.21 within 120 days of being notified by the Regional Administrator that a permit is required. The Regional Administrator's decision to designate a person as a "treatment works treating domestic sewage" under this paragraph shall be stated in the fact sheet or statement of basis for the permit.

* * * * *

(d) * * *

(2) *Technical Regulations.* The NPDES permit program has separate additional regulations. These separate regulations are used by permit issuing authorities to determine what requirements must be placed in permits if they are issued. These separate regulations are located at 40 CFR Parts 125, 129, 133, 136, 40 CFR Subchapter N (Parts 400 through 460), and 40 CFR Part 503.

* * * * *

(g) * * *

(5) Section 405(d)(4) of the CWA requires the Administrator, prior to promulgation of standards for sewage sludge use and disposal, to "impose conditions in permits issued to publicly owned treatment works under section 402 of this Act, or take such other measures as the Administrator deems appropriate to protect public health and the environment from any adverse effects which may occur from toxic pollutants in sewage sludge."

(6) Section 405(f) provides that NPDES permits must include requirements implementing the standards for sludge use and disposal (40 CFR Part 503) "unless such requirements have been included in a permit issued under the appropriate provisions of subtitle C of the Solid Waste Disposal Act, part C of the Safe Drinking Water Act, the Marine Protection, Research, and Sanctuaries Act of 1972, or the Clean Air Act, or under State permit programs approved by the Administrator * * *." Section 405(f) also authorizes the Administrator to issue permits with requirements for sludge use or disposal that assure compliance with 40 CFR Part 503 to any treatment works treating domestic sewage that is not subject to NPDES (i.e., has no point source discharge) and has not been issued a permit that includes applicable 40 CFR Part 503 standards under the other permit programs listed in section 405(f)(1) of the CWA.

(7) Sections 402(b), 318 (b) and (c), and 405 (c) and (f) of CWA authorize EPA approval of State permit programs for discharges from point sources, discharges to aquaculture projects, and use and disposal of sewage sludge.

* * * * *

3. Section 122.2 is amended by revising the definitions of "applicable standards and limitations," "sewage sludge," and "toxic pollutant" and by adding definitions for "class I sludge management facility," "septage," "sewage sludge use or disposal practice," "standards for sewage sludge use or disposal," "sludge-only facility," and "treatment works treating domestic sewage" as follows:

§ 122.2 Definitions.

* * * * *

Applicable standards and limitations means all State, interstate, and federal standards and limitations to which a "discharge," a "sewage sludge use or disposal practice," or a related activity is subject under the CWA, including "effluent limitations," water quality standards, standards of performance, toxic effluent standards or prohibitions, "best management practices," pretreatment standards, and "standards for sewage sludge use or disposal" under sections 301, 302, 303, 304, 306, 307, 308, 403 and 405 of CWA.

* * * * *

Class I sludge management facility means any POTW identified under 40 CFR 403.8(a) as being required to have an approved pretreatment program (including such POTWs located in a State that has elected to assume local program responsibilities pursuant to 40 CFR 403.10(e)) and any other treatment works treating domestic sewage classified as a Class I sludge management facility by the Regional Administrator, or, in the case of approved State programs, the Regional Administrator in conjunction with the State Director, because of the potential for its sludge use or disposal practices to adversely affect public health and the environment.

* * * * *

Septage means the liquid and solid material pumped from a septic tank, cesspool, or similar domestic sewage treatment system, or a holding tank when the system is cleaned or maintained.

* * * * *

Sewage Sludge means any solid, semi-solid, or liquid residue removed during the treatment of municipal waste water or domestic sewage. Sewage sludge includes, but is not limited to, solids removed during primary, secondary, or advanced waste water treatment, scum, septage, portable toilet pumpings, type III marine sanitation device pumpings (33 CFR Part 159), and sewage sludge products. Sewage sludge does not include grit or screenings, or ash generated during the incineration of sewage sludge.

Sewage sludge use or disposal practice means the collection, storage, treatment, transportation, processing, monitoring, use, or disposal of sewage sludge.

* * * * *

Sludge-only facility means any "treatment works treating domestic sewage" whose methods of sewage sludge use or disposal are subject to regulations promulgated pursuant to section 405(d) of the CWA, and is required to obtain a permit under § 122.1(b)(3) of this Part.

Standards for sewage sludge use or disposal means the regulations promulgated pursuant to section 405(d) of the CWA which govern minimum

requirements for sludge quality, management practices, and monitoring and reporting applicable to sewage sludge or the use or disposal of sewage sludge by any person.

* * * * *

Toxic pollutant means any pollutant listed as toxic under section 307(a)(1) or, in the case of "sludge use or disposal practices," any pollutant identified in regulations implementing section 405(d) of the CWA.

Treatment works treating domestic sewage means a POTW or any other sewage sludge or waste water treatment devices or systems, regardless of ownership (including federal facilities), used in the storage, treatment, recycling, and reclamation of municipal or domestic sewage, including land dedicated for the disposal of sewage sludge. This definition does not include septic tanks or similar devices. For purposes of this definition, "domestic sewage" includes waste and waste water from humans or household operations that are discharged to or otherwise enter a treatment works. In States where there is no approved State sludge management program under section 405(f) of the CWA, the Regional Administrator may designate any person subject to the standards for sewage sludge use and disposal in 40 CFR Part 503 as a "treatment works treating domestic sewage," where he or she finds that there is a potential for adverse effects on public health and the environment from poor sludge quality or poor sludge handling, use or disposal practices, or where he or she finds that such designation is necessary to ensure that such person is in compliance with 40 CFR Part 503.

* * * * *

4. Section 122.5 is amended by revising paragraph (a) to read as follows:

§ 122.5 Effect of a permit.

(a) *Applicable to State programs, see § 123.25.* (1) Except for any toxic effluent standards and prohibitions imposed under section 307 of the CWA and "standards for sewage sludge use or disposal" under 405(d) of the CWA, compliance with a permit during its term constitutes compliance, for purposes of enforcement, with sections 301, 302, 306, 307, 318, 403, and 405 (a)–(b) of CWA. However, a permit may be modified, revoked and reissued, or terminated during its term for cause as set forth in §§ 122.62 and 122.64.

(2) Compliance with a permit condition which implements a particular "standard for sewage sludge use or disposal" shall be an affirmative defense in any enforcement action brought for a violation of that "standard for sewage sludge use or disposal" pursuant to sections 405(e) and 309 of the CWA.

* * * * *

5. Section 122.21 is amended by revising paragraph (a), by redesignating paragraph (c) as (c)(1) and adding a new paragraph (c)(2), by revising paragraph (d)(3), and by adding an introductory phrase in paragraph (p) to read as follows:

§ 122.21 Application for a permit (applicable to State programs, see § 123.25).

(a) *Duty to apply.* Any person who discharges or proposes to discharge pollutants or who owns or operates a "sludge-only facility" and who does not have an effective permit, except persons covered by general permits under § 122.28, excluded under § 122.3, or a user of a privately owned treatment works unless the Director requires otherwise under § 122.44(m), shall submit a complete application (which shall include a BMP program if necessary under 40 CFR 125.102) to the Director in accordance with this section and Part 124.

* * * * *

(c) * * *

(2) *Permits under section 405(f) of CWA.* (i) POTWs with currently effective NPDES permits shall submit the application information required by paragraph (d)(3)(ii) of this section with the next application submitted in accordance with paragraph (d) of this section or within 120 days after promulgation of a "standard for sewage sludge use or disposal" applicable to the POTW's sludge use or disposal practice(s), whichever occurs first.

(ii) Any other existing "treatment works treating domestic sewage" not covered under paragraph (c)(2)(i) of this section shall submit an application to the Director within 120 days after promulgation of a "standard for sewage sludge use or disposal" applicable to its sludge use or disposal practice(s) or upon request of the Director prior to the promulgation of an applicable "standard for sewage sludge use or disposal" if the Director determines that a permit is necessary to protect public health and the environment from any potential adverse effects that may occur from toxic pollutants in sewage sludge.

(iii) Any "treatment works treating domestic sewage" that commences operations after promulgation of an applicable "standard for sewage sludge use or disposal" shall submit an application to the Director at least 180 days prior to the date proposed for commencing operations.

(d) * * *

(3)(i) All applicants for EPA-issued permits, other than POTWs, new sources, and "sludge-only facilities," must complete Forms 1 and either 2b or 2c of the consolidated permit application forms to apply under § 122.21 and paragraphs (f), (g), and (h) of this section.

(ii) In addition to any other applicable requirements in this Part, all POTWs and other "treatment works treating domestic sewage," including "sludge-only facilities," must submit with their applications the information listed at 40 CFR 501.15 (a)(2) within the time frames established in paragraph (c)(2) of this section.

* * * * *

(p) *Recordkeeping.* Except for information required by paragraph (d)(3)(ii) of this section, which shall be retained for a period of at least five years from the date the application is signed (or longer as required by 40 CFR Part 503), * * *

* * * * *

6. Section 122.28 is amended by revising the first sentence in paragraphs (a)(1) and (a)(2)(ii) introductory text, and by revising paragraphs (a)(2)(ii) (B) and (C), and paragraphs (b)(2)(i) (B), (C), and (F) to read as follows:

§ 122.28 General permits (applicable to State NPDES programs, see § 123.25).

(a) * * *

(1) *Area.* The general permit shall be written to cover a category of discharges or sludge use or disposal practices or facilities described in the permit under paragraph (a)(2)(ii) of this section, except those covered by individual permits, within a geographic area. * * *

* * * * *

(2) * * *

(ii) A category of point sources other than storm water point sources, or a category of "treatment works treating domestic sewage," if the sources or "treatment works treating domestic sewage" all:

* * * * *

(B) Discharge the same types of wastes or engage in the same types of sludge use or disposal practices;

(C) Require the same effluent limitations, operating conditions, or standards for sewage sludge use or disposal;

* * * * *

(b) * * *

(2) * * *

(i) * * *

(B) The discharger or "treatment works treating domestic sewage" is not in compliance with the conditions of the general NPDES permit;

(C) A change has occurred in the availability of demonstrated technology or practices for the control or abatement of pollutants applicable to the point source or treatment works treating domestic sewage;

* * * * *

(F) Standards for sewage sludge use or disposal have been promulgated for the sludge use and disposal practice covered by the general NPDES permit; or

* * * * *

7. Section 122.41 is amended by revising paragraphs (a)(1), (d), and (j)(4), by adding a new paragraph (l)(1)(iii), and an introductory phrase at the beginning of the first sentence of paragraph (j)(2) and by revising paragraphs (l)(4)(i) and (l)(4)(ii), to read as follows:

§ 122.41 Conditions applicable to all permits (applicable to State programs, see § 123.25).

* * * * *

(a) * * *

(1) The permittee shall comply with effluent standards or prohibitions established under section 307(a) of the Clean Water Act for toxic pollutants and with standards for sewage sludge use or disposal established under section 405(d) of the CWA within the time provided in the regulations that establish these standards or prohibitions or standards for sewage sludge use or disposal, even if the permit has not yet been modified to incorporate the requirement.

* * * * *

(d) *Duty to mitigate.* The permittee shall take all reasonable steps to minimize or prevent any discharge or sludge use or disposal in violation of this permit which has a reasonable likelihood of adversely affecting human health or the environment.

* * * * *

(j) * * *

(2) Except for records of monitoring information required by this permit related to the permittee's sewage sludge use and disposal activities, which shall be retained for a period of at least five years (or longer as required by 40 CFR Part 503), * * *

* * * * *

(4) Monitoring results must be conducted according to test procedures approved under 40 CFR Part 136 or, in the case of sludge use or disposal, approved under 40 CFR Part 136 unless otherwise specified in 40 CFR Part 503, unless other test procedures have been specified in the permit.

* * * * *

(l) * * *

(1) * * *

(iii) The alteration or addition results in a significant change in the permittee's sludge use or disposal practices, and such alteration, addition, or change may justify the application of permit conditions that are different from or absent in the existing permit, including notification of additional use or disposal sites not reported during the permit application process or not reported pursuant to an approved land application plan;

* * * * *

(4) * * *

(i) Monitoring results must be reported on a Discharge Monitoring Report (DMR) or forms provided or specified by the Director for reporting results of monitoring of sludge use or disposal practices.

(ii) If the permittee monitors any pollutant more frequently than required by the permit using test procedures approved under 40 CFR Part 136 or, in the case of sludge use or disposal, approved under 40 CFR Part 136 unless otherwise specified in 40 CFR Part 503, or as specified in the permit, the results of this monitoring shall be included in the calculation and reporting of the data submitted in the DMR or sludge reporting form specified by the Director.

* * * * *

8. Section 122.44 is amended by redesignating paragraph (b) as paragraph (b)(1) and adding a new paragraph (b)(2), by adding a new paragraph (c)(4), by revising paragraphs (i)(1)(iii), by adding a new sentence to the end of paragraph (i)(2), by adding a new paragraph (j)(3), and by revising paragraph (l)(1) to read as follows:

§ 122.44 Establishing limitations, standards, and other permit conditions (applicable to State NPDES programs, see § 123.25).

* * * * *

(b) * * *

(2) *Standards for sewage sludge use or disposal* under section 405(d) of the CWA unless those standards have been included in a permit issued under the appropriate provisions of subtitle C of the Solid Waste Disposal Act, Part C of Safe Drinking Water Act, the Marine Protection, Research, and Sanctuaries Act of 1972, or the Clean Air Act, or under State permit programs approved by the Administrator. When there are no applicable standards for sewage sludge use or disposal, the permit may include requirements developed on a case-by-case basis to protect public health and the environment from any adverse effects which may occur from toxic pollutants in sewage sludge. If any applicable standard for sewage sludge use or disposal is promulgated under section 405(d) of the CWA and that standard is more stringent than any limitation on the pollutant or practice in the permit, the Director may initiate proceedings under these regulations to modify or revoke and reissue the permit to conform to the standard for sewage sludge use or disposal.

(c) * * *

(4) For any permit issued to a treatment works treating domestic sewage (including "sludge-only facilities"), the Director shall include a reopener clause to incorporate any applicable standard for sewage sludge use or disposal promulgated under section 405(d) of the CWA. The Director may promptly modify or revoke and reissue any permit containing the reopener clause required by this paragraph if the standard for sewage sludge use or disposal is more stringent than any requirements for sludge use or disposal in the permit, or controls a pollutant or practice not limited in the permit.

* * * * *

(i) * * *

(1) * * *

(iii) Other measurements as appropriate including pollutants in internal waste streams under § 122.45(i); pollutants in intake water for net limitations under § 122.45(f); frequency, rate of discharge, etc., for noncontinuous discharges under § 122.45(e); pollutants subject to notification requirements under § 122.42(a); and pollutants in sewage sludge or other monitoring as specified in 40 CFR Part 503; or as determined to be necessary on a case-by-case basis pursuant to section 405(d)(4) of the CWA.

* * * * *

(2) * * * For sewage sludge use or disposal practices, requirements to monitor and report results with a frequency dependent on the nature and effect of the sewage sludge use or disposal practice; minimally, this shall be as specified in 40 CFR Part 503 (where applicable), but in no case less than once a year.

* * * * *

(j) * * *

(3) For POTWs which are "sludge-only facilities," a requirement to develop a pretreatment program under 40 CFR Part 403 when the Director determines that a pretreatment program is

necessary to assure compliance with Section 405(d) of the CWA.

* * * * *

(l) *Reissued permits.* (1) Except as provided in paragraph (l)(2) of this section when a permit is renewed or reissued, interim effluent limitations, standards or conditions must be at least as stringent as the final effluent limitations, standards, or conditions in the previous permit (unless the circumstances on which the previous permit was based have materially and substantially changed since the time the permit was issued and would constitute cause for permit modification or revocation and reissuance under § 122.62.)

* * * * *

9. Section 122.45 is amended by revising paragraph (b)(1) to read as follows:

§ 122.45 Calculating NPDES permit conditions (applicable to State NPDES programs, see § 123.25).

* * * * *

(b) * * *

(1) In the case of POTWs, permit effluent limitations, standards, or prohibitions shall be calculated based on design flow.

* * * * *

10. Section 122.47 is amended by revising paragraph (a)(3)(i) to read as follows:

§ 122.47 Schedules of compliance.

(a) * * *

(3) * * *

(i) The time between interim dates shall not exceed 1 year, except that in the case of a schedule for compliance with standards for sewage sludge use and disposal, the time between interim dates shall not exceed six months.

* * * * *

11. Section 122.62 is amended by revising paragraphs (a)(1) and (a)(7) and by adding a new paragraph (a)(18) to read as follows:

§ 122.62 Modification or revocation and reissuance of permits (applicable to State programs, see § 123.25).

* * * * *

(a) * * *

(1) *Alterations.* There are material and substantial alterations or additions to the permitted facility or activity (including a change or changes in the permittee's sludge use or disposal practice) which occurred after permit issuance which justify the application of permit conditions that are different or absent in the existing permit.

* * * * *

(7) *Reopener.* When required by the "reopener" conditions in a permit, which are established in the permit under § 122.44(b) (for CWA toxic effluent limitations and standards for sewage sludge use or disposal, see also § 122.44(c)) or 40 CFR § 403.10(e) (pretreatment program).

* * * * *

(18) *Land application plans.* When required by a permit condition to incorporate a land application plan for beneficial reuse of sewage sludge, to revise an existing land application plan, or to add a land application plan.

12. Section 122.64 is amended by revising paragraph (a)(4) to read as follows:

§ 122.64 Termination of permits (applicable to State programs, see § 123.25).

(a) * * *

(4) A change in any condition that requires either a temporary or permanent reduction or elimination of any discharge or sludge use or disposal practice controlled by the permit (for example, plant closure or termination of discharge by connection to a POTW).

* * * * *

PART 123—STATE PROGRAM REQUIREMENTS

13. The authority citation for Part 123 continues to read as follows:

Authority: Clean Water Act, 33 U.S.C. 1251 *et seq.*

14. Section 123.1 is amended by revising paragraphs (b) and (c) as follows:

§ 123.1 Purpose and scope.

* * * * *

(b) These regulations are promulgated under the authority of sections 304(i), 101(e), and 405 of CWA, and implement the requirements of those sections.

(c) The Administrator shall approve State programs which conform to the applicable requirements of this part. A State NPDES program will not be approved by the Administrator under section 402 of CWA unless it has authority to control the discharges specified in sections 318 and 405(a) of CWA. Permit programs under sections 318 and 405(a) will not be approved independent of a section 402 program. (Permit programs under section 405(f) of CWA (sludge management programs) may be approved under 40 CFR Part 501 independently of a section 402 permit program.)

* * * * *

15. Section 123.2 is revised to read as follows:

§ 123.2 Definitions.

The definitions in Part 122 and Part 501 apply to all subparts of this Part.

16. Section 123.22 is amended by adding a new paragraph (f) to read as follows:

§ 123.22 Program Description.

* * * * *

(f) A State seeking approval of a sludge management program under section 405(f) of the CWA as part of its NPDES program, in addition to the above requirements of this section, shall include the inventory as required in 40 CFR 501.12(f).

17. Section 123.24 is amended by revising the last sentence in the introductory text of paragraph (d), and by adding a new paragraph (d)(8) to read as follows:

§ 123.24 Memorandum of Agreement with the Regional Administrator

* * * * *

(d) * * * While the Regional Administrator and the State may agree to waive EPA review of certain "classes or categories" of permits, no waiver of review may be granted for the following classes or categories:

* * * * *

(8) "Class I sludge management facilities" as defined in 40 CFR 501.2.

* * * * *

18. Section 123.25 is amended by revising the introductory text of paragraph (a) and by revising paragraph (a)(37) to read as follows:

§ 123.25 Requirements for permitting.

(a) All State Programs under this Part must have legal authority to implement each of the following provisions and must be administered in conformance with each, except that a State which chooses not to administer a sludge management program pursuant to section 405(f) of the CWA as part of its NPDES program is not required to have legal authority to implement the portions of the following provisions which were promulgated after the enactment of the Water Quality Act of 1987 (Pub. L. 100–4) and which govern sewage sludge use and disposal. In all cases, States are not precluded from omitting or modifying any provisions to impose more stringent requirements:

* * * * *

(37) 40 CFR Parts 129, 133, Subchapter N and 40 CFR Part 503.

* * * * *

19. Section 123.26 is amended by revising paragraphs (e)(5) to read as follows:

§ 123.26 Requirements for compliance evaluation programs.

* * * * *

(e) * * *

(5) Inspecting the facilities of all major dischargers and all Class I sludge management facilities (as defined in 40 CFR 501.2) where applicable at least annually.

20. Section 123.44 is amended by revising paragraphs (c)(5) and (c)(6) to read as follows:

§ 123.44 EPA review of and objections to State permits.

* * * * *

(c) * * *

(5) Any provisions of the proposed permit relating to the maintenance of records, reporting, monitoring, sampling, or the provision of any other information by the permittee are inadequate, in the judgment of the Regional Administrator, to assure compliance with permit conditions, including effluent standards and limitations or standards for sewage sludge use and disposal required by CWA, by the guidelines and regulations issued under CWA, or by the proposed permit;

(6) In the case of any proposed permit with respect to which applicable effluent standards and limitations or standards for sewage sludge use and disposal under sections 301, 302, 306, 307, 318, 403, and 405 of CWA have not yet been promulgated by the Agency, the proposed permit, in the judgment of the Regional Administrator, fails to carry out the provisions of CWA or of any regulations issued under CWA; the provisions of this paragraph apply to determinations made pursuant to § 125.3(c)(2) in the absence of applicable guidelines, to best management practices under section 304(e) of CWA, which must be incorporated into permits as requirements under section 301, 306, 307, 318, 403 or 405, and to sewage sludge use and disposal requirements developed on a case-by-case basis pursuant to section 405(d) of CWA, as the case may be;

* * * * *

21. Section 123.45 is amended by adding a new paragraph (e) to read as follows:

§ 123.45 Noncompliance and program reporting by the Director.

* * * * *

(e) *Sludge noncompliance program reports.* The Director shall prepare and submit semi-annual noncompliance and annual program reports as required under 40 CFR 501.21. The Director may include this information in reports submitted in accordance with paragraphs (a) through (d) of this section.

PART 124—PROCEDURES FOR DECISIONMAKING

22. The authority citation for Part 124 continues to read as follows:

Authority: Resource Conservation and Recovery Act, 42 U.S.C. 6901 *et seq.;* Safe Drinking Water Act, 42 U.S.C. 300f *et seq.;* Clean Water Act, 33 U.S.C. 1251 *et seq.;* and Clean Air Act, 42 U.S.C. 1857 *et seq.*

23. Section 124.1 is amended by revising the first sentence of paragraph (a) to read as follows:

§ 124.1 Purpose and scope.

(a) This part contains EPA procedures for issuing, modifying, revoking and reissuing, or terminating all RCRA, UIC, PSD and NPDES "permits" (including "sludge-only" permits issued pursuant to § 122.1(b)(3)), other than RCRA and UIC "emergency permits" (see §§ 270.61 and 144.34) and RCRA "permits by rule" (§ 270.60). * * *

* * * * *

24. Section 124.2 is amended by revising the first sentence of paragraph (a) introductory text, and by revising the definitions of "applicable standards and limitations," "facility or activity," and the first sentence of "general permit" to read as follows:

§ 124.2 Definitions.

(a) In addition to the definitions given in §§ 122.2 and 123.2 (NPDES), 501.2 (sludge management), 144.3 and 145.2 (UIC), 233.3 (404), and 270.2 and 271.2 (RCRA), the definitions below apply to this Part, except for PSD permits which are governed by the definitions in § 124.41.* * *

* * * * *

Applicable standards and limitations means all State, interstate, and federal standards and limitations to which a "discharge," a "sludge use or disposal practice" or a related activity is subject under the CWA, including "standards for sewage sludge use or disposal," "effluent limitations," water quality standards, standards of performance, toxic effluent standards or prohibitions, "best management practices," and pretreatment standards under sections 301, 302, 303, 304, 306, 307, 308, 403, and 405 of CWA.

* * * * *

Facility or activity means any "HWM facility," UIC "injection well," NPDES "point source" or "treatment works treating domestic sewage" or State 404 dredge or fill activity, or any other facility or activity (including land or appurtenances thereto) that is subject to regulation under the RCRA, UIC, NPDES, or 404 programs.

General permit (NPDES and 404) means an NPDES or 404 "permit" authorizing a category of discharges or activities under the CWA within a geographical area.* * *

* * * * *

25. Section 124.3 is amended by revising the third and sixth sentences in paragraph (c) to read as follows:

* * * * *

§ 124.3 Application for a permit.

* * * * *

(c) * * * Each application for an EPA-issued permit submitted by an existing HWM facility (both Parts A and B of the application), existing injection well or existing NPDES source or sludge-only facility should be reviewed for completeness within 60 days of receipt. * * * When the application is for an existing HWM facility, an existing UIC injection well or an existing NPDES source or "sludge-only facility" the Regional Administrator shall specify in the notice of deficiency a date for submitting the necessary information.

* * *

* * * * *

26. Section 124.5(d) is amended by revising the last sentence to read as follows:

§ 124.5 Modification, revocation and reissuance, or termination of permits.

* * * * *

(d) * * * In the case of EPA-issued permits, a notice of intent to terminate shall not be issued if the Regional Administrator and the permittee agree to termination in the course of transferring permit responsibility to an approved State under §§ 123.24(b)(1) (NPDES), 145.24(b)(1) (UIC), 271.8(b)(6) (RCRA), or 501.14(b)(1) (Sludge).

* * * * *

27. Section 124.6 is amended by revising paragraph (d)(4)(v) to read as follows:

§ 124.6 Draft permits.

* * * * *

(d) * * *

(4) * * *

(v) NPDES permits, effluent limitations, standards, prohibitions, standards for sewage sludge use or disposal, and conditions under §§ 122.41, 122.42, and 122.44, including when applicable any conditions certified by a State agency under § 124.55, and all variances that are to be included under § 124.63.

* * * * *

28. Section 124.8 is amended by revising the first sentence in paragraph (a) to read as follows:

§ 124.8 Fact sheet.

* * * * *

(a) A fact sheet shall be prepared for every draft permit for a major HWM, UIC, 404, or NPDES facility or activity, for every Class I sludge management facility, for every 404 and NPDES general permit (§§ 237.37 and 122.28), for every NPDES draft permit that incorporates a variance or requires an explanation under § 124.56(b), for every draft permit that includes a sewage sludge land application plan under 40 CFR 501.15(a)(2)(ix), and for every draft permit which the Director finds is the subject of wide-spread public interest or raises major issues. * * *

* * * * *

29. Section 124.10 is amended by revising paragraph (c)(1)(ii), and the first sentence in (d)(1)(vii) and adding a phrase after "permits" and before, "publication" in paragraph (c)(2)(i) to read as follows:

§ 124.10 Public notice of permit actions and public comment period.

(c) * * *

(1) * * *

(ii) Any other agency which the Director knows has issued or is required to issue a RCRA, UIC, PSD (or other permit under the Clean Air Act), NPDES, 404, sludge management permit, or ocean dumping permit under the Marine Research Protection and Sanctuaries Act for the same facility or activity (including EPA when the draft permit is prepared by the State);

* * * * *

(2) * * *

(i) For major permits, NPDES and 404 general permits, and permits that include sewage sludge land application plans under 40 CFR 501.15(a)(2)(ix), * * *

* * * * *

(d) * * *

(1) * * *

(vii) For NPDES permits only (including those for "sludge-only facilities"), a general description of the location of each existing or proposed discharge point and the name of the receiving water and the sludge use and disposal practice(s) and the location of each sludge treatment works treating domestic sewage and use or disposal sites known at the time of permit application. For draft general permits, this requirement will be satisfied by a map or description of the permit area. * * *

* * * * *

30. Section 124.56 is amended by revising paragraphs (a), (b)(1)(iv), and (c), and by adding a new paragraph (e) to read as follows:

§ 124.56 Fact sheets.

* * * * *

(a) Any calculations or other necessary explanation of the derivation of specific effluent limitations and conditions or standards for sewage sludge use or disposal, including a citation to the applicable effluent limitation guideline, performance standard, or standard for sewage sludge use or disposal as required by § 122.44 and reasons why they are applicable or an explanation of how the alternate effluent limitations were developed.

(b) * * *

(1) * * *

(iv) Limitations set on a case-by-case basis under § 125.3 (c)(2) or (c)(3), or pursuant to Section 405(d)(4) of the CWA.

(c) When appropriate, a sketch or detailed description of the location of the discharge or regulated activity described in the application; and

* * * * *

(e) For permits that include a sewage sludge land application plan under 40 CFR 501.15(a)(2)(ix), a brief description of how each of the required elements of the land application plan are addressed in the permit.

31. Section 124.71 is amended by revising the first sentence in paragraph (a) to read as follows:

§ 124.71 Applicability.

(a) The regulations in this subpart govern all formal hearings conducted by EPA under CWA sections 402 and 405(f), except those conducted under Subpart F. * * *

* * * * *

32. Section 124.111 is amended by revising the first sentence of paragraph (a)(1)(i) to read as follows:

§ 124.111 Applicability.

(a) * * *

(1) * * *

(i) In any proceedings for the issuance of any NPDES permit under CWA sections 402 and 405(f) which constitute "initial licensing" under the Administrative Procedure Act, when the Regional Administrator elects to apply this subpart and explicitly so states in the public notice of the draft permit under § 124.10 or in a supplemental notice under § 124.14. * * *

* * * * *

33. Chapter I of Title 40 of the Code of Federal Regulations is amended by adding a new Subchapter O consisting of Part 501 to read as follows:

SUBCHAPTER O—SEWAGE SLUDGE

PART 501—STATE SLUDGE MANAGEMENT PROGRAM REGULATIONS

Subpart A—Purpose, Scope, and General Program Requirements

501.1 Purpose and Scope.
501.2 Definitions.
501.3 Coordination with other programs.

Subpart B—Development and Submission of State Programs

501.11 Elements of a sludge management program submission.
501.12 Program description.
501.13 Attorney General's statement.
501.14 Memorandum of agreement with the Regional Administrator.
501.15 Requirements for permitting.
501.16 Requirements for compliance evaluation programs.
501.17 Requirements for enforcement authority.
501.18 Prohibition.
501.19 Sharing of information.
501.20 Receipt and use of federal information.
501.21 Program reporting to EPA.

Subpart C—Program Approval, Revision and Withdrawal

501.31 Review and approval procedures.
501.32 Procedures for revision of State programs.
501.33 Criteria for withdrawal of State programs.
501.34 Procedures for withdrawal of State programs.

Authority: 33 U.S.C. 1251 *et seq.*

Subpart A—Purpose, Scope and General Program Requirements

§ 501.1 Purpose and scope.

(a) These regulations are promulgated under the authority of sections 101(e), 405(f), 501(a), and 518(e) of the CWA, and implement the requirements of those sections.

(b) This part specifies the procedures EPA will follow in approving, revising, and withdrawing State sludge management programs under section 405(f) that are not part of a State's NPDES program, and the requirements State programs must meet to be approved by the Administrator under section 405(f) of CWA. Sludge Management Program submissions may be developed and implemented under any existing or new State authority or authorities as long as they meet the requirements of this Part. (States seeking approval of their sludge program as part of their NPDES program are to follow the requirements and procedures for program modification set forth in 40 CFR Part 123.)

(c) Any complete State Sludge Management Program submitted for

approval under this part shall have the following as a minimum:

(1) The authority to require compliance by any person who uses or disposes of sewage sludge with standards for sludge use or disposal issued under section 405(d) of the CWA, including compliance by federal facilities;

(2) The authority to issue permits that apply, and ensure compliance with, the applicable requirements of section 405 of the Clean Water Act to any POTW or other treatment works treating domestic sewage, and procedures for issuance of such permits;

(3) Provisions for regulating the use or disposal of sewage sludge by non-permittees;

(4) The authority to take actions to protect public health and the environment from any adverse effects that may occur from toxic pollutants in sewage sludge; and

(5) The authority to abate violations of the State sludge program, including civil and criminal penalties and other ways and means of enforcement.

(d) In addition, any complete State Sludge Management Program submitted for approval under this Part shall have authority to address:

(1) All sewage sludge management practices used in the State, including associated transport and storage, that are practiced or planned to be practiced in the State, unless the State is applying for partial sludge program approval in accordance with 40 CFR 123.30. The State sludge management program shall also be applicable to all federal facilities in the State. Sludge management activities and practices shall include as applicable:

(i) Sludge treatment, processing, and short term storage practices as may be covered by federal regulations;

(ii) Sludge use and ultimate disposal practices, including:

(A) Land application,

(B) Landfilling,

(C) Distribution & marketing,

(D) Incineration,

(E) Surface disposal sites, and

(F) Any other sludge use and disposal practices as may be covered by federal regulations.

(e) The Administrator will approve State programs which conform to the applicable requirements of this Part.

(f) Upon approval of a State program, the Administrator will suspend the issuance of federal permits for those activities subject to the approved State program. After program approval EPA will retain jurisdiction over any permits (including general permits) which it has issued unless arrangements have been made with the State in the Memorandum of Agreement for the State to assume responsibility for these permits. Retention of jurisdiction will include the processing of any permit appeals, modification requests, or variance requests; the conduct of inspections, and the receipt and review of self-monitoring reports. If any permit appeal, modification request, or variance request is not finally resolved when the federally issued permit expires, EPA may, with the consent of the State, retain jurisdiction until the matter is resolved.

(g) Notwithstanding approval of a State sludge program, EPA has the authority to take enforcement actions for any violations of this Part or sections 405 or 309 of the CWA.

(h) Any State program approved by the Administrator shall at all times be conducted in accordance with the requirements of this part.

(i) Nothing in this part precludes a State or political subdivision thereof, or interstate agency, from adopting or enforcing requirements established by State or local law that are more stringent or more extensive than those required in this Part or in any other federal statute or regulation.

(j) Nothing in this part precludes a State from operating a program with a greater scope of coverage than that required under this part. If an approved State program has greater scope of coverage than required by federal law, the additional coverage is not part of the federally approved program.

(k) Sections 106(a) and (d) of the Marine Protection, Research, and Sanctuaries Act (MPRSA), 33 U.S.C. 1416, generally preclude States from regulating or issuing permits for ocean dumping. Nothing in this regulation is intended to confer on the States the authority to engage in the regulation or permitting of ocean dumping in contravention of the provisions of sections 106(a) and (d) of the MPRSA.

(l) The Administrator may allow a State sewage sludge management agency to assign portions of its program responsibilities to local agencies, provided that:

(1) No assignment is made to a local agency which owns or operates a POTW or other facility that treats or disposes of sewage sludge;

(2) The program description required by § 501.12 of this Part identifies any assignment of program responsibilities to the local agency(ies), describes the capabilities of the local agency to carry out assigned functions, and includes copies of any documents which execute the assignment and an agreement between the State sewage sludge management agency and the local agency(ies) defining their respective program responsibilities;

(3) The Attorney General's Statement required by § 501.13 of this part states that any assignment of program responsibilities to the local agency(ies) described in the program description is valid under State law and that State and local law do not otherwise prohibit the local agency(ies) from executing the program responsibilities assigned by the State sewage sludge management agency;

(4) The Memorandum of Agreement (MOA) required by § 501.14 of this part includes adequate provisions for the State sewage sludge management agency's oversight of the program responsibilities assigned to the local agency(ies);

(5) The State sewage sludge management agency retains all responsibility for the program reporting required by § 501.21 of this part and for all other activities required by this part or by the MOA related to EPA oversight of the State's approved program; and

(6) The State sewage sludge management agency retains full authority and ultimate responsibility for administering all aspects of the State's approved program in accordance with the requirements of this Part and the MOA.

§ 501.2 Definitions.

"Administrator" means the Administrator of the United States Environmental Protection Agency, or an authorized representative.

"Approved State program" means a State program which has received EPA approval under this Part.

"Class I sludge management facility" means any POTW identified under 40 CFR 403.8(a) as being required to have an approved pretreatment program (including such POTWs located in a State that has elected to assume local program responsibilities pursuant to 40 CFR 403.10(e)) and any other treatment works treating domestic sewage classified as a Class I sludge management facility by the Regional Administrator in conjunction with the State Program Director because of the potential for its sludge use or disposal practices to adversely affect public health or the environment.

"CWA" means the Clean Water Act (formerly referred to as the Federal Water Pollution Control Act or Federal Water Pollution Control Act Amendments of 1972), Pub. L. 92–500, as amended by Pub. L. 95–217, Pub. L. 95–576, Pub. L. 96–483, Pub. L. 97–117, and Pub. L. 100–4, 33 U.S.C. 1251 *et seq.*

"Municipality" means a city, town, borough, county, parish, district, association, or other public body (including an intermunicipal agency of two or more of the foregoing entities) created under State law (or an Indian tribe or an authorized Indian tribal organization), or a designated and approved management agency under section 208 of the Clean Water Act. This definition includes a special district created under State law such as a water district, sewer district, sanitary district, utility district, drainage district, or similar entity, or an integrated waste management facility as defined in section 201(e) of the CWA, as amended, that has as one of its principal responsibilities the treatment, transport, or disposal of sewage sludge.

"Permit" means an authorization, license, or equivalent control document issued by EPA or an "approved State program" to implement the requirements of this Part.

"Person" is an individual, association, partnership, corporation, municipality, State or Federal Agency, or an agent or employee thereof.

"POTW" means a publicly owned treatment works.

"Publicly Owned Treatment Works" means a treatment works treating domestic sewage that is owned by a municipality or State.

"Septage" means the liquid and solid material pumped from a septic tank, cesspool, or similar domestic sewage treatment system, or a holding tank, when the system is cleaned or maintained.

"Sewage sludge" means any solid, semi-solid, or liquid residue removed during the treatment of municipal waste water or domestic sewage. Sewage sludge includes, but is not limited to, solids removed during primary, secondary or advanced waste water treatment, scum, septage, portable toilet pumpings, Type III Marine Sanitation device pumpings (33 CFR Part 159), and sewage sludge products. Sewage sludge does not include grit, screenings, or ash generated during the incineration of sewage sludge.

"Standards for sewage sludge use or disposal" means the regulations promulgated at 40 CFR Part 503 pursuant to section 405(d) of the CWA which govern minimum requirements for sludge quality, management practices, and monitoring and reporting applicable to the generation or treatment of sewage sludge from a treatment works treating domestic sewage or use or disposal of that sewage sludge by any person.

"State" means a State, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, the Trust Territory of the Pacific Islands, and the Commonwealth of the Northern Mariana Islands, and an Indian Tribe eligible for treatment as a State pursuant to regulations promulgated under the authority of section 518(e) of the CWA.

"State Program Director" or "Director" means the chief executive officer of the State sewage sludge management agency.

"State sewage sludge management agency" means the agency designated by the Governor as having the lead responsibility for managing or coordinating the approved State program under this Part.

"Toxic pollutant" means any pollutant listed as toxic under section 307(a)(1) or any pollutant identified in regulations implementing section 405(d) of the CWA.

"Treatment works treating domestic sewage" means a POTW or any other sewage sludge or wastewater treatment devices or systems, regardless of ownership (including Federal facilities), used in the storage, treatment, recycling, and reclamation of municipal or domestic sewage, including land dedicated for the disposal of sewage sludge. This definition does not include septic tanks or similar devices. For purposes of this definition, "domestic sewage" includes waste and waste water from humans or household operations that are discharged to or otherwise enter a treatment works.

§ 501.3 Coordination with other programs.

Issuance of State permits under this Part may be coordinated with issuance of RCRA, UIC, NPDES, 404 and other permits whether they are controlled by the State, EPA, or the Corps of Engineers. (See for example 40 CFR 124.4 for procedures for coordinating permit issuance.)

Subpart B—Development and Submission of State Programs

§ 501.11 Elements of a sludge management program submission.

(a) Any State that seeks to administer a program under this Part shall submit to the Administrator at least three copies of a program submission. The submission shall contain the following:

(1) A letter from the Governor of the State requesting program approval;

(2) A complete program description, as required by § 501.12 describing how the State intends to carry out its responsibilities under this Part;

(3) An Attorney General's Statement as required by § 501.13;

(4) A Memorandum of Agreement with the Regional Administrator as required by § 501.14; and

(5) Copies of all applicable State statutes and regulations, including those governing State administrative procedures.

(b) Within 30 days of receipt of a State program submission, EPA will notify the State whether its submission is complete. If it is incomplete, EPA will identify the information needed to complete the program submission.

(Information collection requirements in paragraph (a) were approved by the Office of Management and Budget under control number 2040–0128.)

§ 501.12 Program description.

Any State that seeks to administer a program under this part shall submit a description of the program it proposes to administer in lieu of the federal program under State law or under any interstate compact. The program description shall include:

(a) A description in narrative form of the scope, structure, coverage and processes of the State program.

(b) A description (including organization charts) of the organization and structure of the State agency or agencies which will have responsibility for administering the program, including the information listed below. If more than one agency is responsible for administration of a program, the responsibilities of each agency must be delineated, their procedures for coordination set forth, and an agency must be designated as a "lead agency" (i.e., the "State sludge management agency") to facilitate communications between EPA and the State agencies having program responsibility. If the State proposes to administer a program of greater scope of coverage than is required by federal law, the information provided under this paragraph shall indicate the resources dedicated to administering the federally required portion of the program. This description shall include:

(1) A description of the State agency staff who will carry out the State program, including the number, occupations, and general duties of the employees. The State need not submit complete job descriptions for every employee carrying out the State program;

(2) An itemization of the estimated costs of establishing and administering the program for the first two years after approval including cost of the personnel listed in paragraph (b)(1) of this section, cost of administrative support, and cost of technical support; and

(3) An estimate of the sources and amounts of funding for the first two years after approval to meet the costs listed in paragraph (b)(2) of this section.

(c) A description of applicable State procedures, including permitting procedures, and any State administrative or judicial review procedures.

(d) Copies of the permit form(s), application form(s), and reporting form(s) the State intends to employ in its program.

(e) A complete description of the State's compliance tracking and enforcement program (see 40 CFR 501.16 and 501.17).

(f)(1) An inventory of all POTWs and other treatment works treating domestic sewage that are subject to regulations promulgated pursuant to 40 CFR Part 503, which includes:

(i) Name, location, and ownership status (e.g., public, private, federal),

(ii) Sludge use or disposal practice(s),

(iii) Annual sludge production volume, and

(iv) NPDES, UIC, RCRA, Clean Air Act, and State permit number, if any,

(v) Compliance status, and;

(2) An inventory of all sewage sludge disposal and use sites not included under paragraph (f)(1) of this section (except those sites to which sludge that meets the requirements for distribution and marketing is applied such as home gardens), which includes the name, location, permit number (if any), and source of sewage sludge.

(3) States may submit either:

(i) Inventories which contain all of the information required by paragraphs (f)(1) and (2); or

(ii) A partial inventory that covers at a minimum all information required by paragraphs (f)(1) (i) through (ii) of this section together with a detailed plan showing how the State will complete the inventories within five years after approval of its sludge management program under this part.

§ 501.13 Attorney General's statement.

Any State that seeks to administer a program under this part shall submit a statement from the State Attorney General (or the attorney for those State or interstate agencies which have independent legal counsel) that the laws of the State, or an interstate compact, provide adequate authority to carry out the program described under § 501.12 and to meet the requirements of this part. This statement shall include citations to the specific statutes, administrative regulations, and, where appropriate, judicial decisions which demonstrate adequate authority. State statutes and regulations cited by the State Attorney General or independent legal counsel shall be in the form of lawfully adopted State statutes and regulations at the time the statement is signed and shall be fully effective by the time the program is approved. To qualify as "independent legal counsel" the attorney signing the statement required by this section must have full authority to independently represent the State agency in court on all matters pertaining to the State program. If a State seeks to carry out the program on Indian lands, the statement shall include an appropriate opinion and analysis of the State's authority.

§ 501.14 Memorandum of Agreement with the Regional Administrator.

(a) Any State that seeks to administer a program under this part shall submit a Memorandum of Agreement. The Memorandum of Agreement shall be executed by the State Program Director and the Regional Administrator and shall become effective when approved by the Administrator. In addition to meeting the requirements of paragraph (b) of this section, the Memorandum of Agreement may include other terms, conditions, or agreements consistent with this part and relevant to the administration and enforcement of the State's regulatory program. The Administrator shall not approve any Memorandum of Agreement which contains provisions which restrict EPA's oversight responsibility.

(b) The Memorandum of Agreement shall include the following:

(1) Provisions for the prompt transfer from EPA to the State of pending permit applications and any other information relevant to program operation not already in the possession of the State Director (e.g., support files for permit issuance, compliance reports, etc.). If existing permits are transferred from EPA to the State for administration, the Memorandum of Agreement shall contain provisions specifying a procedure for transferring the administration of these permits. If a State lacks the authority to directly administer permits issued by the federal government, a procedure may be established to transfer responsibility for these permits.

(2) Provisions specifying classes and categories of permit applications, draft permits, and proposed permits that the State will send to the Regional Administrator for review, comment and, where applicable, objection. These provisions shall follow the permit review procedures set forth in 40 CFR 123.44, except that where a State issues a general permit for sludge, the review by the Office of Water Enforcement and Permits provided in 40 CFR 123.44(a)(2) for NPDES general permits will not apply.

(3) The Memorandum of Agreement shall also specify the extent to which EPA will waive its right to review, object to, or comment upon State-issued permits. While the Regional Administrator and the State may agree to waive EPA review of certain "classes or categories" of permits, no waiver of review may be granted for permits issued to "Class I sludge management facilities" as defined in § 501.2.

(4) Whenever a waiver is granted under paragraph (3) of this section, the Memorandum of Agreement shall contain a statement that the Regional Administrator retains the right to terminate the waiver as to future permit actions, in whole or in part, at any time by sending the State Director written notice of termination.

(5) Provisions specifying the frequency and content of reports, documents and other information which the State is required to submit to EPA. The State shall allow EPA to routinely review State records, reports, and files relevant to the administration and enforcement of the approved program. State reports may be combined with grant reports where appropriate. The procedures shall implement the requirements of § 501.21.

(c) The Memorandum of Agreement shall also provide for the following:

(1) Prompt transmission to the Regional Administrator of notice of every action taken by the State agency related to the consideration of any permit application or general permit, including a copy of each proposed or draft permit and any conditions, requirements, or documents which are related to the proposed or draft permit or which affect the authorization of the proposed permit, except those for which permit review has been waived under paragraph (b)(3) of this section. The State shall supply EPA with copies of notices for which permit review has been waived whenever requested by EPA; and

(2) Transmission to the Regional Administrator of a copy of every permit issued to a Class I sludge management facility. Copies of final permits issued to other treatment works treating domestic sewage shall be transmitted to the Regional Administrator upon request.

(3) Provisions on the State's compliance monitoring and enforcement program, including:

(i) Provisions for coordination of compliance monitoring activities by the State and by EPA. These may specify the basis on which the Regional Administrator will select facilities or

activities within the State for EPA inspection. The Regional Administrator will normally notify the State at least 7 days before any such inspection; and

(ii) Procedures to assure coordination of enforcement activities.

(4) When appropriate, provisions for joint processing of permits by the State and EPA for facilities or activities which require permits from both EPA and the State under different programs (See for example 40 CFR 124.4).

(5) Provisions for modification of the Memorandum of Agreement in accordance with this Part.

(d) The Memorandum of Agreement, the annual program grant and the State/EPA Agreement should be consistent. If the State/EPA Agreement indicates that a change is needed in the Memorandum of Agreement, the Memorandum of Agreement may be amended through the procedures set forth in this Part. The State/EPA Agreement may not override the Memorandum of Agreement.

(The information collection requirements in paragraph (c) of this section have been approved by the Office of Management and Budget under control number 2040-0128)

§ 501.15 Requirements for Permitting.

(a) *General requirements.* All State programs under this Part shall have legal authority to implement each of the following provisions and must be administered in conformance with each, except that States are not precluded from omitting or modifying any provisions to impose more stringent requirements:

(1) *Confidentiality of information.* Claims of confidentiality shall be denied for the following information:

(i) The name and address of any permit applicant or permittee;

(ii) Permit applications, permits, and effluent data. This includes information submitted on the permit application forms themselves and any attachments used to supply information required by the forms.

(2) *Information requirements.* All treatment works treating domestic sewage shall submit to the Director within the time frames established in paragraph (d)(1)(ii) of this section the following information:

(i) The activities conducted by the applicant which require it to obtain a permit.

(ii) Name, mailing address, and location of the treatment works treating domestic sewage for which the application is submitted.

(iii) The operator's name, address, telephone number, ownership status, and status as Federal, State, private, public, or other entity.

(iv) Whether the facility is located on Indian lands.

(v) A listing of all permits or construction approvals received or applied for under any of the following programs:

(A) Hazardous Waste Management program under RCRA.

(B) UIC program under SDWA.

(C) NPDES program under CWA.

(D) Prevention of Significant Deterioration (PSD) program under the Clean Air Act.

(E) Nonattainment program under the Clean Air Act.

(F) National Emission Standards for Hazardous Pollutants (NESHAPS) preconstruction approval under the Clean Air Act.

(G) Ocean dumping permits under the Marine Protection, Research, and Sanctuaries Act.

(H) Dredge or fill permits under section 404 of CWA.

(I) Other relevant environmental permits, including State or local permits.

(vi) A topographic map (or other map if a topographic map is unavailable) extending one mile beyond the property boundaries of the treatment works treating domestic sewage, depicting the location of the sludge management facilities (including disposal sites), the location of all water bodies, and the location of wells used for drinking water listed in the public records or otherwise known to the applicant within ¼ mile of the property boundaries;

(vii) Any sludge monitoring data the applicant may have, including available ground water monitoring data, with a description of the well locations and approximate depth to ground water, for landfills or land application sites (see Appendix I to 40 CFR Part 257);

(viii) A description of the applicant's sludge use and disposal practices (including, where applicable, the location of any sites where the applicant transfers sludge for treatment and/or disposal, as well as the name of the applicator or other contractor who applies the sludge to land if different from the applicant, and the name of any distributors when the sludge will be disposed of through distribution and marketing, if different from the applicant);

(ix) For each land application site the applicant will use during the life of the permit, the applicant will supply information necessary to determine if the site is appropriate for land application and a description of how the site is (or will be) managed. Applicants intending to apply sludge to land application sites not identified at the time of application must submit a land application plan which at a minimum:

(A) describes the geographical area covered by the plan;

(B) identifies site selection criteria;

(C) describes how sites will be managed;

(D) provides for advance notice to the permit authority of specific land application sites and reasonable time for the permit authority to object prior to the sludge application; and

(E) provides for advance public notice as required by State and local law, but in all cases requires notice to landowners and occupants adjacent to or abutting the proposed land application site.

(x) Annual sludge production volume;

(xi) Any information required to determine the appropriate standards for permitting under 40 CFR Part 503; and

(xii) Any other information the Program Director may request and reasonably require to assess the sludge use and disposal practices, to determine whether to issue a permit, or to ascertain appropriate permit requirements.

(3) *Recordkeeping.* Applicants shall keep records of all data used to complete permit applications and any supplemental information submitted under this section for a period of at least five years from the date the application is signed, or as required by 40 CFR Part 503.

(4) *Signatories to permit applications and reports* as provided in 40 CFR 122.22.

(5) *Duration of permits.* (i) Permits issued to treatment works treating domestic sewage pursuant to section 405(f) of the CWA shall be effective for a fixed term not to exceed five years.

(ii) The term of a permit shall not be extended by modification beyond the maximum duration specified in this section.

(iii) The Director may issue a permit for a duration that is less than the full allowable term under this section.

(6) *Schedules of compliance*—(i) *General.* The permit may, when appropriate, specify a schedule of compliance leading to compliance with the CWA and these regulations. Any schedules of compliance under this section shall require compliance as soon as possible, but not later than any applicable statutory deadline under the CWA.

(ii) *Interim dates.* If a permit establishes a schedule of compliance which exceeds one year from the date of permit issuance, the schedule shall set forth interim requirements and the date for their achievement. The time between interim dates shall not exceed six months.

(iii) *Reporting.* The permit shall be written to require that no later than 14 days following each interim date and the final date of compliance, the permittee shall notify the Director in writing of its compliance or noncompliance with the interim or final requirements, or submit progress reports if paragraph (a)(6)(ii) is applicable.

(b) *Permit conditions applicable to all permits.* In addition to permit conditions which must be developed on a case-by-case basis in order to meet applicable requirements of 40 CFR Part 503, paragraph (a) (1) through (6) of this section, and permit conditions developed on a case-by-case basis using best professional judgment to protect public health and the environment from the adverse effects of toxic pollutants in sewage sludge, all permits shall contain the following permit conditions:

(1) *Duty to comply.* The permittee must comply with all conditions of this permit. Any permit noncompliance constitutes a violation of the Clean Water Act and is grounds for enforcement action; for permit termination, revocation and reissuance, or modification; or denial of a permit renewal application.

(2) *Compliance with sludge standards.* The permittee shall comply with standards for sewage sludge use or disposal established under section 405(d) of the CWA (40 CFR Part 503) within the time provided in the regulations that establish such standards, even if this permit has not yet been modified to incorporate the standards.

(3) *CWA penalties.* Section 309 of the Clean Water Act (CWA) sets out penalties applicable to persons who violate the Act's requirements. For example, section 309(d) provides that any person who violates a permit condition implementing sections 301, 302, 306, 307, 308, 318, or 405 of the Clean Water Act is subject to a civil penalty not to exceed $25,000 per day for each violation. Such violations also may be subject to administrative penalties assessed by the Administrator pursuant to section 309(g) of the CWA. Any person who negligently violates permit conditions implementing sections 301, 302, 306, 307, 308, or 405 of the Clean Water Act is subject to a fine not less than $2,500 nor more than $25,000 per day of violation or by imprisonment for not more than 1 year, or both. Any person who knowingly violates a permit condition implementing sections 301, 302, 304, 307, 308, or 405 shall be punished by a fine not less than $5000 nor more than $50,000 per day of violation, or by imprisonment for not more than 3 years or both.

(4) *Need to halt or reduce activity not a defense.* It shall not be a defense for a permittee in an enforcement action that it would have been necessary to halt or reduce the permitted activity in order to maintain compliance with the conditions of this permit.

(5) *Duty to mitigate.* The permittee shall take all reasonable steps to minimize or prevent sludge use or disposal in violation of this permit which has a reasonable likelihood of adversely affecting human health or the environment.

(6) *Proper operation and maintenance.* The permittee shall at all times properly operate and maintain all facilities and systems of treatment and control (and related appurtenances) which are installed or used by the permittee to achieve compliance with the conditions of this permit. Proper operation and maintenance also includes adequate laboratory controls and appropriate quality assurance procedures. This provision requires the operation of back-up or auxiliary facilities or similar systems which are installed by a permittee only when the operation is necessary to achieve compliance with the conditions of the permit.

(7) *Permit actions.* This permit may be modified, revoked and reissued, or terminated for cause. The filing of a request by the permittee for a permit modification, revocation and reissuance, or termination, or a notification of planned changes or anticipated noncompliance does not stay any permit condition.

(8) *Duty to provide information.* The permittee shall furnish to the Director, within a reasonable time, any information which the Director may request to determine whether cause exists for modifying, revoking and reissuing, or terminating this permit or to determine compliance with this permit. The permittee shall also furnish to the Director, upon request, copies of records required to be kept by this permit.

(9) *Inspection and entry.* The permittee shall allow the Director, or an authorized representative, upon the presentation of credentials and other documents as may be required by law, to:

(i) Enter upon the permittee's premises where a regulated facility or activity is located or conducted, or where records must be kept under the conditions of this permit;

(ii) Have access to and copy, at reasonable times, any records that must be kept under the conditions of this permit;

(iii) Inspect at reasonable times any facilities, equipment (including monitoring and control equipment), practices, or operations regulated or required under this permit; and

(iv) Sample or monitor at reasonable times, for the purposes of assuring permit compliance or as otherwise authorized by the Clean Water Act, any substances, parameters or practices at any location.

(10) *Monitoring and records.* (i) The permittee shall monitor and report monitoring results as specified elsewhere in this permit with a frequency dependent on the nature and effect of its sludge use or disposal practices. At a minimum, this shall be as required by 40 CFR Part 503, but in no case less than once a year.

(ii) Samples and measurements taken for the purpose of monitoring shall be representative of the monitored activity. The permittee shall retain records of all monitoring information, copies of all reports required by this permit, and records of all data used to complete the application for this permit, for a period of at least five years from the date of the sample, measurement, report or application, or longer as required by 40 CFR Part 503. This period may be extended by request of the Director at any time.

(iii) Records of monitoring information shall include:

(A) The date, exact place, and time of sampling or measurements;

(B) The individual(s) who perfored the sampling or measurements;

(C) The date(s) analyses were performed;

(D) The individual(s) who performed the analyses;

(E) The analytical techniques or methods used; and

(F) The results of such analyses.

(iv) Monitoring must be conducted according to test procedures specified in 40 CFR Part 503 or 136 unless other test procedures have been specified in this permit.

(v) The Clean Water Act provides that any person who knowingly falsifies, tampers with, or renders inaccurate any monitoring device or method required to be maintained under this permit shall, upon conviction, be punished for the first conviction by a fine of not more than $10,000 or by imprisonment for not more than 2 years per violation, or by both. Subsequent convictions for the same offense are punishable by a fine of not more than $20,000 per day of violation, or imprisonment of not more than 4 years, or both.

(11) *Signatory requirements.* (i) All applications, reports, or information submitted to the Director shall be signed

and certified according to the provisions of 40 CFR 122.22.

(ii) The CWA provides that any person who knowingly makes any false statement, representation, or certification in any record or other document submitted or required to be maintained under this permit shall, upon conviction, be punished for the first conviction by a fine of not more than $10,000 per violation, or by imprisonment for not more than 2 years per violation, or by both. Subsequent convictions shall be punishable by a fine of not more than $20,000 per day of violation or by imprisonment of not more than 4 years, or by both.

(12) *Notice requirements.* (i) *Planned changes.* The permittee shall give notice to the Director as soon as possible of any planned physical alterations or additions to the permitted facility, or significant changes planned in the permittee's sludge disposal practice, where such alterations, additions, or changes may justify the application of permit conditions that are different from or absent in the existing permit, including notification of additional disposal sites not reported during the permit application process or not reported pursuant to an approved land application plan.

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

(iii) *Transfers.* This permit is not transferable to any person except after notice to the Director. The Director may require modification or revocation and reissuance of the permit to change the name of the permittee and incorporate such other requirements as may be necessary under the CWA.

(iv) *Other noncompliance reporting.* The permittee shall report all instances of noncompli.ance. Reports of noncompliance shall be submitted with the permittee's next self monitoring report or earlier. if requested by the Director or if required by an applicable standard for sewage sludge use or disposal or condition of this permit.

(v) *Other information.* Where the permittee becomes aware that it failed to submit any relevant facts in a permit application, or submitted incorrect information in a permit application or in any report to the Director, it shall promptly submit such facts or information.

(13) Reopener. If a standard for sewage sludge use or disposal applicable to permittee's use or disposal methods is promulgated under section 405(d) of the CWA before the expiration of this permit, and that standard is more stringent than the sludge pollutant limits or acceptable management practices authorized in this permit, or controls a pollutant or practice not limited in this permit, this permit may be promptly modified or revoked and reissued to conform to the standard for sludge use or disposal promulgated under Section 405(d) of the CWA. The permittee shall comply with applicable standards for sludge use or disposal by no later than the compliance deadline specified in the regulations establishing those standards, whether or not this permit has been modified or revoked and reissued.

(14) *Duty to reapply.* If the permittee wishes to continue an activity regulated by the this permit after the expiration date of this permit, the permittee must apply for and obtain a new permit.

(c) *Permit actions.* All State programs under this Part shall have the legal authority to implement the following provisions as a minimum and must be administered in conformance with each.

(1) *Transfer of permits*—(i) *Transfers by modification.* Except as provided in paragraph (ii) of this section, a permit may be transferred by the permittee to a new owner or operator only if the permit has been modified or revoked and reissued to identify the new permittee and incorporate such other requirements as may be necessary to assure compliance with the CWA.

(ii) *Automatic transfers.* As an alternative to transfers under paragraph (c)(1)(i) of this section, the State Director may authorize automatic transfer of any sludge permit to a new permittee if:

(A) The current permittee notifies the Director at least 30 days in advance of the proposed transfer date in paragraph (c)(1)(ii)(B) of this section;

(B) The notice includes a written agreement between the existing and new permittees containing a specific date for transfer of permit responsibility, coverage, and liability between them; and

(C) The Director does not notify the existing permittee and the proposed new permittee of his or her intent to modify or revoke and reissue the permit. If this notice is not received, the transfer is effective on the date specified in the agreement mentioned in paragraph (c)(ii)(B) of this section.

(2) *Modification or revocation and reissuance of permits.* (i) When the Director receives any information (for example, where the Director inspects the facility, receives information submitted by the permittee as required in the permit, receives a request for modification or revocation and reissuance under § 501.15(d)(2)(i), or conducts a review of the permit file), he or she may determine whether or not one or more of the causes listed in paragraphs (c)(2) (ii) and (iii) of this section for modification or revocation and reissuance or both exist. If cause exists, the Director may modify or revoke and reissue the permit and may request an updated application if necessary. When a permit is modified, only the conditions subject to a modification are reopened. If a permit is revoked and reissued, the entire permit is reopened and subject to revision and the permit is reissued for a new term. A draft permit must be prepared and other procedures in § 501.15(d) followed. If cause does not exist under this section, the Director shall not modify or revoke and reissue the permit.

(ii) *Causes for modification.* The following are causes for modification but not revocation and reissuance of permits except when the permittee requests or agrees.

(A) *Alterations.* There are material and substantial alterations or additions to the permitted facility or activity which occurred after permit issuance which justify the application of permit conditions that are different from or absent in the existing permit.

(B) *Information.* The Director has received new information. Permits may be modified during their terms for this cause only if the information was not available at the time of permit issuance (other than revised regulations, guidance, or test methods) and would have justified the application of different permit conditions at the time of issuance.

(C) *New regulations.* New regulations have been promulgated under section 405(d) of the CWA, or the standards or regulations on which the permit was based have been changed by promulgation of amended standards or regulations or by judicial decision after the permit was issued.

(D) *Compliance schedules.* The Director determines good cause exists for modification of a compliance schedule, such as an Act of God, strike, flood, or materials shortage or other events over which the permittee has little or no control and for which there is no reasonable available remedy. However, in no case may a compliance schedule be modified to extend beyond an applicable CWA statutory deadline.

(E) *Land application plans.* When required by a permit condition to incorporate a land application plan for beneficial reuse of sewage sludge, to revise an existing land application plan, or to add a land application plan.

(iii) The following are causes to modify or alternatively, revoke and reissue, a permit.

(A) Cause exists for termination under § 501.15(c)(3) and the Director determines that modification or revocation and reissuance is appropriate.

(B) The Director has received notification (as required in the permit, see § 501.15(b)(12)(iii)) of a proposed transfer of the permit.

(3) *Termination of permits.* The following are causes for terminating a permit during its term, or for denying a permit renewal application:

(i) Noncompliance by the permittee with any condition of the permit;

(ii) The permittee's failure in the application or during the permit issuance process to disclose fully all relevant facts, or the permittee's misrepresentation of any relevant facts at any time;

(iii) A determination that the permitted activity endangers human health or the environment and can only be regulated to acceptable levels by permit modification or termination; or

(iv) A change in any condition that requires either a temporary or a permanent reduction or elimination of any activity controlled by the permit.

(d) *Permit procedures.* All State programs approved under this Part shall have the legal authority to implement each of the following provisions and must be administered in accordance with each, except that States are not precluded from omitting or modifying any provisions to impose more stringent requirements.

(1) *Application for a permit.* (i) Any person who is required to obtain a permit for the use or disposal of sewage sludge shall complete, sign, and submit to the Director an application for a permit within the time specified in paragraph (d)(1)(ii) of this section.

(ii) (A) Any POTW with a currently effective NPDES permit shall submit the application information required by paragraph (a)(2) of this section when its next application for NPDES permit renewal is due or within 120 days after promulgation of a "standard for sewage sludge use or disposal" applicable to the POTW's sludge use or disposal practice(s), whichever occurs first.

(B) Any other existing "treatment works treating domestic sewage" not covered under paragraph (d)(1)(ii)(A) shall submit an application to the Director within 120 days after promulgation of a "standard for sewage sludge use or disposal" applicable to its sludge use or disposal practice(s) or upon request of the Director prior to the promulgation of an applicable "standard for sewage sludge use or disposal" if the Director determines that a permit is necessary to protect public health and the environment from any adverse effects that may occur from toxic pollutants in sewage sludge.

(C) Any "treatment works treating domestic sewage" that commences operations after promulgation of an applicable standard for sewage sludge use or disposal shall submit an application to the Director at least 180 days prior to the date proposed for commencing operations.

(iii) The Director shall not begin the processing of a permit until the applicant has fully complied with the application requirements for that permit.

(2) *Modification, revocation and reissuance, or termination of permits.* (i) Permits may be modified, revoked and reissued, or terminated either at the request of any interested person (including the permittee) or upon the Director's initiative. However, permits may only be modified, revoked and reissued, or terminated for the reasons specified in § 501.15(c). All requests shall be in writing and shall contain factors or reasons supporting the request.

(ii) If the Director tentatively decides to modify or revoke and reissue a permit he or she shall prepare a draft permit incorporating the proposed changes. The Director may request additional information and, in the case of a modified permit, may require the submission of an updated application. In the case of a revoked and reissued permit, the Director shall require the submission of a new application. If the Director tentatively decides to terminate a permit he or she shall prepare a Notice of Intent to Terminate and follow the public notice and comment procedures outlined in Section 501.15(d)(6).

(3) *Draft permits.* Once an application is complete, the Director shall tentatively decide whether to prepare a draft permit or to deny the application. If the Director decides to prepare a draft permit, he or she shall prepare a draft permit that contains the necessary conditions to implement this Part, 40 CFR Part 503, and section 405 of the CWA.

(4) *Fact sheets.* A fact sheet shall be prepared for every draft permit for a Class I sludge management facility, for every draft permit requiring permit conditions developed on a case-by-case basis to implement section 405(d)(4) of the CWA, for every draft permit that includes a sewage sludge land application plan under § 501.15(a)(2)(ix), and for every draft permit which the Director finds is the subject of widespread public interest or raises major issues. The fact sheet shall briefly set forth the principal facts and the significant factual, legal, methodological and policy questions considered in preparing the draft permit. The Director shall send this fact sheet to the applicant and, on request, to any other person.

(i) The fact sheet shall include:

(A) A brief description of the type of facility or activity which is the subject of the draft permit;

(B) Any calculations or other necessary explanation of the derivation of conditions for sludge use and disposal, including a citation to the applicable standards for sludge use or disposal and reasons why they are applicable, or in the case of conditions developed on a case-by-case basis to implement section 405(d)(4) of the CWA, an explanation of, and the bases for, such conditions; and

(C) For permits that include a sewage sludge land application plan under § 501.15(a)(2)(ix), a brief description of how each of the required elements of the land application plan area is addressed in the permit.

(5) *Public notice of permit actions and public comment period.* (i) The Director shall give public notice that the following actions have occurred:

(A) A draft permit has been prepared. The public notice shall allow at least 30 days for public comment.

(B) A hearing has been scheduled. Public notice shall be given at least 30 days before the hearing.

(ii) *Methods.* Public notice of activities described in paragraph (d)(5)(i) of this section shall be given by the following methods:

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

(*1*) The applicant;

(*2*) Any other Agency which the Director knows has issued or is required to issue a RCRA, UIC, PSD, NPDES, MPRSA, or 404 permit for the same facility or activity (including EPA);

(*3*) Any State agency responsible for plan development under CWA section 208(b)(2), 208(b)(4) or 303(e);

(*4*) To any unit of local government having jurisdiction over the area where the facility is proposed to be located; and to each State agency having any authority under State law with respect to the construction or operation of such facility; and

(*5*) Any person who requests a copy.

(B) For Class I sludge management facility permits and permits that include

land application plans under § 501.15(a)(2)(ix), publication of a notice in a daily or weekly newspaper within the area affected by the facility or activity, in addition to the methods required by paragraph (d)(5)(ii)(A) of this section;

(C) In a manner constituting legal notice to the public under State law; and

(D) Any other method reasonably calculated to give actual notice of the action in question to the persons potentially affected by it, including press releases or any other forum or medium to elicit public participation.

(iii) *Contents*—(A) *All public notices.* All public notices issued under this Part shall contain the following minimum information:

(*1*) Name and address of the office processing the permit action for which notice is being given;

(*2*) Name and address of the permittee or permit applicant and, if different, of the facility or activity regulated by the permit;

(*3*) A brief description of the activity described in the permit application (including the inclusion of land application plan, if appropriate);

(*4*) Name, address and telephone number of a person from whom interested persons may obtain further information, including copies of the draft permit, fact sheet, and the application;

(*5*) A brief description of the comment procedures required by § 501.15(d)(6) and the time and place of any hearing that will be held, including a statement of procedures to request a hearing (unless a hearing has already been scheduled) and other procedures by which the public may participate in the final permit decision; and

(*6*) Any additional information considered necessary or proper.

(B) *Public notices for hearings.* In addition to the general public notice described in paragraph (d)(5)(iii)(A) of this section, the public notice of a hearing shall contain the following information:

(*1*) Reference to the date of previous public notices relating to the permit;

(*2*) Date, time and place of the hearing; and

(*3*) A brief description of the nature and purpose of the hearing, including the applicable rules and procedures.

(6) *Public comments and requests for public hearings.* During the public comment period, any interested person may submit written comments on the draft permit and may request a public hearing, if no hearing has already been scheduled. A request for a public hearing shall be in writing and shall state the nature of the issues proposed to be raised in the hearing. All comments shall be considered in making the final decision and shall be answered as provided in paragraph (d)(8) of this section.

(7) *Public hearings.* The Director shall hold a public hearing whenever he or she finds, on the basis of requests, a significant degree of public interest in a draft permit. The Director may also hold a public hearing at his or her discretion, (e.g. where such a hearing might clarify one or more issues involved in the permit decision).

(8) *Response to comments.* At the time a final permit is issued, the Director shall issue a response to comments. The response to comments shall be available to the public, and shall:

(i) Specify which provisions, if any, of the draft permit have been changed in the final permit decision, and the reasons for the change; and

(ii) Briefly describe and respond to all significant comments on the draft permit raised during the public comment period or during any hearing.

(e) *Optional program provisions.* The following provisions may be included in a State program at the State's option. If the State decides to adopt any of these provisions, they must be no less stringent than the corresponding Federal provisions:

(1) Continuation of expiring permits (40 CFR 122.6);

(2) General permits (40 CFR 122.28);

(3) Minor modifications of permits (40 CFR 122.63); and

(4) Effect of permit: affirmative defense (40 CFR 122.5(b)).

(f) *Conflict of interest.* Except as provided in paragraph (f)(2), State sludge management programs shall ensure that any board or body which approves all or portions of permits shall not include as a member any person who receives, or has during the previous two years received, a significant portion of income directly or indirectly from permit holders or applicants for a permit.

(1) For the purposes of this paragraph:

(i) "Board or body" includes any individual, including the Director, who has or shares authority to approve all or portions of permits either in the first instance, as modified or reissued, or on appeal.

(ii) "Significant portion of income" means 10 percent or more of gross personal income for a calendar year, except that it means 50 percent or more of gross personal income for a calendar year if the recipient is over 60 years of age and is receiving that portion under retirement, pension, or similar arrangement.

(iii) "Permit holders or applicants for a permit" does not include any department or agency of a State government, such as a Department of Parks or a Department of Fish and Wildlife.

(iv) "Income" includes retirement benefits, consultant fees, and stock dividends.

(v) Income is not received "directly or indirectly from permit holders or applicants for a permit" when it is derived from mutual fund payments, or from other diversified investments for which the recipient does not know the identity of the primary sources of income.

(2) The Administrator may waive the requirements of this paragraph if the board or body which approves all or portions of permits is subject to, and certifies that it meets, a conflict-of-interest standard imposed as part of another EPA-approved State permitting program or an equivalent standard.

§ 501.16 Requirements for compliance evaluation programs.

State sludge management programs shall have requirements and procedures for compliance monitoring and evaluation as set forth in § 123.26.

§ 501.17 Requirements for enforcement authority.

(a) Any State agency administering a program shall have available the following remedies for violations of State program requirements:

(1) To restrain immediately and effectively any person by order or by suit in State court from engaging in any unauthorized activity which is endangering or causing damage to public health or the environment;

Note: This paragraph ((a)(1)) requires that States have a mechanism (e.g., an administrative cease and desist order or the ability to seek a temporary restraining order) to stop any unauthorized activity endangering public health or the environment.

(2) To sue in courts of competent jurisdiction to enjoin any threatened or continuing violation of any program requirement, including permit conditions, without the necessity of a prior revocation of the permit; and

(3) To assess or sue to recover in court civil penalties and to seek criminal remedies, including fines, as follows:

(i) Civil penalties shall be recoverable for the violation of any permit condition; any applicable standard or limitation; any filing requirement; any duty to allow or carry out inspection, entry or monitoring activities; or any regulation or orders issued by the State Program Director. These penalties shall be

assessable in at least the amount of $5,000 a day for each violation.

(ii) Criminal fines shall be recoverable against any person who willfully or negligently violates any applicable standards or limitations; any permit condition; or any filing requirement. These fines shall be assessable in at least the amount of $10,000 a day for each violation. States which provide the criminal remedies based on "criminal negligence," "gross negligence" or strict liability satisfy the requirement of this paragraph (a)(3)(ii).

(iii) Criminal fines shall be recoverable against any person who knowingly makes any false statement, representation or certification in any program form, or in any notice or report required by a permit or State Program Director, or who knowingly renders inaccurate any monitoring device or method required to be maintained by the State Program Director. These fines shall be recoverable in at least the amount of $5,000 for each instance of violation.

(b)(1) The maximum civil penalty or criminal fine (as provided in paragraph (a)(3) of this section) shall be assessable for each instance of violation and, if the violation is continuous, shall be assessable up to the maximum amount for each day of violation.

(2) The burden of proof and degree of knowledge or intent required under State law for establishing violations under paragraph (a)(3) of this section shall be no greater than the burden of proof or degree of knowledge or intent EPA must provide when it brings an action under the appropriate Act.

Note.— For example, this requirement is not met if State law includes mental state as an element of proof for civil violations.

(c) A civil penalty assessed, sought, or agreed upon by the State Program Director under paragraph (a)(3) of this section shall be appropriate to the violation.

(d) Any State administering a program shall provide for public participation in the State enforcement process by providing either:

(1) Authority which allows intervention as of right in any civil or administrative action to obtain remedies specified in paragraphs (a)(1), (2) or (3) of this section by any citizen having an interest which is or may be adversely affected; or

(2) Assurance that the State agency or enforcement authority will:

(i) Investigate and provide responses to all citizen complaints submitted pursuant to the procedures specified in 40 CFR 123.26(b)(4);

(ii) Not oppose intervention by any citizen in any civil or administrative proceeding when permissive intervention may be authorized by statute, rule, or regulation; and

(iii) Publish notice of and provide at least 30 days for public comment on any proposed settlement of a State enforcement action.

§ 501.18 Prohibition.

State permit programs shall provide that no permit shall be issued when the Regional Administrator has objected in writing under 40 CFR 123.44.

§ 501.19 Sharing of information.

State sludge management programs shall comply with the requirements of 40 CFR 123.41.

§ 501.20 Receipt and use of Federal information.

State sludge management programs shall comply with 40 CFR 123.42.

§ 501.21 Program reporting to EPA.

The State Program Director shall prepare semi-annual and annual reports as detailed below and shall submit any reports required under this section to the Regional Administrator. These reports shall serve as the main vehicle for the State to report on the status of its sludge management program, update its inventory of sewage sludge generators and sludge disposal facilities, and provide information on incidents of noncompliance. The State Program Director shall submit these reports to the Regional Administrator according to a mutually agreed-upon schedule. The Semi-annual Sludge Violation Reports and Annual Reports specified below may be combined with other reports to EPA (e.g., existing NPDES or RCRA reporting systems) where appropriate.

(a) *Semi-annual reports.* Semi-annual Sludge Violation Reports (SSVRs) shall provide a tabular summary of the incidents of noncompliance which occurred in the previous six-month period by Class I sludge management facilities.

(1) At a minimum, the following occurrences must be reported under this section:

(i) Significant failure to comply with minimum Federal requirements for sludge use or disposal practices;

(ii) Significant failure to comply with permit conditions;

(iii) Failure to complete construction of essential elements of a sludge management facility or meet other key milestone dates specified in a permit;

(iv) Failure to provide required compliance monitoring reports or submission of reports that are so deficient as to cause misunderstanding and thus impede the review of the status of compliance;

(v) Significant noncompliance with other program requirements.

(2) The tabular summary will identify:

(i) The non-complying facilities by name and reference number;

(ii) The type of noncompliance, a brief description and date(s) of the event. (See list in paragraph (a)(1) of this section.) If records for a facility show noncompliance of more than one type under the sludge management program, the information should be combined into a single entry for each such facility;

(iii) The date(s) and a brief description of the action(s) taken to ensure timely and appropriate action to achieve compliance;

(iv) Status of the incident(s) of noncompliance with the date of resolution; and

(v) Any details which tend to explain or mitigate the incident(s) of noncompliance.

(b) *Annual report.* In addition to the information required by paragraph (a) of this section, the annual report shall include the following:

(1) Information to update the inventory of all sewage sludge generators and sewage sludge disposal facilities submitted with the program plan or in previous annual reports, including:

(i) Name and location,

(ii) NPDES, UIC, RCRA, Clean Air Act, and State permit number, if any,

(iii) Sludge management practice(s) used,

(iv) Identification of non-complying facilities, and

(v) Sludge production volume.

(2) A summary of the number and type of violations by sludge use and disposal practice over the past year for Class I sludge management facilities;

(3) A list of Class I sludge management facilities brought into compliance since the last annual report;

(4) Information on noncompliance of non-Class I Facilities which shall include:

(i) A tabular listing which identifies:

(A) The non-complying facility by name and reference number,

(B) The type of noncompliance (see list in paragraph (a)(1) of this section),

(C) How long the facility has been in noncompliance, and

(D) What steps are being taken to bring these facilities into compliance;

(ii) A summary of the number and type of violations by sludge use and disposal practice over the past year by non-Class I sludge management facilities;

(iii) A list of non-Class I facilities that have been brought into compliance since the last annual report; and

(5) A separate list of all facilities (along with any applicable permit numbers) that are six or more months behind in their schedules for achieving compliance.

(6) A summary of the results of periodic State compliance monitoring efforts to verify self-monitoring reports.

(The information collection requirements in this section have been approved by the Office of Management and Budget under control number 2040-0128)

Subpart C—Program Approval, Revision and Withdrawal

§ 501.31 Review and approval procedures.

(a) EPA shall approve or disapprove a State's application for approval of its State sludge management program within 90 days after receiving a complete program submission.

(b) Within 30 days of receipt by EPA of a State program submission, EPA will notify the State whether its submission is complete. If EPA finds that a State's submission is complete, the 90-day review period will be deemed to have begun on the date of the completeness determination. If EPA finds that a State's submission is incomplete, the review period will not begin until all the necessary information is received by EPA.

(c) After determining that a State program submission is complete, EPA will publish notice of the State's application in the **Federal Register** and in enough of the largest newspapers in the State to attract statewide attention. EPA will mail notices to persons known to be interested in such matters, including all persons on appropriate State and EPA mailing lists and all treatment works treating domestic sewage listed on the inventory required by § 501.12(f) of this part. The notice will:

(1) Provide a comment period of not less than 45 days during which interested members of the public may express their views on the State program;

(2) Provide opportunity for a public hearing within the State to be held no less than 30 days after notice is published in the **Federal Register** and indicate when and where the hearing is to be held, or how interested persons may request that a hearing be held if a hearing has not been scheduled. EPA shall hold a public hearing whenever the Regional Administrator finds, on the basis of requests, a significant degree of public interest in the State's application or that a public hearing might clarify one or more issues involved in the State's application.

(3) Indicate the cost of obtaining a copy of the State's submission;

(4) Indicate where and when the State's submission may be reviewed by the public;

(5) Indicate whom an interested member of the public should contact with any questions; and

(6) Briefly outline the fundamental aspects of the State's proposed program, and the process for EPA review and decision.

(d) Within 90 days after determining that the State has submitted a complete program, the Administrator shall approve or disapprove the program based on the requirements of this part and of the CWA and after taking into consideration all comments received. A responsiveness summary shall be prepared by the Regional Office which identifies the public participation activities conducted, describes the matters presented to the public, summarizes significant comments received and explains EPA's response to these comments.

(e) The State and EPA may extend the 90-day review period by mutual agreement.

(f) If the State's submission is materially changed during the 90-day review, either as a result of EPA's review or the State action, the official review period shall begin again upon receipt of the revised submission.

(g) Notice of program approval shall be published by EPA in the **Federal Register.**

(h) If the Administrator disapproves the State program he or she shall notify the State of the reasons for disapproval and of any revisions or modifications to the State program which are necessary to obtain approval.

§ 501.32 Procedures for revision of State programs.

(a) Any approved State program which requires revision to comply with amendments to federal regulations governing sewage sludge use or disposal (including revisions to this part) shall revise its program within one year after promulgation of applicable regulations, unless the State must amend or enact a statute in order to make the required revision, in which case such revision shall take place within 2 years.

(b) State sludge management programs shall follow the procedures for program revision set forth in 40 CFR 123.62.

§ 501.33 Criteria for withdrawal of State programs.

The criteria for withdrawal of sludge management programs shall be those set forth in 40 CFR 123.63.

§ 501.34 Procedures for withdrawal of State programs.

The procedures for withdrawal of sludge management programs shall be those set forth in 40 CFR 123.64.

[FR Doc. 89-10064 Filed 5-1-89; 8:45 am]
BILLING CODE 6560-50-M