IN THE SUPREME COURT OF OHIO

STATE OF OHIO EX REL. DAVE YOST, OHIO ATTORNEY GENERAL	:	Case No. 2020-0091
Appellant,	:	On appeal from the Stark County Court of Appeals, Fifth Appellate District
v.	:	
ROVER PIPELINE LLC, ET AL.,	:	Court of Appeals Case No. 2019CA00056
Appellees.	:	

BRIEF OF APPELLEES ROVER PIPELINE LLC, PRETEC DIRECTIONAL DRILLING, LLC, AND MEARS GROUP, INC.

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INTRODUCTION

The question presented here narrowly applies to a special category of construction projects: those requiring federal approval. The question is whether a state agency, having missed the federal statutory deadline for placing water-quality conditions on a federally licensed project, can nonetheless later place and enforce such conditions after construction has begun. Section 401 of the Clean Water Act forbids a state agency from doing so. Because the State waived its power to issue a water quality certification with conditions that it now seeks to enforce in this lawsuit, this Court should affirm the Fifth District's judgment dismissing the Complaint.

The Federal Energy Regulatory Commission ("FERC") exercises plenary authority over the construction of interstate natural gas pipelines such as the Rover Pipeline. All parties agree that, when it comes to *federally* licensed projects like this, a state's ability to regulate water quality is limited to those powers that the federal government has delegated. Section 401 of the Clean Water Act is the source of that delegated authority. It gives states up to a year to identify all limitations and requirements that will be needed for the license applicant to comply with state water quality standards and laws.

Ohio EPA ("OEPA") waived its authority to issue a water quality certification under Section 401, because it failed to act on (*i.e.*, to grant or deny) Rover's certification request within a year of receiving it. For the first time in this litigation, the State finally concedes that its waiver has consequences. But the State's brand new interpretation of Section 401—like the other interpretations it offered in the courts below—is incorrect.

The State tries to limit its waiver to those discharges that the State "allowed" through its failure to act on the certification request within a year. But that merely begs the question: What *did* the State allow through its waiver? The answer is found in Section 401, which requires the state agency to consider and address the eventuality of "any discharge" into waters within the state

that "may result" from "any activity" under the "Federal license or permit." 33 U.S.C. 1341(a). And the statute further provides that the state agency's certification "shall set forth any" limitation or monitoring requirement "necessary to assure that" the "*applicant*" for the license "will comply with any applicable * * * limitations" and "with any other appropriate requirement of State law set forth in such certification[.]" *Id.* 1341(d) (emphasis added).

The parties agree that the discharges at issue here—(1) inadvertent releases of drilling fluid during construction of tunnels for the pipeline; (2) stormwater runoff carrying construction debris; and (3) releases of water needed to pressure test the pipeline before putting it in service—were discharges that "may result" from "any activity" under the FERC license to construct the pipeline. 33 U.S.C. 1341(a). FERC's license did not impose quantitative or qualitative thresholds that would "allow" a subset of inadvertent releases of drilling fluid. Instead, FERC developed a remediation and mitigation framework covering all potential inadvertent releases to minimize the construction's environmental consequences. By failing to act within Section 401's time limit, OEPA gave up its opportunity to add conditions by "set[ting] forth any" limitation "necessary to assure that" the "applicant" "will comply with any applicable * * * limitations" or "any other appropriate requirement of State law." *Id.* 1341(d). When OEPA failed to act, FERC enforced and modified the conditions needed to protect water quality, including actions FERC took at OEPA's specific urging. There was no regulatory gap.

The Tenth Amendment—which the State invokes for the first time in this Court—does not change the outcome. The Rover Pipeline is a federally licensed project. FERC exercised plenary authority over its construction. OEPA's authority to regulate that construction came from Congress, exercising its powers under the Commerce Clause, not from the Tenth Amendment. Without

Section 401, the environmental consequences of Rover's construction would be left solely to federal oversight. Section 401 gave OEPA an opportunity to participate in setting conditions relevant to water quality, but when OEPA waived that opportunity the oversight reverted to and rested with FERC, which took a number of actions to ensure that construction was environmentally sound. This is why there was never a regulatory gap.

The State also asks this Court to hold that it met the deadline in Section 401 because it did not receive a "complete" request for a water quality certification until July 2016, less than a year before it acted on the request (*i.e.*, in February 2017). The State has forfeited this argument in two ways. In the trial court, the State defended timeliness, but with a *different* argument: that Rover "resubmitted" its request at OEPA's insistence in February 2017, thus resetting the one-year clock. And in the Fifth District, the State abandoned *any* defense of the certification as timely. The State is now arguing for the first time, in this Court or any other, that a certification request must be "complete" before the one-year clock starts running.

Even were this argument preserved, the statute's plain language would defeat it. Section 401's time limit—"a reasonable period of time (which shall not exceed one year)"—runs from "receipt of such request," 33 U.S.C. 1341(a)(1), not from receipt of a "complete request" or from "the date on which a request is deemed complete." Congress specified in a neighboring CWA provision that a request must be complete before the clock starts running, but Congress chose not to include that qualifier in Section 401. Federal courts of appeals, U.S. EPA, and FERC all agree with Appellees on this issue. The State's only support for its contrary view is both inapt and outdated. In that decade-old case, the court deferred to the U.S. Army Corps of Engineers—a federal agency whose views have no relevance to the license here and which no longer defends its interpretation, even in cases where its views matter.

Finally, the judgment should be affirmed for two different reasons even if timeliness is measured from the date Rover's certification request was "complete." First, the relevant State law—R.C. 6111.30(G)—required OEPA to act on Rover's request within 180 days of the date when that request was "complete." Even if the Court accepts the State's assertion that Rover's request was not complete until July 2016, OEPA waited more than another 180 days to act on the request. Second, even if OEPA's certification had been timely, that document imposed no limitations or conditions on any of the discharges at issue here, contrary to Section 401(d)'s directive that the certification "shall" set forth any such limitations or requirements if they are to apply to the applicant. The State cannot enforce that which is missing from a timely certification.

The judgment of the Fifth District should be affirmed.

COUNTERSTATEMENTS OF THE FACTS AND THE CASE

I. Federal Law Provides The Framework For Federal And State Agencies To Work Cooperatively In Connection With Natural Gas Pipeline Construction

A. The Clean Water Act Delegates Authority To The States

The CWA establishes a comprehensive framework for regulating the discharge of pollutants into waters of the United States. *See, e.g.*, *S.D. Warren Co. v. Me. Bd. of Envtl. Prot.*, 547 U.S. 370, 385 (2006). U.S. EPA oversees the CWA's implementation and has authority to interpret it. 33 U.S.C. 1251(d); *Chem. Mfrs. Assn. v. NRDC*, 470 U.S. 116, 125 (1985). As that agency has explained, Congress recognized the traditional role of states in regulating land and water resources by giving them the chance to participate in implementing the CWA, but then balanced that involvement with the need for comprehensive federal policy. U.S. EPA, Clean Water Act Section 401 Certification Rule, 85 Fed. Reg. 42,210, 42,216-17 (July 13, 2020) ("EPA Rule"), citing 33 U.S.C. 1251, 1370. The CWA therefore uses a cooperative federalism arrangement that allows

U.S. EPA to delegate authority to the state to operate permitting programs once the state demonstrates compliance with the federal requirements. 33 U.S.C. 1313.

This CWA regulatory framework operates by generally prohibiting all discharges into navigable waters without a permit, and then dividing among federal agencies and the states the authority to "permit" certain discharges, under stated conditions, to maintain water quality.

Section 301 (33 U.S.C. 1311) generally prohibits the "discharge of any pollutant," except in compliance with the other provisions of the CWA, such as the permitting requirements of Section 402, discussed *infra*.

Section 303 (33 U.S.C. 1313) "requires each State, subject to federal approval, to institute comprehensive * * * water quality goals for all intrastate waters." *PUD No. 1 of Jefferson Cty. v. Wash. Dept. of Ecology*, 511 U.S. 700, 704 (1994). Generally, states promulgate water quality standards that are then subject to U.S. EPA's review and approval. 33 U.S.C. 1313. U.S. EPA approved OEPA's water quality standards—the same standards at issue here—under Section 303. *See* Third Am. Compl. ¶ 38 ("TAC").

Section 402 (33 U.S.C. 1342), mentioned above, is the authority for states to enforce water quality standards through National Pollutant Discharge Elimination System ("NPDES") permits. *See id.* 1342(a), (b); 40 C.F.R. 123.1(a). U.S. EPA delegated such permitting authority to Ohio. *See* R.C. 6111.03(J)(1). Section 402 regulates pollutants discharged from a "point source" (*e.g.*, a pipe that drains into a waterbody). 33 U.S.C. 1342(f). It also covers certain "stormwater discharges": *i.e.*, rainwater that flows over land, carrying into regulated waters the byproducts of industrial activity, such as material loosened by ground-disturbing construction. *Id.* 1342(p); 40 C.F.R. 122.26.

B. Section 401 Preserves A Role For States In Federal Permitting By Channeling State Authority Through The Clean Water Act Certification Process

Section 401 of the CWA, 33 U.S.C. 1341, is central to this appeal. It governs the application of the CWA in the unique context of a federally permitted project. While the CWA preserves states' traditional authority to regulate the environmental impacts of purely local construction activities, 33 U.S.C. 1370, the states' authority to regulate federally permitted projects is considerably more constrained. Congress has long exercised its powers under the Commerce Clause to transfer oversight of activities in and affecting interstate commerce from the states to the federal level. Federal agencies, exercising statutory authority, issue permits for a wide range of interstate commercial activities, including the construction and operation of critical pieces of our nation's energy infrastructure—for example, interstate natural gas pipelines, 15 U.S.C. 717f(c)(1), and hydroelectric and nuclear power plants, 16 U.S.C. 797(e); 42 U.S.C. 2137(a).

The principle that a federal "license" confers "permission or authority to do th[e] thing" permitted—without any "State inhibiting" the licensed activity—is one of the most venerable principles of our Republic. *Gibbons v. Ogden*, 22 U.S. 1, 213, 221 (1824). The Supreme Court has long recognized that "[n]o State law can hinder or obstruct the free use of a license granted under an act of Congress," *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 54 U.S. 518, 566 (1851), and that a detailed federal licensing regime therefore "leave[s] no room or need for conflicting state controls" unless specifically provided by Congress. *First Iowa Hydro-Elec. Co-op. v. Fed. Power Comm.*, 328 U.S. 152, 181 (1946). States, in other words, have no authority to "impose upon the performance of activity sanctioned by federal license additional conditions not contemplated by Congress." *Sperry v. State of Fla. ex rel. Fla. Bar*, 373 U.S. 379, 385 (1963).

Operating within this framework, Section 401 provides states a limited "opportunity * * * to evaluate and address water quality concerns *during* the federal license or permit processes,

which, in some cases"—including in the licensing of "interstate natural gas pipelines"—"might otherwise preempt State authority." EPA Rule, 85 Fed. Reg. at 42,255, 42,276, fn. 64 (emphasis added). In enacting the CWA, Congress recognized that absent a specific carveout of federal authority for state regulation of the water quality impacts of such projects, federal licensees could rely on "a Federal license or permit" to "excuse * * * a violation of [state] water quality standard[s]." 116 Cong. Rec. 8984 (1970) (remarks of Senator Muskie). To address this, Congress enacted Section 401 as "a specific provision for licensing an activity that could cause a 'discharge' into navigable waters." *S.D. Warren Co.*, 547 U.S. at 374. Under that provision, "a license is conditioned on a certification from the State in which the discharge may originate that it will not violate certain water quality standards, including those set by the State's own laws." *Id.* As the U.S. Supreme Court has recognized, this federal carveout was "essential * * * to preserve state authority" in this area, *id.* at 386; without the carveout, state authority "would be preempted by federal law," EPA Rule, 85 Fed. Reg. at 42,276, fn. 64.

Section 401 thus circumscribes the states' role when an "applicant" seeks "a Federal license or permit to conduct any activity"—including "construction" of "facilities" such as an interstate natural gas pipeline—"which may result in any discharge into * * * navigable waters." 33 U.S.C. 1341(a). Under Section 401, each "State in which the discharge * * * will originate" has an opportunity, through a certification process, to impose conditions on the federal license. *Id.* Section 401 first requires the applicant to seek from each such state a certification that "any such discharge will comply with" five CWA provisions—33 U.S.C. "1311, 1312, 1313, 1316, and 1317." *Id.* 1341(a)(1). Those sections sweep broadly. As relevant here, the state is asked to certify whether the proposed project will: (1) result in the unauthorized discharge of pollutants in violation of

Section 301 (*id.* 1311) without a Section 402 permit (*id.* 1342); or (2) violate the state's water quality standards promulgated under Section 303 (*id.* 1313).

A state is by no means required to grant a water quality certification. If a proposed federal project will not comply with the CWA provisions cited in Section 401, the state can deny the certification and, unless successfully challenged in court, block the project entirely. 33 U.S.C. 1341(a)(1). But if the state grants a certification, Section 401(d) specifies that the state "*shall*" condition that grant on the project's compliance with "any effluent limitations and other limitations, and monitoring requirements necessary to assure that" the project "will comply with any applicable effluent limitations and other limitations," under four CWA sections (33 U.S.C. 1311, 1312, 1316 & 1317) "and with any other appropriate requirement of State law set forth in such certification." *Id.* 1341(d) (emphasis added).[1]

As the court of appeals explained, Section 401(d) thus makes it "mandatory" for states to specify at the start of the permitting process—before the permit is issued and the permitted activity commences—all conditions necessary to comply with the CWA and with state law. App. Op. ¶¶ 22-23. These limitations then "become a condition" on the federal license, and may be enforced by the relevant federal licensing agency. 33 U.S.C. 1341(d). This requirement to impose conditions up front as part of the federal licensing process ensures that all parties know what is required from the outset, and it allows the federal agency to assess fully the risks and benefits of the project.

[1] In addition, "state water quality standards adopted pursuant to § 303 are among the 'other limitations' with which a State may ensure compliance through the § 401 certification process." *PUD No. 1*, 511 U.S. at 713; *see also* H.R. Rep. No. 95-830, at 96 (Dec. 6, 1977) ("Section 303 is always included by reference where section 301 is listed," and "a federally licensed or permitted activity * * * must be certified to comply with State water quality standards adopted under section 303[.]").

Not once does the State's brief address Section 401(d)'s *requirement* that OEPA include all conditions in a timely water quality certification, even though that provision's use of the mandatory word "shall" played a key role on the Fifth District's decision, App. Op. ¶¶ 22-23.

Section 401 imposes a time limit on the certification process to prevent states from indefinitely delaying federal projects. Section 401(a) specifies that the state must "act on a request for certification, within a reasonable period of time (which shall not exceed one year) after receipt of such request." 33 U.S.C. 1341(a)(1). The statute is unambiguous as to the result if the state fails to act before this deadline: "[T]he certification requirements of this subsection shall be waived with respect to such Federal application." *Id*. The permit may then issue, allowing the project to go forward on federally approved terms without further restriction or any need for that state's certification. *Id.* ("No license or permit shall be granted until * * * certification * * * has been obtained or has been waived as provided."). Congress imposed this strict timing requirement "to curb a state's 'dalliance or unreasonable delay'" in the licensing of federal projects. *Hoopa Valley Tribe v. FERC*, 913 F.3d 1099, 1104 (D.C.Cir.2019), quoting 115 Cong. Rec. 9264 (1969) (emphasis omitted). In the event of waiver, the state's delegated authority to impose water quality conditions for the relevant project reverts to the federal licensing agency. *Del. Riverkeeper Network v. Secy. Penn. Dept. of Envtl. Prot.*, 833 F.3d 360, 376 (3d Cir.2016); 15 U.S.C. 717f(e).

C. The Natural Gas Act Gives FERC Exclusive Authority To Oversee The Construction And Operation Of Interstate Natural Gas Pipelines

The federal permitting statute in this case—the Natural Gas Act ("NGA"), 15 U.S.C. 717 *et seq.*—is an exercise of the federal government's Commerce Clause authority that gives FERC "exclusive jurisdiction" to regulate the transportation of natural gas in interstate commerce. *Islander E. Pipeline Co. v. Conn. Dept. of Envtl. Prot.*, 482 F.3d 79, 84 (2d Cir.2006); *see also Natl. Fuel Gas Supply Corp. v. Pub. Serv. Comm. of State of N.Y.*, 894 F.2d 571, 576 (2d Cir.1990)

(same); *Del. Riverkeeper*, 833 F.3d at 367 ("exclusive authority"). The NGA provides a "comprehensive" framework of "federal regulation" for the construction and operation of interstate natural gas pipelines. *Islander E. Pipeline Co.*, 482 F.3d at 84. Under it, FERC leads a coordinated effort to review and approve applications for the construction of natural gas pipelines and impose any conditions necessary to ensure that the project is consistent with the public interest, including environmental conditions. 15 U.S.C. 717f(e), 717n(b)(1). Section 7 of the NGA thus "grants FERC the power to authorize the construction and operation of interstate" natural gas pipelines by issuing a certificate of public convenience and necessity, known as a "certificate order." *Del. Riverkeeper*, 833 F.3d at 367, citing 15 U.S.C. 717f. FERC grants a certificate only if construction of the pipeline is in the public interest, and FERC imposes "reasonable terms and conditions" on certificates "as the public convenience and necessity may require," including on environmental matters. 15 U.S.C. 717f(e).

As part of this review, FERC acts as the "lead agency" to coordinate "all applicable Federal authorizations" for the project and the comprehensive environmental review of the proposal under the National Environmental Policy Act of 1969, 42 U.S.C. 4321 *et seq.* ("NEPA"). 15 U.S.C. 717n(b)(1). These federal authorizations include "any permits, special use authorizations, certifications, opinions, or other approvals as may be required under Federal law." *Id.* 717n(a)(2). In particular, the NGA expressly preserves the states' authority, as federally delegated under the CWA (referred to in the NGA as "the Federal Water Pollution Control Act") and two other federal environmental statutes. *Id.* 717b(d)(3). State agencies may also participate in FERC's NEPA review process. 42 U.S.C. 4370m-2(c)(3). Outside of this *federally* delegated authority, however, states have no power to regulate the construction of natural gas pipelines because, as with other federal permitting arrangements, the NGA "wholly preempt[s] and completely federalize[s] the

area of natural gas regulation," *Islander E. Pipeline Co.*, 482 F.3d at 90, citing *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 300-301 (1988). Even "site-specific environmental review" of a pipeline construction project by state agencies outside of the CWA framework is preempted because it falls within FERC's "exclusive authority" over the "facility used in the interstate transportation of natural gas," and "the imposition of additional requirements or prohibitions" could "delay" or even "prevent the construction of federally approved facilities." *Natl. Fuel*, 894 F.2d at 576-577.

The NGA requires identification of any necessary federal permissions up front, and the review for these permissions must abide by the schedule FERC sets. *See* 15 U.S.C. 717n. "Each Federal and State agency considering an aspect of an application" must "cooperate with the Commission and comply with the deadlines [it] establishe[s]." *Id.* 717n(b)(2).[2]

Once FERC determines that a proposed pipeline is "required by the present or future public convenience and necessity" and has obtained the necessary federal authorizations, FERC issues a certificate order that authorizes the applicant to proceed with construction. 15 U.S.C. 717f(e). The NGA then empowers FERC to monitor compliance with any conditions in that order; to ensure continued compliance via stop-work orders, *id.* 717o, and civil penalties, *id.* 717t-1; and to impose additional conditions if unforeseen circumstances arise, *id.* 717s(a) (injunctive relief).

[2] The NGA also provides project proponents a remedy for "[a]gency delay" if a state fails to act within any time period "required under Federal law," 15 U.S.C. 717r(d)(2), or established by FERC, *id.* 717n(c)(2). Resort to that provision is unnecessary, though, when a state agency has failed to timely act on a request for certification under § 401 of the CWA, because § 401 provides that such a failure "automatically" waives the certification requirement. *Millennium Pipeline Co. v. Seggos*, 860 F.3d 696, 701 (D.C.Cir.2017) (finding no jurisdiction under the NGA to force state to act on a § 401 request).

II. Rover Received All Necessary Regulatory Approvals Before Starting Construction

In 2014, Rover began the extensive process for licensing its 713-mile interstate pipeline. FERC approved Rover's use of a pre-filing option for engaging the many agencies that have permitting authority and seeking public input on the scope of environmental review. Rover-Mears Motion to Dismiss ("Rover MTD") Ex. B, *Rover Pipeline LLC*, 158 FERC ¶ 61,109, at P 151 (2017) (FERC Certificate). Rover notified OEPA of the permissions it would seek—including a Section 401 water quality certification—and sought OEPA's participation in the FERC pre-filing process. Rover Pre-Filing Request, FERC Docket PF14-14, submittal 20140626-5025, App'x A at 6.[3] OEPA chose to be a cooperating agency in developing the environmental impact statement ("EIS") that NEPA required here. Request for Participation as a Cooperating Agency, FERC Docket PF14-14, submittal 20140821-3022; Rover MTD Ex. D, FERC Docket CP15-93, submittal 20160729-4001 (EIS), at 1.

In February 2015, after Rover completed the pre-filing process, it applied for its FERC license. Rover MTD Ex. A, FERC Docket CP15-93, submittal 20150220-5241 (Rover Section 7(c) Application). In evaluating Rover's application, FERC fully considered the range of potential environmental impacts and summarized its work in the EIS that it published more than a year later. Rover MTD Ex. B (FERC Certificate) at P 157. This comprehensive environmental analysis included overseeing plans to mitigate or eliminate potential impacts in coordination with various cooperating agencies, including OEPA. Rover MTD Ex. D (EIS) at 1-6.

[3] This filing is available on the FERC Docket under docket number PF14-4 as "submittal" 20140626-5025. All FERC docket materials are available on the FERC website, in the "eLibrary" under "Documents & Filings," at https://ferc.gov/docs-filing/elibrary.asp. Each "submittal" or "issuance" on the docket has an "accession number" that begins with the filing or docketing date in the format YYYYMMDD. For example, the item just mentioned (20140626-5025) was docketed on June 26, 2014. Filings can be located by their unique accession number using the "Advanced Search" tool in FERC's eLibrary.

FERC's environmental analysis extensively addressed the principal impact about which OEPA now complains: inadvertent drilling fluid releases during horizontal directional drilling ("HDD"). State Br. 27-28; TAC ¶¶ 98-138. Rover proposed the HDD construction method to minimize environmental impacts from installing the pipe at 45 waterbody crossings, including wetlands. Rover MTD Ex. B (FERC Certificate) at P 177. Before the advent of HDD, pipelines typically rested at the bottom of rivers and other sensitive waterbodies, or were buried in trenches dug in a waterbody's floor. HDD is now the environmentally "preferred" construction method, because it avoids all contact with the waterbody. Rover MTD Ex. D (EIS) at 2-29 to 2-30. Instead, a tunnel for the pipe is drilled through the ground below the waterbody. *Id.* at 2-31. A small-diameter hole runs at an angle under the waterbody and then angles back up, emerging on the other side. *Id.* The hole's diameter is gradually expanded with multiple passes of progressively larger drills until it is big enough to pull the pipeline through it. *Id.*

Throughout the drilling, hundreds of gallons per minute of fluid (containing naturally occurring, non-toxic bentonite clay and water) are pumped down the hole to lubricate the drill and remove the cut rock and soil. Rover MTD Ex. D (EIS) at 2-31. Because it is impossible to predict the geological composition of the ground in the drill's path, the drill sometimes encounters natural fissures or other features that allow drilling fluid to reach the surface. *See* EIS, FERC Docket CP15-93, submittal 20160729-4001, at 4-130. This is called an "inadvertent return," "inadvertent release," or "IR."

The question is not "if" HDD will cause inadvertent returns, but rather "when and where." FERC fully accounted for IRs, requiring an HDD Contingency Plan with procedures Rover would follow when they occurred. Rover MTD Ex. E, FERC Docket CP15-93, submittal 20150422-5306 (HDD Contingency Plan). FERC's EIS, which OEPA helped prepare, explicitly contemplated

such events, providing that "[i]f a release is observed or suspected, Rover would immediately implement corrective actions," including steps "outlined in its HDD Plan." Rover MTD Ex. D (EIS) at 2-31 to 2-32. Of particular significance to this appeal, FERC did not set volume or ingredient limits that would result in "allowed" IRs. FERC instead found that "implementation of the mitigation measures outlined in Rover's *Construction Mitigation Plans* and other project-specific plans will avoid or adequately minimize impacts on surface waters to the extent practicable." Rover MTD Ex. B (FERC Certificate) at P 184. Rover's HDD Contingency Plan is a condition of its FERC certificate. *Id.* at App'x B ¶¶ 1, 6.

Because pipeline construction involves operating numerous pieces of heavy machinery that run off of diesel fuel and fuel oil, the EIS also contemplated the possibility that such materials may be discharged during construction. *See, e.g.*, EIS, FERC Docket CP15-93, submittal 20160729-4001, at 4-115 (addressing "[a] spill of hazardous materials during construction, such as diesel fuel or oil"). To help mitigate such impacts, Rover provided spill prevention and response procedures that FERC approved and made a condition of the certificate. Draft Spill Prevention and Response Procedures, FERC Docket CP15-93, submittal 20150223-5014 , at 1 (disclosing possibility that fuel would be released and identifying preventative and remedial measures); Rover MTD Ex. B (FERC Certificate) at App'x B ¶¶ 1, 6.

FERC's EIS also addressed the two other environmental impacts that OEPA challenges in this litigation: stormwater discharges, *see* TAC ¶¶ 125-141, and hydrostatic testing, *id.* ¶¶ 142-149. Stormwater discharges—also inevitable during pipeline construction—occur when rainfall carries sediment from disturbed ground to nearby waterways. FERC made it a condition of the certificate to comply with procedures, which the EIS identified, for controlling stormwater discharges. Rover MTD Ex. B (FERC Certificate) at P 210. Hydrostatic testing is a U.S. Department

of Transportation requirement that involves using pressurized water to check the pipeline for leaks before putting it into operation. EIS, FERC Docket CP15-93, submittal 20160729-4001, at 4-81. Rover proposed withdrawing large quantities of water from nearby waterbodies and municipal sources to conduct this testing and then discharging that water into an upland vegetated area in accordance with specified procedures and applicable state requirements. *Id.* at 4-82. Per the EIS, Rover MTD Ex. D (EIS) at 1-17, Rover obtained NPDES point-source permits for this testing, TAC ¶¶ 142-149, even though OEPA waived the ability to impose this requirement under CWA Section 401, as argued *infra* at 38-39.

Despite Rover's early engagement with OEPA in the FERC certificate process, OEPA missed its one-year deadline to act on Rover's request for a water quality certification under Section 401 of the CWA. OEPA concedes that "[o]n November 16, 2015, the Ohio Environmental Protection Agency (Ohio EPA) Division of Surface Water (DSW) received a Section 401 WQC application for [the Rover pipeline] project." Letter from Todd Surrena, Application Coordinator 401/Wetlands Section to Buffy Thomason, Rover Pipeline LLC (Dec. 7, 2015), http://tiny.cc/00d9rz ("December 2015 Surrena Letter"). The certification request stated, consistent with FERC's EIS, that Rover planned to use HDD techniques "to install the pipelines under sensitive streams and wetlands." Rover MTD Ex. F (Mitigation Plan) at 3.

OEPA held a public information session and a hearing on Rover's Section 401 application, but ultimately failed to act on the request by the one-year deadline (November 16, 2016). Instead, OEPA did not purport to grant a water quality certification until February 24, 2017, after FERC had already issued its certificate for the project. On that date, OEPA certified that the construction, as proposed, would comply with the applicable provisions of sections 301-303 and 306-307 of the CWA. *See* Rover MTD Ex. H (OEPA decision). In doing so, OEPA did not purport to require

this large construction project to meet every water quality requirement that applies generally in Ohio. Instead, OEPA expressly recognized that "a lowering of water quality in" 11 watersheds "as authorized by this certification is necessary" and that "the project meets public need for impacts to certain wetlands." *Id.* at 1-2. That document included no limitations on the quantity or quality of discharges stemming from IRs, stormwater, or hydrostatic testing. *Id.* The only conditions that would have applied if OEPA had issued a timely certification were requirements for Rover to report certain discharges to state authorities and to use best practices for managing stormwater. *Id.* at 62-64 (conditions D, E, L.2).

In March 2017, FERC authorized Rover to begin construction after confirming that it met the Certificate Order's conditions, including all required state and federal permits and authorizations. *See* Rover MTD Ex. D (EIS) at 1-13; Rover MTD Ex. I, FERC Docket CP15-93, issuance 20170303-3000 (Notice to Proceed).

III. FERC Provided Extensive Oversight And Responded To OEPA's Concerns

After OEPA missed the Section 401 deadline, FERC ensured Rover's compliance with environmental conditions affecting Ohio resources and responded swiftly to OEPA's various concerns. For example, OEPA asked FERC to halt construction citing the concerns underlying this lawsuit: inadvertent returns and alleged "fail[ures] to adequately control storm water runoff from pipeline construction activities." Rover MTD Ex. J, FERC Docket CP15-93, submittal 20170516-0027 (OEPA May 5, 2017 letter to FERC), at 1. OEPA claimed that this "contributed to violations of Ohio's water quality standards" and "ask[ed] FERC to review the matter and to take appropriate action in the most expeditious manner to ensure that Rover is held responsible." *Id.* at 1-2. (During the FERC certificate process, OEPA had not sought to impose an NPDES permit requirement for drilling fluid discharges. *See* Rover MTD Ex. D (EIS) at 1-16 to 1-17.)

FERC responded promptly, stopping work at any new HDD site until Rover implemented

extensive protective measures and received FERC's authorization to resume work. Rover MTD Ex. C, FERC Docket CP15-93, issuance 20170510-3009 (FERC May 10, 2017 letter to Rover). These new measures included paying for an independent third party to review Rover's compliance with HDD procedures and assess additional mitigative measures to prevent future impacts. *Id.* at 2-3. FERC also ordered Rover to double the number of environmental inspectors and vested FERC staff with "complete control over the scope, content, and quality of the [third-party] contractor's work." *Id.*

Rover worked extensively to address FERC's and OEPA's concerns. It documented HDD protocol implementation that the independent third-party contractor proposed, including deeper HDD paths, a better tool for monitoring pressure during HDD operations, employment of a drilling fluid engineer or specialist to assist in drilling improvements, the addition of third-party inspectors, and revised HDD plans "to reflect modifications requested by" OEPA. Rover MTD Ex. K, FERC Docket CP15-93, submittal 20170804-5084 (Rover Aug. 4, 2017 letter to FERC), at 3. FERC further agreed to a wetland restoration plan and a well monitoring program that "have also been approved by the Ohio EPA." Rover MTD Ex. L, FERC Docket CP15-93, issuance 20170831-3070 (FERC Aug. 31, 2017 Authorization), at 2. And Rover documented compliance with FERC's Measures Required For Implementation of Remaining HDDs. Rover Ex. M, FERC Docket CP15-93, submittal 20170912-5072 (Rover Sept. 6, 2017 letter to FERC).

In the midst of the other construction that continued while HDD work was suspended, OEPA's director opined, for the first time, that FERC-mandated stormwater control measures were not enough, because they did not limit discharges "to every extent practical and possible," and that Rover should *now* need to apply to OEPA for a permit for that type of discharge. Rover MTD Ex. N, FERC Docket CP15-93, submittal 20170908-5153 (OEPA Sept. 7, 2017 letter to FERC), citing

requirements in Ohio Admin. Code 3745-1-04 (A), (C). OEPA tried to enlist FERC in forcing Rover to acquiesce to OEPA's jurisdiction and to its new demands for a stormwater permit and other mitigative measures that Rover had *already* agreed to implement on a voluntary basis, with OEPA's earlier approval. *Id.*; Rover MTD Ex. O, FERC Docket CP15-93, submittal 20170908-5153 (OEPA Sept. 8, 2017 letter to Rover). Rover explained to FERC that it opposed OEPA's attempted use of FERC approvals as leverage in OEPA's belated effort to set and enforce construction conditions. Rover MTD Ex. P, FERC Docket CP15-93, submittal 20170911-5112 (Rover Sept. 11, 2017 letter to FERC), at 4; *see also id.* at 3-4 (adding that the only item Rover had declined to adopt voluntarily was the content of an NPDES permit that OEPA had previously agreed was unnecessary). On September 18, 2017, FERC agreed with Rover, allowing the company to resume certain HDD activities without first requiring it to meet OEPA's new NPDES permitting demands or submit to OEPA's jurisdiction. Rover MTD Ex. Q, FERC Docket CP15-93, issuance 20170918-3075 (FERC Sept. 18, 2017 Authorization) (finding sufficient safeguards in place).

IV. The Trial Court Dismisses OEPA's State-Court Lawsuit, And The Appeals Court Affirms Dismissal

Rather than seek review of FERC's rulings in the federal courts of appeals, as the NGA provides for, 15 U.S.C. 717r, OEPA filed this lawsuit in the Court of Common Pleas for Stark County, Ohio. The current complaint contains overlapping counts against six defendants, challenging three alleged environmental impacts from the FERC-permitted pipeline construction process: (1) inadvertent returns of drilling fluid; (2) stormwater discharges; and (3) allegations that Rover violated a hydrostatic NPDES permit issued by OEPA by exceeding various effluent limits, and not meeting certain reporting and monitoring requirements. TAC ¶¶ 98-149. A final count alleged that Rover failed to timely pay the fees associated with the Section 401 certification. TAC

¶¶ 150-154 (Count 7). OEPA principally sought an injunction requiring, *inter alia*, compliance with various state permitting requirements for project-related discharges, as well as substantial civil penalties.

Defendants-Appellees moved to dismiss, principally because OEPA waived its power to impose the conditions it was seeking to enforce on the Rover Pipeline project after failing to act on Rover's Section 401 water quality certification request before the one-year deadline. *See, e.g.*, Rover-Mears MTD (filed Sept. 10, 2018). In contrast to the State's position here, in the trial court it conceded that OEPA received Rover's application on November 16, 2015. *See* State MTD Opp. at 25. The State instead defended the timeliness of its February 24, 2017 certification by noting that OEPA required Rover to resubmit its certification request on February 23, 2017—15 months after the agency received it. The State claimed that, by requiring this resubmission, OEPA turned the clock for the one-year time limit back to zero. That allowed the State to insist that because OEPA granted Rover's request just one day after it was resubmitted, the agency "had 364 days to spare." *Id.*at 24-25.[4]

The State also disputed the *scope* of the waiver. Again, though, the State did not take the position that it takes today. In the trial court, the State argued that (1) Section 401 only applies to the certification of discharges over which OEPA lacks permitting authority (specifically, discharges of dredge and fill material that the Corps regulates under CWA Section 404), and (2) states can skip the Section 401 process, waiting until later to impose water quality conditions on federally licensed projects, because Section 401(d) makes the inclusion of such conditions in a timely water quality certification merely optional rather than mandatory. State MTD Opp. at 20, 25-27.

[4] Maneuvers like this to circumvent the one-year time limit confirm that it is still "commonplace for states to use Section 401" of the CWA "to hold federal licensing hostage." *Hoopa Valley Tribe*, 913 F.3d at 1104.

The trial court rejected these arguments too, dismissing the action for lack of subject-matter jurisdiction and failure to state a claim. *State ex rel. DeWine v. Rover Pipeline, LLC*, Stark C.P. No. 2017CV02216, at 8-10 (Mar. 12, 2019) ("Trial Op."). Applying the "'bright-line' rule" in Section 401(a) of the CWA, the trial court ruled that OEPA "waived its authority" to impose and enforce conditions on the project by failing to act timely on Rover's request for a water quality certification. *Id.* at 8-9. The trial court explained that Section 401 gave OEPA "the opportunity, within one year of Rover's request for certification, to set forth" any "limitations and monitoring requirements needed for compliance with Ohio's water quality standards." *Id.* at 9. Because OEPA waived this opportunity, "all aspects of the construction of the pipeline, including the discharging of pollutants into waterways, were subject to oversight by FERC, which responded to environmental concerns presented by the State of Ohio," including through work stoppages, until all valid concerns were addressed. *Id.* at 10. The State "cannot, through the instant litigation, assert rights given to it under the Clean Water Act which it waived." *Id.* at 9.[5]

The State then appealed to the Fifth District. In its appeal, the State expressly abandoned its count alleging that Rover failed to timely pay fees for the Section 401 certification (Count 7), as well as any argument that the certification OEPA issued was timely. *See* App. Op. ¶ 12, fn. 1, quoting State's brief. Instead, it repeated its arguments contesting the scope of that waiver. The Fifth District affirmed. App. Op. ¶¶ 19-32. It emphasized that: (1) its holding did not deprive OEPA of its "right to impose regulations to curb * * * impacts on its waterways"— it merely meant that "to assert its rights, the State of Ohio is required to act in conformance with the Clean Water

[5] Without "specifically address[ing]" defendants' other arguments, the court concluded that "defendants would be entitled to dismissal on the alternative grounds presented by the motions to dismiss, including, but not limited to, preemption." Trial Op. 9-10, fn. 2. The Fifth District did not reach these grounds on appeal, so they are not before this Court. However, these are alternative grounds for affirmance in the Fifth District if this Court were to reverse.

Act, as opposed to instigating litigation as a collateral attack subsequent to the completion of a pipeline"—and (2) "all aspects of the construction of the pipeline, including the discharging of pollutants into waterways, were subject to oversight by FERC, which responded to environmental concerns presented by the State." *Id.* ¶ 28, quoting Trial Op. 9-10. Regarding the count applicable to the hydrostatic permit that Rover obtained, the appeals court also found that the trial court rightly dismissed Count Six because "[t]he mere fact [Rover] chose to obtain a certificate from the state * * * does not change the fact the state waived its right to enforce its hydrostatic water laws by failing to include such permit requirement in a timely issued 401 certificate." App. Op. ¶ 31.

ARGUMENT

I. Appellant's Proposition of Law 1: A State's decision not to act on a Section 401 water-quality certification has no effect on the State's power to enforce state water-pollution laws.

The State sought review in this Court to argue, as its first proposition of law, that a Section 401 waiver has "no effect" on its "power to enforce state water-pollution laws." State Mem. in Supp. of Jurisdiction 10 (Jan. 17, 2020). Now that this Court has accepted jurisdiction, the State finally realizes that this proposition is untenable, conceding that "non-participating States waive *something*." State Br. 25 (emphasis in original). That leaves to this Court a narrower inquiry under the State's novel theory: the scope of that waiver and its application to the specific facts of this case.

The answers are found in the statute's plain text. Section 401 requires a state to include in a timely certification any and all conditions it deems necessary to ensure that the *applicant* for a federally licensed *project* will comply with state water quality standards. 33 U.S.C. 1341(a)(1), (d). Applied to this case, the State's failure to timely act on the certification request means that it cannot enforce its water-pollution laws as to the pipeline construction's water-quality impacts. *Id.* 1341(a)(1). There is no constitutional issue for the Court to avoid. *See* State Br. 23-26. States

exercise federally delegated authority—not inherent authority—in imposing conditions on federally licensed projects, leaving a state that waives under Section 401 with no retained authority over the water-quality impacts of such projects. *See S.D. Warren Co.*, 547 U.S. at 386.

The court of appeals applied the statute's plain language to hold that the State's waiver under Section 401 meant it could not regulate discharges from the licensed activity: construction of the Rover Pipeline. *See* App. Op. ¶¶ 27-28. That ruling should be affirmed.[6]

A. The Lower Courts Correctly Held That A State May Impose Its Water Quality Standards On A Federally Licensed Project Only Through A Timely Section 401 Certification

The lower courts correctly held that Section 401's text is clear: A state's failure to submit a timely Section 401 certification setting "limitations and monitoring requirements * * * for compliance with [state] water quality standards * * * waive[s] its authority to enforce the same." Trial Op. 9; *accord* App. Op. ¶¶ 21-28.

Section 401 is a state's opportunity to seek to impose conditions on federally permitted projects, including the types of conditions that OEPA seeks to enforce here. It states that "[a]ny applicant for a Federal license or permit to conduct any activity"—including "construction" of "facilities" such as an interstate pipeline—must obtain a certification if the activity "may result in any discharge into * * * navigable waters." 33 U.S.C. 1341(a)(1). Rather than singling out specific discharges, the certification extends to "any discharge" from "any activity" covered by the federal permit. *Id.* And rather than only addressing discharges that are certain or even likely to occur, "Section 401 certifications are inherently predictive in nature," *Sierra Club v. State Water Control Bd.*, 898 F.3d 383, 404 (4th Cir.2018) (quotation marks omitted), covering any discharge

[6] If this Court does not affirm dismissal on the basis of waiver under § 401, it could instead remand for the trial court to develop its reasoning as to Defendants-Appellees' alternative arguments for dismissal, as informed by this Court's forthcoming opinion on the § 401 issue.

that "*may* result" from the activity to be permitted, 33 U.S.C. 1341(a)(1) (emphasis added).

The State has finally abandoned the position it argued below that its Section 401 certifications (and waivers thereof) extend solely to the narrow category of "fill" material discharges not at issue here. *See* State MTD Opp. 3, 9-10, 15-17, 24; State App. Opening Br. 1. The State gives up that argument for good reason. The statutory text shows that Section 401 certifications fully encompass the water quality standards OEPA is trying to enforce through this suit. It provides that when a certification is requested the state must certify that any discharge in the state "will comply" with five enumerated provisions of the CWA. 33 U.S.C. 1341(a)(1) (referencing 33 U.S.C. 1311, 1312, 1313, 1316, and 1317). These include: (1) Section 301(a)'s prohibition of "the discharge of any pollutant" without a Section 402 permit, *id.* 1311(a) (referencing *id.* 1342); (2) state effluent limitations promulgated under Section 301(b), *id*. 1311(b); and (3) state water quality standards promulgated under Section 303, *id.* 1313. These are the provisions from which the State derives the authority it currently invokes—to prohibit and sanction discharges into state waters, R.C. 6111.04(A)(1), R.C. 6111.07(A), and set water quality standards for state waters and wetlands, Ohio Admin. Code 3745-1-04 and 3745-1-51(A). Indeed, the State admits—as it must in seeking to avoid preemption under the NGA, *see infra*, at 29-30—that "[t]he provisions that Ohio seeks to enforce against Rover * * * *all carry out state duties under the Clean Water Act*." State Br. 32 (emphasis added). And a Section 401 certification request is the state's opportunity, under that Act, to decide at *the outset* of the permitting process whether construction of the pipeline "may result" in "any discharge" that would violate these standards.

Section 401(d), in turn, makes it "mandatory" for the state to include in a timely certification the types of limitations and requirements at issue here. App. Op. ¶¶ 22-23. The certification

"*shall* set forth *any* effluent limitations and other limitations, and monitoring requirements necessary to assure that any applicant for a Federal license or permit will comply," not only "with *any* applicable effluent limitations" under specified CWA sections, including Section 301, but also "with *any other* appropriate requirement of State law." 33 U.S.C. 1341(d) (referencing 33 U.S.C. 1311) (emphases added). "Unlike the word 'may,' which implies discretion, the word 'shall' usually connotes a requirement." *Kingdomware Technologies, Inc. v. United States*, 136 S.Ct. 1969, 1977 (2016). While the State admonishes this Court to "'begin with the text'" of the statute, State Br. 17, it ignores entirely this unambiguous language, which confirms precisely what the State denies: States not only "*may* grant a 401 certification with conditions requiring compliance with state-environmental laws," but "they *must* impose such conditions" or "lose their right to do so." *Id.* 26 (emphases in original). This is not an "extreme conclusion," as the State suggests. *Id.* It is *exactly* what Section 401(d) says in the passage the State ignores. Any and all conditions necessary to ensure the project and related discharges comply with a certifying state's laws *must* be set out in the certification.

In the courts below, the State sought to avoid Section 401(d)'s mandatory language ("shall") by quoting the U.S. Supreme Court's statement in *PUD No. 1 of Jefferson County v. Washington Department of Ecology*, 511 U.S. 700 (1994), that States "may" impose conditions under Section 401(d), *id.* at 713-714 ("States may condition certification upon any limitations necessary to ensure compliance with state water quality standards or any other 'appropriate requirement of State law'"). But the State has rightly abandoned this argument here. As the Fifth District recognized, *PUD No. 1* did not purport to change the statute's "clear language * * * from 'shall' to 'may.'" App. Op. ¶¶ 22-23. The Supreme Court used "may" because the question was whether the state in that case "*could* impose" what it had included in its certificate, *id*. (emphasis added),

not what happens if a state declines to impose a condition. States *may* exercise that authority or waive it. *Sierra Club*, 898 F.3d at 388. But if they wish to impose conditions on a federally permitted project, they "shall" do so through a timely Section 401 certification or not at all.[7]

A state that elects not to impose these conditions under the timeline that governs the certification process thus waives the right to enforce them. The breadth of the waiver is commensurate with the breadth of the certification requirement. A waiver occurs if the state "fails or refuses to act on a request for certification, within a reasonable period of time (which shall not exceed one year) after receipt of such request." 33 U.S.C. 1341(a)(1). The authority "waived" includes the "certification requirements" of Section 401 "with respect to [the] Federal application." *Id.* In other words, the state waives its authority to enforce the "applicable requirements" set forth in Section 401(a)(1) and the "[l]imitations and monitoring requirements of certification" set forth in Section 401(d), per the titles of those subsections. The waiver thus encompasses the state's authority to determine whether any discharge "will comply" with the CWA provisions that the State seeks to enforce here, *id.*, and the authority to impose "any applicable effluent limitations" and "any other appropriate requirement of State law" needed for the "applicant" to be in compliance, *id.* 1341(d). The state waives these requirements not with respect to a specific discharge, but "with respect to [the] Federal application" itself—that is, with respect to the "activity" that the applicant is seeking "a Federal license or permit to conduct." *Id.* 1341(a)(1).

[7] Amici, but not the State, argue that § 401(b) allows states to avoid the meaning of "shall." *See* Ohio Environmental Counsel and Sierra Club Amicus Br. 13. But § 401(b) merely provides that nothing in § 401 "limit[s] the authority of any department or agency pursuant to any other provision of law to require compliance with any applicable water quality requirements." 33 U.S.C. 1341(b). States thus retain their authority under "other provisions" to regulate water quality impacts from activities that are not authorized by a federal permit. States also retain their authority over impacts from the federally licensed activity so long as, unlike how OEPA acted here, they follow § 401's clear procedures for exercising that authority.

Consistent with the statute's wording, the Supreme Court has explained that the authority at issue is the power to impose "additional conditions and limitations on *the activity as a whole*." *PUD No. 1*, 511 U.S. at 712 (emphasis added) (grounding Section 401(d)'s breadth in its reference to limitations necessary to assure that the "applicant"—and not just discharges—will be in compliance). Far from narrowing the scope of the waiver as the State suggests (at 18), the phrase "with respect to [the] Federal application" makes clear that it extends to the full project covered by the permit. A state's waiver thus "return[s] the state's delegated authority to enforce Section 401 of the Clean Water Act to FERC *with respect to the project*." *Del. Riverkeeper*, 833 F.3d at 376 (emphasis added).

Section 1341(a)(3)—the only other Section 401 provision that the State cites—likewise confirms that the waiver extends to the entire project. It provides that for "construction" projects like the one here, the same "certification" may be used for multiple permit applications, as long as the applicant provides "notice of any proposed changes in the construction" and the state does not timely object. 33 U.S.C. 1341(a)(3). The State reads this as evidence that waiver is limited to the specific "discharges * * * submitted to the State for certification." State Br. 19. But the provision actually yields the opposite: The state must consider all aspects of the construction project in its initial certification, not just those relevant to a specific permit for the project. As long as the nature of the "construction" does not change—and no one suggests that it has changed here—the certification (and any corresponding waiver) covers the entire project.

The scope of the waiver thus turns on the project or "activity" that the federal permit authorizes the "applicant" to undertake; it is not limited to any specific "discharge." In the State's hypothetical, for example, an "auto-body shop" that "seeks a Section 401 certification so it can expand its parking lot by filling part of a wetland with soil," State Br. 18, would need a federal

permit from the U.S. Army Corps of Engineers under Section 404 of the CWA to "discharge * * * dredged or fill material" into the wetland. 33 U.S.C. 1344(a). That is because the "activity" covered by the permit (filling the wetland with soil) involves a "discharge" of pollutants (soil). The certification would need to cover not only the discharge of soil, as the State concedes (at 18-19), but also "any discharge" that "may result" from filling the wetland, *id.* 1341(a)(1)—which might include, for example, stormwater runoff from the construction site used for the fill, *see supra*, at 5, 14. If the necessary federal permit were broader—*i.e.*, if the body shop needed permission not only to fill the wetland, but to construct the parking lot itself—the scope of the waiver would be broader as well.[8]

It is of course correct that in any of these scenarios, the waiver would not extend to "dump[ing] used oil and brake fluid into the wetland," State Br. 19, since such dumping is not in furtherance of the parking lot's construction in the State's hypothetical. Nor would it encompass the State's hypothetical involving a spill of "thousands of gallons of radioactive waste," *id.* at 26, since that also is not what "may result" during a parking lot construction project—or when constructing a natural gas pipeline, for that matter. But neither is the waiver necessarily limited to any specific discharge of soil into the wetland. Instead, the state waives its authority to challenge any discharge resulting from the permitted construction *activity*. The text of Section 401 thus confirms the lower courts' interpretation.

[8] This point is of particular importance here. As noted above, when it comes to interstate natural gas pipelines, FERC exercises plenary authority over the construction and operation of *the entire* pipeline. That contrasts with other projects, such as the hypothesized parking lot, in which federal permission is limited to effects on waters within federal jurisdiction.

B. The Lower Courts' Interpretation Of Section 401 Accords With Both The Statute's Purpose And Principles Of Cooperative Federalism

The lower courts' interpretation of Section 401 is also consistent with the statute's purposes. Section 401 prevents a state from waiving its opportunity to impose conditions at the outset of a federally permitted project and later "indefinitely delaying" the project, *Alcoa Power Generating Inc. v. FERC*, 643 F.3d 963, 972-973 (D.C.Cir.2011), by seeking to impose the same types of conditions after the permit has been approved, or—worse yet—by suing for alleged violations of such unimposed conditions. This reading preserves to states the full scope of federal authority delegated to them under the CWA, *so long as they exercise that authority at the time and in the manner that Section 401 requires*. As the Fifth District recognized, nothing in the CWA stopped the State from "imposing additional conditions [in a Section 401 certification] subjecting all types of discharge to compliance with the laws of Ohio." App. Op. ¶ 27, citing *Sierra Club*, 898 F.3d 383. Or, where appropriate, a state can deny a certification request entirely. What it *cannot* do is hold up or modify construction plans beyond a one-year period by enforcing, *outside* of the certification process, the same effluent limitations and permit requirements that it waived *in* that process. If a state could, it would have waived nothing at all. That reading cannot be correct because it would "defeat the purpose of the * * * statute," *DHS v. MacLean*, 135 S.Ct. 913, 920 (2015), which is to ensure that the plan for constructing a pipeline is promptly and comprehensively resolved as to all stakeholders *before* construction begins.

Contrary to the State's assertion, the lower courts' interpretation of Section 401 is also fully consistent with the CWA's model of cooperative federalism and with settled constitutional principles. Congress enacted this provision to give states a power that federal permitting authority—including the NGA—would "otherwise preempt." EPA Rule, 85 Fed. Reg. at 42,255, 42,276, fn. 64. The CWA's legislative history reflects Congress's acute awareness that, without Section 401,

"a Federal license or permit" might otherwise "excuse * * * a violation of [state] water quality standard[s]." 116 Cong. Rec. 8984 (1970) (remarks of Senator Muskie). The U.S. Supreme Court has thus recognized Section 401's carveout as "essential * * * to preserve state authority." *S.D. Warren Co.*, 547 U.S. at 386. Without that carveout, in other words, states would be unable to regulate water quality impacts from federally licensed projects.

The permitting statute here (the NGA), for instance, "wholly preempt[s] and completely federalize[s] the area of natural gas regulation." *Islander E. Pipeline Co.*, 482 F.3d at 90, citing *Schneidewind.*, 485 U.S. at 300-301. The NGA gives FERC "exclusive authority" over the permitting, regulation, and operation of interstate natural gas pipelines, *Del. Riverkeeper*, 833 F.3d at 367. The NGA expressly preserves states' federally delegated CWA authority, 15 U.S.C. 717b(d)(3), while preempting any arguable authority that states have to regulate water quality *outside of* that federal statute. If a state waives its Section 401 authority, therefore, it has no residual authority to regulate water quality with respect to such a project. Any authority that a state fails to exercise through a waiver under Section 401 in relation to natural gas pipeline projects is FERC's to exercise. *Del. Riverkeeper*, 833 F.3d at 376 (waiver "return[s] the state's delegated authority" "to FERC with respect to the project").

The State seeks refuge in the fact that the NGA preserves "States' power to regulate water pollution under the Clean Water Act." State Br. 31. But that is precisely the point. Seeking to avoid preemption under the NGA, the State has conceded time and again in this litigation that OEPA was attempting here to exercise its "delegated" *federal* authority under the CWA. *E.g.*, State MTD Opp. x, 2, 5, 7-10, 13, 15, 18, 23, 28, 35, 39; *cf.* State App. Opening Br. 8-9, 19, 27. All agree that the State "exercises only such authority as has been delegated by Congress" under the CWA. *Islander E. Pipeline Co.*, 482 F.3d at 93. The State thus misses the mark with its focus

on whether or when a federal statute could "preclude or deny" a state's exercise of authority *inherent* to a state. 33 U.S.C. 1370; *see* State Br. 1, 4. The State is not seeking to exercise inherent authority here. It is seeking to exercise authority that the CWA delegates. Whatever inherent state authority the states might otherwise have enjoyed is preempted by the NGA, which preserves only that which Congress delegated under the CWA.[9]

The State's concession that it seeks to exercise delegated authority under a federal statute—in the federally occupied field of federally permitted construction of interstate natural gas pipelines—also explains why Section 401 does not threaten "the usual constitutional balance of federal and state powers." State Br. 21, quoting *Bond v. United States*, 572 U.S. 844, 857-858 (2014). Section 401 does not "deprive the States of their traditional rights and responsibilities." *Id.* at 4. It *grants* authority to the states that otherwise "would be preempted by federal law." EPA Rule, 85 Fed. Reg. at 42,276, fn. 64. The waiver provision of Section 401 dictates, in turn, *when* a state must act if it decides to exercise its delegated authority in the context of a federally licensed project. Congress's decision to impose statutory limits on this authority that *Congress itself* delegated to the states simply is not preemption. And nothing about this deprives the states of their "primary responsibilities" over water quality, 33 U.S.C. 1251(b), in a different context: the much more plentiful universe of activities for which a federal license or permit simply is unnecessary.

[9] The U.S. District Court did not, as the State suggests, pass on the NGA's relative importance to the merits of this case. State Br. 32. Judge Adams's main holding was that the defendants (at that time, only Rover and Pretec) "invoked [the NGA] solely through * * * defenses," and the presence of a federal defense is not enough, standing alone, to confer jurisdiction on a federal court. *State of Ohio ex rel. DeWine v. Rover Pipeline, LLC*, N.D.Ohio No. 5:17-cv-2566 (Jan. 26, 2018), Doc. 27 at 4. In any event, because that remand decision was not appealable, 28 U.S.C. 1447(d), this Court is "free to reject the remanding court's reasoning" for the remand, *Kircher v. Putnam Funds Tr.*, 547 U.S. 633, 647 (2006).

Even assuming some contrary presumption, it would be overcome here. As explained *supra*, at 23-26, Section 401 *explicitly* described the limitations and requirements that a state waives its power to impose when it fails to act promptly on a certification request. And it is well established that no express preemption is needed in the event of a "clear conflict" between state and federal law. *Am. Ins. Assn. v. Garamendi*, 539 U.S. 396, 419-420 & fn. 11 (2003); *see also id.* at 425 ("The express federal policy and the clear conflict raised by the state statute are alone enough to require state law to yield" irrespective of the strength of "the State's interest"). It is enough, therefore, that states would, without a doubt, undermine Section 401's basic purpose if they could sit out the Section 401 process, only to impose new conditions after a federal permit issues.

The State's newly minted concern about unconstitutional commandeering is likewise misplaced. State Br. 5, 23-25. It claims the lower courts' interpretation of Section 401 runs afoul of the principle that "Congress cannot require States to enforce a federal regulatory program." *Id.* at 5. But the U.S. Supreme Court has long recognized "Congress' power to offer States the choice of regulating" interstate commerce "according to federal standards or having state law pre-empted by federal regulation," including under the "Clean Water Act." *New York v. United States*, 505 U.S. 144, 167-168 (1992). The State's own authorities recognize that "simply establish[ing] requirements for continued state activity in an otherwise pre-emptible field"—or here, the *already preempted* field of interstate natural gas pipeline construction—does not "involve the compelled exercise of [state] sovereign powers" or pose any other "constitutional problems." *FERC v. Mississippi*, 456 U.S. 742, 769 (1982). The State thus is left to rely on Justice O'Connor's *dissent* from this holding as the centerpiece of its contrary argument. State Br. 5, 24.

If this argument had any merit, surely the State would have raised it below. But the State did not, for the simple reason that Section 401 does not commandeer state power. Congress did

not "issue direct orders to state legislatures," as it did in *Murphy v. NCAA*, 138 S.Ct. 1461, 1478 (2018). Nor did it use "'financial inducements'" under the Spending Clause to force the states "to implement federal policy [that Congress] could not impose directly under its enumerated powers," as in *Natl. Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 577-578 (2012). FERC's oversight of pipeline construction is not *dependent* on any state's input. FERC is fully capable of regulating these matters on its own. Instead, it *invites* the states to exercise the authority that they find necessary, which could include "conditions subjecting all types of discharge to compliance with the laws of Ohio," or setting limits for any anticipated discharge, App. Op. ¶ 27. Critically, however, Section 401 does not require states to act at all. It simply assigns a consequence to a failure to act: The state loses its federally delegated regulatory authority as to the project; the authority reverts to the responsible agency (here, FERC). *Del. Riverkeeper*, 833 F.3d at 376. The FERC-led permitting regime that the lower courts described still holds projects accountable for water-quality impacts, as occurred here. *See supra*, at 16-18. The trial court explained that despite OEPA's waiver, "all aspects of the construction of the pipeline * * * were subject to oversight by FERC, which responded to environmental concerns presented by [OEPA], including, but not limited to, halting construction operations." App. Op. ¶ 28, quoting Trial Op. at 9-10.

Accordingly, there are no constitutional issues to avoid in this straightforward case of statutory interpretation. The lower courts' interpretation of Section 401 is correct.

C. The State Offers No Viable Alternative Standard

The State's interpretation of the scope of a Section 401 waiver has evolved at each stage of this litigation. That it took more than two years, three rounds of briefing, and oral argument in the Fifth District for the State to develop its current theory speaks volumes: It is the antithesis of an obvious reading of the law. In its latest brief, the State argues that waiver of its power to act on a certification request only prevents it from bringing an enforcement action for "pollution that is

within the federal permit's scope," State Br. 4, *see also id.* at 6, or within the "scope of the federal application," *id.* at 3; *see also id.* at 5, 17, 18, 19, 26. It then seeks to *further* limit the waiver to discharges that a state "allowed to occur by failing to act on a certification request." *Id.* at 3; *see also id.* at 6, 17, 18, 25, 27, 30.

That bears no resemblance to the State's interpretation of Section 401 in either court below. Rather than argue below that the federal permit required drilling fluids to contain only specified ingredients, *see* State Br. 28-29 (contending that the "Impact Statement" for the federal application said only "'naturally occurring, non-toxic bentonite clay and water'" would be used for "drilling fluid"), it argued that Section 401 does not apply to drilling fluids *at all*. Starting in the trial court, it insisted that when it comes to states (like Ohio) with their own NPDES programs, Section 401 simply does not apply to the potential discharge of anything but "fill" material, over which the U.S. Army Corps of Engineers exercises jurisdiction under Section 404 of the CWA. State MTD Opp. 9-10; *id.* at 3, 15, 16, 17, 24. The State argued that Section 401's supposed limitation to fill material meant "the State's 401 certification program does not cover the water pollution discharges alleged here," including the "drilling fluids in Counts One, Three, and Four." *Id.* at 3.

In the court of appeals, the State again contended that "Ohio's program that issues Section 401 certifications does not cover any of the discharges alleged here." State App. Opening Br. 1. It argued that Ohio instead "issues Section 401 water quality certifications for fill-material placement only," *id.* at 7, and that the "sources of authority" for regulating discharges of drilling fluid "exist independent of Section 401, 33 U.S.C. 1341," *id.* at 1. *See also id.* at 14, 18. Not once did the State argue below that a waiver could extend to drilling fluid discharges that were "within the federal permit's scope," *id.* at 4, or within "the scope of the federal application," *id.* at 17, much less that this meant a waiver was further narrowed to discharges a state "allowed to occur by failing

to act on a certification request," *id.* at 3. And it did not contend that the words "with respect to such Federal application," from Section 401(a), have any bearing on a waiver's scope.

The State would now have this Court invent a new test: whether the discharge is one that a state did or did not "allo[w] to occur by failing to act on a certification request." State Br. 3; *see also id.* at 25. Under this reading, a state could not enforce its laws as to pollution it "allowed" to occur, while it could address pollution it did not allow. But that cryptic test merely begs the very question posed by this appeal: What does a state "allow" when it fails to act timely on a Section 401 request? As explained above, the text of Section 401 provides a clear answer. By waiving the opportunity to impose conditions on a federally permitted activity—conditions that "shall" appear in a Section 401 certification—the state necessarily *allows* the activity to proceed without compliance with those conditions. That is what the trial court concluded, and the Fifth District affirmed it on appeal: By failing to set "limitations and monitoring requirements * * * for compliance with [state] water quality standards," a state "waive[s] its authority to enforce the same." Trial Op. 9; *accord* App. Op. ¶¶ 21-28.

To read the statute otherwise would be unworkable and undermine the Section 401 regime. The State offers no principle or metric for identifying in advance what a state did or did not allow through its waiver. The State's formula is thus both backward looking and subjective, undermining the benefit of predictability from a comprehensive federal licensing process where the licensee knows the rules and who it answers to at the start of the project. And it could introduce delay in resolving both the water-quality impacts at issue and any jurisdictional disputes. Giving states the power to change aspects of the regulatory regime after the fact would also erase Section 401(d)'s requirement (using the word "shall") that certifying authorities set out "any" conditions or limitations needed to assure compliance with the CWA or related state law provisions. 33 U.S.C.

1341(d). Furthermore, *after* a license issues the authority rests with FERC, not states, to add or modify conditions for projects licensed under the NGA. *Del. Riverkeeper*, 833 F.3d at 376; *Islander E. Pipeline Co.*, 482 F.3d at 90. A reading that presents so many conflicts cannot be correct.

The State's variation on its own test—that it "waives its right to enforce state pollution laws in response to *pollution* that is within the federal permit's scope, if it fails timely to act on a certification request," State Br. 4 (emphasis added)—still misses a key point: The federal permit (FERC's Certificate Order) allows a particular "*activity*" to proceed, 33 U.S.C. 1341(a)(1), and need not "allow" or proscribe particular types or amounts of pollution from that project, *see* State Br. 23. By issuing a Certificate Order, FERC concludes (as it did for the Rover Pipeline) that a project's benefits outweigh its risks and it imposes any conditions necessary to minimize or redress potential environmental impacts from the licensed activity. *See* Rover MTD Ex. B (FERC Certificate) at P 6 ("the benefits that the Rover Pipeline Project * * * will provide to the market outweigh any adverse effects" to the public, and while "the project[] will result in some adverse and significant environmental impacts, * * * these impacts will be reduced to acceptable levels with the implementation of the applicants' proposed mitigation and staff's recommendations, now adopted as conditions" to the order). OEPA also recognized that major construction projects like this will necessarily require some reduction in water quality to achieve the project's overall benefits to the public interest. Rover MTD Ex. H (OEPA decision) at 1-2 (concluding that "a lowering of water quality in" 11 watersheds "as authorized by this certification is necessary" and that "the project meets public need for impacts to certain wetlands"). The Section 401 certification is the state's opportunity to strike that balance. If a state chooses not to participate in the licensing process through Section 401, then it cedes its authority to regulate the licensed *activity* and the impacts of that activity, rather than ceding power over only some undefined *subset* of discharges that the

activity might cause.

D. The Lower Courts Correctly Applied The State's Section 401 Waiver To Dismiss Each Count Of The Complaint

Each of the discharges at issue in this case could have been addressed in a timely Section 401 certification because they were a foreseeable result of the federally licensed construction activity. Because the State did not issue such a certification, the lower courts correctly applied the State's waiver to each count. Trial Op. 9; App. Op. ¶¶ 27-32. That judgment should be affirmed.

1. On appeal to this Court the State finally concedes that as to Counts 1, 3, and 4, various discharges—known as inadvertent returns or IRs—of drilling fluid during construction were expected and planned for in the federal permitting process. State Br. 28-29. And the State no longer defends its original theory that IRs fall outside a Section 401 certification's scope. As a result of these concessions, the State's application of its own theory of waiver now prevents it from pursuing enforcement against several IRs that occurred during the Rover Pipeline's construction.[10]

The State, in fact, only defends its waiver theory as to one particular IR, arguing that it was larger than anticipated and allegedly contained an ingredient that the project plans and EIS did not allow or contemplate (diesel fuel). State Br. 28. This is where the State's interpretation of Section 401 falls apart. The issue is not whether FERC approved adding diesel fuel to drilling fluid. Rather, early project plans *and* the final environmental impact statement cited the possibility of "[a] spill of hazardous materials during construction, such as diesel fuel or oil." EIS, FERC Docket CP15-93, submittal 20160729-4001, at 4-115; *see also* Draft Spill Prevention and Response Procedures, FERC Docket CP15-93, submittal 20150223-5014, at 1 (disclosing possibility that fuel

[10] All of the claims against Mears Group (Counts 1, 3 & 4) involve discharges of a limited amount of non-toxic drilling fluid during construction that the State concedes were expected and planned for in the federal permitting process. Therefore, the claims against Mears Group would not survive even under the State's flawed limited waiver argument.

would be released and identifying preventative and remedial measures). Assuming for the sake of argument that the IR occurred as alleged, it was in the course of the permitted activity (construction of the pipeline) using a construction technique included in the license application (HDD) with possible consequences that the planning materials included (spills of diesel fuel during construction). The State's waiver extends to this IR too.

Likewise, FERC did not approve a volume threshold for IRs, nor did it specify volumes for any other purpose. *See generally* Rover MTD Ex. B (FERC Certificate). After all, they are called "inadvertent" discharges because their sizes and locations are inherently unpredictable. Instead of approving volume thresholds, FERC provided its staff with general tools for responding to IRs as a whole (*e.g.*, ordering mitigation, requiring work to stop). *Id.* at App'x B (Environmental Conditions). Rover also created a plan to address all IRs, regardless of volume. Rover MTD Ex. E (HDD Contingency Plan). Nothing prevented OEPA from adding IR monitoring, remediation, or limitations (whether quantitative or qualitative) in a Section 401 certification if documented as necessary to meet Ohio's water quality standards. Moreover, the State—in its Complaint as well as its arguments below and here—fails to say what volume threshold would be "allowed" (or why) under its newly articulated waiver test. Instead, until it reached this Court, the State has treated every discharge of *any* volume as a violation that it could enforce against despite not even purporting to put a volume threshold in its tardy Section 401 certification. *See* TAC ¶¶ 101-123; Rover MTD Ex. H (OEPA decision). Under the State's new test, all are left to guess which IRs the State "allowed." That is not a reasonable or predictable result.

The State's argument sets up a false choice: either allow a state to enforce its water quality laws, or unlimited volumes of drilling fluids can be discharged without consequence. Not only did OEPA have the power to impose conditions to mitigate the risk of foreseeable project impacts

in a timely manner through the Section 401 process, when it opted out of that process FERC actively oversaw the Rover Pipeline project and ensured that IRs of any size—small and large—were properly addressed and remediated as needed. *See supra*, at 16-18. OEPA participated in that process with FERC and Rover. *Id.* That is what happens upon waiver; there is no regulatory gap.

2. The State also waived its authority to regulate the project's stormwater (Counts 2 and 5) and hydrostatic test water discharges (Count 6) because these discharges are inevitable consequences of the construction and could have been addressed through conditions in a Section 401 certification. *See supra*, at 13-16. In the Fifth District, the State admitted that "discharges of construction storm water * * * were predictable." State App. Reply Br. 9. Conspicuously, the State does not address in this Court its allegations concerning stormwater discharges and a stormwater permit that OEPA asked Rover to obtain *after* its belated, ineffective Section 401 certification. *See supra*, at 17-18; TAC ¶ 83. Because the State "could have raised this * * * in [its] initial merit brief but failed to do so," this Court should "not address th[ese] claim[s]," and should consider them conceded. *State ex rel. Murray v. Scioto Cty. Bd. of Elections*, 127 Ohio St.3d 280, 2010-Ohio-5849, 939 N.E.2d 157, ¶ 58. Even if not, it follows from the State's own proposed test that because stormwater discharges inevitably occur during a large project such as this one, and because OEPA did not require a stormwater permit as a condition of a timely Section 401 certification, it is a discharge the State "allowed to occur by failing to act on a certification request." State Br. 3. And thus, the State waived its ability to regulate those discharges under either side's view of the law.

The State takes a different tack with the hydrostatic permit, arguing that because Rover *voluntarily* obtained it, the State did not allow hydrostatic test water discharges to occur and so

regulation of hydrostatic test water falls outside the scope of a Section 401 waiver. State Br. 30. That gets the timeline backwards. The State had *already* waived its rights under Section 401 *before* it issued the hydrostatic test permit. Once the Section 401 certification requirement "ha[d] been waived," OEPA's "decision to grant or deny" a permit "ha[d] no legal significance." *Millennium Pipeline*, 860 F.3d at 701. The fact that Rover *later* obtained the hydrostatic test permit voluntarily does not and cannot undo OEPA's waiver. *See N.Y. State Dept. of Envtl. Conserv. v. FERC*, 884 F.3d 450, 456 (2d Cir.2018) (late action on a Section 401 certification had no legal effect). Were the rule otherwise—*i.e.*, if the State had free reign to decide, even *post hoc*, what conduct it had "allowed" through inaction on a Section 401 certification request—the requirement in Section 401(d) to set forth "any" necessary conditions in a timely certification would be meaningless. The State should therefore be held to its concession that "a waiver cannot be 'undone' by agreement." State Br. 30.

Finally, it is no answer to say that in July 2016 FERC's EIS listed the hydrostatic test permit as something Rover was required to obtain under "state law." State Br. 10. OEPA still had ample time—another four months—to require Rover to obtain that permit as a condition on a timely Section 401 certification. Once OEPA missed the deadline to issue that certification, however, the requirement to get a state-issued permit was nullified. *See* 33 U.S.C. 1341(a)(1). FERC has no authority, through its EIS or otherwise, to waive the statutory deadline for a state to issue a Section 401 certification. *See Millennium Pipeline*, 860 F.3d at 701 (failure to find waiver is appealable). And it did not purport to do so here. Since the State does not dispute that it *could* have imposed conditions on hydrostatic testing as part of the Section 401 process, its failure to do so waived any such conditions.

II. Appellant's Proposition of Law 2: The one-year time limit in Section 401 of the Clean Water Act begins to run only once the applicant submits a completed application.

The State fares no better with its eleventh-hour theory for why its Section 401 certification was timely. A state waives its rights under Section 401 "[i]f the State * * * fails or refuses to act on a request for certification, within a reasonable period of time (which shall not exceed one year) after receipt of such request." 33 U.S.C. 1341(a)(1). The clock thus begins to run upon the State's "receipt" of a "request for certification." *Id.* OEPA expressly acknowledged in December 2015 that it had "received a Section 401 WQC [(water quality certification)] application" from Rover "[o]n November 16, 2015." December 2015 Surrena Letter at 1. By Section 401's plain terms, therefore, the clock began to run in November 2015, not nine months later (July 2016) when the State believes that Rover "completed" its application by answering questions from OEPA. State Br. 37. The clock ran out at the latest in November 2016. It is "undisputed" that OEPA missed that deadline, App. Op. ¶ 20, by failing to act until February 24, 2017, State Br. 38-39; Rover MTD Ex. H (OEPA decision).

A. As an initial matter, the State has forfeited this argument. In the trial court, its theory (ultimately "abandoned on appeal," including *here*) was that the clock *restarted* when Rover supposedly resubmitted its application in February 2017. App. Op. ¶¶ 9-10, 20. This Court is the first place the State has ever argued that it did not receive the request until OEPA deemed it complete in July 2016. That explains why the Fifth District never mentioned, much less considered, such a theory. *Id.* ¶¶ 19-20. The State "cannot change the theory of [its] case and present these new arguments for the first time on appeal." *State ex rel. Gutierrez v. Trumbull Cty. Bd. of Elections*, 65 Ohio St. 3d 175, 177, 602 N.E.2d 622 (1992). The State is not exempt from the preservation rules that apply to private litigants, *see, e.g.*, *State v. Wintermeyer*, 158 Ohio St. 3d 513, 2019-Ohio-5156, 145 N.E.3d 278, ¶¶ 21-23; *State ex rel. Moore v. Indus. Comm.*, 141 Ohio

St. 241, 248, 47 N.E.2d 767 (1943), and the Court should not encourage such procedural gamesmanship, *cf. State ex rel. Smith v. O'Connor*, 71 Ohio St. 3d 660, 663, 646 N.E.2d 1115 (1995) (invited-error doctrine).

The Court should not consider this forfeited proposition of law.

B. Even if not forfeited, the State's new theory should be rejected as contrary to statutory text and precedent. The statute is clear that the clock starts on "receipt" of a "request for certification," 33 U.S.C. 1341(a)(1), not when the state concludes that the request is "complete." Congress did not specify a "complete" request, and courts may not "add words to [a] law to produce what is thought to be a desirable result. That is Congress's province." *E.E.O.C. v. Abercrombie & Fitch Stores, Inc.*, 135 S.Ct. 2028, 2033 (2015).

Nor can the State read the missing word "complete" into the more general term that the statute does use—"request." State Br. 33. Congress's failure to expressly "define[] th[at] term," *id.*, is not license to rewrite the statute. Instead, "[w]hen a term goes undefined in a statute," courts "give the term its ordinary meaning." *Taniguchi v. Kan Pac. Saipan, Ltd.*, 566 U.S. 560, 566 (2012). There can be no doubt that Rover's November 2015 submission to OEPA was a "request" in the ordinary sense of that term: an "act or an instance of asking for something," Webster's Third New International Dictionary 1929 (1993)—here, asking for certification. OEPA itself called the submission an "application." December 2015 Surrena Letter at 1. "Application" is synonymous with "request" in its ordinary usage. Webster's Third New International Dictionary 105 (1993) (defining "application" as a "request"); New Oxford American Dictionary 76 (3rd ed. 2010) (defining "application" as "a formal request to an authority for something"); Roget's Thesaurus, https://bit.ly/2P0YNbI (listing "application" as synonymous with "request"). And those terms are

used interchangeably in Section 401. *See* 33 U.S.C. 1341(a)(1) (equating "applications for certification" with "request[s] for certification"). Even the State understands that in ordinary usage, an "incomplete" application is still a "request," as the State's opening brief uses the term "request" to refer to such an application. State Br. 36 ("any request, incomplete or otherwise").[11]

If any doubt remains, the CWA itself resolves it. Simply put, that Act shows that "Congress knew how to draft the kind of statutory language that [the State] seeks to read into" Section 401. *State Farm Fire & Cas. Co. v. U.S. ex rel. Rigsby*, 137 S.Ct. 436, 444 (2016). When Congress has intended for a deadline to run from receipt of a "complete" application, it has said so explicitly. In fact, just three sections later—in CWA Section 404—Congress required a "complete" application to trigger a time-limited agency action. *See* 33 U.S.C. 1344(a) ("Not later than the fifteenth day after the date an applicant submits all the information required to *complete* an application for a permit under this subsection, the Secretary shall publish the notice required by this subsection." (emphasis added)).[12] Congress's "deliberate omission of [a] word" from one provision that it included in another provision of the *same statute* is proof positive that it intended a different meaning. *Fedorenko v. United States*, 449 U.S. 490, 512-13 (1981) (where one provision referred to

[11] OEPA's regulations likewise show that it understood the difference between "receipt of an application" under § 401, R.C. 6111.30(B), and "recei[pt]" of a "complete application," *id*. 6111.30(G), as each event triggers distinct obligations and deadlines. Upon "receipt of an application," OEPA must "determine *if* it is complete," *id*. 6111.30(B) (emphasis added), as it did upon Rover's November 2015 submission. Thus, a submission need not be "complete" to be "an application."

[12] Congress has drawn this same distinction in other statutes, too. The Clean Air Act, for example, requires that the relevant permitting authority act on "a completed application" within "18 months after the date of receipt thereof." 42 U.S.C. 7661b(c). *See also, e.g.*, 22 U.S.C. 8753(d) ("License determinations for complete requests * * * shall be made not later than 90 days after receipt"); 42 U.S.C. 505(f) ("within 30 days after receipt of a complete application"); 42 U.S.C. 7651g(c)(2) ("within 6 months after receipt of a complete submission"); 20 U.S.C. 6364(f) ("90 days after receipt of the complete application"); 20 U.S.C. 1087-1(b)(3) ("after receipt of an accurate and complete request for payment").

"voluntary assistance," adjacent provision referring only to "assistance" included involuntary assistance). The CWA's reference to a "complete" application in Section 404 but not Section 401 thus confirms that *all* "requests" for certification—not just "complete" ones—start the clock toward waiver under Section 401.

C. The State's reading, moreover, would "defeat the purpose of the * * * statute." *MacLean*, 135 S.Ct. at 920. If OEPA decides when its one-year deadline starts, it is no deadline at all, and "the purpose of the waiver provision"—"to prevent a State from indefinitely delaying a federal licensing proceeding by failing to issue a timely water quality certification"—would be lost. *Alcoa*, 643 F.3d at 972. The State's rule could keep applicants in limbo, where an incomplete request never triggers the one-year clock that could lead to waiver and a state never acts on the request. The NGA was specifically designed to prevent states from "usurp[ing] FERC's control over whether and when a federal license will issue" in this way. *Hoopa Valley*, 913 F.3d at 1104.

The problem is not just, as the State puts it (at 37), that state standards may be "subjective." Subjectivity is a good start, though, given the malleability of OEPA's requirements. *E.g.*, R.C. 6111.30(A)(3) ("data sufficient to determine the existing aquatic life use"), (A)(4) (a "specific and detailed mitigation proposal"). The State's approach leaves no recourse if OEPA or a sister state's agency exploits such subjectivity to perpetually delay the waiver deadline. But even objective application requirements can unduly delay the application process. Under the State's theory, nothing would stop any state from imposing onerous or unwarranted requirements for submitting a Section 401 request without regard to (or even for the purpose of) delaying review.[13]

[13] This case illustrates the problem: OEPA deemed Rover's application incomplete because it did not include documents that Rover needed to obtain from *other* agencies—a jurisdictional determination letter and public notice from the U.S. Army Corps of Engineers. December 2015 Surrena Letter at 1-2. If states can refuse to process § 401 requests until other agencies have acted,

By contrast, there is no basis for the State's concern that under Rover's view of Section 401, applicants may force a state waiver by providing insufficient detail about the request. State Br. 37. Congress gave certifying authorities a powerful remedy: "If a state deems an application incomplete, it can simply deny the application without prejudice." *N.Y. State Dept. of Envtl. Conserv.*, 884 F.3d at 456. Likewise, "to the extent a state lacks sufficient information to act on a certification request, * * * it can deny certification." *Merced Irrigation Dist.*, 171 FERC ¶ 61,240, at P 32 (2020). The applicant can then either resubmit a new, stronger application package or challenge the denial in federal court. 15 U.S.C. 717r(d)(1). Either way, the process moves forward, free from the indefinite delay that the State's approach would countenance.[14]

D. In light of Section 401's plain text and purpose, it is little surprise that federal courts and agencies that have interpreted Section 401 have roundly dismissed the State's new litigation theory that only a "complete" request triggers the one-year deadline. This Court should reject the State's urging to create a split in authority.

Two federal courts of appeals have decided the issue. In *New York State Department of*

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they can unilaterally control the sequencing of the federal permitting process—"usurp[ing]" a role that the NGA delegates to FERC, not the states. *Hoopa Valley*, 913 F.3d at 1104; *see* 15 U.S.C. 717n(b)(2), (c).

[14] The State's concern that the plain text of § 401 could create line-drawing problems in extreme cases, State Br. 34, is better directed at Congress and also irrelevant. Rover's initial § 401 application is not part of the record because the State did not make its contents an issue until now—another reason to hold that the State forfeited this argument. While that application is no longer available on OEPA's website, the State has admitted that it includes detailed information identifying the activity for which Rover sought certification, including "[d]escriptions, schematics, and appropriate economic information of the applicant's preferred, non-degradation and minimal degradation alternatives for design and operation of the activity," in addition to seven other categories of documents requested by the State. December 2015 Surrena Letter at 1-2. The request was nothing like an "email" or a "flyer slipped under an Ohio EPA employee's door." State Br. 34. The State recognized the application as an application, on the State's required form, and acknowledged receipt. December 2015 Surrena Letter at 1-2. While other cases may raise harder line-drawing questions, those questions must be answered based on the text and ordinary meaning of the statute, not avoided by adding words to the statute as the State suggests.

Environmental Conservation, the Second Circuit expressly rejected the theory that the clock starts "only once" the State "deems an application 'complete.'" 884 F.3d at 455. The panel held that Section 401's "plain language * * * outlines a bright-line rule regarding the beginning of review": it starts with the state's "'receipt of [a] request,'" not "when state agencies decide that they have all the information they need." *Id.* at 455-456. The panel thus found that a state agency had waived its rights under Section 401 by failing to act within a year after the agency "received" the applicant's "application for a water quality certification," even though the agency "deemed the application incomplete." *Id.* at 453, 456. Similarly, in *California v. FERC*, 966 F.2d 1541 (9th Cir.1992), the Ninth Circuit found this same interpretation "fully consistent with the letter and intent" of the CWA, *id*. at 1554. The panel thus upheld FERC's waiver finding based on the date the applicant's Section 401 request was submitted, even though the record "d[id] not reveal when, if ever, [the agency] accepted th[e] request for processing." *Id.* at 1552-1554.

The relevant federal agencies have each reached the same conclusion. U.S. EPA—which administers the CWA, 33 U.S.C. 1251(d), and has authority to interpret it, *see Chem. Mfrs. Assn.*, 470 U.S. at 125—recently codified a new Section 401 Certification Rule providing that "the statutory timeline for certification review starts when the certifying authority receives a 'certification request,' rather than when the certifying authority receives a 'complete application' or 'complete request' as determined by the certifying authority." EPA Rule, 85 Fed. Reg. at 42,243. That recent codification is in line with FERC's longstanding approach. As in *California*, FERC—the agency empowered to establish "deadlines" for the federal licensing process at issue in this case, 15 U.S.C. 717n(b)—has "consistently found that the one-year waiver period begins when the certifying agency receives the request for water quality certification," and *not* when the certifying agency decides the request is "complete." *In re FFP Missouri 15, LLC*, 162 FERC ¶ 61,237, at P 11

(2018).[15] FERC's regulations thus provide that "[a] certifying agency is deemed to have waived the certification requirements of section 401(a)(1) of the [CWA] if the certifying agency has not denied or granted certification by one year after the date the certifying agency received a written request for certification." 18 C.F.R. 4.34(b)(5)(iii).

U.S. EPA's rule postdates OEPA's waiver. State Br. 36. But it does not replace a contrary rule. Rather, as U.S. EPA's "*interpretation*" of Section 401, "whatever its form," that view "merit[s] some deference * * * given the [agency's] specialized experience" and "the value of uniformity in its administrative and judicial understandings of what a national law requires." *United States v. Mead Corp.*, 533 U.S. 218, 234 (2001) (emphasis added; quotation marks omitted). Here, U.S. EPA made clear that its interpretation follows from "the text of the CWA," 85 Fed. Reg. at 42,243, and merely clarifies how the statute has always operated. "Neither the proposal nor the final rule shortened the timeframe for certification." *Id.* at 42,262. They "provide exactly the same timeframe as the statute." *Id.* The rule merely reflects the agency's recognition that the statute "does not use the term 'complete application,'" *id.* at 42,245, and "a project proponent's failure to provide additional information does not prevent" the agency "from taking action on a certification request," *id.* at 42,273, including by "deny[ing]" the request, *id.* at 42,246.

That well-reasoned and "common-sense interpretation" by the agency charged with administering the statute has "persuasive value" even if the rule itself postdates, and therefore "is not dispositive of," the "present case" directly. *Osorio v. State Farm Bank, F.S.B.*, 746 F.3d 1242,

[15] *See also, e.g.*, *Pac. Gas & Elec. Co.*, 170 FERC ¶ 61,232, at P 5, fn. 10 (2020) ("it is clear that a state agency's one-year review period begins with the agency's receipt of an application for water quality certification and not from a date that the agency deems the application complete"); *Wyo. Valley Hydro Partners*, 58 FERC ¶ 61219, 61694 (1992) ("The one-year period begins when the certifying agency receives the request for certification. As a result, it is no longer necessary for [FERC] to determine whether the various state filing requirements have been met.").

1256 (11th Cir.2014). And FERC's consistent "administrative usage" of the term "request" for decades further "confirms" the "everyday sense of the term." *S.D. Warren Co.*, 547 U.S. at 378.

Against this authority, the State cites no case that agrees with its attempted end-run around waiver. The best it can muster is a poorly reasoned, decade-old case that never decided the issue, but instead found the CWA "ambiguous" and thus "defer[red]" to (rather than *agreed* with) an inapposite U.S. Army Corps of Engineers regulation that purported to interpret the statute. *AES Sparrows Point LNG v. Wilson*, 589 F.3d 721, 729 (4th Cir.2009). *AES Sparrows* involved a certification request made in support of a liquefied natural gas marine import terminal that had to be approved both by FERC, as lead agency under the NGA, and by the Corps, which issues dredge and fill permits under Section 404 of the CWA. *Id.* at 724. Both approvals may trigger the need for a Section 401 certification, and neither agency has any more authority than the other to administer Section 401, yet the Fourth Circuit never explained why it looked to the Corps—rather than FERC or U.S. EPA—to interpret Section 401.

Regardless, whatever deference the Corps may have been due in *AES Sparrows*, that case is "distinguishable" where "the Corps' interpretation of the CWA is not at issue" in that the applicant "did not require an individual 404 permit and instead fell under a nationwide general permit." *Millennium Pipeline Co., L.L.C.*, 161 FERC ¶ 61,186, at P 31 (2017). That is precisely the case here. Rover proceeded under the same nationwide general permit applicable in *Millennium*, which made the Corps' regulation governing notice for individual permits inapplicable. *See* Request for Notice to Proceed with Construction, *Rover Pipeline LLC*, FERC Docket CP15-93, submittal 20170221-5030, at 3-119. The only relevant agencies here—FERC and U.S. EPA—have each rejected the State's interpretation by regulation, *see supra*, at 45-46, so any deference to federal

agencies favors Defendants-Appellees, not the State.[16]

E. In any event, accepting the State's theory would not change the outcome. The State has still waived the water quality standards it seeks to enforce, for two independent reasons.

First, even under the State's self-imposed standards, its Section 401 certification was still untimely. Accepting *arguendo* the State's broad view of its authority to set procedures for submitting and processing Section 401 requests, OEPA must at least comply with its own procedures. The State's failure to meet even its own internal deadlines is enough to establish waiver.

"Section 401 does not guarantee a State * * * a full year to act on a certification request, as the statute only grants as much time as is reasonable." EPA Rule, 85 Fed. Reg. at 42,211. Once the clock starts running, the state must act within a "reasonable period of time." 33 U.S.C. 1341(a)(1). The maximum time period "shall not exceed one year," *id.*, but "[t]he certifying authority may be subject to a shorter period of time, provided it is reasonable," EPA Rule, 85 Fed. Reg. at 42,235. "Thus, while a full year is the absolute maximum, it does not preclude a finding of waiver prior to the passage of a full year." *Hoopa Valley*, 913 F.3d at 1104. Indeed, U.S. EPA "generally finds a state's waiver after only six months." *Id.*, citing 40 C.F.R. 121.16. The Corps

[16] Further, the Corps has declined to defend the regulation at issue in *AES Sparrows*, and that regulation is now superseded by the new U.S. EPA rule. Faced with the same question of statutory interpretation in *Millennium Pipeline*, the Corps expressly declined to "endorse the position taken by either side" and promised to "abide by [the] final determination [of] the Federal Courts * * * in th[at] case," 161 FERC ¶ 61,186, at P 31, fn. 54 (quotation marks omitted). When the federal courts spoke in that case, they rejected the state's theory that the clock starts "only once" the state "deems an application 'complete.'" *N.Y. State Dept. of Envtl. Conserv.*, 884 F.3d at 455-56. Apart from the Corps' stated willingness to follow that ruling, U.S. EPA's new rule is now binding on the Corps. Executive Order 13868 directs "each agency that issues permits or licenses subject to the certification requirements of section 401"—including the Corps—to "initiate a rulemaking to ensure their respective agencies' regulations are consistent with" the EPA's new rule. Exec. Order No. 13868 § 3(d) (Apr. 10, 2019). U.S. EPA thus recognizes that "other federal agencies that issue licenses or permits subject to the certification requirements of section 401 are expected to ensure that any regulations governing their own processing, disposition, and enforcement of section 401 certifications are consistent with the EPA's final regulations." EPA Rule, 85 Fed. Reg. at 42,214.

regulation that the State asks this Court to follow (State Br. 34) is even stricter: Once the Corps receives a "valid request," the agency ordinarily must act on it "within sixty days." 33 C.F.R. 325.2(b)(1)(ii).

The Ohio statute on which the State relies here likewise gives OEPA less than a full year to act on a Section 401 request. It requires OEPA to "issue or deny" a Section 401 certification "not later than one hundred eighty days" (or six months) after receipt of a "complete application." R.C. 6111.30(G). The statute thus reflects the legislature's judgment that six months is a "reasonable period of time" to act on a Section 401 certification request. 33 U.S.C. 1341(a)(1). While a full year might be warranted to respond to an *incomplete* application—to allow time for submission of any missing materials—the State has identified *no* state or federal agency that allows a full year from the time an application is deemed complete. If the State wants authority to fill gaps in Section 401, *see* State Br. 33, it must at least meet its own standards. It cannot mix and match.

If the State is right that completeness starts the clock, OEPA missed its own 180-day time limit to act on a "complete" Section 401 request under R.C. 6111.30(G). As OEPA acknowledged receipt of Rover's "complete" application in July 2016, *see* State Br. 38, this deadline would have expired in January 2017. OEPA's February 24, 2017 issuance of a water-quality certificate was therefore untimely even under the State's theory.

Second, even if the State's Section 401 certification were considered timely, it did not include any of the effluent limitations or other requirements that the State now wants to enforce. *Compare* Rover MTD Ex. H (OEPA decision) at 62-70, *with* TAC ¶¶ 98-149 (Counts 1-6). The submission of a timely certification merely preserves the State's authority to enforce the specific limitations included *in that certification*. As already explained, Section 401(d) states in "manda-

tory" terms, App. Op. ¶¶ 22-23, that the agency "*shall*" include "*any*" limitations it deems "necessary" to meet state and federal requirements. 33 U.S.C. 1341(d) (emphases added). Limitations not included in OEPA's certification—which covers each limitation that the State seeks to enforce here—would therefore be waived regardless of whether the certification is timely.

CONCLUSION

For the foregoing reasons, this Court should reject the State's interpretation of Section 401 and affirm dismissal of this case.

Respectfully submitted,

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APPENDIX

Selected Statutes and Regulations

Contents:

ments of subchapter VI of this chapter relating to the application of section 1372 of this title are inconsistent with the purposes of this section.

(f) Authorization of appropriations

(1) In general

There is authorized to be appropriated to carry out this section $225,000,000 for each of fiscal years 2019 through 2020.

(2) Minimum allocations

To the extent there are sufficient eligible project applications, the Administrator shall ensure that a State uses not less than 20 percent of the amount of the grants made to the State under subsection (a) in a fiscal year to carry out projects to intercept, transport, control, treat, or reuse municipal combined sewer overflows, sanitary sewer overflows, or stormwater through the use of green infrastructure, water and energy efficiency improvements, and other environmentally innovative activities.

(g) Allocation of funds

(1) Fiscal year 2019

Subject to subsection (h), the Administrator shall use the amounts appropriated to carry out this section for fiscal year 2019 for making grants to municipalities and municipal entities under subsection (a)(2) in accordance with the criteria set forth in subsection (b).

(2) Fiscal year 2020 and thereafter

Subject to subsection (h), the Administrator shall use the amounts appropriated to carry out this section for fiscal year 2020 and each fiscal year thereafter for making grants to States under subsection (a)(1) in accordance with a formula to be established by the Administrator, after providing notice and an opportunity for public comment, that allocates to each State a proportional share of such amounts based on the total needs of the State for municipal combined sewer overflow controls, sanitary sewer overflow controls, and stormwater identified in the most recent detailed estimate and comprehensive study submitted pursuant to section 1375 of this title and any other information the Administrator considers appropriate.

(h) Administrative expenses

Of the amounts appropriated to carry out this section for each fiscal year—

(1) the Administrator may retain an amount not to exceed 1 percent for the reasonable and necessary costs of administering this section; and

(2) the Administrator, or a State, may retain an amount not to exceed 4 percent of any grant made to a municipality or municipal entity under subsection (a), for the reasonable and necessary costs of administering the grant.

(i) Reports

Not later than December 31, 2003, and periodically thereafter, the Administrator shall transmit to Congress a report containing recommended funding levels for grants under this section. The recommended funding levels shall be sufficient to ensure the continued expeditious implementation of municipal combined sewer overflow and sanitary sewer overflow controls nationwide.

(June 30, 1948, ch. 758, title II, §221, as added Pub. L. 106–554, §1(a)(4) [div. B, title I, §112(c)], Dec. 21, 2000, 114 Stat. 2763, 2763A–225; amended Pub. L. 115–270, title IV, §4106, Oct. 23, 2018, 132 Stat. 3875.)

AMENDMENTS

2018—Pub. L. 115–270, §4106(1), substituted ''Sewer overflow and stormwater reuse municipal grants'' for ''Sewer overflow control grants'' in section catchline.

Subsec. (a). Pub. L. 115–270, §4106(2), amended subsec. (a) generally. Prior to amendment, subsec. (a) related to purposes for making sewer overflow control grants to States, municipalities, and municipal entities.

Subsec. (e). Pub. L. 115–270, §4106(3), amended subsec. (e) generally. Prior to amendment, text read as follows: ''If a project receives grant assistance under subsection (a) and loan assistance from a State water pollution control revolving fund and the loan assistance is for 15 percent or more of the cost of the project, the project may be administered in accordance with State water pollution control revolving fund administrative reporting requirements for the purposes of streamlining such requirements.''

Subsec. (f). Pub. L. 115–270, §4106(4), amended subsec. (f) generally. Prior to amendment, text read as follows: ''There is authorized to be appropriated to carry out this section $750,000,000 for each of fiscal years 2002 and 2003. Such sums shall remain available until expended.''

Subsec. (g). Pub. L. 115–270, §4106(5), amended subsec. (g) generally. Prior to amendment, subsec. (g) related to allocation of funds.

INFORMATION ON CSOS AND SSOS

Pub. L. 106–554, §1(a)(4) [div. B, title I, §112(d)], Dec. 21, 2000, 114 Stat. 2763, 2763A–227, provided that:

''(1) REPORT TO CONGRESS.—Not later than 3 years after the date of enactment of this Act [Dec. 21, 2000], the Administrator of the Environmental Protection Agency shall transmit to Congress a report summarizing—

''(A) the extent of the human health and environmental impacts caused by municipal combined sewer overflows and sanitary sewer overflows, including the location of discharges causing such impacts, the volume of pollutants discharged, and the constituents discharged;

''(B) the resources spent by municipalities to address these impacts; and

''(C) an evaluation of the technologies used by municipalities to address these impacts.

''(2) TECHNOLOGY CLEARINGHOUSE.—After transmitting a report under paragraph (1), the Administrator shall maintain a clearinghouse of cost-effective and efficient technologies for addressing human health and environmental impacts due to municipal combined sewer overflows and sanitary sewer overflows.''

SUBCHAPTER III—STANDARDS AND ENFORCEMENT

§ 1311. Effluent limitations

(a) Illegality of pollutant discharges except in compliance with law

Except as in compliance with this section and sections 1312, 1316, 1317, 1328, 1342, and 1344 of this title, the discharge of any pollutant by any person shall be unlawful.

(b) Timetable for achievement of objectives

In order to carry out the objective of this chapter there shall be achieved—

(1)(A) not later than July 1, 1977, effluent limitations for point sources, other than publicly owned treatment works, (i) which shall require the application of the best practicable control technology currently available as defined by the Administrator pursuant to section 1314(b) of this title, or (ii) in the case of a discharge into a publicly owned treatment works which meets the requirements of subparagraph (B) of this paragraph, which shall require compliance with any applicable pretreatment requirements and any requirements under section 1317 of this title; and

(B) for publicly owned treatment works in existence on July 1, 1977, or approved pursuant to section 1283 of this title prior to June 30, 1974 (for which construction must be completed within four years of approval), effluent limitations based upon secondary treatment as defined by the Administrator pursuant to section 1314(d)(1) of this title; or,

(C) not later than July 1, 1977, any more stringent limitation, including those necessary to meet water quality standards, treatment standards, or schedules of compliance, established pursuant to any State law or regulations (under authority preserved by section 1370 of this title) or any other Federal law or regulation, or required to implement any applicable water quality standard established pursuant to this chapter.

(2)(A) for pollutants identified in subparagraphs (C), (D), and (F) of this paragraph, effluent limitations for categories and classes of point sources, other than publicly owned treatment works, which (i) shall require application of the best available technology economically achievable for such category or class, which will result in reasonable further progress toward the national goal of eliminating the discharge of all pollutants, as determined in accordance with regulations issued by the Administrator pursuant to section 1314(b)(2) of this title, which such effluent limitations shall require the elimination of discharges of all pollutants if the Administrator finds, on the basis of information available to him (including information developed pursuant to section 1325 of this title), that such elimination is technologically and economically achievable for a category or class of point sources as determined in accordance with regulations issued by the Administrator pursuant to section 1314(b)(2) of this title, or (ii) in the case of the introduction of a pollutant into a publicly owned treatment works which meets the requirements of subparagraph (B) of this paragraph, shall require compliance with any applicable pretreatment requirements and any other requirement under section 1317 of this title;

(B) Repealed. Pub. L. 97–117, § 21(b), Dec. 29, 1981, 95 Stat. 1632.

(C) with respect to all toxic pollutants referred to in table 1 of Committee Print Numbered 95–30 of the Committee on Public Works and Transportation of the House of Representatives compliance with effluent limitations in accordance with subparagraph (A) of this paragraph as expeditiously as practicable but in no case later than three years after the date such limitations are promulgated under section 1314(b) of this title, and in no case later than March 31, 1989;

(D) for all toxic pollutants listed under paragraph (1) of subsection (a) of section 1317 of this title which are not referred to in subparagraph (C) of this paragraph compliance with effluent limitations in accordance with subparagraph (A) of this paragraph as expeditiously as practicable, but in no case later than three years after the date such limitations are promulgated under section 1314(b) of this title, and in no case later than March 31, 1989;

(E) as expeditiously as practicable but in no case later than three years after the date such limitations are promulgated under section 1314(b) of this title, and in no case later than March 31, 1989, compliance with effluent limitations for categories and classes of point sources, other than publicly owned treatment works, which in the case of pollutants identified pursuant to section 1314(a)(4) of this title shall require application of the best conventional pollutant control technology as determined in accordance with regulations issued by the Administrator pursuant to section 1314(b)(4) of this title; and

(F) for all pollutants (other than those subject to subparagraphs (C), (D), or (E) of this paragraph) compliance with effluent limitations in accordance with subparagraph (A) of this paragraph as expeditiously as practicable but in no case later than 3 years after the date such limitations are established, and in no case later than March 31, 1989.

(3)(A) for effluent limitations under paragraph (1)(A)(i) of this subsection promulgated after January 1, 1982, and requiring a level of control substantially greater or based on fundamentally different control technology than under permits for an industrial category issued before such date, compliance as expeditiously as practicable but in no case later than three years after the date such limitations are promulgated under section 1314(b) of this title, and in no case later than March 31, 1989; and

(B) for any effluent limitation in accordance with paragraph (1)(A)(i), (2)(A)(i), or (2)(E) of this subsection established only on the basis of section 1342(a)(1) of this title in a permit issued after February 4, 1987, compliance as expeditiously as practicable but in no case later than three years after the date such limitations are established, and in no case later than March 31, 1989.

(c) Modification of timetable

The Administrator may modify the requirements of subsection (b)(2)(A) of this section with respect to any point source for which a permit application is filed after July 1, 1977, upon a showing by the owner or operator of such point source satisfactory to the Administrator that such modified requirements (1) will represent the maximum use of technology within the economic capability of the owner or operator; and (2) will result in reasonable further progress toward the elimination of the discharge of pollutants.

(d) Review and revision of effluent limitations

Any effluent limitation required by paragraph (2) of subsection (b) of this section shall be reviewed at least every five years and, if appropriate, revised pursuant to the procedure established under such paragraph.

(e) All point discharge source application of effluent limitations

Effluent limitations established pursuant to this section or section 1312 of this title shall be applied to all point sources of discharge of pollutants in accordance with the provisions of this chapter.

(f) Illegality of discharge of radiological, chemical, or biological warfare agents, high-level radioactive waste, or medical waste

Notwithstanding any other provisions of this chapter it shall be unlawful to discharge any radiological, chemical, or biological warfare agent, any high-level radioactive waste, or any medical waste, into the navigable waters.

(g) Modifications for certain nonconventional pollutants

(1) General authority

The Administrator, with the concurrence of the State, may modify the requirements of subsection (b)(2)(A) of this section with respect to the discharge from any point source of ammonia, chlorine, color, iron, and total phenols (4AAP) (when determined by the Administrator to be a pollutant covered by subsection (b)(2)(F)) and any other pollutant which the Administrator lists under paragraph (4) of this subsection.

(2) Requirements for granting modifications

A modification under this subsection shall be granted only upon a showing by the owner or operator of a point source satisfactory to the Administrator that—

(A) such modified requirements will result at a minimum in compliance with the requirements of subsection (b)(1)(A) or (C) of this section, whichever is applicable;

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

(C) such modification will not interfere with the attainment or maintenance of that water quality which shall assure protection of public water supplies, and the protection and propagation of a balanced population of shellfish, fish, and wildlife, and allow recreational activities, in and on the water and such modification will not result in the discharge of pollutants in quantities which may reasonably be anticipated to pose an unacceptable risk to human health or the environment because of bioaccumulation, persistency in the environment, acute toxicity, chronic toxicity (including carcinogenicity, mutagenicity or teratogenicity), or synergistic propensities.

(3) Limitation on authority to apply for subsection (c) modification

If an owner or operator of a point source applies for a modification under this subsection with respect to the discharge of any pollutant, such owner or operator shall be eligible to apply for modification under subsection (c) of this section with respect to such pollutant only during the same time period as he is eligible to apply for a modification under this subsection.

(4) Procedures for listing additional pollutants

(A) General authority

Upon petition of any person, the Administrator may add any pollutant to the list of pollutants for which modification under this section is authorized (except for pollutants identified pursuant to section 1314(a)(4) of this title, toxic pollutants subject to section 1317(a) of this title, and the thermal component of discharges) in accordance with the provisions of this paragraph.

(B) Requirements for listing

(i) Sufficient information

The person petitioning for listing of an additional pollutant under this subsection shall submit to the Administrator sufficient information to make the determinations required by this subparagraph.

(ii) Toxic criteria determination

The Administrator shall determine whether or not the pollutant meets the criteria for listing as a toxic pollutant under section 1317(a) of this title.

(iii) Listing as toxic pollutant

If the Administrator determines that the pollutant meets the criteria for listing as a toxic pollutant under section 1317(a) of this title, the Administrator shall list the pollutant as a toxic pollutant under section 1317(a) of this title.

(iv) Nonconventional criteria determination

If the Administrator determines that the pollutant does not meet the criteria for listing as a toxic pollutant under such section and determines that adequate test methods and sufficient data are available to make the determinations required by paragraph (2) of this subsection with respect to the pollutant, the Administrator shall add the pollutant to the list of pollutants specified in paragraph (1) of this subsection for which modifications are authorized under this subsection.

(C) Requirements for filing of petitions

A petition for listing of a pollutant under this paragraph—

(i) must be filed not later than 270 days after the date of promulgation of an applicable effluent guideline under section 1314 of this title;

(ii) may be filed before promulgation of such guideline; and

(iii) may be filed with an application for a modification under paragraph (1) with respect to the discharge of such pollutant.

(D) Deadline for approval of petition

A decision to add a pollutant to the list of pollutants for which modifications under this subsection are authorized must be made

within 270 days after the date of promulgation of an applicable effluent guideline under section 1314 of this title.

(E) Burden of proof

The burden of proof for making the determinations under subparagraph (B) shall be on the petitioner.

(5) Removal of pollutants

The Administrator may remove any pollutant from the list of pollutants for which modifications are authorized under this subsection if the Administrator determines that adequate test methods and sufficient data are no longer available for determining whether or not modifications may be granted with respect to such pollutant under paragraph (2) of this subsection.

(h) Modification of secondary treatment requirements

The Administrator, with the concurrence of the State, may issue a permit under section 1342 of this title which modifies the requirements of subsection (b)(1)(B) of this section with respect to the discharge of any pollutant from a publicly owned treatment works into marine waters, if the applicant demonstrates to the satisfaction of the Administrator that—

(1) there is an applicable water quality standard specific to the pollutant for which the modification is requested, which has been identified under section 1314(a)(6) of this title;

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

(3) the applicant has established a system for monitoring the impact of such discharge on a representative sample of aquatic biota, to the extent practicable, and the scope of such monitoring is limited to include only those scientific investigations which are necessary to study the effects of the proposed discharge;

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

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

(6) in the case of any treatment works serving a population of 50,000 or more, with respect to any toxic pollutant introduced into such works by an industrial discharger for which pollutant there is no applicable pretreatment requirement in effect, sources introducing waste into such works are in compliance with all applicable pretreatment requirements, the applicant will enforce such requirements, and the applicant has in effect a pretreatment program which, in combination with the treatment of discharges from such works, removes the same amount of such pollutant as would be removed if such works were to apply secondary treatment to discharges and if such works had no pretreatment program with respect to such pollutant;

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

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

(9) the applicant at the time such modification becomes effective will be discharging effluent which has received at least primary or equivalent treatment and which meets the criteria established under section 1314(a)(1) of this title after initial mixing in the waters surrounding or adjacent to the point at which such effluent is discharged.

For the purposes of this subsection the phrase ''the discharge of any pollutant into marine waters'' refers to a discharge into deep waters of the territorial sea or the waters of the contiguous zone, or into saline estuarine waters where there is strong tidal movement and other hydrological and geological characteristics which the Administrator determines necessary to allow compliance with paragraph (2) of this subsection, and section 1251(a)(2) of this title. For the purposes of paragraph (9), ''primary or equivalent treatment'' means treatment by screening, sedimentation, and skimming adequate to remove at least 30 percent of the biological oxygen demanding material and of the suspended solids in the treatment works influent, and disinfection, where appropriate. A municipality which applies secondary treatment shall be eligible to receive a permit pursuant to this subsection which modifies the requirements of subsection (b)(1)(B) of this section with respect to the discharge of any pollutant from any treatment works owned by such municipality into marine waters. No permit issued under this subsection shall authorize the discharge of sewage sludge into marine waters. In order for a permit to be issued under this subsection for the discharge of a pollutant into marine waters, such marine waters must exhibit characteristics assuring that water providing dilution does not contain significant amounts of previously discharged effluent from such treatment works. No permit issued under this subsection shall authorize the discharge of any pollutant into saline estuarine waters which at the time of application do not support a balanced indigenous population of shellfish, fish and wildlife, or allow recreation in and on the waters or which exhibit ambient water quality below applicable water quality standards adopted for the protection of public water supplies, shellfish, fish and wildlife or recreational activities or such other standards necessary to assure support and protection of such uses. The prohibition contained in the preceding sentence shall apply without regard to the presence or absence of a causal relationship between such characteristics and the applicant's current or proposed discharge. Notwithstanding any other provisions of this subsection, no permit may be issued under this subsection for discharge of a pollutant into the New

York Bight Apex consisting of the ocean waters of the Atlantic Ocean westward of 73 degrees 30 minutes west longitude and northward of 40 degrees 10 minutes north latitude.

(i) Municipal time extensions

(1) Where construction is required in order for a planned or existing publicly owned treatment works to achieve limitations under subsection (b)(1)(B) or (b)(1)(C) of this section, but (A) construction cannot be completed within the time required in such subsection, or (B) the United States has failed to make financial assistance under this chapter available in time to achieve such limitations by the time specified in such subsection, the owner or operator of such treatment works may request the Administrator (or if appropriate the State) to issue a permit pursuant to section 1342 of this title or to modify a permit issued pursuant to that section to extend such time for compliance. Any such request shall be filed with the Administrator (or if appropriate the State) within 180 days after February 4, 1987. The Administrator (or if appropriate the State) may grant such request and issue or modify such a permit, which shall contain a schedule of compliance for the publicly owned treatment works based on the earliest date by which such financial assistance will be available from the United States and construction can be completed, but in no event later than July 1, 1988, and shall contain such other terms and conditions, including those necessary to carry out subsections (b) through (g) of section 1281 of this title, section 1317 of this title, and such interim effluent limitations applicable to that treatment works as the Administrator determines are necessary to carry out the provisions of this chapter.

(2)(A) Where a point source (other than a publicly owned treatment works) will not achieve the requirements of subsections (b)(1)(A) and (b)(1)(C) of this section and—

(i) if a permit issued prior to July 1, 1977, to such point source is based upon a discharge into a publicly owned treatment works; or

(ii) if such point source (other than a publicly owned treatment works) had before July 1, 1977, a contract (enforceable against such point source) to discharge into a publicly owned treatment works; or

(iii) if either an application made before July 1, 1977, for a construction grant under this chapter for a publicly owned treatment works, or engineering or architectural plans or working drawings made before July 1, 1977, for a publicly owned treatment works, show that such point source was to discharge into such publicly owned treatment works,

and such publicly owned treatment works is presently unable to accept such discharge without construction, and in the case of a discharge to an existing publicly owned treatment works, such treatment works has an extension pursuant to paragraph (1) of this subsection, the owner or operator of such point source may request the Administrator (or if appropriate the State) to issue or modify such a permit pursuant to such section 1342 of this title to extend such time for compliance. Any such request shall be filed with the Administrator (or if appropriate the State) within 180 days after December 27, 1977, or the filing of a request by the appropriate publicly owned treatment works under paragraph (1) of this subsection, whichever is later. If the Administrator (or if appropriate the State) finds that the owner or operator of such point source has acted in good faith, he may grant such request and issue or modify such a permit, which shall contain a schedule of compliance for the point source to achieve the requirements of subsections (b)(1)(A) and (C) of this section and shall contain such other terms and conditions, including pretreatment and interim effluent limitations and water conservation requirements applicable to that point source, as the Administrator determines are necessary to carry out the provisions of this chapter.

(B) No time modification granted by the Administrator (or if appropriate the State) pursuant to paragraph (2)(A) of this subsection shall extend beyond the earliest date practicable for compliance or beyond the date of any extension granted to the appropriate publicly owned treatment works pursuant to paragraph (1) of this subsection, but in no event shall it extend beyond July 1, 1988; and no such time modification shall be granted unless (i) the publicly owned treatment works will be in operation and available to the point source before July 1, 1988, and will meet the requirements of subsections (b)(1)(B) and (C) of this section after receiving the discharge from that point source; and (ii) the point source and the publicly owned treatment works have entered into an enforceable contract requiring the point source to discharge into the publicly owned treatment works, the owner or operator of such point source to pay the costs required under section 1284 of this title, and the publicly owned treatment works to accept the discharge from the point source; and (iii) the permit for such point source requires that point source to meet all requirements under section 1317(a) and (b) of this title during the period of such time modification.

(j) Modification procedures

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

(A) subsection (b)(1)(B) under subsection (h) of this section shall be filed not later that[1] the 365th day which begins after December 29, 1981, except that a publicly owned treatment works which prior to December 31, 1982, had a contractual arrangement to use a portion of the capacity of an ocean outfall operated by another publicly owned treatment works which has applied for or received modification under subsection (h), may apply for a modification of subsection (h) in its own right not later than 30 days after February 4, 1987, and except as provided in paragraph (5);

(B) subsection (b)(2)(A) as it applies to pollutants identified in subsection (b)(2)(F) shall be filed not later than 270 days after the date of promulgation of an applicable effluent guideline under section 1314 of this title or not later than 270 days after December 27, 1977, whichever is later.

(2) Subject to paragraph (3) of this section, any application for a modification filed under

[1] So in original. Probably should be ''than''.

subsection (g) of this section shall not operate to stay any requirement under this chapter, unless in the judgment of the Administrator such a stay or the modification sought will not result in the discharge of pollutants in quantities which may reasonably be anticipated to pose an unacceptable risk to human health or the environment because of bioaccumulation, persistency in the environment, acute toxicity, chronic toxicity (including carcinogenicity, mutagenicity, or teratogenicity), or synergistic propensities, and that there is a substantial likelihood that the applicant will succeed on the merits of such application. In the case of an application filed under subsection (g) of this section, the Administrator may condition any stay granted under this paragraph on requiring the filing of a bond or other appropriate security to assure timely compliance with the requirements from which a modification is sought.

(3) COMPLIANCE REQUIREMENTS UNDER SUBSECTION (g).—

(A) EFFECT OF FILING.—An application for a modification under subsection (g) and a petition for listing of a pollutant as a pollutant for which modifications are authorized under such subsection shall not stay the requirement that the person seeking such modification or listing comply with effluent limitations under this chapter for all pollutants not the subject of such application or petition.

(B) EFFECT OF DISAPPROVAL.—Disapproval of an application for a modification under subsection (g) shall not stay the requirement that the person seeking such modification comply with all applicable effluent limitations under this chapter.

(4) DEADLINE FOR SUBSECTION (g) DECISION.—An application for a modification with respect to a pollutant filed under subsection (g) must be approved or disapproved not later than 365 days after the date of such filing; except that in any case in which a petition for listing such pollutant as a pollutant for which modifications are authorized under such subsection is approved, such application must be approved or disapproved not later than 365 days after the date of approval of such petition.

(5) EXTENSION OF APPLICATION DEADLINE.—

(A) IN GENERAL.—In the 180-day period beginning on October 31, 1994, the city of San Diego, California, may apply for a modification pursuant to subsection (h) of the requirements of subsection (b)(1)(B) with respect to biological oxygen demand and total suspended solids in the effluent discharged into marine waters.

(B) APPLICATION.—An application under this paragraph shall include a commitment by the applicant to implement a waste water reclamation program that, at a minimum, will—

(i) achieve a system capacity of 45,000,000 gallons of reclaimed waste water per day by January 1, 2010; and

(ii) result in a reduction in the quantity of suspended solids discharged by the applicant into the marine environment during the period of the modification.

(C) ADDITIONAL CONDITIONS.—The Administrator may not grant a modification pursuant to an application submitted under this paragraph unless the Administrator determines that such modification will result in removal of not less than 58 percent of the biological oxygen demand (on an annual average) and not less than 80 percent of total suspended solids (on a monthly average) in the discharge to which the application applies.

(D) PRELIMINARY DECISION DEADLINE.—The Administrator shall announce a preliminary decision on an application submitted under this paragraph not later than 1 year after the date the application is submitted.

(k) Innovative technology

In the case of any facility subject to a permit under section 1342 of this title which proposes to comply with the requirements of subsection (b)(2)(A) or (b)(2)(E) of this section by replacing existing production capacity with an innovative production process which will result in an effluent reduction significantly greater than that required by the limitation otherwise applicable to such facility and moves toward the national goal of eliminating the discharge of all pollutants, or with the installation of an innovative control technique that has a substantial likelihood for enabling the facility to comply with the applicable effluent limitation by achieving a significantly greater effluent reduction than that required by the applicable effluent limitation and moves toward the national goal of eliminating the discharge of all pollutants, or by achieving the required reduction with an innovative system that has the potential for significantly lower costs than the systems which have been determined by the Administrator to be economically achievable, the Administrator (or the State with an approved program under section 1342 of this title, in consultation with the Administrator) may establish a date for compliance under subsection (b)(2)(A) or (b)(2)(E) of this section no later than two years after the date for compliance with such effluent limitation which would otherwise be applicable under such subsection, if it is also determined that such innovative system has the potential for industrywide application.

***(l)* Toxic pollutants**

Other than as provided in subsection (n) of this section, the Administrator may not modify any requirement of this section as it applies to any specific pollutant which is on the toxic pollutant list under section 1317(a)(1) of this title.

(m) Modification of effluent limitation requirements for point sources

(1) The Administrator, with the concurrence of the State, may issue a permit under section 1342 of this title which modifies the requirements of subsections (b)(1)(A) and (b)(2)(E) of this section, and of section 1343 of this title, with respect to effluent limitations to the extent such limitations relate to biochemical oxygen demand and pH from discharges by an industrial discharger in such State into deep waters of the territorial seas, if the applicant demonstrates and the Administrator finds that—

(A) the facility for which modification is sought is covered at the time of the enactment of this subsection by National Pollutant Discharge Elimination System permit number CA0005894 or CA0005282;

(B) the energy and environmental costs of meeting such requirements of subsections (b)(1)(A) and (b)(2)(E) and section 1343 of this title exceed by an unreasonable amount the benefits to be obtained, including the objectives of this chapter;

(C) the applicant has established a system for monitoring the impact of such discharges on a representative sample of aquatic biota;

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

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

(F) the discharge is into waters where there is strong tidal movement and other hydrological and geological characteristics which are necessary to allow compliance with this subsection and section 1251(a)(2) of this title;

(G) the applicant accepts as a condition to the permit a contractural[2] obligation to use funds in the amount required (but not less than $250,000 per year for ten years) for research and development of water pollution control technology, including but not limited to closed cycle technology;

(H) the facts and circumstances present a unique situation which, if relief is granted, will not establish a precedent or the relaxation of the requirements of this chapter applicable to similarly situated discharges; and

(I) no owner or operator of a facility comparable to that of the applicant situated in the United States has demonstrated that it would be put at a competitive disadvantage to the applicant (or the parent company or any subsidiary thereof) as a result of the issuance of a permit under this subsection.

(2) The effluent limitations established under a permit issued under paragraph (1) shall be sufficient to implement the applicable State water quality standards, to assure the protection of public water supplies and protection and propagation of a balanced, indigenous population of shellfish, fish, fauna, wildlife, and other aquatic organisms, and to allow recreational activities in and on the water. In setting such limitations, the Administrator shall take into account any seasonal variations and the need for an adequate margin of safety, considering the lack of essential knowledge concerning the relationship between effluent limitations and water quality and the lack of essential knowledge of the effects of discharges on beneficial uses of the receiving waters.

(3) A permit under this subsection may be issued for a period not to exceed five years, and such a permit may be renewed for one additional period not to exceed five years upon a demonstration by the applicant and a finding by the Administrator at the time of application for any such renewal that the provisions of this subsection are met.

(4) The Administrator may terminate a permit issued under this subsection if the Administrator determines that there has been a decline in ambient water quality of the receiving waters during the period of the permit even if a direct cause and effect relationship cannot be shown: *Provided*, That if the effluent from a source with a permit issued under this subsection is contributing to a decline in ambient water quality of the receiving waters, the Administrator shall terminate such permit.

(n) Fundamentally different factors

(1) General rule

The Administrator, with the concurrence of the State, may establish an alternative requirement under subsection (b)(2) or section 1317(b) of this title for a facility that modifies the requirements of national effluent limitation guidelines or categorical pretreatment standards that would otherwise be applicable to such facility, if the owner or operator of such facility demonstrates to the satisfaction of the Administrator that—

(A) the facility is fundamentally different with respect to the factors (other than cost) specified in section 1314(b) or 1314(g) of this title and considered by the Administrator in establishing such national effluent limitation guidelines or categorical pretreatment standards;

(B) the application—

(i) is based solely on information and supporting data submitted to the Administrator during the rulemaking for establishment of the applicable national effluent limitation guidelines or categorical pretreatment standard specifically raising the factors that are fundamentally different for such facility; or

(ii) is based on information and supporting data referred to in clause (i) and information and supporting data the applicant did not have a reasonable opportunity to submit during such rulemaking;

(C) the alternative requirement is no less stringent than justified by the fundamental difference; and

(D) the alternative requirement will not result in a non-water quality environmental impact which is markedly more adverse than the impact considered by the Administrator in establishing such national effluent limitation guideline or categorical pretreatment standard.

(2) Time limit for applications

An application for an alternative requirement which modifies the requirements of an effluent limitation or pretreatment standard under this subsection must be submitted to the Administrator within 180 days after the date on which such limitation or standard is established or revised, as the case may be.

(3) Time limit for decision

The Administrator shall approve or deny by final agency action an application submitted under this subsection within 180 days after the date such application is filed with the Administrator.

(4) Submission of information

The Administrator may allow an applicant under this subsection to submit information

[2] So in original. Probably should be ''contractual''.

and supporting data until the earlier of the date the application is approved or denied or the last day that the Administrator has to approve or deny such application.

(5) Treatment of pending applications

For the purposes of this subsection, an application for an alternative requirement based on fundamentally different factors which is pending on February 4, 1987, shall be treated as having been submitted to the Administrator on the 180th day following February 4, 1987. The applicant may amend the application to take into account the provisions of this subsection.

(6) Effect of submission of application

An application for an alternative requirement under this subsection shall not stay the applicant's obligation to comply with the effluent limitation guideline or categorical pretreatment standard which is the subject of the application.

(7) Effect of denial

If an application for an alternative requirement which modifies the requirements of an effluent limitation or pretreatment standard under this subsection is denied by the Administrator, the applicant must comply with such limitation or standard as established or revised, as the case may be.

(8) Reports

By January 1, 1997, and January 1 of every odd-numbered year thereafter, the Administrator shall submit to the Committee on Environment and Public Works of the Senate and the Committee on Transportation and Infrastructure of the House of Representatives a report on the status of applications for alternative requirements which modify the requirements of effluent limitations under section 1311 or 1314 of this title or any national categorical pretreatment standard under section 1317(b) of this title filed before, on, or after February 4, 1987.

(*o*) Application fees

The Administrator shall prescribe and collect from each applicant fees reflecting the reasonable administrative costs incurred in reviewing and processing applications for modifications submitted to the Administrator pursuant to subsections (c), (g), (i), (k), (m), and (n) of this section, section 1314(d)(4) of this title, and section 1326(a) of this title. All amounts collected by the Administrator under this subsection shall be deposited into a special fund of the Treasury entitled ''Water Permits and Related Services'' which shall thereafter be available for appropriation to carry out activities of the Environmental Protection Agency for which such fees were collected.

(p) Modified permit for coal remining operations

(1) In general

Subject to paragraphs (2) through (4) of this subsection, the Administrator, or the State in any case which the State has an approved permit program under section 1342(b) of this title, may issue a permit under section 1342 of this title which modifies the requirements of subsection (b)(2)(A) of this section with respect to the pH level of any pre-existing discharge, and with respect to pre-existing discharges of iron and manganese from the remined area of any coal remining operation or with respect to the pH level or level of iron or manganese in any pre-existing discharge affected by the remining operation. Such modified requirements shall apply the best available technology economically achievable on a case-by-case basis, using best professional judgment, to set specific numerical effluent limitations in each permit.

(2) Limitations

The Administrator or the State may only issue a permit pursuant to paragraph (1) if the applicant demonstrates to the satisfaction of the Administrator or the State, as the case may be, that the coal remining operation will result in the potential for improved water quality from the remining operation but in no event shall such a permit allow the pH level of any discharge, and in no event shall such a permit allow the discharges of iron and manganese, to exceed the levels being discharged from the remined area before the coal remining operation begins. No discharge from, or affected by, the remining operation shall exceed State water quality standards established under section 1313 of this title.

(3) Definitions

For purposes of this subsection—

(A) Coal remining operation

The term ''coal remining operation'' means a coal mining operation which begins after February 4, 1987 at a site on which coal mining was conducted before August 3, 1977.

(B) Remined area

The term ''remined area'' means only that area of any coal remining operation on which coal mining was conducted before August 3, 1977.

(C) Pre-existing discharge

The term ''pre-existing discharge'' means any discharge at the time of permit application under this subsection.

(4) Applicability of strip mining laws

Nothing in this subsection shall affect the application of the Surface Mining Control and Reclamation Act of 1977 [30 U.S.C. 1201 et seq.] to any coal remining operation, including the application of such Act to suspended solids.

(June 30, 1948, ch. 758, title III, § 301, as added Pub. L. 92–500, § 2, Oct. 18, 1972, 86 Stat. 844; amended Pub. L. 95–217, §§ 42–47, 53(c), Dec. 27, 1977, 91 Stat. 1582–1586, 1590; Pub. L. 97–117, §§ 21, 22(a)–(d), Dec. 29, 1981, 95 Stat. 1631, 1632; Pub. L. 97–440, Jan. 8, 1983, 96 Stat. 2289; Pub. L. 100–4, title III, §§ 301(a)–(e), 302(a)–(d), 303(a), (b)(1), (c)–(f), 304(a), 305, 306(a), (b), 307, Feb. 4, 1987, 101 Stat. 29–37; Pub. L. 100–688, title III, § 3202(b), Nov. 18, 1988, 102 Stat. 4154; Pub. L. 103–431, § 2, Oct. 31, 1994, 108 Stat. 4396; Pub. L. 104–66, title II, § 2021(b), Dec. 21, 1995, 109 Stat. 727.)

REFERENCES IN TEXT

The Surface Mining Control and Reclamation Act of 1977, referred to in subsec. (p)(4), is Pub. L. 95–87, Aug.

3, 1977, 91 Stat. 445, as amended, which is classified generally to chapter 25 (§ 1201 et seq.) of Title 30, Mineral Lands and Mining. For complete classification of this Act to the Code, see Short Title note set out under section 1201 of Title 30 and Tables.

AMENDMENTS

1995—Subsec. (n)(8). Pub. L. 104–66 substituted ''By January 1, 1997, and January 1 of every odd-numbered year thereafter, the Administrator shall submit to the Committee on Environment and Public Works of the Senate and the Committee on Transportation and Infrastructure'' for ''Every 6 months after February 4, 1987, the Administrator shall submit to the Committee on Environment and Public Works of the Senate and the Committee on Public Works and Transportation''.

1994—Subsec. (j)(1)(A). Pub. L. 103–431, § 2(1), inserted before semicolon at end '', and except as provided in paragraph (5)''.

Subsec. (j)(5). Pub. L. 103–431, § 2(2), added par. (5).

1988—Subsec. (f). Pub. L. 100–688 substituted '', any high-level radioactive waste, or any medical waste,'' for ''or high-level radioactive waste''.

1987—Subsec. (b)(2)(C). Pub. L. 100–4, § 301(a), struck out ''not later than July 1, 1984,'' before ''with respect'' and inserted ''as expeditiously as practicable but in no case later than three years after the date such limitations are promulgated under section 1314(b) of this title, and in no case later than March 31, 1989'' after ''of this paragraph''.

Subsec. (b)(2)(D). Pub. L. 100–4, § 301(b), substituted ''as expeditiously as practicable, but in no case later than three years after the date such limitations are promulgated under section 1314(b) of this title, and in no case later than March 31, 1989'' for ''not later than three years after the date such limitations are established''.

Subsec. (b)(2)(E). Pub. L. 100–4, § 301(c), substituted ''as expeditiously as practicable but in no case later than three years after the date such limitations are promulgated under section 1314(b) of this title, and in no case later than March 31, 1989, compliance with'' for ''not later than July 1, 1984,''.

Subsec. (b)(2)(F). Pub. L. 100–4, § 301(d), substituted ''as expeditiously as practicable but in no case'' for ''not'' and ''and in no case later than March 31, 1989'' for ''or not later than July 1, 1984, whichever is later, but in no case later than July 1, 1987''.

Subsec. (b)(3). Pub. L. 100–4, § 301(e), added par. (3).

Subsec. (g)(1). Pub. L. 100–4, § 302(a), substituted par. (1) for introductory provisions of former par. (1) which read as follows: ''The Administrator, with the concurrence of the State, shall modify the requirements of subsection (b)(2)(A) of this section with respect to the discharge of any pollutant (other than pollutants identified pursuant to section 1314(a)(4) of this title, toxic pollutants subject to section 1317(a) of this title, and the thermal component of discharges) from any point source upon a showing by the owner or operator of such point source satisfactory to the Administrator that—''. Subpars (A) to (C) of former par. (1) were redesignated as subpars. (A) to (C) of par. (2).

Subsec. (g)(2). Pub. L. 100–4, § 302(a), (d)(2), inserted introductory provisions of par. (2), and by so doing, redesignated subpars. (A) to (C) of former par. (1) as subpars. (A) to (C) of par. (2), realigned such subpars. with subpar. (A) of par. (4), and redesignated former par. (2) as (3).

Subsec. (g)(3). Pub. L. 100–4, § 302(a), (d)(1), redesignated former par. (2) as (3), inserted heading, and aligned par. (3) with par. (4).

Subsec. (g)(4), (5). Pub. L. 100–4, § 302(b), added pars. (4) and (5).

Subsec. (h). Pub. L. 100–4, § 303(d)(2), (e), in closing provisions, inserted provision defining ''primary or equivalent treatment'' for purposes of par. (9) and provisions placing limitations on issuance of permits for discharge of pollutant into marine waters and saline estuarine waters and prohibiting issuance of permit for discharge of pollutant into New York Bight Apex.

Subsec. (h)(2). Pub. L. 100–4, § 303(a), substituted ''the discharge of pollutants in accordance with such modified requirements will not interfere, alone or in combination with pollutants from other sources,'' for ''such modified requirements will not interfere''.

Subsec. (h)(3). Pub. L. 100–4, § 303(b)(1), inserted '', and the scope of such monitoring is limited to include only those scientific investigations which are necessary to study the effects of the proposed discharge'' before semicolon at end.

Subsec. (h)(6) to (9). Pub. L. 100–4, § 303(c), (d)(1), added par. (6), redesignated former pars. (6) and (7) as (7) and (8), respectively, substituted semicolon for period at end of par. (8), and added par. (9).

Subsec. (i)(1). Pub. L. 100–4, § 304(a), substituted ''February 4, 1987'' for ''December 27, 1977''.

Subsec. (j)(1)(A). Pub. L. 100–4, § 303(f), inserted before semicolon at end '', except that a publicly owned treatment works which prior to December 31, 1982, had a contractual arrangement to use a portion of the capacity of an ocean outfall operated by another publicly owned treatment works which has applied for or received modification under subsection (h), may apply for a modification of subsection (h) in its own right not later than 30 days after February 4, 1987''.

Subsec. (j)(2). Pub. L. 100–4, § 302(c)(1), substituted ''Subject to paragraph (3) of this section, any'' for ''Any''.

Subsec. (j)(3), (4). Pub. L. 100–4, § 302(c)(2), added pars. (3) and (4).

Subsec. (k). Pub. L. 100–4, § 305, substituted ''two years after the date for compliance with such effluent limitation which would otherwise be applicable under such subsection'' for ''July 1, 1987'' and inserted ''or (b)(2)(E)'' after ''(b)(2)(A)'' in two places.

Subsec. (*l*). Pub. L. 100–4, § 306(b), substituted ''Other than as provided in subsection (n) of this section, the'' for ''The''.

Subsecs. (n), (*o*). Pub. L. 100–4, § 306(a), added subsecs. (n) and (*o*).

Subsec. (p). Pub. L. 100–4, § 307, added subsec. (p).

1983—Subsec. (m). Pub. L. 97–440 added subsec. (m).

1981—Subsec. (b)(2)(B). Pub. L. 97–117, § 21(b), struck out subpar. (B) which required that, not later than July 1, 1983, compliance by all publicly owned treatment works with the requirements in section 1281(g)(2)(A) of this title be achieved.

Subsec. (h). Pub. L. 97–117, § 22(a) to (c), struck out in provision preceding par. (1) ''in an existing discharge'' after ''discharge of any pollutant'', struck out par. (8), which required the applicant to demonstrate to the satisfaction of the Administrator that any funds available to the owner of such treatment works under subchapter II of this chapter be used to achieve the degree of effluent reduction required by section 1281(b) and (g)(2)(A) of this title or to carry out the requirements of this subsection, and inserted in provision following par. (7) a further provision that a municipality which applies secondary treatment be eligible to receive a permit which modifies the requirements of subsec. (b)(1)(B) of this section with respect to the discharge of any pollutant from any treatment works owned by such municipality into marine waters and that no permit issued under this subsection authorize the discharge of sewage sludge into marine waters.

Subsec. (i)(1), (2)(B). Pub. L. 97–117, § 21(a), substituted ''July 1, 1988,'' for ''July 1, 1983,'' wherever appearing. Par. (2)(B) contained a reference to ''July 1, 1983;'' which was changed to ''July 1, 1988;'' as the probable intent of Congress in that reference to July 1, 1983, was to the outside date for compliance for a point source other than a publicly owned treatment works and subpar. (B) allows a time extension for such a point source up to the date granted in an extension for a publicly owned treatment works, which date was extended to July 1, 1988, by Pub. L. 97–117.

Subsec. (j)(1)(A). Pub. L. 97–117, § 22(d), substituted ''that the 365th day which begins after December 29, 1981'' for ''than 270 days after December 27, 1977''.

1977—Subsec. (b)(2)(A). Pub. L. 95–217, § 42(b), substituted ''for pollutants identified in subparagraphs (C),

(D), and (F) of this paragraph'' for ''not later than July 1, 1983''.

Subsec. (b)(2)(C) to (F). Pub. L. 95–217, § 42(a), added subpars. (C) to (F).

Subsec. (g). Pub. L. 95–217, § 43, added subsec. (g).

Subsec. (h). Pub. L. 95–217, § 44, added subsec. (h).

Subsec. (i). Pub. L. 95–217, § 45, added subsec. (i).

Subsec. (j). Pub. L. 95–217, § 46, added subsec. (j).

Subsec. (k). Pub. L. 95–217, § 47, added subsec. (k).

Subsec. (*l*). Pub. L. 95–217, § 53(c), added subsec. (*l*).

CHANGE OF NAME

Committee on Public Works and Transportation of House of Representatives treated as referring to Committee on Transportation and Infrastructure of House of Representatives by section 1(a) of Pub. L. 104–14, set out as a note preceding section 21 of Title 2, The Congress.

EFFECTIVE DATE OF 1987 AMENDMENT

Pub. L. 100–4, title III, § 302(e), Feb. 4, 1987, 101 Stat. 32, provided that:

''(1) GENERAL RULE.—Except as provided in paragraph (2), the amendments made by this section [amending this section] shall apply to all requests for modifications under section 301(g) of the Federal Water Pollution Control Act [33 U.S.C. 1311(g)] pending on the date of the enactment of this Act [Feb. 4, 1987] and shall not have the effect of extending the deadline established in section 301(j)(1)(B) of such Act.

''(2) EXCEPTION.—The amendments made by this section shall not affect any application for a modification with respect to the discharge of ammonia, chlorine, color, iron, or total phenols (4AAP) under section 301(g) of the Federal Water Pollution Control Act pending on the date of the enactment of this Act; except that the Administrator must approve or disapprove such application not later than 365 days after the date of such enactment.''

Pub. L. 100–4, title III, § 303(b)(2), Feb. 4, 1987, 101 Stat. 33, provided that: ''The amendment made by subsection (b) [amending this section] shall only apply to modifications and renewals of modifications which are tentatively or finally approved after the date of the enactment of this Act [Feb. 4, 1987].''

Pub. L. 100–4, title III, § 303(g), Feb. 4, 1987, 101 Stat. 34, provided that: ''The amendments made by subsections (a), (c), (d), and (e) of this section [amending this section] shall not apply to an application for a permit under section 301(h) of the Federal Water Pollution Control Act [33 U.S.C. 1311(h)] which has been tentatively or finally approved by the Administrator before the date of the enactment of this Act [Feb. 4, 1987]; except that such amendments shall apply to all renewals of such permits after such date of enactment.''

Pub. L. 100–4, title III, § 304(b), Feb. 4, 1987, 101 Stat. 34, provided that: ''The amendment made by subsection (a) [amending this section] shall not apply to those treatment works which are subject to a compliance schedule established before the date of the enactment of this Act [Feb. 4, 1987] by a court order or a final administrative order.''

EFFECTIVE DATE OF 1981 AMENDMENT

Pub. L. 97–117, § 22(e), Dec. 29, 1981, 95 Stat. 1632, provided that: ''The amendments made by this section [amending this section] shall take effect on the date of enactment of this Act [Dec. 29, 1981], except that no applicant, other than the city of Avalon, California, who applies after the date of enactment of this Act for a permit pursuant to subsection (h) of section 301 of the Federal Water Pollution Control Act [33 U.S.C. 1311(h)] which modifies the requirements of subsection (b)(1)(B) of section 301 of such Act [33 U.S.C. 1311(b)(1)(B)] shall receive such permit during the one-year period which begins on the date of enactment of this Act.''

REGULATIONS

Pub. L. 100–4, title III, § 301(f), Feb. 4, 1987, 101 Stat. 30, provided that: ''The Administrator shall promulgate final regulations establishing effluent limitations in accordance with sections 301(b)(2)(A) and 307(b)(1) of the Federal Water Pollution Control Act [33 U.S.C. 1311(b)(2)(A), 1317(b)(1)] for all toxic pollutants referred to in table 1 of Committee Print Numbered 95–30 of the Committee on Public Works and Transportation of the House of Representatives which are discharged from the categories of point sources in accordance with the following table:

''Category	Date by which the final regulation shall be promulgated
Organic chemicals and plastics and synthetic fibers	December 31, 1986.
Pesticides	December 31, 1986.''

PHOSPHATE FERTILIZER EFFLUENT LIMITATION

Amendment by section 306(a), (b) of Pub. L. 100–4 not to be construed (A) to require the Administrator to permit the discharge of gypsum or gypsum waste into the navigable waters, (B) to affect the procedures and standards applicable to the Administrator in issuing permits under section 1342(a)(1)(B) of this title, and (C) to affect the authority of any State to deny or condition certification under section 1314 of this title with respect to the issuance of permits under section 1342(a)(1)(B) of this title, see section 306(c) of Pub. L. 100–4, set out as a note under section 1342 of this title.

DISCHARGES FROM POINT SOURCES IN UNITED STATES VIRGIN ISLANDS ATTRIBUTABLE TO MANUFACTURE OF RUM; EXEMPTION FROM FEDERAL WATER POLLUTION CONTROL REQUIREMENTS; CONDITIONS

Pub. L. 98–67, title II, § 214(g), Aug. 5, 1983, 97 Stat. 393, as amended by Pub. L. 99–514, § 2, Oct. 22, 1986, 100 Stat. 2095, provided that: ''Any discharge from a point source in the United States Virgin Islands in existence on the date of the enactment of this subsection [Aug. 5, 1983] which discharge is attributable to the manufacture of rum (as defined in paragraphs (3) of section 7652(c) of the Internal Revenue Code of 1986 [formerly I.R.C. 1954]) [26 U.S.C. 7652(c)(3)] shall not be subject to the requirements of section 301 (other than toxic pollutant discharges), section 306 or section 403 of the Federal Water Pollution Control Act [33 U.S.C. 1311, 1316, 1343] if—

''(1) such discharge occurs at least one thousand five hundred feet into the territorial sea from the line of ordinary low water from that portion of the coast which is in direct contact with the sea, and

''(2) the Governor of the United States Virgin Islands determines that such discharge will not interfere with the attainment or maintenance of that water quality which shall assure protection of public water supplies, and the protection and propagation of a balanced population of shellfish, fish, and wildlife, and allow recreational activities, in and on the water and will not result in the discharge of pollutants in quantities which may reasonably be anticipated to pose an unacceptable risk to human health or the environment because of bioaccumulation, persistency in the environment, acute toxicity, chronic toxicity (including carcinogenicity, mutagenicity, or teratogenicity), or synergistic propensities.''

CERTAIN MUNICIPAL COMPLIANCE DEADLINES UNAFFECTED; EXCEPTION

Pub. L. 97–117, § 21(a), Dec. 29, 1981, 95 Stat. 1631, provided in part that: ''The amendment made by this subsection [amending this section] shall not be interpreted or applied to extend the date for compliance with section 301(b)(1)(B) or (C) of the Federal Water Pollution Control Act [33 U.S.C. 1311(b)(1)(B), (C)] beyond schedules for compliance in effect as of the date of enactment of this Act [Dec. 29, 1981], except in cases where reductions in the amount of financial assistance under this Act [Pub. L. 97–117, see Short Title of 1981 Amendment note set out under section 1251 of this title] or changed conditions affecting the rate of construction

beyond the control of the owner or operator will make it impossible to complete construction by July 1, 1983.''

TERRITORIAL SEA AND CONTIGUOUS ZONE OF UNITED STATES

For extension of territorial sea and contiguous zone of United States, see Proc. No. 5928 and Proc. No. 7219, respectively, set out as notes under section 1331 of Title 43, Public Lands.

§ 1312. Water quality related effluent limitations

(a) Establishment

Whenever, in the judgment of the Administrator or as identified under section 1314(*l*) of this title, discharges of pollutants from a point source or group of point sources, with the application of effluent limitations required under section 1311(b)(2) of this title, would interfere with the attainment or maintenance of that water quality in a specific portion of the navigable waters which shall assure protection of public health, public water supplies, agricultural and industrial uses, and the protection and propagation of a balanced population of shellfish, fish and wildlife, and allow recreational activities in and on the water, effluent limitations (including alternative effluent control strategies) for such point source or sources shall be established which can reasonably be expected to contribute to the attainment or maintenance of such water quality.

(b) Modifications of effluent limitations

(1) Notice and hearing

Prior to establishment of any effluent limitation pursuant to subsection (a) of this section, the Administrator shall publish such proposed limitation and within 90 days of such publication hold a public hearing.

(2) Permits

(A) No reasonable relationship

The Administrator, with the concurrence of the State, may issue a permit which modifies the effluent limitations required by subsection (a) of this section for pollutants other than toxic pollutants if the applicant demonstrates at such hearing that (whether or not technology or other alternative control strategies are available) there is no reasonable relationship between the economic and social costs and the benefits to be obtained (including attainment of the objective of this chapter) from achieving such limitation.

(B) Reasonable progress

The Administrator, with the concurrence of the State, may issue a permit which modifies the effluent limitations required by subsection (a) of this section for toxic pollutants for a single period not to exceed 5 years if the applicant demonstrates to the satisfaction of the Administrator that such modified requirements (i) will represent the maximum degree of control within the economic capability of the owner and operator of the source, and (ii) will result in reasonable further progress beyond the requirements of section 1311(b)(2) of this title toward the requirements of subsection (a) of this section.

(c) Delay in application of other limitations

The establishment of effluent limitations under this section shall not operate to delay the application of any effluent limitation established under section 1311 of this title.

(June 30, 1948, ch. 758, title III, § 302, as added Pub. L. 92–500, § 2, Oct. 18, 1972, 86 Stat. 846; amended Pub. L. 100–4, title III, § 308(e), Feb. 4, 1987, 101 Stat. 39.)

AMENDMENTS

1987—Subsec. (a). Pub. L. 100–4, § 308(e)(2), inserted ''or as identified under section 1314(*l*) of this title'' after ''Administrator'' and ''public health,'' after ''protection of''.

Subsec. (b). Pub. L. 100–4, § 308(e)(1), amended subsec. (b) generally. Prior to amendment, subsec. (b) read as follows:

''(1) Prior to establishment of any effluent limitation pursuant to subsection (a) of this section, the Administrator shall issue notice of intent to establish such limitation and within ninety days of such notice hold a public hearing to determine the relationship of the economic and social costs of achieving any such limitation or limitations, including any economic or social dislocation in the affected community or communities, to the social and economic benefits to be obtained (including the attainment of the objective of this chapter) and to determine whether or not such effluent limitations can be implemented with available technology or other alternative control strategies.

''(2) If a person affected by such limitation demonstrates at such hearing that (whether or not such technology or other alternative control strategies are available) there is no reasonable relationship between the economic and social costs and the benefits to be obtained (including attainment of the objective of this chapter), such limitation shall not become effective and the Administrator shall adjust such limitation as it applies to such person.''

§ 1313. Water quality standards and implementation plans

(a) Existing water quality standards

(1) In order to carry out the purpose of this chapter, any water quality standard applicable to interstate waters which was adopted by any State and submitted to, and approved by, or is awaiting approval by, the Administrator pursuant to this Act as in effect immediately prior to October 18, 1972, shall remain in effect unless the Administrator determined that such standard is not consistent with the applicable requirements of this Act as in effect immediately prior to October 18, 1972. If the Administrator makes such a determination he shall, within three months after October 18, 1972, notify the State and specify the changes needed to meet such requirements. If such changes are not adopted by the State within ninety days after the date of such notification, the Administrator shall promulgate such changes in accordance with subsection (b) of this section.

(2) Any State which, before October 18, 1972, has adopted, pursuant to its own law, water quality standards applicable to intrastate waters shall submit such standards to the Administrator within thirty days after October 18, 1972. Each such standard shall remain in effect, in the same manner and to the same extent as any other water quality standard established under this chapter unless the Administrator determines that such standard is inconsistent with

the applicable requirements of this Act as in effect immediately prior to October 18, 1972. If the Administrator makes such a determination he shall not later than the one hundred and twentieth day after the date of submission of such standards, notify the State and specify the changes needed to meet such requirements. If such changes are not adopted by the State within ninety days after such notification, the Administrator shall promulgate such changes in accordance with subsection (b) of this section.

(3)(A) Any State which prior to October 18, 1972, has not adopted pursuant to its own laws water quality standards applicable to intrastate waters shall, not later than one hundred and eighty days after October 18, 1972, adopt and submit such standards to the Administrator.

(B) If the Administrator determines that any such standards are consistent with the applicable requirements of this Act as in effect immediately prior to October 18, 1972, he shall approve such standards.

(C) If the Administrator determines that any such standards are not consistent with the applicable requirements of this Act as in effect immediately prior to October 18, 1972, he shall, not later than the ninetieth day after the date of submission of such standards, notify the State and specify the changes to meet such requirements. If such changes are not adopted by the State within ninety days after the date of notification, the Administrator shall promulgate such standards pursuant to subsection (b) of this section.

(b) Proposed regulations

(1) The Administrator shall promptly prepare and publish proposed regulations setting forth water quality standards for a State in accordance with the applicable requirements of this Act as in effect immediately prior to October 18, 1972, if—

(A) the State fails to submit water quality standards within the times prescribed in subsection (a) of this section.

(B) a water quality standard submitted by such State under subsection (a) of this section is determined by the Administrator not to be consistent with the applicable requirements of subsection (a) of this section.

(2) The Administrator shall promulgate any water quality standard published in a proposed regulation not later than one hundred and ninety days after the date he publishes any such proposed standard, unless prior to such promulgation, such State has adopted a water quality standard which the Administrator determines to be in accordance with subsection (a) of this section.

(c) Review; revised standards; publication

(1) The Governor of a State or the State water pollution control agency of such State shall from time to time (but at least once each three year period beginning with October 18, 1972) hold public hearings for the purpose of reviewing applicable water quality standards and, as appropriate, modifying and adopting standards. Results of such review shall be made available to the Administrator.

(2)(A) Whenever the State revises or adopts a new standard, such revised or new standard shall be submitted to the Administrator. Such revised or new water quality standard shall consist of the designated uses of the navigable waters involved and the water quality criteria for such waters based upon such uses. Such standards shall be such as to protect the public health or welfare, enhance the quality of water and serve the purposes of this chapter. Such standards shall be established taking into consideration their use and value for public water supplies, propagation of fish and wildlife, recreational purposes, and agricultural, industrial, and other purposes, and also taking into consideration their use and value for navigation.

(B) Whenever a State reviews water quality standards pursuant to paragraph (1) of this subsection, or revises or adopts new standards pursuant to this paragraph, such State shall adopt criteria for all toxic pollutants listed pursuant to section 1317(a)(1) of this title for which criteria have been published under section 1314(a) of this title, the discharge or presence of which in the affected waters could reasonably be expected to interfere with those designated uses adopted by the State, as necessary to support such designated uses. Such criteria shall be specific numerical criteria for such toxic pollutants. Where such numerical criteria are not available, whenever a State reviews water quality standards pursuant to paragraph (1), or revises or adopts new standards pursuant to this paragraph, such State shall adopt criteria based on biological monitoring or assessment methods consistent with information published pursuant to section 1314(a)(8) of this title. Nothing in this section shall be construed to limit or delay the use of effluent limitations or other permit conditions based on or involving biological monitoring or assessment methods or previously adopted numerical criteria.

(3) If the Administrator, within sixty days after the date of submission of the revised or new standard, determines that such standard meets the requirements of this chapter, such standard shall thereafter be the water quality standard for the applicable waters of that State. If the Administrator determines that any such revised or new standard is not consistent with the applicable requirements of this chapter, he shall not later than the ninetieth day after the date of submission of such standard notify the State and specify the changes to meet such requirements. If such changes are not adopted by the State within ninety days after the date of notification, the Administrator shall promulgate such standard pursuant to paragraph (4) of this subsection.

(4) The Administrator shall promptly prepare and publish proposed regulations setting forth a revised or new water quality standard for the navigable waters involved—

(A) if a revised or new water quality standard submitted by such State under paragraph (3) of this subsection for such waters is determined by the Administrator not to be consistent with the applicable requirements of this chapter, or

(B) in any case where the Administrator determines that a revised or new standard is necessary to meet the requirements of this chapter.

The Administrator shall promulgate any revised or new standard under this paragraph not later than ninety days after he publishes such proposed standards, unless prior to such promulgation, such State has adopted a revised or new water quality standard which the Administrator determines to be in accordance with this chapter.

(d) Identification of areas with insufficient controls; maximum daily load; certain effluent limitations revision

(1)(A) Each State shall identify those waters within its boundaries for which the effluent limitations required by section 1311(b)(1)(A) and section 1311(b)(1)(B) of this title are not stringent enough to implement any water quality standard applicable to such waters. The State shall establish a priority ranking for such waters, taking into account the severity of the pollution and the uses to be made of such waters.

(B) Each State shall identify those waters or parts thereof within its boundaries for which controls on thermal discharges under section 1311 of this title are not stringent enough to assure protection and propagation of a balanced indigenous population of shellfish, fish, and wildlife.

(C) Each State shall establish for the waters identified in paragraph (1)(A) of this subsection, and in accordance with the priority ranking, the total maximum daily load, for those pollutants which the Administrator identifies under section 1314(a)(2) of this title as suitable for such calculation. Such load shall be established at a level necessary to implement the applicable water quality standards with seasonal variations and a margin of safety which takes into account any lack of knowledge concerning the relationship between effluent limitations and water quality.

(D) Each State shall estimate for the waters identified in paragraph (1)(B) of this subsection the total maximum daily thermal load required to assure protection and propagation of a balanced, indigenous population of shellfish, fish, and wildlife. Such estimates shall take into account the normal water temperatures, flow rates, seasonal variations, existing sources of heat input, and the dissipative capacity of the identified waters or parts thereof. Such estimates shall include a calculation of the maximum heat input that can be made into each such part and shall include a margin of safety which takes into account any lack of knowledge concerning the development of thermal water quality criteria for such protection and propagation in the identified waters or parts thereof.

(2) Each State shall submit to the Administrator from time to time, with the first such submission not later than one hundred and eighty days after the date of publication of the first identification of pollutants under section 1314(a)(2)(D) of this title, for his approval the waters identified and the loads established under paragraphs (1)(A), (1)(B), (1)(C), and (1)(D) of this subsection. The Administrator shall either approve or disapprove such identification and load not later than thirty days after the date of submission. If the Administrator approves such identification and load, such State shall incorporate them into its current plan under subsection (e) of this section. If the Administrator disapproves such identification and load, he shall not later than thirty days after the date of such disapproval identify such waters in such State and establish such loads for such waters as he determines necessary to implement the water quality standards applicable to such waters and upon such identification and establishment the State shall incorporate them into its current plan under subsection (e) of this section.

(3) For the specific purpose of developing information, each State shall identify all waters within its boundaries which it has not identified under paragraph (1)(A) and (1)(B) of this subsection and estimate for such waters the total maximum daily load with seasonal variations and margins of safety, for those pollutants which the Administrator identifies under section 1314(a)(2) of this title as suitable for such calculation and for thermal discharges, at a level that would assure protection and propagation of a balanced indigenous population of fish, shellfish, and wildlife.

(4) LIMITATIONS ON REVISION OF CERTAIN EFFLUENT LIMITATIONS.—

(A) STANDARD NOT ATTAINED.—For waters identified under paragraph (1)(A) where the applicable water quality standard has not yet been attained, any effluent limitation based on a total maximum daily load or other waste load allocation established under this section may be revised only if (i) the cumulative effect of all such revised effluent limitations based on such total maximum daily load or waste load allocation will assure the attainment of such water quality standard, or (ii) the designated use which is not being attained is removed in accordance with regulations established under this section.

(B) STANDARD ATTAINED.—For waters identified under paragraph (1)(A) where the quality of such waters equals or exceeds levels necessary to protect the designated use for such waters or otherwise required by applicable water quality standards, any effluent limitation based on a total maximum daily load or other waste load allocation established under this section, or any water quality standard established under this section, or any other permitting standard may be revised only if such revision is subject to and consistent with the antidegradation policy established under this section.

(e) Continuing planning process

(1) Each State shall have a continuing planning process approved under paragraph (2) of this subsection which is consistent with this chapter.

(2) Each State shall submit not later than 120 days after October 18, 1972, to the Administrator for his approval a proposed continuing planning process which is consistent with this chapter. Not later than thirty days after the date of submission of such a process the Administrator shall either approve or disapprove such process. The Administrator shall from time to time review each State's approved planning process for the purpose of insuring that such planning proc-

ess is at all times consistent with this chapter. The Administrator shall not approve any State permit program under subchapter IV of this chapter for any State which does not have an approved continuing planning process under this section.

(3) The Administrator shall approve any continuing planning process submitted to him under this section which will result in plans for all navigable waters within such State, which include, but are not limited to, the following:

(A) effluent limitations and schedules of compliance at least as stringent as those required by section 1311(b)(1), section 1311(b)(2), section 1316, and section 1317 of this title, and at least as stringent as any requirements contained in any applicable water quality standard in effect under authority of this section;

(B) the incorporation of all elements of any applicable area-wide waste management plans under section 1288 of this title, and applicable basin plans under section 1289 of this title;

(C) total maximum daily load for pollutants in accordance with subsection (d) of this section;

(D) procedures for revision;

(E) adequate authority for intergovernmental cooperation;

(F) adequate implementation, including schedules of compliance, for revised or new water quality standards, under subsection (c) of this section;

(G) controls over the disposition of all residual waste from any water treatment processing;

(H) an inventory and ranking, in order of priority, of needs for construction of waste treatment works required to meet the applicable requirements of sections 1311 and 1312 of this title.

(f) Earlier compliance

Nothing in this section shall be construed to affect any effluent limitation, or schedule of compliance required by any State to be implemented prior to the dates set forth in sections 1311(b)(1) and 1311(b)(2) of this title nor to preclude any State from requiring compliance with any effluent limitation or schedule of compliance at dates earlier than such dates.

(g) Heat standards

Water quality standards relating to heat shall be consistent with the requirements of section 1326 of this title.

(h) Thermal water quality standards

For the purposes of this chapter the term ''water quality standards'' includes thermal water quality standards.

(i) Coastal recreation water quality criteria

(1) Adoption by States

(A) Initial criteria and standards

Not later than 42 months after October 10, 2000, each State having coastal recreation waters shall adopt and submit to the Administrator water quality criteria and standards for the coastal recreation waters of the State for those pathogens and pathogen indicators for which the Administrator has published criteria under section 1314(a) of this title.

(B) New or revised criteria and standards

Not later than 36 months after the date of publication by the Administrator of new or revised water quality criteria under section 1314(a)(9) of this title, each State having coastal recreation waters shall adopt and submit to the Administrator new or revised water quality standards for the coastal recreation waters of the State for all pathogens and pathogen indicators to which the new or revised water quality criteria are applicable.

(2) Failure of States to adopt

(A) In general

If a State fails to adopt water quality criteria and standards in accordance with paragraph (1)(A) that are as protective of human health as the criteria for pathogens and pathogen indicators for coastal recreation waters published by the Administrator, the Administrator shall promptly propose regulations for the State setting forth revised or new water quality standards for pathogens and pathogen indicators described in paragraph (1)(A) for coastal recreation waters of the State.

(B) Exception

If the Administrator proposes regulations for a State described in subparagraph (A) under subsection (c)(4)(B), the Administrator shall publish any revised or new standard under this subsection not later than 42 months after October 10, 2000.

(3) Applicability

Except as expressly provided by this subsection, the requirements and procedures of subsection (c) apply to this subsection, including the requirement in subsection (c)(2)(A) that the criteria protect public health and welfare.

(June 30, 1948, ch. 758, title III, § 303, as added Pub. L. 92–500, § 2, Oct. 18, 1972, 86 Stat. 846; amended Pub. L. 100–4, title III, § 308(d), title IV, § 404(b), Feb. 4, 1987, 101 Stat. 39, 68; Pub. L. 106–284, § 2, Oct. 10, 2000, 114 Stat. 870.)

REFERENCES IN TEXT

This Act, referred to in subsecs. (a)(1), (2), (3)(B), (C) and (b)(1), means act June 30, 1948, ch. 758, 62 Stat. 1155, prior to the supersedure and reenactment of act June 30, 1948 by act Oct. 18, 1972, Pub. L. 92–500, 86 Stat. 816. Act June 30, 1948, ch. 758, as added by act Oct. 18, 1972, Pub. L. 92–500, 86 Stat. 816, enacted this chapter.

AMENDMENTS

2000—Subsec. (i). Pub. L. 106–284 added subsec. (i).

1987—Subsec. (c)(2). Pub. L. 100–4, § 308(d), designated existing provision as subpar. (A) and added subpar. (B).

Subsec. (d)(4). Pub. L. 100–4, § 404(b), added par. (4).

§ 1313a. Revised water quality standards

The review, revision, and adoption or promulgation of revised or new water quality standards pursuant to section 303(c) of the Federal Water Pollution Control Act [33 U.S.C. 1313(c)] shall be completed by the date three years after December 29, 1981. No grant shall be made under title II of the Federal Water Pollution Control Act [33 U.S.C. 1281 et seq.] after such date until water

(b) Compliance with other provisions of law setting applicable water quality requirements

Nothing in this section shall be construed to limit the authority of any department or agency pursuant to any other provision of law to require compliance with any applicable water quality requirements. The Administrator shall, upon the request of any Federal department or agency, or State or interstate agency, or applicant, provide, for the purpose of this section, any relevant information on applicable effluent limitations, or other limitations, standards, regulations, or requirements, or water quality criteria, and shall, when requested by any such department or agency or State or interstate agency, or applicant, comment on any methods to comply with such limitations, standards, regulations, requirements, or criteria.

(c) Authority of Secretary of the Army to permit use of spoil disposal areas by Federal licensees or permittees

In order to implement the provisions of this section, the Secretary of the Army, acting through the Chief of Engineers, is authorized, if he deems it to be in the public interest, to permit the use of spoil disposal areas under his jurisdiction by Federal licensees or permittees, and to make an appropriate charge for such use. Moneys received from such licensees or permittees shall be deposited in the Treasury as miscellaneous receipts.

(d) Limitations and monitoring requirements of certification

Any certification provided under this section shall set forth any effluent limitations and other limitations, and monitoring requirements necessary to assure that any applicant for a Federal license or permit will comply with any applicable effluent limitations and other limitations, under section 1311 or 1312 of this title, standard of performance under section 1316 of this title, or prohibition, effluent standard, or pretreatment standard under section 1317 of this title, and with any other appropriate requirement of State law set forth in such certification, and shall become a condition on any Federal license or permit subject to the provisions of this section.

(June 30, 1948, ch. 758, title IV, § 401, as added Pub. L. 92–500, § 2, Oct. 18, 1972, 86 Stat. 877; amended Pub. L. 95–217, §§ 61(b), 64, Dec. 27, 1977, 91 Stat. 1598, 1599.)

AMENDMENTS

1977—Subsec. (a). Pub. L. 95–217 inserted reference to section 1313 of this title in pars. (1), (3), (4), and (5), struck out par. (6) which provided that no Federal agency be deemed an applicant for purposes of this subsection, and redesignated par. (7) as (6).

§ 1342. National pollutant discharge elimination system

(a) Permits for discharge of pollutants

(1) Except as provided in sections 1328 and 1344 of this title, the Administrator may, after opportunity for public hearing issue a permit for the discharge of any pollutant, or combination of pollutants, notwithstanding section 1311(a) of this title, upon condition that such discharge will meet either (A) all applicable requirements under sections 1311, 1312, 1316, 1317, 1318, and 1343 of this title, or (B) prior to the taking of necessary implementing actions relating to all such requirements, such conditions as the Administrator determines are necessary to carry out the provisions of this chapter.

(2) The Administrator shall prescribe conditions for such permits to assure compliance with the requirements of paragraph (1) of this subsection, including conditions on data and information collection, reporting, and such other requirements as he deems appropriate.

(3) The permit program of the Administrator under paragraph (1) of this subsection, and permits issued thereunder, shall be subject to the same terms, conditions, and requirements as apply to a State permit program and permits issued thereunder under subsection (b) of this section.

(4) All permits for discharges into the navigable waters issued pursuant to section 407 of this title shall be deemed to be permits issued under this subchapter, and permits issued under this subchapter shall be deemed to be permits issued under section 407 of this title, and shall continue in force and effect for their term unless revoked, modified, or suspended in accordance with the provisions of this chapter.

(5) No permit for a discharge into the navigable waters shall be issued under section 407 of this title after October 18, 1972. Each application for a permit under section 407 of this title, pending on October 18, 1972, shall be deemed to be an application for a permit under this section. The Administrator shall authorize a State, which he determines has the capability of administering a permit program which will carry out the objectives of this chapter to issue permits for discharges into the navigable waters within the jurisdiction of such State. The Administrator may exercise the authority granted him by the preceding sentence only during the period which begins on October 18, 1972, and ends either on the ninetieth day after the date of the first promulgation of guidelines required by section 1314(i)(2) of this title, or the date of approval by the Administrator of a permit program for such State under subsection (b) of this section, whichever date first occurs, and no such authorization to a State shall extend beyond the last day of such period. Each such permit shall be subject to such conditions as the Administrator determines are necessary to carry out the provisions of this chapter. No such permit shall issue if the Administrator objects to such issuance.

(b) State permit programs

At any time after the promulgation of the guidelines required by subsection (i)(2) of section 1314 of this title, the Governor of each State desiring to administer its own permit program for discharges into navigable waters within its jurisdiction may submit to the Administrator a full and complete description of the program it proposes to establish and administer under State law or under an interstate compact. In addition, such State shall submit a statement from the attorney general (or the attorney for those State water pollution control agencies which have independent legal counsel), or from

the chief legal officer in the case of an interstate agency, that the laws of such State, or the interstate compact, as the case may be, provide adequate authority to carry out the described program. The Administrator shall approve each submitted program unless he determines that adequate authority does not exist:

(1) To issue permits which—

(A) apply, and insure compliance with, any applicable requirements of sections 1311, 1312, 1316, 1317, and 1343 of this title;

(B) are for fixed terms not exceeding five years; and

(C) can be terminated or modified for cause including, but not limited to, the following:

(i) violation of any condition of the permit;

(ii) obtaining a permit by misrepresentation, or failure to disclose fully all relevant facts;

(iii) change in any condition that requires either a temporary or permanent reduction or elimination of the permitted discharge;

(D) control the disposal of pollutants into wells;

(2)(A) To issue permits which apply, and insure compliance with, all applicable requirements of section 1318 of this title; or

(B) To inspect, monitor, enter, and require reports to at least the same extent as required in section 1318 of this title;

(3) To insure that the public, and any other State the waters of which may be affected, receive notice of each application for a permit and to provide an opportunity for public hearing before a ruling on each such application;

(4) To insure that the Administrator receives notice of each application (including a copy thereof) for a permit;

(5) To insure that any State (other than the permitting State), whose waters may be affected by the issuance of a permit may submit written recommendations to the permitting State (and the Administrator) with respect to any permit application and, if any part of such written recommendations are not accepted by the permitting State, that the permitting State will notify such affected State (and the Administrator) in writing of its failure to so accept such recommendations together with its reasons for so doing;

(6) To insure that no permit will be issued if, in the judgment of the Secretary of the Army acting through the Chief of Engineers, after consultation with the Secretary of the department in which the Coast Guard is operating, anchorage and navigation of any of the navigable waters would be substantially impaired thereby;

(7) To abate violations of the permit or the permit program, including civil and criminal penalties and other ways and means of enforcement;

(8) To insure that any permit for a discharge from a publicly owned treatment works includes conditions to require the identification in terms of character and volume of pollutants of any significant source introducing pollutants subject to pretreatment standards under section 1317(b) of this title into such works and a program to assure compliance with such pretreatment standards by each such source, in addition to adequate notice to the permitting agency of (A) new introductions into such works of pollutants from any source which would be a new source as defined in section 1316 of this title if such source were discharging pollutants, (B) new introductions of pollutants into such works from a source which would be subject to section 1311 of this title if it were discharging such pollutants, or (C) a substantial change in volume or character of pollutants being introduced into such works by a source introducing pollutants into such works at the time of issuance of the permit. Such notice shall include information on the quality and quantity of effluent to be introduced into such treatment works and any anticipated impact of such change in the quantity or quality of effluent to be discharged from such publicly owned treatment works; and

(9) To insure that any industrial user of any publicly owned treatment works will comply with sections 1284(b), 1317, and 1318 of this title.

(c) Suspension of Federal program upon submission of State program; withdrawal of approval of State program; return of State program to Administrator

(1) Not later than ninety days after the date on which a State has submitted a program (or revision thereof) pursuant to subsection (b) of this section, the Administrator shall suspend the issuance of permits under subsection (a) of this section as to those discharges subject to such program unless he determines that the State permit program does not meet the requirements of subsection (b) of this section or does not conform to the guidelines issued under section 1314(i)(2) of this title. If the Administrator so determines, he shall notify the State of any revisions or modifications necessary to conform to such requirements or guidelines.

(2) Any State permit program under this section shall at all times be in accordance with this section and guidelines promulgated pursuant to section 1314(i)(2) of this title.

(3) Whenever the Administrator determines after public hearing that a State is not administering a program approved under this section in accordance with requirements of this section, he shall so notify the State and, if appropriate corrective action is not taken within a reasonable time, not to exceed ninety days, the Administrator shall withdraw approval of such program. The Administrator shall not withdraw approval of any such program unless he shall first have notified the State, and made public, in writing, the reasons for such withdrawal.

(4) LIMITATIONS ON PARTIAL PERMIT PROGRAM RETURNS AND WITHDRAWALS.—A State may return to the Administrator administration, and the Administrator may withdraw under paragraph (3) of this subsection approval, of—

(A) a State partial permit program approved under subsection (n)(3) only if the entire permit program being administered by the State department or agency at the time is returned or withdrawn; and

(B) a State partial permit program approved under subsection (n)(4) only if an entire phased component of the permit program being administered by the State at the time is returned or withdrawn.

(d) Notification of Administrator

(1) Each State shall transmit to the Administrator a copy of each permit application received by such State and provide notice to the Administrator of every action related to the consideration of such permit application, including each permit proposed to be issued by such State.

(2) No permit shall issue (A) if the Administrator within ninety days of the date of his notification under subsection (b)(5) of this section objects in writing to the issuance of such permit, or (B) if the Administrator within ninety days of the date of transmittal of the proposed permit by the State objects in writing to the issuance of such permit as being outside the guidelines and requirements of this chapter. Whenever the Administrator objects to the issuance of a permit under this paragraph such written objection shall contain a statement of the reasons for such objection and the effluent limitations and conditions which such permit would include if it were issued by the Administrator.

(3) The Administrator may, as to any permit application, waive paragraph (2) of this subsection.

(4) In any case where, after December 27, 1977, the Administrator, pursuant to paragraph (2) of this subsection, objects to the issuance of a permit, on request of the State, a public hearing shall be held by the Administrator on such objection. If the State does not resubmit such permit revised to meet such objection within 30 days after completion of the hearing, or, if no hearing is requested within 90 days after the date of such objection, the Administrator may issue the permit pursuant to subsection (a) of this section for such source in accordance with the guidelines and requirements of this chapter.

(e) Waiver of notification requirement

In accordance with guidelines promulgated pursuant to subsection (i)(2) of section 1314 of this title, the Administrator is authorized to waive the requirements of subsection (d) of this section at the time he approves a program pursuant to subsection (b) of this section for any category (including any class, type, or size within such category) of point sources within the State submitting such program.

(f) Point source categories

The Administrator shall promulgate regulations establishing categories of point sources which he determines shall not be subject to the requirements of subsection (d) of this section in any State with a program approved pursuant to subsection (b) of this section. The Administrator may distinguish among classes, types, and sizes within any category of point sources.

(g) Other regulations for safe transportation, handling, carriage, storage, and stowage of pollutants

Any permit issued under this section for the discharge of pollutants into the navigable waters from a vessel or other floating craft shall be subject to any applicable regulations promulgated by the Secretary of the department in which the Coast Guard is operating, establishing specifications for safe transportation, handling, carriage, storage, and stowage of pollutants.

(h) Violation of permit conditions; restriction or prohibition upon introduction of pollutant by source not previously utilizing treatment works

In the event any condition of a permit for discharges from a treatment works (as defined in section 1292 of this title) which is publicly owned is violated, a State with a program approved under subsection (b) of this section or the Administrator, where no State program is approved or where the Administrator determines pursuant to section 1319(a) of this title that a State with an approved program has not commenced appropriate enforcement action with respect to such permit, may proceed in a court of competent jurisdiction to restrict or prohibit the introduction of any pollutant into such treatment works by a source not utilizing such treatment works prior to the finding that such condition was violated.

(i) Federal enforcement not limited

Nothing in this section shall be construed to limit the authority of the Administrator to take action pursuant to section 1319 of this title.

(j) Public information

A copy of each permit application and each permit issued under this section shall be available to the public. Such permit application or permit, or portion thereof, shall further be available on request for the purpose of reproduction.

(k) Compliance with permits

Compliance with a permit issued pursuant to this section shall be deemed compliance, for purposes of sections 1319 and 1365 of this title, with sections 1311, 1312, 1316, 1317, and 1343 of this title, except any standard imposed under section 1317 of this title for a toxic pollutant injurious to human health. Until December 31, 1974, in any case where a permit for discharge has been applied for pursuant to this section, but final administrative disposition of such application has not been made, such discharge shall not be a violation of (1) section 1311, 1316, or 1342 of this title, or (2) section 407 of this title, unless the Administrator or other plaintiff proves that final administrative disposition of such application has not been made because of the failure of the applicant to furnish information reasonably required or requested in order to process the application. For the 180-day period beginning on October 18, 1972, in the case of any point source discharging any pollutant or combination of pollutants immediately prior to such date which source is not subject to section 407 of this title, the discharge by such source shall not be a violation of this chapter if such a source applies for a permit for discharge pursuant to this section within such 180-day period.

***(l)* Limitation on permit requirement**

(1) Agricultural return flows

The Administrator shall not require a permit under this section for discharges composed entirely of return flows from irrigated agriculture, nor shall the Administrator directly or indirectly, require any State to require such a permit.

(2) Stormwater runoff from oil, gas, and mining operations

The Administrator shall not require a permit under this section, nor shall the Administrator directly or indirectly require any State to require a permit, for discharges of stormwater runoff from mining operations or oil and gas exploration, production, processing, or treatment operations or transmission facilities, composed entirely of flows which are from conveyances or systems of conveyances (including but not limited to pipes, conduits, ditches, and channels) used for collecting and conveying precipitation runoff and which are not contaminated by contact with, or do not come into contact with, any overburden, raw material, intermediate products, finished product, byproduct, or waste products located on the site of such operations.

(3) Silvicultural activities

(A) NPDES PERMIT REQUIREMENTS FOR SILVICULTURAL ACTIVITIES.—The Administrator shall not require a permit under this section nor directly or indirectly require any State to require a permit under this section for a discharge from runoff resulting from the conduct of the following silviculture activities conducted in accordance with standard industry practice: nursery operations, site preparation, reforestation and subsequent cultural treatment, thinning, prescribed burning, pest and fire control, harvesting operations, surface drainage, or road construction and maintenance.

(B) OTHER REQUIREMENTS.—Nothing in this paragraph exempts a discharge from silvicultural activity from any permitting requirement under section 1344 of this title, existing permitting requirements under section 1342 of this title, or from any other federal law.

(C) The authorization provided in Section[1] 1365(a) of this title does not apply to any nonpermitting program established under 1342(p)(6)[2] of this title for the silviculture activities listed in 1342(*l*)(3)(A)[2] of this title, or to any other limitations that might be deemed to apply to the silviculture activities listed in 1342(*l*)(3)(A)[2] of this title.

(m) Additional pretreatment of conventional pollutants not required

To the extent a treatment works (as defined in section 1292 of this title) which is publicly owned is not meeting the requirements of a permit issued under this section for such treatment works as a result of inadequate design or operation of such treatment works, the Administrator, in issuing a permit under this section, shall not require pretreatment by a person introducing conventional pollutants identified pursuant to section 1314(a)(4) of this title into such treatment works other than pretreatment required to assure compliance with pretreatment standards under subsection (b)(8) of this section and section 1317(b)(1) of this title. Nothing in this subsection shall affect the Administrator's authority under sections 1317 and 1319 of this title, affect State and local authority under sections 1317(b)(4) and 1370 of this title, relieve such treatment works of its obligations to meet requirements established under this chapter, or otherwise preclude such works from pursuing whatever feasible options are available to meet its responsibility to comply with its permit under this section.

(n) Partial permit program

(1) State submission

The Governor of a State may submit under subsection (b) of this section a permit program for a portion of the discharges into the navigable waters in such State.

(2) Minimum coverage

A partial permit program under this subsection shall cover, at a minimum, administration of a major category of the discharges into the navigable waters of the State or a major component of the permit program required by subsection (b).

(3) Approval of major category partial permit programs

The Administrator may approve a partial permit program covering administration of a major category of discharges under this subsection if—

(A) such program represents a complete permit program and covers all of the discharges under the jurisdiction of a department or agency of the State; and

(B) the Administrator determines that the partial program represents a significant and identifiable part of the State program required by subsection (b).

(4) Approval of major component partial permit programs

The Administrator may approve under this subsection a partial and phased permit program covering administration of a major component (including discharge categories) of a State permit program required by subsection (b) if—

(A) the Administrator determines that the partial program represents a significant and identifiable part of the State program required by subsection (b); and

(B) the State submits, and the Administrator approves, a plan for the State to assume administration by phases of the remainder of the State program required by subsection (b) by a specified date not more than 5 years after submission of the partial program under this subsection and agrees to make all reasonable efforts to assume such administration by such date.

(*o*) Anti-backsliding

(1) General prohibition

In the case of effluent limitations established on the basis of subsection (a)(1)(B) of this section, a permit may not be renewed, reissued, or modified on the basis of effluent guidelines promulgated under section 1314(b) of this title subsequent to the original issuance of such permit, to contain effluent limitations which are less stringent than the comparable effluent limitations in the previous

[1] So in original. Probably should not be capitalized.

[2] So in original. Probably should be preceded by ''section''.

permit. In the case of effluent limitations established on the basis of section 1311(b)(1)(C) or section 1313(d) or (e) of this title, a permit may not be renewed, reissued, or modified to contain effluent limitations which are less stringent than the comparable effluent limitations in the previous permit except in compliance with section 1313(d)(4) of this title.

(2) Exceptions

A permit with respect to which paragraph (1) applies may be renewed, reissued, or modified to contain a less stringent effluent limitation applicable to a pollutant if—

(A) material and substantial alterations or additions to the permitted facility occurred after permit issuance which justify the application of a less stringent effluent limitation;

(B)(i) information is available which was not available at the time of permit issuance (other than revised regulations, guidance, or test methods) and which would have justified the application of a less stringent effluent limitation at the time of permit issuance; or

(ii) the Administrator determines that technical mistakes or mistaken interpretations of law were made in issuing the permit under subsection (a)(1)(B);

(C) a less stringent effluent limitation is necessary because of events over which the permittee has no control and for which there is no reasonably available remedy;

(D) the permittee has received a permit modification under section 1311(c), 1311(g), 1311(h), 1311(i), 1311(k), 1311(n), or 1326(a) of this title; or

(E) the permittee has installed the treatment facilities required to meet the effluent limitations in the previous permit and has properly operated and maintained the facilities but has nevertheless been unable to achieve the previous effluent limitations, in which case the limitations in the reviewed, reissued, or modified permit may reflect the level of pollutant control actually achieved (but shall not be less stringent than required by effluent guidelines in effect at the time of permit renewal, reissuance, or modification).

Subparagraph (B) shall not apply to any revised waste load allocations or any alternative grounds for translating water quality standards into effluent limitations, except where the cumulative effect of such revised allocations results in a decrease in the amount of pollutants discharged into the concerned waters, and such revised allocations are not the result of a discharger eliminating or substantially reducing its discharge of pollutants due to complying with the requirements of this chapter or for reasons otherwise unrelated to water quality.

(3) Limitations

In no event may a permit with respect to which paragraph (1) applies be renewed, reissued, or modified to contain an effluent limitation which is less stringent than required by effluent guidelines in effect at the time the permit is renewed, reissued, or modified. In no event may such a permit to discharge into waters be renewed, reissued, or modified to contain a less stringent effluent limitation if the implementation of such limitation would result in a violation of a water quality standard under section 1313 of this title applicable to such waters.

(p) Municipal and industrial stormwater discharges

(1) General rule

Prior to October 1, 1994, the Administrator or the State (in the case of a permit program approved under this section) shall not require a permit under this section for discharges composed entirely of stormwater.

(2) Exceptions

Paragraph (1) shall not apply with respect to the following stormwater discharges:

(A) A discharge with respect to which a permit has been issued under this section before February 4, 1987.

(B) A discharge associated with industrial activity.

(C) A discharge from a municipal separate storm sewer system serving a population of 250,000 or more.

(D) A discharge from a municipal separate storm sewer system serving a population of 100,000 or more but less than 250,000.

(E) A discharge for which the Administrator or the State, as the case may be, determines that the stormwater discharge contributes to a violation of a water quality standard or is a significant contributor of pollutants to waters of the United States.

(3) Permit requirements

(A) Industrial discharges

Permits for discharges associated with industrial activity shall meet all applicable provisions of this section and section 1311 of this title.

(B) Municipal discharge

Permits for discharges from municipal storm sewers—

(i) may be issued on a system- or jurisdiction-wide basis;

(ii) shall include a requirement to effectively prohibit non-stormwater discharges into the storm sewers; and

(iii) shall require controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods, and such other provisions as the Administrator or the State determines appropriate for the control of such pollutants.

(4) Permit application requirements

(A) Industrial and large municipal discharges

Not later than 2 years after February 4, 1987, the Administrator shall establish regulations setting forth the permit application requirements for stormwater discharges described in paragraphs (2)(B) and (2)(C). Applications for permits for such discharges shall be filed no later than 3 years after February

4, 1987. Not later than 4 years after February 4, 1987, the Administrator or the State, as the case may be, shall issue or deny each such permit. Any such permit shall provide for compliance as expeditiously as practicable, but in no event later than 3 years after the date of issuance of such permit.

(B) Other municipal discharges

Not later than 4 years after February 4, 1987, the Administrator shall establish regulations setting forth the permit application requirements for stormwater discharges described in paragraph (2)(D). Applications for permits for such discharges shall be filed no later than 5 years after February 4, 1987. Not later than 6 years after February 4, 1987, the Administrator or the State, as the case may be, shall issue or deny each such permit. Any such permit shall provide for compliance as expeditiously as practicable, but in no event later than 3 years after the date of issuance of such permit.

(5) Studies

The Administrator, in consultation with the States, shall conduct a study for the purposes of—

(A) identifying those stormwater discharges or classes of stormwater discharges for which permits are not required pursuant to paragraphs (1) and (2) of this subsection;

(B) determining, to the maximum extent practicable, the nature and extent of pollutants in such discharges; and

(C) establishing procedures and methods to control stormwater discharges to the extent necessary to mitigate impacts on water quality.

Not later than October 1, 1988, the Administrator shall submit to Congress a report on the results of the study described in subparagraphs (A) and (B). Not later than October 1, 1989, the Administrator shall submit to Congress a report on the results of the study described in subparagraph (C).

(6) Regulations

Not later than October 1, 1993, the Administrator, in consultation with State and local officials, shall issue regulations (based on the results of the studies conducted under paragraph (5)) which designate stormwater discharges, other than those discharges described in paragraph (2), to be regulated to protect water quality and shall establish a comprehensive program to regulate such designated sources. The program shall, at a minimum, (A) establish priorities, (B) establish requirements for State stormwater management programs, and (C) establish expeditious deadlines. The program may include performance standards, guidelines, guidance, and management practices and treatment requirements, as appropriate.

(q) Combined sewer overflows

(1) Requirement for permits, orders, and decrees

Each permit, order, or decree issued pursuant to this chapter after December 21, 2000, for a discharge from a municipal combined storm and sanitary sewer shall conform to the Combined Sewer Overflow Control Policy signed by the Administrator on April 11, 1994 (in this subsection referred to as the ''CSO control policy'').

(2) Water quality and designated use review guidance

Not later than July 31, 2001, and after providing notice and opportunity for public comment, the Administrator shall issue guidance to facilitate the conduct of water quality and designated use reviews for municipal combined sewer overflow receiving waters.

(3) Report

Not later than September 1, 2001, the Administrator shall transmit to Congress a report on the progress made by the Environmental Protection Agency, States, and municipalities in implementing and enforcing the CSO control policy.

(r) Discharges incidental to the normal operation of recreational vessels

No permit shall be required under this chapter by the Administrator (or a State, in the case of a permit program approved under subsection (b)) for the discharge of any graywater, bilge water, cooling water, weather deck runoff, oil water separator effluent, or effluent from properly functioning marine engines, or any other discharge that is incidental to the normal operation of a vessel, if the discharge is from a recreational vessel.

(s) Integrated plans

(1) Definition of integrated plan

In this subsection, the term ''integrated plan'' means a plan developed in accordance with the Integrated Municipal Stormwater and Wastewater Planning Approach Framework, issued by the Environmental Protection Agency and dated June 5, 2012.

(2) In general

The Administrator (or a State, in the case of a permit program approved by the Administrator) shall inform municipalities of the opportunity to develop an integrated plan that may be incorporated into a permit under this section.

(3) Scope

(A) Scope of permit incorporating integrated plan

A permit issued under this section that incorporates an integrated plan may integrate all requirements under this chapter addressed in the integrated plan, including requirements relating to—

(i) a combined sewer overflow;

(ii) a capacity, management, operation, and maintenance program for sanitary sewer collection systems;

(iii) a municipal stormwater discharge;

(iv) a municipal wastewater discharge; and

(v) a water quality-based effluent limitation to implement an applicable wasteload allocation in a total maximum daily load.

(B) Inclusions in integrated plan

An integrated plan incorporated into a permit issued under this section may include the implementation of—

(i) projects, including innovative projects, to reclaim, recycle, or reuse water; and

(ii) green infrastructure.

(4) Compliance schedules

(A) In general

A permit issued under this section that incorporates an integrated plan may include a schedule of compliance, under which actions taken to meet any applicable water quality-based effluent limitation may be implemented over more than 1 permit term if the schedule of compliance—

(i) is authorized by State water quality standards; and

(ii) meets the requirements of section 122.47 of title 40, Code of Federal Regulations (as in effect on January 14, 2019).

(B) Time for compliance

For purposes of subparagraph (A)(ii), the requirement of section 122.47 of title 40, Code of Federal Regulations, for compliance by an applicable statutory deadline under this chapter does not prohibit implementation of an applicable water quality-based effluent limitation over more than 1 permit term.

(C) Review

A schedule of compliance incorporated into a permit issued under this section may be reviewed at the time the permit is renewed to determine whether the schedule should be modified.

(5) Existing authorities retained

(A) Applicable standards

Nothing in this subsection modifies any obligation to comply with applicable technology and water quality-based effluent limitations under this chapter.

(B) Flexibility

Nothing in this subsection reduces or eliminates any flexibility available under this chapter, including the authority of a State to revise a water quality standard after a use attainability analysis under section 131.10(g) of title 40, Code of Federal Regulations (or a successor regulation), subject to the approval of the Administrator under section 1313(c) of this title.

(6) Clarification of State authority

(A) In general

Nothing in section 1311(b)(1)(C) of this title precludes a State from authorizing in the water quality standards of the State the issuance of a schedule of compliance to meet water quality-based effluent limitations in permits that incorporate provisions of an integrated plan.

(B) Transition rule

In any case in which a discharge is subject to a judicial order or consent decree, as of January 14, 2019, resolving an enforcement action under this chapter, any schedule of compliance issued pursuant to an authorization in a State water quality standard may not revise a schedule of compliance in that order or decree to be less stringent, unless the order or decree is modified by agreement of the parties and the court.

(June 30, 1948, ch. 758, title IV, §402, as added Pub. L. 92–500, §2, Oct. 18, 1972, 86 Stat. 880; amended Pub. L. 95–217, §§33(c), 50, 54(c)(1), 65, 66, Dec. 27, 1977, 91 Stat. 1577, 1588, 1591, 1599, 1600; Pub. L. 100–4, title IV, §§401–404(a), 404(c), formerly 404(d), 405, Feb. 4, 1987, 101 Stat. 65–67, 69, renumbered §404(c), Pub. L. 104–66, title II, §2021(e)(2), Dec. 21, 1995, 109 Stat. 727; Pub. L. 102–580, title III, §364, Oct. 31, 1992, 106 Stat. 4862; Pub. L. 106–554, §1(a)(4) [div. B, title I, §112(a)], Dec. 21, 2000, 114 Stat. 2763, 2763A–224; Pub. L. 110–288, §2, July 29, 2008, 122 Stat. 2650; Pub. L. 113–79, title XII, §12313, Feb. 7, 2014, 128 Stat. 992; Pub. L. 115–436, §3(a), Jan. 14, 2019, 132 Stat. 5558.)

AMENDMENTS

2019—Subsec. (s). Pub. L. 115–436 added subsec. (s).

2014—Subsec. (*l*)(3). Pub. L. 113–79 added par. (3).

2008—Subsec. (r). Pub. L. 110–288 added subsec. (r).

2000—Subsec. (q). Pub. L. 106–554 added subsec. (q).

1992—Subsec. (p)(1), (6). Pub. L. 102–580 substituted ''October 1, 1994'' for ''October 1, 1992'' in par. (1) and ''October 1, 1993'' for ''October 1, 1992'' in par. (6).

1987—Subsec. (a)(1). Pub. L. 100–4, §404(c), inserted cl. (A) and (B) designations.

Subsec. (c)(1). Pub. L. 100–4, §403(b)(2), substituted ''as to those discharges'' for ''as to those navigable waters''.

Subsec. (c)(4). Pub. L. 100–4, §403(b)(1), added par. (4).

Subsec. (*l*). Pub. L. 100–4, §401, inserted ''Limitation on permit requirement'' as subsec. heading designated existing provisions as par. (1) and inserted par. heading, added par. (2), and aligned pars. (1) and (2).

Subsecs. (m) to (p). Pub. L. 100–4, §§402, 403(a), 404(a), 405, added subsecs. (m) to (p).

1977—Subsec. (a)(5). Pub. L. 95–217, §50, substituted ''section 1314(i)(2)'' for ''section 1314(h)(2)''.

Subsec. (b). Pub. L. 95–217, §50, substituted in provisions preceding par. (1) ''subsection (i)(2) of section 1314'' for ''subsection (h)(2) of section 1314''.

Subsec. (b)(8). Pub. L. 95–217, §54(c)(1), inserted reference to identification in terms of character and volume of pollutants of any significant source introducing pollutants subject to pretreatment standards under section 1317(b) of this title into treatment works and programs to assure compliance with pretreatment standards by each source.

Subsec. (c)(1), (2). Pub. L. 95–217, §50, substituted ''section 1314(i)(2)'' for ''section 1314(h)(2)''.

Subsec. (d)(2). Pub. L. 95–217, §65(b), inserted provision requiring that, whenever the Administrator objects to the issuance of a permit under subsec. (d)(2) of this section, the written objection contain a statement of the reasons for the objection and the effluent limitations and conditions which the permit would include if it were issued by the Administrator.

Subsec. (d)(4). Pub. L. 95–217, §65(a), added par. (4).

Subsec. (e). Pub. L. 95–217, §50, substituted ''subsection (i)(2) of section 1314'' for ''subsection (h)(2) of section 1314''.

Subsec. (h). Pub. L. 95–217, §66, substituted ''where no State program is approved or where the Administrator determines pursuant to section 1319(a) of this title that a State with an approved program has not commenced appropriate enforcement action with respect to such permit,'' for ''where no State program is approved,''.

Subsec. (*l*). Pub. L. 95–217, §33(c), added subsec. (*l*).

TRANSFER OF FUNCTIONS

For transfer of authorities, functions, personnel, and assets of the Coast Guard, including the authorities

and functions of the Secretary of Transportation relating thereto, to the Department of Homeland Security, and for treatment of related references, see sections 468(b), 551(d), 552(d), and 557 of Title 6, Domestic Security, and the Department of Homeland Security Reorganization Plan of November 25, 2002, as modified, set out as a note under section 542 of Title 6.

Enforcement functions of Administrator or other official of the Environmental Protection Agency under this section relating to compliance with national pollutant discharge elimination system permits with respect to pre-construction, construction, and initial operation of transportation system for Canadian and Alaskan natural gas were transferred to the Federal Inspector, Office of Federal Inspector for the Alaska Natural Gas Transportation System, until the first anniversary of the date of initial operation of the Alaska Natural Gas Transportation System, see Reorg. Plan No. 1 of 1979, §§ 102(a), 203(a), 44 F.R. 33663, 33666, 93 Stat. 1373, 1376, effective July 1, 1979, set out in the Appendix to Title 5, Government Organization and Employees. Office of Federal Inspector for the Alaska Natural Gas Transportation System abolished and functions and authority vested in Inspector transferred to Secretary of Energy by section 3012(b) of Pub. L. 102–486, set out as an Abolition of Office of Federal Inspector note under section 719e of Title 15, Commerce and Trade. Functions and authority vested in Secretary of Energy subsequently transferred to Federal Coordinator for Alaska Natural Gas Transportation Projects by section 720d(f) of Title 15.

PERMIT REQUIREMENTS FOR DISCHARGES FROM CERTAIN VESSELS

Pub. L. 110–299, §§ 1, 2, July 31, 2008, 122 Stat. 2995, as amended by Pub. L. 111–215, § 1, July 30, 2010, 124 Stat. 2347; Pub. L. 112–213, title VII, § 703, Dec. 20, 2012, 126 Stat. 1580; Pub. L. 113–281, title VI, § 602, Dec. 18, 2014, 128 Stat. 3061; Pub. L. 115–100, § 1, Jan. 3, 2018, 131 Stat. 2245, which exempted from permit requirements, for the period from July 31, 2008, through Jan. 19, 2018, discharges incidental to the normal operation of vessels, subject to certain exceptions, was repealed by Pub. L. 115–282, title IX, § 903(a)(2)(A)(ii), Dec. 4, 2018, 132 Stat. 4354.

STORMWATER PERMIT REQUIREMENTS

Pub. L. 102–240, title I, § 1068, Dec. 18, 1991, 105 Stat. 2007, provided that:

''(a) GENERAL RULE.—Notwithstanding the requirements of sections 402(p)(2)(B), (C), and (D) of the Federal Water Pollution Control Act [33 U.S.C. 1342(p)(2)(B), (C), (D)], permit application deadlines for stormwater discharges associated with industrial activities from facilities that are owned or operated by a municipality shall be established by the Administrator of the Environmental Protection Agency (hereinafter in this section referred to as the 'Administrator') pursuant to the requirements of this section.

''(b) PERMIT APPLICATIONS.—

''(1) INDIVIDUAL APPLICATIONS.—The Administrator shall require individual permit applications for discharges described in subsection (a) on or before October 1, 1992; except that any municipality that has participated in a timely part I group application for an industrial activity discharging stormwater that is denied such participation in a group application or for which a group application is denied shall not be required to submit an individual application until the 180th day following the date on which the denial is made.

''(2) GROUP APPLICATIONS.—With respect to group applications for permits for discharges described in subsection (a), the Administrator shall require—

''(A) part I applications on or before September 30, 1991, except that any municipality with a population of less than 250,000 shall not be required to submit a part I application before May 18, 1992; and

''(B) part II applications on or before October 1, 1992, except that any municipality with a population of less than 250,000 shall not be required to submit a part II application before May 17, 1993.

''(c) MUNICIPALITIES WITH LESS THAN 100,000 POPULATION.—The Administrator shall not require any municipality with a population of less than 100,000 to apply for or obtain a permit for any stormwater discharge associated with an industrial activity other than an airport, powerplant, or uncontrolled sanitary landfill owned or operated by such municipality before October 1, 1992, unless such permit is required by section 402(p)(2)(A) or (E) of the Federal Water Pollution Control Act [33 U.S.C. 1342(p)(2)(A), (E)].

''(d) UNCONTROLLED SANITARY LANDFILL DEFINED.—For the purposes of this section, the term 'uncontrolled sanitary landfill' means a landfill or open dump, whether in operation or closed, that does not meet the requirements for run-on and run-off controls established pursuant to subtitle D of the Solid Waste Disposal Act [42 U.S.C. 6941 et seq.].

''(e) LIMITATION ON STATUTORY CONSTRUCTION.—Nothing in this section shall be construed to affect any application or permit requirement, including any deadline, to apply for or obtain a permit for stormwater discharges subject to section 402(p)(2)(A) or (E) of the Federal Water Pollution Control Act [33 U.S.C. 1342(p)(2)(A), (E)].

''(f) REGULATIONS.—The Administrator shall issue final regulations with respect to general permits for stormwater discharges associated with industrial activity on or before February 1, 1992.''

PHOSPHATE FERTILIZER EFFLUENT LIMITATION

Pub. L. 100–4, title III, § 306(c), Feb. 4, 1987, 101 Stat. 36, provided that:

''(1) ISSUANCE OF PERMIT.—As soon as possible after the date of the enactment of this Act [Feb. 4, 1987], but not later than 180 days after such date of enactment, the Administrator shall issue permits under section 402(a)(1)(B) of the Federal Water Pollution Control Act [33 U.S.C. 1342(a)(1)(B)] with respect to facilities—

''(A) which were under construction on or before April 8, 1974, and

''(B) for which the Administrator is proposing to revise the applicability of the effluent limitation established under section 301(b) of such Act [33 U.S.C. 1311(b)] for phosphate subcategory of the fertilizer manufacturing point source category to exclude such facilities.

''(2) LIMITATIONS ON STATUTORY CONSTRUCTION.—Nothing in this section [amending section 1311 of this title and enacting this note] shall be construed—

''(A) to require the Administrator to permit the discharge of gypsum or gypsum waste into the navigable waters,

''(B) to affect the procedures and standards applicable to the Administrator in issuing permits under section 402(a)(1)(B) of the Federal Water Pollution Control Act [33 U.S.C. 1342(a)(1)(B)], and

''(C) to affect the authority of any State to deny or condition certification under section 401 of such Act [33 U.S.C. 1341] with respect to the issuance of permits under section 402(a)(1)(B) of such Act.''

LOG TRANSFER FACILITIES

Pub. L. 100–4, title IV, § 407, Feb. 4, 1987, 101 Stat. 74, provided that:

''(a) AGREEMENT.—The Administrator and Secretary of the Army shall enter into an agreement regarding coordination of permitting for log transfer facilities to designate a lead agency and to process permits required under sections 402 and 404 of the Federal Water Pollution Control Act [33 U.S.C. 1342, 1344], where both such sections apply, for discharges associated with the construction and operation of log transfer facilities. The Administrator and Secretary are authorized to act in accordance with the terms of such agreement to assure that, to the maximum extent practicable, duplication, needless paperwork and delay in the issuance of permits, and inequitable enforcement between and among facilities in different States, shall be eliminated.

''(b) APPLICATIONS AND PERMITS BEFORE OCTOBER 22, 1985.—Where both of sections 402 and 404 of the Federal Water Pollution Control Act [33 U.S.C. 1342, 1344] apply, log transfer facilities which have received a permit under section 404 of such Act before October 22, 1985, shall not be required to submit a new application for a permit under section 402 of such Act. If the Administrator determines that the terms of a permit issued on or before October 22, 1985, under section 404 of such Act satisfies the applicable requirements of sections 301, 302, 306, 307, 308, and 403 of such Act [33 U.S.C. 1311, 1312, 1316, 1317, 1318, and 1343], a separate application for a permit under section 402 of such Act shall not thereafter be required. In any case where the Administrator demonstrates, after an opportunity for a hearing, that the terms of a permit issued on or before October 22, 1985, under section 404 of such Act do not satisfy the applicable requirements of sections 301, 302, 306, 307, 308, and 403 of such Act, modifications to the existing permit under section 404 of such Act to incorporate such applicable requirements shall be issued by the Administrator as an alternative to issuance of a separate new permit under section 402 of such Act.

''(c) LOG TRANSFER FACILITY DEFINED.—For the purposes of this section, the term 'log transfer facility' means a facility which is constructed in whole or in part in waters of the United States and which is utilized for the purpose of transferring commercially harvested logs to or from a vessel or log raft, including the formation of a log raft.''

ALLOWABLE DELAY IN MODIFYING EXISTING APPROVED STATE PERMIT PROGRAMS TO CONFORM TO 1977 AMENDMENT

Pub. L. 95–217, § 54(c)(2), Dec. 27, 1977, 91 Stat. 1591, provided that any State permit program approved under this section before Dec. 27, 1977, which required modification to conform to the amendment made by section 54(c)(1) of Pub. L. 95–217, which amended subsec. (b)(8) of this section, not be required to be modified before the end of the one year period which began on Dec. 27, 1977, unless in order to make the required modification a State must amend or enact a law in which case such modification not be required for such State before the end of the two year period which began on Dec. 27, 1977.

§ 1343. Ocean discharge criteria

(a) Issuance of permits

No permit under section 1342 of this title for a discharge into the territorial sea, the waters of the contiguous zone, or the oceans shall be issued, after promulgation of guidelines established under subsection (c) of this section, except in compliance with such guidelines. Prior to the promulgation of such guidelines, a permit may be issued under such section 1342 of this title if the Administrator determines it to be in the public interest.

(b) Waiver

The requirements of subsection (d) of section 1342 of this title may not be waived in the case of permits for discharges into the territorial sea.

(c) Guidelines for determining degradation of waters

(1) The Administrator shall, within one hundred and eighty days after October 18, 1972 (and from time to time thereafter), promulgate guidelines for determining the degradation of the waters of the territorial seas, the contiguous zone, and the oceans, which shall include:

(A) the effect of disposal of pollutants on human health or welfare, including but not limited to plankton, fish, shellfish, wildlife, shorelines, and beaches;

(B) the effect of disposal of pollutants on marine life including the transfer, concentration, and dispersal of pollutants or their by-products through biological, physical, and chemical processes; changes in marine ecosystem diversity, productivity, and stability; and species and community population changes;

(C) the effect of disposal, of pollutants on esthetic, recreation, and economic values;

(D) the persistence and permanence of the effects of disposal of pollutants;

(E) the effect of the disposal of varying rates, of particular volumes and concentrations of pollutants;

(F) other possible locations and methods of disposal or recycling of pollutants including land-based alternatives; and

(G) the effect on alternate uses of the oceans, such as mineral exploitation and scientific study.

(2) In any event where insufficient information exists on any proposed discharge to make a reasonable judgment on any of the guidelines established pursuant to this subsection no permit shall be issued under section 1342 of this title.

(June 30, 1948, ch. 758, title IV, § 403, as added Pub. L. 92–500, § 2, Oct. 18, 1972, 86 Stat. 883.)

DISCHARGES FROM POINT SOURCES IN UNITED STATES VIRGIN ISLANDS ATTRIBUTABLE TO MANUFACTURE OF RUM; EXEMPTION; CONDITIONS

Discharges from point sources in the United States Virgin Islands in existence on Aug. 5, 1983, attributable to the manufacture of rum not to be subject to the requirements of this section under certain conditions, see section 214(g) of Pub. L. 98–67, set out as a note under section 1311 of this title.

TERRITORIAL SEA AND CONTIGUOUS ZONE OF UNITED STATES

For extension of territorial sea and contiguous zone of United States, see Proc. No. 5928 and Proc. No. 7219, respectively, set out as notes under section 1331 of Title 43, Public Lands.

§ 1344. Permits for dredged or fill material

(a) Discharge into navigable waters at specified disposal sites

The Secretary may issue permits, after notice and opportunity for public hearings for the discharge of dredged or fill material into the navigable waters at specified disposal sites. Not later than the fifteenth day after the date an applicant submits all the information required to complete an application for a permit under this subsection, the Secretary shall publish the notice required by this subsection.

(b) Specification for disposal sites

Subject to subsection (c) of this section, each such disposal site shall be specified for each such permit by the Secretary (1) through the application of guidelines developed by the Administrator, in conjunction with the Secretary, which guidelines shall be based upon criteria comparable to the criteria applicable to the territorial seas, the contiguous zone, and the ocean under section 1343(c) of this title, and (2) in any case where such guidelines under clause (1) alone would prohibit the specification of a site,

through the application additionally of the economic impact of the site on navigation and anchorage.

(c) Denial or restriction of use of defined areas as disposal sites

The Administrator is authorized to prohibit the specification (including the withdrawal of specification) of any defined area as a disposal site, and he is authorized to deny or restrict the use of any defined area for specification (including the withdrawal of specification) as a disposal site, whenever he determines, after notice and opportunity for public hearings, that the discharge of such materials into such area will have an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas (including spawning and breeding areas), wildlife, or recreational areas. Before making such determination, the Administrator shall consult with the Secretary. The Administrator shall set forth in writing and make public his findings and his reasons for making any determination under this subsection.

(d) "Secretary" defined

The term ''Secretary'' as used in this section means the Secretary of the Army, acting through the Chief of Engineers.

(e) General permits on State, regional, or nationwide basis

(1) In carrying out his functions relating to the discharge of dredged or fill material under this section, the Secretary may, after notice and opportunity for public hearing, issue general permits on a State, regional, or nationwide basis for any category of activities involving discharges of dredged or fill material if the Secretary determines that the activities in such category are similar in nature, will cause only minimal adverse environmental effects when performed separately, and will have only minimal cumulative adverse effect on the environment. Any general permit issued under this subsection shall (A) be based on the guidelines described in subsection (b)(1) of this section, and (B) set forth the requirements and standards which shall apply to any activity authorized by such general permit.

(2) No general permit issued under this subsection shall be for a period of more than five years after the date of its issuance and such general permit may be revoked or modified by the Secretary if, after opportunity for public hearing, the Secretary determines that the activities authorized by such general permit have an adverse impact on the environment or such activities are more appropriately authorized by individual permits.

(f) Non-prohibited discharge of dredged or fill material

(1) Except as provided in paragraph (2) of this subsection, the discharge of dredged or fill material—

(A) from normal farming, silviculture, and ranching activities such as plowing, seeding, cultivating, minor drainage, harvesting for the production of food, fiber, and forest products, or upland soil and water conservation practices;

(B) for the purpose of maintenance, including emergency reconstruction of recently damaged parts, of currently serviceable structures such as dikes, dams, levees, groins, riprap, breakwaters, causeways, and bridge abutments or approaches, and transportation structures;

(C) for the purpose of construction or maintenance of farm or stock ponds or irrigation ditches, or the maintenance of drainage ditches;

(D) for the purpose of construction of temporary sedimentation basins on a construction site which does not include placement of fill material into the navigable waters;

(E) for the purpose of construction or maintenance of farm roads or forest roads, or temporary roads for moving mining equipment, where such roads are constructed and maintained, in accordance with best management practices, to assure that flow and circulation patterns and chemical and biological characteristics of the navigable waters are not impaired, that the reach of the navigable waters is not reduced, and that any adverse effect on the aquatic environment will be otherwise minimized;

(F) resulting from any activity with respect to which a State has an approved program under section 1288(b)(4) of this title which meets the requirements of subparagraphs (B) and (C) of such section,

is not prohibited by or otherwise subject to regulation under this section or section 1311(a) or 1342 of this title (except for effluent standards or prohibitions under section 1317 of this title).

(2) Any discharge of dredged or fill material into the navigable waters incidental to any activity having as its purpose bringing an area of the navigable waters into a use to which it was not previously subject, where the flow or circulation of navigable waters may be impaired or the reach of such waters be reduced, shall be required to have a permit under this section.

(g) State administration

(1) The Governor of any State desiring to administer its own individual and general permit program for the discharge of dredged or fill material into the navigable waters (other than those waters which are presently used, or are susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce shoreward to their ordinary high water mark, including all waters which are subject to the ebb and flow of the tide shoreward to their mean high water mark, or mean higher high water mark on the west coast, including wetlands adjacent thereto) within its jurisdiction may submit to the Administrator a full and complete description of the program it proposes to establish and administer under State law or under an interstate compact. In addition, such State shall submit a statement from the attorney general (or the attorney for those State agencies which have independent legal counsel), or from the chief legal officer in the case of an interstate agency, that the laws of such State, or the interstate compact, as the case may be, provide adequate authority to carry out the described program.

(2) Not later than the tenth day after the date of the receipt of the program and statement submitted by any State under paragraph (1) of this subsection, the Administrator shall provide copies of such program and statement to the Secretary and the Secretary of the Interior, acting through the Director of the United States Fish and Wildlife Service.

(3) Not later than the ninetieth day after the date of the receipt by the Administrator of the program and statement submitted by any State, under paragraph (1) of this subsection, the Secretary and the Secretary of the Interior, acting through the Director of the United States Fish and Wildlife Service, shall submit any comments with respect to such program and statement to the Administrator in writing.

(h) Determination of State's authority to issue permits under State program; approval; notification; transfers to State program

(1) Not later than the one-hundred-twentieth day after the date of the receipt by the Administrator of a program and statement submitted by any State under paragraph (1) of this subsection, the Administrator shall determine, taking into account any comments submitted by the Secretary and the Secretary of the Interior, acting through the Director of the United States Fish and Wildlife Service, pursuant to subsection (g) of this section, whether such State has the following authority with respect to the issuance of permits pursuant to such program:

(A) To issue permits which—

(i) apply, and assure compliance with, any applicable requirements of this section, including, but not limited to, the guidelines established under subsection (b)(1) of this section, and sections 1317 and 1343 of this title;

(ii) are for fixed terms not exceeding five years; and

(iii) can be terminated or modified for cause including, but not limited to, the following:

(I) violation of any condition of the permit;

(II) obtaining a permit by misrepresentation, or failure to disclose fully all relevant facts;

(III) change in any condition that requires either a temporary or permanent reduction or elimination of the permitted discharge.

(B) To issue permits which apply, and assure compliance with, all applicable requirements of section 1318 of this title, or to inspect, monitor, enter, and require reports to at least the same extent as required in section 1318 of this title.

(C) To assure that the public, and any other State the waters of which may be affected, receive notice of each application for a permit and to provide an opportunity for public hearing before a ruling on each such application.

(D) To assure that the Administrator receives notice of each application (including a copy thereof) for a permit.

(E) To assure that any State (other than the permitting State), whose waters may be affected by the issuance of a permit may submit written recommendations to the permitting State (and the Administrator) with respect to any permit application and, if any part of such written recommendations are not accepted by the permitting State, that the permitting State will notify such affected State (and the Administrator) in writing of its failure to so accept such recommendations together with its reasons for so doing.

(F) To assure that no permit will be issued if, in the judgment of the Secretary, after consultation with the Secretary of the department in which the Coast Guard is operating, anchorage and navigation of any of the navigable waters would be substantially impaired thereby.

(G) To abate violations of the permit or the permit program, including civil and criminal penalties and other ways and means of enforcement.

(H) To assure continued coordination with Federal and Federal-State water-related planning and review processes.

(2) If, with respect to a State program submitted under subsection (g)(1) of this section, the Administrator determines that such State—

(A) has the authority set forth in paragraph (1) of this subsection, the Administrator shall approve the program and so notify (i) such State and (ii) the Secretary, who upon subsequent notification from such State that it is administering such program, shall suspend the issuance of permits under subsections (a) and (e) of this section for activities with respect to which a permit may be issued pursuant to such State program; or

(B) does not have the authority set forth in paragraph (1) of this subsection, the Administrator shall so notify such State, which notification shall also describe the revisions or modifications necessary so that such State may resubmit such program for a determination by the Administrator under this subsection.

(3) If the Administrator fails to make a determination with respect to any program submitted by a State under subsection (g)(1) of this section within one-hundred-twenty days after the date of the receipt of such program, such program shall be deemed approved pursuant to paragraph (2)(A) of this subsection and the Administrator shall so notify such State and the Secretary who, upon subsequent notification from such State that it is administering such program, shall suspend the issuance of permits under subsection (a) and (e) of this section for activities with respect to which a permit may be issued by such State.

(4) After the Secretary receives notification from the Administrator under paragraph (2) or (3) of this subsection that a State permit program has been approved, the Secretary shall transfer any applications for permits pending before the Secretary for activities with respect to which a permit may be issued pursuant to such State program to such State for appropriate action.

(5) Upon notification from a State with a permit program approved under this subsection that such State intends to administer and en-

force the terms and conditions of a general permit issued by the Secretary under subsection (e) of this section with respect to activities in such State to which such general permit applies, the Secretary shall suspend the administration and enforcement of such general permit with respect to such activities.

(i) Withdrawal of approval

Whenever the Administrator determines after public hearing that a State is not administering a program approved under subsection (h)(2)(A) of this section, in accordance with this section, including, but not limited to, the guidelines established under subsection (b)(1) of this section, the Administrator shall so notify the State, and, if appropriate corrective action is not taken within a reasonable time, not to exceed ninety days after the date of the receipt of such notification, the Administrator shall (1) withdraw approval of such program until the Administrator determines such corrective action has been taken, and (2) notify the Secretary that the Secretary shall resume the program for the issuance of permits under subsections (a) and (e) of this section for activities with respect to which the State was issuing permits and that such authority of the Secretary shall continue in effect until such time as the Administrator makes the determination described in clause (1) of this subsection and such State again has an approved program.

(j) Copies of applications for State permits and proposed general permits to be transmitted to Administrator

Each State which is administering a permit program pursuant to this section shall transmit to the Administrator (1) a copy of each permit application received by such State and provide notice to the Administrator of every action related to the consideration of such permit application, including each permit proposed to be issued by such State, and (2) a copy of each proposed general permit which such State intends to issue. Not later than the tenth day after the date of the receipt of such permit application or such proposed general permit, the Administrator shall provide copies of such permit application or such proposed general permit to the Secretary and the Secretary of the Interior, acting through the Director of the United States Fish and Wildlife Service. If the Administrator intends to provide written comments to such State with respect to such permit application or such proposed general permit, he shall so notify such State not later than the thirtieth day after the date of the receipt of such application or such proposed general permit and provide such written comments to such State, after consideration of any comments made in writing with respect to such application or such proposed general permit by the Secretary and the Secretary of the Interior, acting through the Director of the United States Fish and Wildlife Service, not later than the ninetieth day after the date of such receipt. If such State is so notified by the Administrator, it shall not issue the proposed permit until after the receipt of such comments from the Administrator, or after such ninetieth day, whichever first occurs. Such State shall not issue such proposed permit after such ninetieth day if it has received such written comments in which the Administrator objects (A) to the issuance of such proposed permit and such proposed permit is one that has been submitted to the Administrator pursuant to subsection (h)(1)(E), or (B) to the issuance of such proposed permit as being outside the requirements of this section, including, but not limited to, the guidelines developed under subsection (b)(1) of this section unless it modifies such proposed permit in accordance with such comments. Whenever the Administrator objects to the issuance of a permit under the preceding sentence such written objection shall contain a statement of the reasons for such objection and the conditions which such permit would include if it were issued by the Administrator. In any case where the Administrator objects to the issuance of a permit, on request of the State, a public hearing shall be held by the Administrator on such objection. If the State does not resubmit such permit revised to meet such objection within 30 days after completion of the hearing or, if no hearing is requested within 90 days after the date of such objection, the Secretary may issue the permit pursuant to subsection (a) or (e) of this section, as the case may be, for such source in accordance with the guidelines and requirements of this chapter.

(k) Waiver

In accordance with guidelines promulgated pursuant to subsection (i)(2) of section 1314 of this title, the Administrator is authorized to waive the requirements of subsection (j) of this section at the time of the approval of a program pursuant to subsection (h)(2)(A) of this section for any category (including any class, type, or size within such category) of discharge within the State submitting such program.

(*l*) Categories of discharges not subject to requirements

The Administrator shall promulgate regulations establishing categories of discharges which he determines shall not be subject to the requirements of subsection (j) of this section in any State with a program approved pursuant to subsection (h)(2)(A) of this section. The Administrator may distinguish among classes, types, and sizes within any category of discharges.

(m) Comments on permit applications or proposed general permits by Secretary of the Interior acting through Director of United States Fish and Wildlife Service

Not later than the ninetieth day after the date on which the Secretary notifies the Secretary of the Interior, acting through the Director of the United States Fish and Wildlife Service that (1) an application for a permit under subsection (a) of this section has been received by the Secretary, or (2) the Secretary proposes to issue a general permit under subsection (e) of this section, the Secretary of the Interior, acting through the Director of the United States Fish and Wildlife Service, shall submit any comments with respect to such application or such proposed general permit in writing to the Secretary.

(n) Enforcement authority not limited

Nothing in this section shall be construed to limit the authority of the Administrator to take action pursuant to section 1319 of this title.

(*o*) Public availability of permits and permit applications

A copy of each permit application and each permit issued under this section shall be available to the public. Such permit application or portion thereof, shall further be available on request for the purpose of reproduction.

(p) Compliance

Compliance with a permit issued pursuant to this section, including any activity carried out pursuant to a general permit issued under this section, shall be deemed compliance, for purposes of sections 1319 and 1365 of this title, with sections 1311, 1317, and 1343 of this title.

(q) Minimization of duplication, needless paperwork, and delays in issuance; agreements

Not later than the one-hundred-eightieth day after December 27, 1977, the Secretary shall enter into agreements with the Administrator, the Secretaries of the Departments of Agriculture, Commerce, Interior, and Transportation, and the heads of other appropriate Federal agencies to minimize, to the maximum extent practicable, duplication, needless paperwork, and delays in the issuance of permits under this section. Such agreements shall be developed to assure that, to the maximum extent practicable, a decision with respect to an application for a permit under subsection (a) of this section will be made not later than the ninetieth day after the date the notice for such application is published under subsection (a) of this section.

(r) Federal projects specifically authorized by Congress

The discharge of dredged or fill material as part of the construction of a Federal project specifically authorized by Congress, whether prior to or on or after December 27, 1977, is not prohibited by or otherwise subject to regulation under this section, or a State program approved under this section, or section 1311(a) or 1342 of this title (except for effluent standards or prohibitions under section 1317 of this title), if information on the effects of such discharge, including consideration of the guidelines developed under subsection (b)(1) of this section, is included in an environmental impact statement for such project pursuant to the National Environmental Policy Act of 1969 [42 U.S.C. 4321 et seq.] and such environmental impact statement has been submitted to Congress before the actual discharge of dredged or fill material in connection with the construction of such project and prior to either authorization of such project or an appropriation of funds for such construction.

(s) Violation of permits

(1) Whenever on the basis of any information available to him the Secretary finds that any person is in violation of any condition or limitation set forth in a permit issued by the Secretary under this section, the Secretary shall issue an order requiring such person to comply with such condition or limitation, or the Secretary shall bring a civil action in accordance with paragraph (3) of this subsection.

(2) A copy of any order issued under this subsection shall be sent immediately by the Secretary to the State in which the violation occurs and other affected States. Any order issued under this subsection shall be by personal service and shall state with reasonable specificity the nature of the violation, specify a time for compliance, not to exceed thirty days, which the Secretary determines is reasonable, taking into account the seriousness of the violation and any good faith efforts to comply with applicable requirements. In any case in which an order under this subsection is issued to a corporation, a copy of such order shall be served on any appropriate corporate officers.

(3) The Secretary is authorized to commence a civil action for appropriate relief, including a permanent or temporary injunction for any violation for which he is authorized to issue a compliance order under paragraph (1) of this subsection. Any action under this paragraph may be brought in the district court of the United States for the district in which the defendant is located or resides or is doing business, and such court shall have jurisdiction to restrain such violation and to require compliance. Notice of the commencement of such acton[1] shall be given immediately to the appropriate State.

(4) Any person who violates any condition or limitation in a permit issued by the Secretary under this section, and any person who violates any order issued by the Secretary under paragraph (1) of this subsection, shall be subject to a civil penalty not to exceed $25,000 per day for each violation. In determining the amount of a civil penalty the court shall consider the seriousness of the violation or violations, the economic benefit (if any) resulting from the violation, any history of such violations, any good-faith efforts to comply with the applicable requirements, the economic impact of the penalty on the violator, and such other matters as justice may require.

(t) Navigable waters within State jurisdiction

Nothing in this section shall preclude or deny the right of any State or interstate agency to control the discharge of dredged or fill material in any portion of the navigable waters within the jurisdiction of such State, including any activity of any Federal agency, and each such agency shall comply with such State or interstate requirements both substantive and procedural to control the discharge of dredged or fill material to the same extent that any person is subject to such requirements. This section shall not be construed as affecting or impairing the authority of the Secretary to maintain navigation.

(June 30, 1948, ch. 758, title IV, §404, as added Pub. L. 92–500, §2, Oct. 18, 1972, 86 Stat. 884; amended Pub. L. 95–217, §67(a), (b), Dec. 27, 1977, 91 Stat. 1600; Pub. L. 100–4, title III, §313(d), Feb. 4, 1987, 101 Stat. 45.)

[1] So in original. Probably should be ''action''.

REFERENCES IN TEXT

The National Environmental Policy Act of 1969, referred to in subsec. (r), is Pub. L. 91–190, Jan. 1, 1970, 83 Stat. 852, as amended, which is classified generally to chapter 55 (§ 4321 et seq.) of Title 42, The Public Health and Welfare. For complete classification of this Act to the Code, see Short Title note set out under section 4321 of Title 42 and Tables.

AMENDMENTS

1987—Subsec. (s). Pub. L. 100–4 redesignated par. (5) as (4), substituted ''$25,000 per day for each violation'' for ''$10,000 per day of such violation'', inserted provision specifying factors to consider in determining the penalty amount, and struck out former par. (4) which read as follows:

''(A) Any person who willfully or negligently violates any condition or limitation in a permit issued by the Secretary under this section shall be punished by a fine of not less than $2,500 nor more than $25,000 per day of violation, or by imprisonment for not more than one year, or by both. If the conviction is for a violation committed after a first conviction of such person under this paragraph, punishment shall be by a fine of not more than $50,000 per day of violation, or by imprisonment for not more than two years, or by both.

''(B) For the purposes of this paragraph, the term 'person' shall mean, in addition to the definition contained in section 1362(5) of this title, any responsible corporate officer.''

1977—Subsec. (a). Pub. L. 95–217, § 67(a)(1), substituted ''The Secretary'' for ''The Secretary of the Army, acting through the Chief of Engineers,'' and inserted provision that, not later than the fifteenth day after the date an applicant submits all the information required to complete an application for a permit under this subsection, the Secretary publish the notice required by this subsection.

Subsecs. (b), (c). Pub. L. 95–217, § 67(a)(2), substituted ''the Secretary'' for ''the Secretary of the Army''.

Subsecs. (d) to (t). Pub. L. 95–217, § 67(b), added subsecs. (d) to (t).

TRANSFER OF FUNCTIONS

For transfer of authorities, functions, personnel, and assets of the Coast Guard, including the authorities and functions of the Secretary of Transportation relating thereto, to the Department of Homeland Security, and for treatment of related references, see sections 468(b), 551(d), 552(d), and 557 of Title 6, Domestic Security, and the Department of Homeland Security Reorganization Plan of November 25, 2002, as modified, set out as a note under section 542 of Title 6.

Enforcement functions of Administrator or other official of the Environmental Protection Agency and of Secretary or other official in Department of the Interior relating to review of the Corps of Engineers' dredged and fill material permits and such functions of Secretary of the Army, Chief of Engineers, or other official in Corps of Engineers of the United States Army relating to compliance with dredged and fill material permits issued under this section with respect to preconstruction, construction, and initial operation of transportation system for Canadian and Alaskan natural gas were transferred to the Federal Inspector, Office of Federal Inspector for the Alaska Natural Gas Transportation System, until the first anniversary of the date of initial operation of the Alaska Natural Gas Transportation System, see Reorg. Plan No. 1 of 1979, §§ 102(a), (b), (e), 203(a), 44 F.R. 33663, 33666, 93 Stat. 1373, 1376, effective July 1, 1979, set out in the Appendix to Title 5, Government Organization and Employees. Office of Federal Inspector for the Alaska Natural Gas Transportation System abolished and functions and authority vested in Inspector transferred to Secretary of Energy by section 3012(b) of Pub. L. 102–486, set out as an Abolition of Office of Federal Inspector note under section 719e of Title 15, Commerce and Trade. Functions and authority vested in Secretary of Energy subsequently transferred to Federal Coordinator for Alaska Natural Gas Transportation Projects by section 720d(f) of Title 15.

MITIGATION AND MITIGATION BANKING REGULATIONS

Pub. L. 108–136, div. A, title III, § 314(b), Nov. 24, 2003, 117 Stat. 1431, provided that:

''(1) To ensure opportunities for Federal agency participation in mitigation banking, the Secretary of the Army, acting through the Chief of Engineers, shall issue regulations establishing performance standards and criteria for the use, consistent with section 404 of the Federal Water Pollution Control Act (33 U.S.C. 1344), of on-site, off-site, and in-lieu fee mitigation and mitigation banking as compensation for lost wetlands functions in permits issued by the Secretary of the Army under such section. To the maximum extent practicable, the regulatory standards and criteria shall maximize available credits and opportunities for mitigation, provide flexibility for regional variations in wetland conditions, functions and values, and apply equivalent standards and criteria to each type of compensatory mitigation.

''(2) Final regulations shall be issued not later than two years after the date of the enactment of this Act [Nov. 24, 2003].''

REGULATORY PROGRAM

Pub. L. 106–377, § 1(a)(2) [title I], Oct. 27, 2000, 114 Stat. 1441, 1441A–63, provided in part that: ''For expenses necessary for administration of laws pertaining to regulation of navigable waters and wetlands, $125,000,000, to remain available until expended: *Provided*, That the Secretary of the Army, acting through the Chief of Engineers, is directed to use funds appropriated herein to: (1) by March 1, 2001, supplement the report, Cost Analysis For the 1999 Proposal to Issue and Modify Nationwide Permits, to reflect the Nationwide Permits actually issued on March 9, 2000, including changes in the acreage limits, preconstruction notification requirements and general conditions between the rule proposed on July 21, 1999, and the rule promulgated and published in the Federal Register; (2) after consideration of the cost analysis for the 1999 proposal to issue and modify nationwide permits and the supplement prepared pursuant to this Act [H.R. 5483, as enacted by section 1(a)(2) of Pub. L. 106–377, see Tables for classification] and by September 30, 2001, prepare, submit to Congress and publish in the Federal Register a Permit Processing Management Plan by which the Corps of Engineers will handle the additional work associated with all projected increases in the number of individual permit applications and preconstruction notifications related to the new and replacement permits and general conditions. The Permit Processing Management Plan shall include specific objective goals and criteria by which the Corps of Engineers' progress towards reducing any permit backlog can be measured; (3) beginning on December 31, 2001, and on a biannual basis thereafter, report to Congress and publish in the Federal Register, an analysis of the performance of its program as measured against the criteria set out in the Permit Processing Management Plan; (4) implement a 1-year pilot program to publish quarterly on the U.S. Army Corps of Engineer's Regulatory Program website all Regulatory Analysis and Management Systems (RAMS) data for the South Pacific Division and North Atlantic Division beginning within 30 days of the enactment of this Act [Oct. 27, 2000]; and (5) publish in Division Office websites all findings, rulings, and decisions rendered under the administrative appeals process for the Corps of Engineers Regulatory Program as established in Public Law 106–60 [113 Stat. 486]: *Provided further*, That, through the period ending on September 30, 2003, the Corps of Engineers shall allow any appellant to keep a verbatim record of the proceedings of the appeals conference under the aforementioned administrative appeals process: *Provided further*, That within 30 days of the enactment of this Act, the Secretary of the Army,

acting through the Chief of Engineers, shall require all U.S. Army Corps of Engineers Divisions and Districts to record the date on which a section 404 individual permit application or nationwide permit notification is filed with the Corps of Engineers: *Provided further*, That the Corps of Engineers, when reporting permit processing times, shall track both the date a permit application is first received and the date the application is considered complete, as well as the reason that the application is not considered complete upon first submission.''

AUTHORITY TO DELEGATE TO STATE OF WASHINGTON FUNCTIONS OF THE SECRETARY RELATING TO LAKE CHELAN, WASHINGTON

Pub. L. 95–217, § 76, Dec. 27, 1977, 91 Stat. 1610, provided that: ''The Secretary of the Army, acting through the Chief of Engineers, is authorized to delegate to the State of Washington upon its request all or any part of those functions vested in such Secretary by section 404 of the Federal Water Pollution Control Act [this section] and by sections 9, 10, and 13 of the Act of March 3, 1899 [sections 401, 403, and 407 of this title], relating to Lake Chelan, Washington, if the Secretary determines (1) that such State has the authority, responsibility, and capability to carry out such functions, and (2) that such delegation is in the public interest. Such delegation shall be subject to such terms and conditions as the Secretary deems necessary, including, but not limited to, suspension and revocation for cause of such delegation.''

DREDGED MATERIAL DISPOSAL

Pub. L. 114–322, title I, § 1189, Dec. 16, 2016, 130 Stat. 1681, provided that: ''Disposal of dredged material shall not be considered environmentally acceptable for the purposes of identifying the Federal standard (as defined in section 335.7 of title 33, Code of Federal Regulations (or successor regulations)) if the disposal violates applicable State water quality standards approved by the Administrator of the Environmental Protection Agency under section 303 of the Federal Water Pollution Control Act (33 U.S.C. 1313).''

CONTIGUOUS ZONE OF UNITED STATES

For extension of contiguous zone of United States, see Proc. No. 7219, set out as a note under section 1331 of Title 43, Public Lands.

§ 1345. Disposal or use of sewage sludge

(a) Permit

Notwithstanding any other provision of this chapter or of any other law, in any case where the disposal of sewage sludge resulting from the operation of a treatment works as defined in section 1292 of this title (including the removal of in-place sewage sludge from one location and its deposit at another location) would result in any pollutant from such sewage sludge entering the navigable waters, such disposal is prohibited except in accordance with a permit issued by the Administrator under section 1342 of this title.

(b) Issuance of permit; regulations

The Administrator shall issue regulations governing the issuance of permits for the disposal of sewage sludge subject to subsection (a) of this section and section 1342 of this title. Such regulations shall require the application to such disposal of each criterion, factor, procedure, and requirement applicable to a permit issued under section 1342 of this title.

(c) State permit program

Each State desiring to administer its own permit program for disposal of sewage sludge subject to subsection (a) of this section within its jurisdiction may do so in accordance with section 1342 of this title.

(d) Regulations

(1) Regulations

The Administrator, after consultation with appropriate Federal and State agencies and other interested persons, shall develop and publish, within one year after December 27, 1977, and from time to time thereafter, regulations providing guidelines for the disposal of sludge and the utilization of sludge for various purposes. Such regulations shall—

(A) identify uses for sludge, including disposal;

(B) specify factors to be taken into account in determining the measures and practices applicable to each such use or disposal (including publication of information on costs);

(C) identify concentrations of pollutants which interfere with each such use or disposal.

The Administrator is authorized to revise any regulation issued under this subsection.

(2) Identification and regulation of toxic pollutants

(A) On basis of available information

(i) Proposed regulations

Not later than November 30, 1986, the Administrator shall identify those toxic pollutants which, on the basis of available information on their toxicity, persistence, concentration, mobility, or potential for exposure, may be present in sewage sludge in concentrations which may adversely affect public health or the environment, and propose regulations specifying acceptable management practices for sewage sludge containing each such toxic pollutant and establishing numerical limitations for each such pollutant for each use identified under paragraph (1)(A).

(ii) Final regulations

Not later than August 31, 1987, and after opportunity for public hearing, the Administrator shall promulgate the regulations required by subparagraph (A)(i).

(B) Others

(i) Proposed regulations

Not later than July 31, 1987, the Administrator shall identify those toxic pollutants not identified under subparagraph (A)(i) which may be present in sewage sludge in concentrations which may adversely affect public health or the environment, and propose regulations specifying acceptable management practices for sewage sludge containing each such toxic pollutant and establishing numerical limitations for each pollutant for each such use identified under paragraph (1)(A).

(ii) Final regulations

Not later than June 15, 1988, the Administrator shall promulgate the regulations required by subparagraph (B)(i).

EX. ORD. NO. 10752. DELEGATION OF FUNCTIONS TO THE SECRETARY OF THE INTERIOR

Ex. Ord. No. 10752, Feb. 12, 1958, 23 F.R. 973, provided:

SECTION 1. The Secretary of the Interior is hereby designated and appointed as the agent of the President for the execution of all the powers and functions vested in the President by the act of February 22, 1935, 49 Stat. 30, entitled ''An Act to regulate interstate and foreign commerce in petroleum and its products by prohibiting the shipment in such commerce of petroleum and its products produced in violation of State law, and for other purposes,'' as amended (15 U.S.C. 715 *et seq.*), except those vested in the President by section 4 of the act (15 U.S.C. 715c).

SEC. 2. The Secretary of the Interior may make such provisions in the Department of the Interior as he may deem appropriate to administer the said act.

SEC. 3. This Executive order supersedes Executive Order No. 6979 of February 28, 1935, Executive Order No. 7756 of December 1, 1937 (2 F.R. 2664), Executive Order No. 9732 of June 3, 1946 (11 F.R. 5985), and paragraph (q) of section 1 of Executive Order No. 10250 of June 5, 1951 (16 F.R. 5385).

DWIGHT D. EISENHOWER.

§ 715k. Saving clause

If any provision of this chapter, or the application thereof to any person or circumstance, shall be held invalid, the validity of the remainder of the chapter and the application of such provision to other persons or circumstances shall not be affected thereby.

(Feb. 22, 1935, ch. 18, § 12, 49 Stat. 33.)

§ 715*l*. Repealed. June 22, 1942, ch. 436, 56 Stat. 381

Section, acts Feb. 22, 1935, ch. 18, § 13, 49 Stat. 33; June 14, 1937, ch. 335, 50 Stat. 257; June 29, 1939, ch. 250, 53 Stat. 927, provided for expiration of this chapter on June 30, 1942.

§ 715m. Cooperation between Secretary of the Interior and Federal and State authorities

The Secretary of the Interior, in carrying out this chapter, is authorized to cooperate with Federal and State authorities.

(June 25, 1946, ch. 472, § 3, 60 Stat. 307.)

CODIFICATION

Section was not enacted as a part of act Feb. 22, 1935, which comprises this chapter.

DELEGATION OF FUNCTIONS

Delegation of President's authority to Secretary of the Interior, see note set out under section 715j of this title.

CHAPTER 15B—NATURAL GAS

§ 717. Regulation of natural gas companies

(a) Necessity of regulation in public interest

As disclosed in reports of the Federal Trade Commission made pursuant to S. Res. 83 (Seventieth Congress, first session) and other reports made pursuant to the authority of Congress, it is declared that the business of transporting and selling natural gas for ultimate distribution to the public is affected with a public interest, and that Federal regulation in matters relating to the transportation of natural gas and the sale thereof in interstate and foreign commerce is necessary in the public interest.

(b) Transactions to which provisions of chapter applicable

The provisions of this chapter shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, and to the importation or exportation of natural gas in foreign commerce and to persons engaged in such importation or exportation, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas.

(c) Intrastate transactions exempt from provisions of chapter; certification from State commission as conclusive evidence

The provisions of this chapter shall not apply to any person engaged in or legally authorized to engage in the transportation in interstate commerce or the sale in interstate commerce for resale, of natural gas received by such person from another person within or at the boundary of a State if all the natural gas so received is ultimately consumed within such State, or to any facilities used by such person for such transportation or sale, provided that the rates and service of such person and facilities be subject to regulation by a State commission. The matters

exempted from the provisions of this chapter by this subsection are declared to be matters primarily of local concern and subject to regulation by the several States. A certification from such State commission to the Federal Power Commission that such State commission has regulatory jurisdiction over rates and service of such person and facilities and is exercising such jurisdiction shall constitute conclusive evidence of such regulatory power or jurisdiction.

(d) Vehicular natural gas jurisdiction

The provisions of this chapter shall not apply to any person solely by reason of, or with respect to, any sale or transportation of vehicular natural gas if such person is—

(1) not otherwise a natural-gas company; or

(2) subject primarily to regulation by a State commission, whether or not such State commission has, or is exercising, jurisdiction over the sale, sale for resale, or transportation of vehicular natural gas.

(June 21, 1938, ch. 556, §1, 52 Stat. 821; Mar. 27, 1954, ch. 115, 68 Stat. 36; Pub. L. 102–486, title IV, §404(a)(1), Oct. 24, 1992, 106 Stat. 2879; Pub. L. 109–58, title III, §311(a), Aug. 8, 2005, 119 Stat. 685.)

AMENDMENTS

2005—Subsec. (b). Pub. L. 109–58 inserted ''and to the importation or exportation of natural gas in foreign commerce and to persons engaged in such importation or exportation,'' after ''such transportation or sale,''.

1992—Subsec. (d). Pub. L. 102–486 added subsec. (d).

1954—Subsec. (c). Act Mar. 27, 1954, added subsec. (c).

TERMINATION OF FEDERAL POWER COMMISSION; TRANSFER OF FUNCTIONS

Federal Power Commission terminated and functions, personnel, property, funds, etc., transferred to Secretary of Energy (except for certain functions transferred to Federal Energy Regulatory Commission) by sections 7151(b), 7171(a), 7172(a), 7291, and 7293 of Title 42, The Public Health and Welfare.

STATE LAWS AND REGULATIONS

Pub. L. 102–486, title IV, §404(b), Oct. 24, 1992, 106 Stat. 2879, provided that: ''The transportation or sale of natural gas by any person who is not otherwise a public utility, within the meaning of State law—

''(1) in closed containers; or

''(2) otherwise to any person for use by such person as a fuel in a self-propelled vehicle,

shall not be considered to be a transportation or sale of natural gas within the meaning of any State law, regulation, or order in effect before January 1, 1989. This subsection shall not apply to any provision of any State law, regulation, or order to the extent that such provision has as its primary purpose the protection of public safety.''

EMERGENCY NATURAL GAS ACT OF 1977

Pub. L. 95–2, Feb. 2, 1977, 91 Stat. 4, authorized President to declare a natural gas emergency and to require emergency deliveries and transportation of natural gas until the earlier of Apr. 30, 1977, or termination of emergency by President and provided for antitrust protection, emergency purchases, adjustment in charges for local distribution companies, relationship to Natural Gas Act, effect of certain contractual obligations, administrative procedure and judicial review, enforcement, reporting to Congress, delegation of authorities, and preemption of inconsistent State or local action.

EXECUTIVE ORDER NO. 11969

Ex. Ord. No. 11969, Feb. 2, 1977, 42 F.R. 6791, as amended by Ex. Ord. No. 12038, Feb. 3, 1978, 43 F.R. 4957, which delegated to the Secretary of Energy the authority vested in the President by the Emergency Natural Gas Act of 1977 except the authority to declare and terminate a natural gas emergency, was revoked by Ex. Ord. No. 12553, Feb. 25, 1986, 51 F.R. 7237.

PROCLAMATION NO. 4485

Proc. No. 4485, Feb. 2, 1977, 42 F.R. 6789, declared that a natural gas emergency existed within the meaning of section 3 of the Emergency Natural Gas Act of 1977, set out as a note above, which emergency was terminated by Proc. No. 4495, Apr. 1, 1977, 42 F.R. 18053, formerly set out below.

PROCLAMATION NO. 4495

Proc. No. 4495, Apr. 1, 1977, 42 F.R. 18053, terminated the natural gas emergency declared to exist by Proc. No. 4485, Feb. 2, 1977, 42 F.R. 6789, formerly set out above.

§ 717a. Definitions

When used in this chapter, unless the context otherwise requires—

(1) ''Person'' includes an individual or a corporation.

(2) ''Corporation'' includes any corporation, joint-stock company, partnership, association, business trust, organized group of persons, whether incorporated or not, receiver or receivers, trustee or trustees of any of the foregoing, but shall not include municipalities as hereinafter defined.

(3) ''Municipality'' means a city, county, or other political subdivision or agency of a State.

(4) ''State'' means a State admitted to the Union, the District of Columbia, and any organized Territory of the United States.

(5) ''Natural gas'' means either natural gas unmixed, or any mixture of natural and artificial gas.

(6) ''Natural-gas company'' means a person engaged in the transportation of natural gas in interstate commerce, or the sale in interstate commerce of such gas for resale.

(7) ''Interstate commerce'' means commerce between any point in a State and any point outside thereof, or between points within the same State but through any place outside thereof, but only insofar as such commerce takes place within the United States.

(8) ''State commission'' means the regulatory body of the State or municipality having jurisdiction to regulate rates and charges for the sale of natural gas to consumers within the State or municipality.

(9) ''Commission'' and ''Commissioner'' means the Federal Power Commission, and a member thereof, respectively.

(10) ''Vehicular natural gas'' means natural gas that is ultimately used as a fuel in a self-propelled vehicle.

(11) ''LNG terminal'' includes all natural gas facilities located onshore or in State waters that are used to receive, unload, load, store, transport, gasify, liquefy, or process natural gas that is imported to the United States from a foreign country, exported to a foreign country from the United States, or transported in interstate commerce by waterborne vessel, but does not include—

(A) waterborne vessels used to deliver natural gas to or from any such facility; or

(B) any pipeline or storage facility subject to the jurisdiction of the Commission under section 717f of this title.

(June 21, 1938, ch. 556, § 2, 52 Stat. 821; Pub. L. 102–486, title IV, § 404(a)(2), Oct. 24, 1992, 106 Stat. 2879; Pub. L. 109–58, title III, § 311(b), Aug. 8, 2005, 119 Stat. 685.)

AMENDMENTS

2005—Par. (11). Pub. L. 109–58 added par. (11).
1992—Par. (10). Pub. L. 102–486 added par. (10).

TERMINATION OF FEDERAL POWER COMMISSION; TRANSFER OF FUNCTIONS

Federal Power Commission terminated and functions, personnel, property, funds, etc., transferred to Secretary of Energy (except for certain functions transferred to Federal Energy Regulatory Commission) by sections 7151(b), 7171(a), 7172(a)(1), 7291, and 7293 of Title 42, The Public Health and Welfare.

§ 717b. Exportation or importation of natural gas; LNG terminals

(a) Mandatory authorization order

After six months from June 21, 1938, no person shall export any natural gas from the United States to a foreign country or import any natural gas from a foreign country without first having secured an order of the Commission authorizing it to do so. The Commission shall issue such order upon application, unless, after opportunity for hearing, it finds that the proposed exportation or importation will not be consistent with the public interest. The Commission may by its order grant such application, in whole or in part, with such modification and upon such terms and conditions as the Commission may find necessary or appropriate, and may from time to time, after opportunity for hearing, and for good cause shown, make such supplemental order in the premises as it may find necessary or appropriate.

(b) Free trade agreements

With respect to natural gas which is imported into the United States from a nation with which there is in effect a free trade agreement requiring national treatment for trade in natural gas, and with respect to liquefied natural gas—

(1) the importation of such natural gas shall be treated as a ''first sale'' within the meaning of section 3301(21) of this title; and

(2) the Commission shall not, on the basis of national origin, treat any such imported natural gas on an unjust, unreasonable, unduly discriminatory, or preferential basis.

(c) Expedited application and approval process

For purposes of subsection (a), the importation of the natural gas referred to in subsection (b), or the exportation of natural gas to a nation with which there is in effect a free trade agreement requiring national treatment for trade in natural gas, shall be deemed to be consistent with the public interest, and applications for such importation or exportation shall be granted without modification or delay.

(d) Construction with other laws

Except as specifically provided in this chapter, nothing in this chapter affects the rights of States under—

(1) the Coastal Zone Management Act of 1972 (16 U.S.C. 1451 et seq.);

(2) the Clean Air Act (42 U.S.C. 7401 et seq.); or

(3) the Federal Water Pollution Control Act (33 U.S.C. 1251 et seq.).

(e) LNG terminals

(1) The Commission shall have the exclusive authority to approve or deny an application for the siting, construction, expansion, or operation of an LNG terminal. Except as specifically provided in this chapter, nothing in this chapter is intended to affect otherwise applicable law related to any Federal agency's authorities or responsibilities related to LNG terminals.

(2) Upon the filing of any application to site, construct, expand, or operate an LNG terminal, the Commission shall—

(A) set the matter for hearing;

(B) give reasonable notice of the hearing to all interested persons, including the State commission of the State in which the LNG terminal is located and, if not the same, the Governor-appointed State agency described in section 717b–1 of this title;

(C) decide the matter in accordance with this subsection; and

(D) issue or deny the appropriate order accordingly.

(3)(A) Except as provided in subparagraph (B), the Commission may approve an application described in paragraph (2), in whole or part, with such modifications and upon such terms and conditions as the Commission find[1] necessary or appropriate.

(B) Before January 1, 2015, the Commission shall not—

(i) deny an application solely on the basis that the applicant proposes to use the LNG terminal exclusively or partially for gas that the applicant or an affiliate of the applicant will supply to the facility; or

(ii) condition an order on—

(I) a requirement that the LNG terminal offer service to customers other than the applicant, or any affiliate of the applicant, securing the order;

(II) any regulation of the rates, charges, terms, or conditions of service of the LNG terminal; or

(III) a requirement to file with the Commission schedules or contracts related to the rates, charges, terms, or conditions of service of the LNG terminal.

(C) Subparagraph (B) shall cease to have effect on January 1, 2030.

(4) An order issued for an LNG terminal that also offers service to customers on an open access basis shall not result in subsidization of expansion capacity by existing customers, degradation of service to existing customers, or undue discrimination against existing customers as to their terms or conditions of service at the facility, as all of those terms are defined by the Commission.

(f) Military installations

(1) In this subsection, the term ''military installation''—

[1] So in original. Probably should be ''finds''.

(A) means a base, camp, post, range, station, yard, center, or homeport facility for any ship or other activity under the jurisdiction of the Department of Defense, including any leased facility, that is located within a State, the District of Columbia, or any territory of the United States; and

(B) does not include any facility used primarily for civil works, rivers and harbors projects, or flood control projects, as determined by the Secretary of Defense.

(2) The Commission shall enter into a memorandum of understanding with the Secretary of Defense for the purpose of ensuring that the Commission coordinate and consult[2] with the Secretary of Defense on the siting, construction, expansion, or operation of liquefied natural gas facilities that may affect an active military installation.

(3) The Commission shall obtain the concurrence of the Secretary of Defense before authorizing the siting, construction, expansion, or operation of liquefied natural gas facilities affecting the training or activities of an active military installation.

(June 21, 1938, ch. 556, §3, 52 Stat. 822; Pub. L. 102–486, title II, §201, Oct. 24, 1992, 106 Stat. 2866; Pub. L. 109–58, title III, §311(c), Aug. 8, 2005, 119 Stat. 685.)

REFERENCES IN TEXT

The Coastal Zone Management Act of 1972, referred to in subsec. (d)(1), is title III of Pub. L. 89–454 as added by Pub. L. 92–583, Oct. 27, 1972, 86 Stat. 1280, as amended, which is classified generally to chapter 33 (§1451 et seq.) of Title 16, Conservation. For complete classification of this Act to the Code, see Short Title note set out under section 1451 of Title 16 and Tables.

The Clean Air Act, referred to in subsec. (d)(2), is act July 14, 1955, ch. 360, 69 Stat. 322, as amended, which is classified generally to chapter 85 (§7401 et seq.) of Title 42, The Public Health and Welfare. For complete classification of this Act to the Code, see Short Title note set out under section 7401 of Title 42 and Tables.

The Federal Water Pollution Control Act, referred to in subsec. (d)(3), is act June 30, 1948, ch. 758, as amended generally by Pub. L. 92–500, §2, Oct. 18, 1972, 86 Stat. 816, which is classified generally to chapter 26 (§1251 et seq.) of Title 33, Navigation and Navigable Waters. For complete classification of this Act to the Code, see Short Title note set out under section 1251 of Title 33 and Tables.

AMENDMENTS

2005—Pub. L. 109–58, §311(c)(1), inserted ''; LNG terminals'' after ''natural gas'' in section catchline.

Subsecs. (d) to (f). Pub. L. 109–58, §311(c)(2), added subsecs. (d) to (f).

1992—Pub. L. 102–486 designated existing provisions as subsec. (a) and added subsecs. (b) and (c).

TRANSFER OF FUNCTIONS

Enforcement functions of Secretary or other official in Department of Energy and Commission, Commissioners, or other official in Federal Energy Regulatory Commission related to compliance with authorizations for importation of natural gas from Alberta as pre-deliveries of Alaskan gas issued under this section with respect to pre-construction, construction, and initial operation of transportation system for Canadian and Alaskan natural gas transferred to the Federal Inspector, Office of Federal Inspector for Alaska Natural Gas Transportation System, until first anniversary of date of initial operation of Alaska Natural Gas Transportation System, see Reorg. Plan No. 1 of 1979, §§102(d), 203(a), 44 F.R. 33663, 33666, 93 Stat. 1373, 1376, effective July 1, 1979, set out under section 719e of this title. Office of Federal Inspector for the Alaska Natural Gas Transportation System abolished and functions and authority vested in Inspector transferred to Secretary of Energy by section 3012(b) of Pub. L. 102–486, set out as an Abolition of Office of Federal Inspector note under section 719e of this title. Functions and authority vested in Secretary of Energy subsequently transferred to Federal Coordinator for Alaska Natural Gas Transportation Projects by section 720d(f) of this title.

DELEGATION OF FUNCTIONS

Functions of President respecting certain facilities constructed and maintained on United States borders delegated to Secretary of State, see Ex. Ord. No. 11423, Aug. 16, 1968, 33 F.R. 11741, set out as a note under section 301 of Title 3, The President.

EX. ORD. NO. 10485. PERFORMANCE OF FUNCTIONS RESPECTING ELECTRIC POWER AND NATURAL GAS FACILITIES LOCATED ON UNITED STATES BORDERS

Ex. Ord. No. 10485. Sept. 3, 1953, 18 F.R. 5397, as amended by Ex. Ord. No. 12038, Feb. 3, 1978, 43 F.R. 4957, provided:

SECTION 1. (a) The Secretary of Energy is hereby designated and empowered to perform the following-described functions:

(1) To receive all applications for permits for the construction, operation, maintenance, or connection, at the borders of the United States, of facilities for the transmission of electric energy between the United States and a foreign country.

(2) To receive all applications for permits for the construction, operation, maintenance, or connection, at the borders of the United States, of facilities for the exportation or importation of natural gas to or from a foreign country.

(3) Upon finding the issuance of the permit to be consistent with the public interest, and, after obtaining the favorable recommendations of the Secretary of State and the Secretary of Defense thereon, to issue to the applicant, as appropriate, a permit for such construction, operation, maintenance, or connection. The Secretary of Energy shall have the power to attach to the issuance of the permit and to the exercise of the rights granted thereunder such conditions as the public interest may in its judgment require.

(b) In any case wherein the Secretary of Energy, the Secretary of State, and the Secretary of Defense cannot agree as to whether or not a permit should be issued, the Secretary of Energy shall submit to the President for approval or disapproval the application for a permit with the respective views of the Secretary of Energy, the Secretary of State and the Secretary of Defense.

SEC. 2. [Deleted.]

SEC. 3. The Secretary of Energy is authorized to issue such rules and regulations, and to prescribe such procedures, as it may from time to time deem necessary or desirable for the exercise of the authority delegated to it by this order.

SEC. 4. All Presidential Permits heretofore issued pursuant to Executive Order No. 8202 of July 13, 1939, and in force at the time of the issuance of this order, and all permits issued hereunder, shall remain in full force and effect until modified or revoked by the President or by the Secretary of Energy.

SEC. 5. Executive Order No. 8202 of July 13, 1939, is hereby revoked.

§ 717b–1. State and local safety considerations

(a) Promulgation of regulations

The Commission shall promulgate regulations on the National Environmental Policy Act of

[2] So in original. Probably should be ''coordinates and consults''.

tions as the Commission may prescribe as necessary in the public interest or for the protection of natural gas ratepayers. Nothing in this section shall be construed to create a private right of action.

(June 21, 1938, ch. 556, § 4A, as added Pub. L. 109–58, title III, § 315, Aug. 8, 2005, 119 Stat. 691.)

§ 717d. Fixing rates and charges; determination of cost of production or transportation

(a) Decreases in rates

Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas distributing company, shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order: *Provided*, *however*, That the Commission shall have no power to order any increase in any rate contained in the currently effective schedule of such natural gas company on file with the Commission, unless such increase is in accordance with a new schedule filed by such natural gas company; but the Commission may order a decrease where existing rates are unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rates.

(b) Costs of production and transportation

The Commission upon its own motion, or upon the request of any State commission, whenever it can do so without prejudice to the efficient and proper conduct of its affairs, may investigate and determine the cost of the production or transportation of natural gas by a natural-gas company in cases where the Commission has no authority to establish a rate governing the transportation or sale of such natural gas.

(June 21, 1938, ch. 556, § 5, 52 Stat. 823.)

§ 717e. Ascertainment of cost of property

(a) Cost of property

The Commission may investigate and ascertain the actual legitimate cost of the property of every natural-gas company, the depreciation therein, and, when found necessary for rate-making purposes, other facts which bear on the determination of such cost or depreciation and the fair value of such property.

(b) Inventory of property; statements of costs

Every natural-gas company upon request shall file with the Commission an inventory of all or any part of its property and a statement of the original cost thereof, and shall keep the Commission informed regarding the cost of all additions, betterments, extensions, and new construction.

(June 21, 1938, ch. 556, § 6, 52 Stat. 824.)

§ 717f. Construction, extension, or abandonment of facilities

(a) Extension or improvement of facilities on order of court; notice and hearing

Whenever the Commission, after notice and opportunity for hearing, finds such action necessary or desirable in the public interest, it may by order direct a natural-gas company to extend or improve its transportation facilities, to establish physical connection of its transportation facilities with the facilities of, and sell natural gas to, any person or municipality engaged or legally authorized to engage in the local distribution of natural or artificial gas to the public, and for such purpose to extend its transportation facilities to communities immediately adjacent to such facilities or to territory served by such natural-gas company, if the Commission finds that no undue burden will be placed upon such natural-gas company thereby: *Provided*, That the Commission shall have no authority to compel the enlargement of transportation facilities for such purposes, or to compel such natural-gas company to establish physical connection or sell natural gas when to do so would impair its ability to render adequate service to its customers.

(b) Abandonment of facilities or services; approval of Commission

No natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission first had and obtained, after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment.

(c) Certificate of public convenience and necessity

(1)(A) No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations: *Provided*, *however*, That if any such natural-gas company or predecessor in interest was bona fide engaged in transportation or sale of natural gas, subject to the jurisdiction of the Commission, on February 7, 1942, over the route or routes or within the area for which application is made and has so operated since that time, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission within ninety days after February 7, 1942. Pending the determination of any such application, the continuance of such operation shall be lawful.

(B) In all other cases the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission; and the application shall be decided in accordance with the procedure provided in subsection (e) of this section and such certificate shall be issued or denied accordingly: *Provided, however*, That the Commission may issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of an application for a certificate, and may by regulation exempt from the requirements of this section temporary acts or operations for which the issuance of a certificate will not be required in the public interest.

(2) The Commission may issue a certificate of public convenience and necessity to a natural-gas company for the transportation in interstate commerce of natural gas used by any person for one or more high-priority uses, as defined, by rule, by the Commission, in the case of—

(A) natural gas sold by the producer to such person; and

(B) natural gas produced by such person.

(d) Application for certificate of public convenience and necessity

Application for certificates shall be made in writing to the Commission, be verified under oath, and shall be in such form, contain such information, and notice thereof shall be served upon such interested parties and in such manner as the Commission shall, by regulation, require.

(e) Granting of certificate of public convenience and necessity

Except in the cases governed by the provisos contained in subsection (c)(1) of this section, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of this chapter and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require.

(f) Determination of service area; jurisdiction of transportation to ultimate consumers

(1) The Commission, after a hearing had upon its own motion or upon application, may determine the service area to which each authorization under this section is to be limited. Within such service area as determined by the Commission a natural-gas company may enlarge or extend its facilities for the purpose of supplying increased market demands in such service area without further authorization; and

(2) If the Commission has determined a service area pursuant to this subsection, transportation to ultimate consumers in such service area by the holder of such service area determination, even if across State lines, shall be subject to the exclusive jurisdiction of the State commission in the State in which the gas is consumed. This section shall not apply to the transportation of natural gas to another natural gas company.

(g) Certificate of public convenience and necessity for service of area already being served

Nothing contained in this section shall be construed as a limitation upon the power of the Commission to grant certificates of public convenience and necessity for service of an area already being served by another natural-gas company.

(h) Right of eminent domain for construction of pipelines, etc.

When any holder of a certificate of public convenience and necessity cannot acquire by contract, or is unable to agree with the owner of property to the compensation to be paid for, the necessary right-of-way to construct, operate, and maintain a pipe line or pipe lines for the transportation of natural gas, and the necessary land or other property, in addition to right-of-way, for the location of compressor stations, pressure apparatus, or other stations or equipment necessary to the proper operation of such pipe line or pipe lines, it may acquire the same by the exercise of the right of eminent domain in the district court of the United States for the district in which such property may be located, or in the State courts. The practice and procedure in any action or proceeding for that purpose in the district court of the United States shall conform as nearly as may be with the practice and procedure in similar action or proceeding in the courts of the State where the property is situated: *Provided*, That the United States district courts shall only have jurisdiction of cases when the amount claimed by the owner of the property to be condemned exceeds $3,000.

(June 21, 1938, ch. 556, §7, 52 Stat. 824; Feb. 7, 1942, ch. 49, 56 Stat. 83; July 25, 1947, ch. 333, 61 Stat. 459; Pub. L. 95–617, title VI, §608, Nov. 9, 1978, 92 Stat. 3173; Pub. L. 100–474, §2, Oct. 6, 1988, 102 Stat. 2302.)

AMENDMENTS

1988—Subsec. (f). Pub. L. 100–474 designated existing provisions as par. (1) and added par. (2).

1978—Subsec. (c). Pub. L. 95–617, §608(a), (b)(1), designated existing first paragraph as par. (1)(A) and existing second paragraph as par. (1)(B) and added par. (2).

Subsec. (e). Pub. L. 95–617, §608(b)(2), substituted ''subsection (c)(1)'' for ''subsection (c)''.

1947—Subsec. (h). Act July 25, 1947, added subsec. (h).

1942—Subsecs. (c) to (g). Act Feb. 7, 1942, struck out subsec. (c), and added new subsecs. (c) to (g).

EFFECTIVE DATE OF 1988 AMENDMENT

Pub. L. 100–474, §3, Oct. 6, 1988, 102 Stat. 2302, provided that: ''The provisions of this Act [amending this section and enacting provisions set out as a note under section 717w of this title] shall become effective one hundred and twenty days after the date of enactment [Oct. 6, 1988].''

TRANSFER OF FUNCTIONS

Enforcement functions of Secretary or other official in Department of Energy and Commission, Commissioners, or other official in Federal Energy Regulatory Commission related to compliance with certificates of public convenience and necessity issued under this section with respect to pre-construction, construction, and initial operation of transportation system for Canadian and Alaskan natural gas transferred to Federal Inspector, Office of Federal Inspector for Alaska Natural Gas Transportation System, until first anniversary of date of initial operation of Alaska Natural Gas Transportation System, see Reorg. Plan No. 1 of 1979, §§102(d), 203(a), 44 F.R. 33663, 33666, 93 Stat. 1373, 1376, effective July 1, 1979, set out under section 719e of this title. Office of Federal Inspector for the Alaska Natural Gas Transportation System abolished and functions and authority vested in Inspector transferred to Secretary of Energy by section 3012(b) of Pub. L. 102–486, set out as an Abolition of Office of Federal Inspector note under section 719e of this title. Functions and authority vested in Secretary of Energy subsequently transferred to Federal Coordinator for Alaska Natural Gas Transportation Projects by section 720d(f) of this title.

§ 717g. Accounts; records; memoranda

(a) Rules and regulations for keeping and preserving accounts, records, etc.

Every natural-gas company shall make, keep, and preserve for such periods, such accounts, records of cost-accounting procedures, correspondence, memoranda, papers, books, and other records as the Commission may by rules and regulations prescribe as necessary or appropriate for purposes of the administration of this chapter: *Provided, however*, That nothing in this chapter shall relieve any such natural-gas company from keeping any accounts, memoranda, or records which such natural-gas company may be required to keep by or under authority of the laws of any State. The Commission may prescribe a system of accounts to be kept by such natural-gas companies, and may classify such natural-gas companies and prescribe a system of accounts for each class. The Commission, after notice and opportunity for hearing, may determine by order the accounts in which particular outlays or receipts shall be entered, charged, or credited. The burden of proof to justify every accounting entry questioned by the Commission shall be on the person making, authorizing, or requiring such entry, and the Commission may suspend a charge or credit pending submission of satisfactory proof in support thereof.

(b) Access to and inspection of accounts and records

The Commission shall at all times have access to and the right to inspect and examine all accounts, records, and memoranda of natural-gas companies; and it shall be the duty of such natural-gas companies to furnish to the Commission, within such reasonable time as the Commission may order, any information with respect thereto which the Commission may by order require, including copies of maps, contracts, reports of engineers, and other data, records, and papers, and to grant to all agents of the Commission free access to its property and its accounts, records, and memoranda when requested so to do. No member, officer, or employee of the Commission shall divulge any fact or information which may come to his knowledge during the course of examination of books, records, data, or accounts, except insofar as he may be directed by the Commission or by a court.

(c) Books, accounts, etc., of the person controlling gas company subject to examination

The books, accounts, memoranda, and records of any person who controls directly or indirectly a natural-gas company subject to the jurisdiction of the Commission and of any other company controlled by such person, insofar as they relate to transactions with or the business of such natural-gas company, shall be subject to examination on the order of the Commission.

(June 21, 1938, ch. 556, § 8, 52 Stat. 825.)

§ 717h. Rates of depreciation

(a) Depreciation and amortization

The Commission may, after hearing, require natural-gas companies to carry proper and adequate depreciation and amortization accounts in accordance with such rules, regulations, and forms of account as the Commission may prescribe. The Commission may from time to time ascertain and determine, and by order fix, the proper and adequate rates of depreciation and amortization of the several classes of property of each natural-gas company used or useful in the production, transportation, or sale of natural gas. Each natural-gas company shall conform its depreciation and amortization accounts to the rates so ascertained, determined, and fixed. No natural-gas company subject to the jurisdiction of the Commission shall charge to operating expenses any depreciation or amortization charges on classes of property other than those prescribed by the Commission, or charge with respect to any class of property a percentage of depreciation or amortization other than that prescribed therefor by the Commission. No such natural-gas company shall in any case include in any form under its operating or other expenses any depreciation, amortization, or other charge or expenditure included elsewhere as a depreciation or amortization charge or otherwise under its operating or other expenses. Nothing in this section shall limit the power of a State commission to determine in the exercise of its jurisdiction, with respect to any natural-gas company, the percentage rates of depreciation or amortization to be allowed, as to any class of property of such natural-gas company, or the composite depreciation or amortization rate, for the purpose of determining rates or charges.

(b) Rules

The Commission, before prescribing any rules or requirements as to accounts, records, or memoranda, or as to depreciation or amortization rates, shall notify each State commission having jurisdiction with respect to any natural-gas company involved and shall give reasonable opportunity to each such commission to present its views and shall receive and consider such views and recommendations.

(June 21, 1938, ch. 556, § 9, 52 Stat. 826.)

''(c) REPORT.—Not later than 1 year after the date of enactment of this Act [Dec. 17, 2002], the Federal Energy Regulatory Commission shall prepare and submit to the Committee on Energy and Natural Resources of the Senate and the Committee on Energy and Commerce of the House of Representatives a report containing the results of the study conducted under subsection (a), including recommendations for addressing potential natural gas transmission and storage capacity problems in New England.''

§ 717n. Process coordination; hearings; rules of procedure

(a) Definition

In this section, the term ''Federal authorization''—

(1) means any authorization required under Federal law with respect to an application for authorization under section 717b of this title or a certificate of public convenience and necessity under section 717f of this title; and

(2) includes any permits, special use authorizations, certifications, opinions, or other approvals as may be required under Federal law with respect to an application for authorization under section 717b of this title or a certificate of public convenience and necessity under section 717f of this title.

(b) Designation as lead agency

(1) In general

The Commission shall act as the lead agency for the purposes of coordinating all applicable Federal authorizations and for the purposes of complying with the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.).

(2) Other agencies

Each Federal and State agency considering an aspect of an application for Federal authorization shall cooperate with the Commission and comply with the deadlines established by the Commission.

(c) Schedule

(1) Commission authority to set schedule

The Commission shall establish a schedule for all Federal authorizations. In establishing the schedule, the Commission shall—

(A) ensure expeditious completion of all such proceedings; and

(B) comply with applicable schedules established by Federal law.

(2) Failure to meet schedule

If a Federal or State administrative agency does not complete a proceeding for an approval that is required for a Federal authorization in accordance with the schedule established by the Commission, the applicant may pursue remedies under section 717r(d) of this title.

(d) Consolidated record

The Commission shall, with the cooperation of Federal and State administrative agencies and officials, maintain a complete consolidated record of all decisions made or actions taken by the Commission or by a Federal administrative agency or officer (or State administrative agency or officer acting under delegated Federal authority) with respect to any Federal authorization. Such record shall be the record for—

(1) appeals or reviews under the Coastal Zone Management Act of 1972 (16 U.S.C. 1451 et seq.), provided that the record may be supplemented as expressly provided pursuant to section 319 of that Act [16 U.S.C. 1465]; or

(2) judicial review under section 717r(d) of this title of decisions made or actions taken of Federal and State administrative agencies and officials, provided that, if the Court determines that the record does not contain sufficient information, the Court may remand the proceeding to the Commission for further development of the consolidated record.

(e) Hearings; parties

Hearings under this chapter may be held before the Commission, any member or members thereof, or any representative of the Commission designated by it, and appropriate records thereof shall be kept. In any proceeding before it, the Commission in accordance with such rules and regulations as it may prescribe, may admit as a party any interested State, State commission, municipality or any representative of interested consumers or security holders, or any competitor of a party to such proceeding, or any other person whose participation in the proceeding may be in the public interest.

(f) Procedure

All hearings, investigations, and proceedings under this chapter shall be governed by rules of practice and procedure to be adopted by the Commission, and in the conduct thereof the technical rules of evidence need not be applied. No informality in any hearing, investigation, or proceeding or in the manner of taking testimony shall invalidate any order, decision, rule, or regulation issued under the authority of this chapter.

(June 21, 1938, ch. 556, §15, 52 Stat. 829; Pub. L. 109–58, title III, §313(a), Aug. 8, 2005, 119 Stat. 688.)

REFERENCES IN TEXT

The National Environmental Policy Act of 1969, referred to in subsec. (b)(1), is Pub. L. 91–190, Jan. 1, 1970, 83 Stat. 852, as amended, which is classified generally to chapter 55 (§4321 et seq.) of Title 42, The Public Health and Welfare. For complete classification of this Act to the Code, see Short Title note set out under section 4321 of Title 42 and Tables.

The Coastal Zone Management Act of 1972, referred to in subsec. (d)(1), is title III of Pub. L. 89–454, as added by Pub. L. 92–583, Oct. 27, 1972, 86 Stat. 1280, as amended, which is classified generally to chapter 33 (§1451 et seq.) of Title 16, Conservation. For complete classification of this Act to the Code, see Short Title note set out under section 1451 of Title 16 and Tables.

AMENDMENTS

2005—Pub. L. 109–58 substituted ''Process coordination; hearings; rules of procedure'' for ''Hearings; rules of procedure'' in section catchline, added subsecs. (a) to (d), and redesignated former subsecs. (a) and (b) as (e) and (f), respectively.

§ 717*o*. Administrative powers of Commission; rules, regulations, and orders

The Commission shall have power to perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders, rules, and regulations as it may find necessary or appropriate

to carry out the provisions of this chapter. Among other things, such rules and regulations may define accounting, technical, and trade terms used in this chapter; and may prescribe the form or forms of all statements, declarations, applications, and reports to be filed with the Commission, the information which they shall contain, and the time within which they shall be filed. Unless a different date is specified therein, rules and regulations of the Commission shall be effective thirty days after publication in the manner which the Commission shall prescribe. Orders of the Commission shall be effective on the date and in the manner which the Commission shall prescribe. For the purposes of its rules and regulations, the Commission may classify persons and matters within its jurisdiction and prescribe different requirements for different classes of persons or matters. All rules and regulations of the Commission shall be filed with its secretary and shall be kept open in convenient form for public inspection and examination during reasonable business hours.

(June 21, 1938, ch. 556, § 16, 52 Stat. 830.)

§ 717p. Joint boards

(a) Reference of matters to joint boards; composition and power

The Commission may refer any matter arising in the administration of this chapter to a board to be composed of a member or members, as determined by the Commission, from the State or each of the States affected or to be affected by such matter. Any such board shall be vested with the same power and be subject to the same duties and liabilities as in the case of a member of the Commission when designated by the Commission to hold any hearings. The action of such board shall have such force and effect and its proceedings shall be conducted in such manner as the Commission shall by regulations prescribe. The Board shall be appointed by the Commission from persons nominated by the State commission of each State affected, or by the Governor of such State if there is no State commission. Each State affected shall be entitled to the same number of representatives on the board unless the nominating power of such State waives such right. The Commission shall have discretion to reject the nominee from any State, but shall thereupon invite a new nomination from that State. The members of a board shall receive such allowances for expenses as the Commission shall provide. The Commission may, when in its discretion sufficient reason exists therefor, revoke any reference to such a board.

(b) Conference with State commissions regarding rate structure, costs, etc.

The Commission may confer with any State commission regarding rate structures, costs, accounts, charges, practices, classifications, and regulations of natural-gas companies; and the Commission is authorized, under such rules and regulations as it shall prescribe, to hold joint hearings with any State commission in connection with any matter with respect to which the Commission is authorized to act. The Commission is authorized in the administration of this chapter to avail itself of such cooperation, services, records, and facilities as may be afforded by any State commission.

(c) Information and reports available to State commissions

The Commission shall make available to the several State commissions such information and reports as may be of assistance in State regulation of natural-gas companies. Whenever the Commission can do so without prejudice to the efficient and proper conduct of its affairs, it may, upon request from a State commission, make available to such State commission as witnesses any of its trained rate, valuation, or other experts, subject to reimbursement of the compensation and traveling expenses of such witnesses. All sums collected hereunder shall be credited to the appropriation from which the amounts were expended in carrying out the provisions of this subsection.

(June 21, 1938, ch. 556, § 17, 52 Stat. 830.)

§ 717q. Appointment of officers and employees

The Commission is authorized to appoint and fix the compensation of such officers, attorneys, examiners, and experts as may be necessary for carrying out its functions under this chapter; and the Commission may, subject to civil-service laws, appoint such other officers and employees as are necessary for carrying out such functions and fix their salaries in accordance with chapter 51 and subchapter III of chapter 53 of title 5.

(June 21, 1938, ch. 556, § 18, 52 Stat. 831; Oct. 28, 1949, ch. 782, title XI, § 1106(a), 63 Stat. 972.)

CODIFICATION

Provisions that authorized the Commission to appoint and fix the compensation of such officers, attorneys, examiners, and experts as may be necessary for carrying out its functions under this chapter ''without regard to the provisions of other laws applicable to the employment and compensation of officers and employees of the United States'' are omitted as obsolete and superseded.

As to the compensation of such personnel, sections 1202 and 1204 of the Classification Act of 1949, 63 Stat. 972, 973, repealed the Classification Act of 1923 and all other laws or parts of laws inconsistent with the 1949 Act. The Classification Act of 1949 was repealed by Pub. L. 89–554, Sept. 6, 1966, § 8(a), 80 Stat. 632, and reenacted as chapter 51 and subchapter III of chapter 53 of Title 5, Government Organization and Employees. Section 5102 of Title 5 contains the applicability provisions of the 1949 Act, and section 5103 of Title 5 authorizes the Office of Personnel Management to determine the applicability to specific positions and employees.

Such appointments are now subject to the civil service laws unless specifically excepted by those laws or by laws enacted subsequent to Executive Order 8743, Apr. 23, 1941, issued by the President pursuant to the Act of Nov. 26, 1940, ch. 919, title I, § 1, 54 Stat. 1211, which covered most excepted positions into the classified (competitive) civil service. The Order is set out as a note under section 3301 of Title 5.

''Chapter 51 and subchapter III of chapter 53 of title 5'' substituted in text for ''the Classification Act of 1949, as amended'' on authority of Pub. L. 89–554, § 7(b), Sept. 6, 1966, 80 Stat. 631, the first section of which enacted Title 5.

AMENDMENTS

1949—Act Oct. 28, 1949, substituted ''Classification Act of 1949'' for ''Classification Act of 1923''.

REPEALS

Act Oct. 28, 1949, ch. 782, cited as a credit to this section, was repealed (subject to a savings clause) by Pub. L. 89–554, Sept. 6, 1966, § 8, 80 Stat. 632, 655.

§ 717r. Rehearing and review

(a) Application for rehearing; time

Any person, State, municipality, or State commission aggrieved by an order issued by the Commission in a proceeding under this chapter to which such person, State, municipality, or State commission is a party may apply for a rehearing within thirty days after the issuance of such order. The application for rehearing shall set forth specifically the ground or grounds upon which such application is based. Upon such application the Commission shall have power to grant or deny rehearing or to abrogate or modify its order without further hearing. Unless the Commission acts upon the application for rehearing within thirty days after it is filed, such application may be deemed to have been denied. No proceeding to review any order of the Commission shall be brought by any person unless such person shall have made application to the Commission for a rehearing thereon. Until the record in a proceeding shall have been filed in a court of appeals, as provided in subsection (b), the Commission may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it under the provisions of this chapter.

(b) Review of Commission order

Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the court of appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of title 28. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which is supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of title 28.

(c) Stay of Commission order

The filing of an application for rehearing under subsection (a) shall not, unless specifically ordered by the Commission, operate as a stay of the Commission's order. The commencement of proceedings under subsection (b) of this section shall not, unless specifically ordered by the court, operate as a stay of the Commission's order.

(d) Judicial review

(1) In general

The United States Court of Appeals for the circuit in which a facility subject to section 717b of this title or section 717f of this title is proposed to be constructed, expanded, or operated shall have original and exclusive jurisdiction over any civil action for the review of an order or action of a Federal agency (other than the Commission) or State administrative agency acting pursuant to Federal law to issue, condition, or deny any permit, license, concurrence, or approval (hereinafter collectively referred to as ''permit'') required under Federal law, other than the Coastal Zone Management Act of 1972 (16 U.S.C. 1451 et seq.).

(2) Agency delay

The United States Court of Appeals for the District of Columbia shall have original and exclusive jurisdiction over any civil action for the review of an alleged failure to act by a Federal agency (other than the Commission) or State administrative agency acting pursuant to Federal law to issue, condition, or deny any permit required under Federal law, other than the Coastal Zone Management Act of 1972 (16 U.S.C. 1451 et seq.), for a facility subject to section 717b of this title or section 717f of this title. The failure of an agency to take action on a permit required under Federal law, other than the Coastal Zone Management Act of 1972, in accordance with the Commission schedule established pursuant to section 717n(c) of this title shall be considered inconsistent with Federal law for the purposes of paragraph (3).

(3) Court action

If the Court finds that such order or action is inconsistent with the Federal law governing such permit and would prevent the construction, expansion, or operation of the facility subject to section 717b of this title or section

717f of this title, the Court shall remand the proceeding to the agency to take appropriate action consistent with the order of the Court. If the Court remands the order or action to the Federal or State agency, the Court shall set a reasonable schedule and deadline for the agency to act on remand.

(4) Commission action

For any action described in this subsection, the Commission shall file with the Court the consolidated record of such order or action to which the appeal hereunder relates.

(5) Expedited review

The Court shall set any action brought under this subsection for expedited consideration.

(June 21, 1938, ch. 556, § 19, 52 Stat. 831; June 25, 1948, ch. 646, § 32(a), 62 Stat. 991; May 24, 1949, ch. 139, § 127, 63 Stat. 107; Pub. L. 85–791, § 19, Aug. 28, 1958, 72 Stat. 947; Pub. L. 109–58, title III, § 313(b), Aug. 8, 2005, 119 Stat. 689.)

REFERENCES IN TEXT

The Coastal Zone Management Act of 1972, referred to in subsec. (d)(1), (2), is title III of Pub. L. 89–454, as added by Pub. L. 92–583, Oct. 27, 1972, 86 Stat. 1280, as amended, which is classified generally to chapter 33 (§ 1451 et seq.) of Title 16, Conservation. For complete classification of this Act to the Code, see Short Title note set out under section 1451 of Title 16 and Tables.

CODIFICATION

In subsec. (b), ''section 1254 of title 28'' substituted for ''sections 239 and 240 of the Judicial Code, as amended [28 U.S.C. 346, 347]'' on authority of act June 25, 1948, ch. 646, 62 Stat. 869, the first section of which enacted Title 28, Judiciary and Judicial Procedure.

AMENDMENTS

2005—Subsec. (d). Pub. L. 109–58 added subsec. (d).

1958—Subsec. (a). Pub. L. 85–791, § 19(a), inserted sentence providing that until record in a proceeding has been filed in a court of appeals, Commission may modify or set aside any finding or order issued by it.

Subsec. (b). Pub. L. 85–791, § 19(b), in second sentence, substituted ''transmitted by the clerk of the court to'' for ''served upon'', substituted ''file with the court'' for ''certify and file with the court a transcript of'', and inserted ''as provided in section 2112 of title 28'', and, in third sentence, substituted ''petition'' for ''transcript'', and ''jurisdiction, which upon the filing of the record with it shall be exclusive'' for ''exclusive jurisdiction''.

CHANGE OF NAME

Act June 25, 1948, eff. Sept. 1, 1948, as amended by act May 24, 1949, substituted ''court of appeals'' for ''circuit court of appeals'' wherever appearing.

§ 717s. Enforcement of chapter

(a) Action in district court for injunction

Whenever it shall appear to the Commission that any person is engaged or about to engage in any acts or practices which constitute or will constitute a violation of the provisions of this chapter, or of any rule, regulation, or order thereunder, it may in its discretion bring an action in the proper district court of the United States, or the United States courts of any Territory or other place subject to the jurisdiction of the United States, to enjoin such acts or practices and to enforce compliance with this chapter or any rule, regulation, or order thereunder, and upon a proper showing a permanent or temporary injunction or decree or restraining order shall be granted without bond. The Commission may transmit such evidence as may be available concerning such acts or practices or concerning apparent violations of the Federal antitrust laws to the Attorney General, who, in his discretion, may institute the necessary criminal proceedings.

(b) Mandamus

Upon application of the Commission the district courts of the United States and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have jurisdiction to issue writs of mandamus commanding any person to comply with the provisions of this chapter or any rule, regulation, or order of the Commission thereunder.

(c) Employment of attorneys by Commission

The Commission may employ such attorneys as it finds necessary for proper legal aid and service of the Commission or its members in the conduct of their work, or for proper representation of the public interest in investigations made by it, or cases or proceedings pending before it, whether at the Commission's own instance or upon complaint, or to appear for or represent the Commission in any case in court; and the expenses of such employment shall be paid out of the appropriation for the Commission.

(d) Violation of market manipulation provisions

In any proceedings under subsection (a), the court may prohibit, conditionally or unconditionally, and permanently or for such period of time as the court determines, any individual who is engaged or has engaged in practices constituting a violation of section 717c–1 of this title (including related rules and regulations) from—

(1) acting as an officer or director of a natural gas company; or

(2) engaging in the business of—

(A) the purchasing or selling of natural gas; or

(B) the purchasing or selling of transmission services subject to the jurisdiction of the Commission.

(June 21, 1938, ch. 556, § 20, 52 Stat. 832; June 25, 1948, ch. 646, § 1, 62 Stat. 875, 895; Pub. L. 109–58, title III, § 318, Aug. 8, 2005, 119 Stat. 693.)

CODIFICATION

The words ''the District Court of the United States for the District of Columbia'' in subsec. (a) following ''district court of the United States'' and in subsec. (b) following ''district courts of the United States'' omitted as superfluous in view of section 132(a) of Title 28, Judiciary and Judicial Procedure, which states that ''There shall be in each judicial district a district court which shall be a court of record known as the United States District Court for the district'', and section 88 of title 28 which states that ''The District of Columbia constitutes one judicial district''.

AMENDMENTS

2005—Subsec. (d). Pub. L. 109–58 added subsec. (d).

§ 717t. General penalties

(a) Any person who willfully and knowingly does or causes or suffers to be done any act,

matter, or thing in this chapter prohibited or declared to be unlawful, or who willfully and knowingly omits or fails to do any act, matter, or thing in this chapter required to be done, or willfully and knowingly causes or suffers such omission or failure, shall, upon conviction thereof, be punished by a fine of not more than $1,000,000 or by imprisonment for not more than 5 years, or both.

(b) Any person who willfully and knowingly violates any rule, regulation, restriction, condition, or order made or imposed by the Commission under authority of this chapter, shall, in addition to any other penalties provided by law, be punished upon conviction thereof by a fine of not exceeding $50,000 for each and every day during which such offense occurs.

(June 21, 1938, ch. 556, § 21, 52 Stat. 833; Pub. L. 109–58, title III, § 314(a)(1), Aug. 8, 2005, 119 Stat. 690.)

AMENDMENTS

2005—Subsec. (a). Pub. L. 109–58, § 314(a)(1)(A), substituted ''$1,000,000'' for ''$5,000'' and ''5 years'' for ''two years''.

Subsec. (b). Pub. L. 109–58, § 314(a)(1)(B), substituted ''$50,000'' for ''$500''.

§ 717t–1. Civil penalty authority

(a) In general

Any person that violates this chapter, or any rule, regulation, restriction, condition, or order made or imposed by the Commission under authority of this chapter, shall be subject to a civil penalty of not more than $1,000,000 per day per violation for as long as the violation continues.

(b) Notice

The penalty shall be assessed by the Commission after notice and opportunity for public hearing.

(c) Amount

In determining the amount of a proposed penalty, the Commission shall take into consideration the nature and seriousness of the violation and the efforts to remedy the violation.

(June 21, 1938, ch. 556, § 22, as added Pub. L. 109–58, title III, § 314(b)(1)(B), Aug. 8, 2005, 119 Stat. 691.)

PRIOR PROVISIONS

A prior section 22 of act June 21, 1938, was renumbered section 24 and is classified to section 717u of this title.

§ 717t–2. Natural gas market transparency rules

(a) In general

(1) The Commission is directed to facilitate price transparency in markets for the sale or transportation of physical natural gas in interstate commerce, having due regard for the public interest, the integrity of those markets, fair competition, and the protection of consumers.

(2) The Commission may prescribe such rules as the Commission determines necessary and appropriate to carry out the purposes of this section. The rules shall provide for the dissemination, on a timely basis, of information about the availability and prices of natural gas sold at wholesale and in interstate commerce to the Commission, State commissions, buyers and sellers of wholesale natural gas, and the public.

(3) The Commission may—

(A) obtain the information described in paragraph (2) from any market participant; and

(B) rely on entities other than the Commission to receive and make public the information, subject to the disclosure rules in subsection (b).

(4) In carrying out this section, the Commission shall consider the degree of price transparency provided by existing price publishers and providers of trade processing services, and shall rely on such publishers and services to the maximum extent possible. The Commission may establish an electronic information system if it determines that existing price publications are not adequately providing price discovery or market transparency.

(b) Information exempted from disclosure

(1) Rules described in subsection (a)(2), if adopted, shall exempt from disclosure information the Commission determines would, if disclosed, be detrimental to the operation of an effective market or jeopardize system security.

(2) In determining the information to be made available under this section and the time to make the information available, the Commission shall seek to ensure that consumers and competitive markets are protected from the adverse effects of potential collusion or other anticompetitive behaviors that can be facilitated by untimely public disclosure of transaction-specific information.

(c) Information sharing

(1) Within 180 days of August 8, 2005, the Commission shall conclude a memorandum of understanding with the Commodity Futures Trading Commission relating to information sharing, which shall include, among other things, provisions ensuring that information requests to markets within the respective jurisdiction of each agency are properly coordinated to minimize duplicative information requests, and provisions regarding the treatment of proprietary trading information.

(2) Nothing in this section may be construed to limit or affect the exclusive jurisdiction of the Commodity Futures Trading Commission under the Commodity Exchange Act (7 U.S.C. 1 et seq.).

(d) Compliance with requirements

(1) The Commission shall not condition access to interstate pipeline transportation on the reporting requirements of this section.

(2) The Commission shall not require natural gas producers, processors, or users who have a de minimis market presence to comply with the reporting requirements of this section.

(e) Retroactive effect

(1) Except as provided in paragraph (2), no person shall be subject to any civil penalty under this section with respect to any violation occurring more than 3 years before the date on which the person is provided notice of the proposed penalty under section 717t–1(b) of this title.

that project. If a license application is submitted under this clause, any other qualified license applicant may submit a competing license application in accordance with §4.36.

(d) *Limitations on submission and acceptance of exemption applications*—(1) *Unexpired permit or license.* (i) If there is an unexpired permit in effect for a project, the Commission will accept an application for exemption of that project from licensing only if the exemption applicant is the permittee. Upon acceptance for filing of the permittee's application, the permit will be considered to have expired.

(ii) If there is an unexpired license in effect for a project, the Commission will accept an application for exemption of that project from licensing only if the exemption applicant is the licensee.

(2) *Pending license applications.* If an accepted license application for a project was submitted by a permittee before the preliminary permit expired, the Commission will not accept an application for exemption of that project from licensing submitted by a person other than the former permittee.

(3) *Submitted by qualified exemption applicant.* If the first accepted license application for a project was filed by a qualified exemption applicant, the applicant may request that its license application be treated initially as an application for exemption from licensing by so notifying the Commission in writing and, unless only rights to use or occupy Federal lands would be necessary to develop and operate the project, by submitting documentary evidence showing that the applicant holds the real property interests required under §4.31. Such notice and documentation must be submitted not later than the last date for filing protests or motions to intervene prescribed in the public notice issued for its license application under §4.32(d)(2).

(e) *Priority of exemption applicant's earlier permit or license application.* Any accepted preliminary permit or license application submitted by a person who later applies for exemption of the project from licensing will retain its validity and priority under this subpart until the preliminary permit or license application is withdrawn or the project is exempted from licensing.

[Order 413, 50 FR 11680, Mar. 25, 1985, as amended by Order 499, 53 FR 27002, July 18, 1988; Order 2002, 68 FR 51116, Aug. 25, 2003; Order 699, 72 FR 45324, Aug. 14, 2007]

§4.34 Hearings on applications; consultation on terms and conditions; motions to intervene; alternative procedures.

(a) *Trial-type hearing.* The Commission may order a trial-type hearing on an application for a preliminary permit, a license, or an exemption from licensing upon either its own motion or the motion of any interested party of record. Any trial-type hearing will be limited to the issues prescribed by order of the Commission. In all other cases the hearings will be conducted by notice and comment procedures.

(b) *Notice and comment hearings.* All comments (including mandatory and recommended terms and conditions or prescriptions) on an application for exemption or license must be filed with the Commission no later than 60 days after issuance by the Commission of public notice declaring that the application is ready for environmental analysis. All reply comments must be filed within 105 days of that notice. All comments and reply comments and all other filings described in this section must be served on all persons listed in the service list prepared by the Commission, in accordance with the requirements of §385.2010 of this chapter. If a party or interceder (as defined in §385.2201 of this Chapter) submits any written material to the Commission relating to the merits of an issue that may affect the responsibilities of a particular resource agency, the party or interceder must also serve a copy of the submission on this resource agency. The Commission may allow for longer comment or reply comment periods if appropriate. A commenter or reply commenter may obtain an extension of time from the Commission only upon a showing of good cause or extraordinary circumstances in accordance with §385.2008 of this chapter. Late-filed fish and wildlife recommendations will not be subject to the requirements of paragraphs (e), (f)(1)(ii), and (f)(3) of this section, and

late-filed terms and conditions or prescriptions will not be subject to the requirements of paragraphs (f)(1)(iv), (f)(1)(v), and (f)(2) of this section. Late-filed fish and wildlife recommendations, terms and conditions, or prescriptions will be considered by the Commission under section 10(a) of the Federal Power Act if such consideration would not delay or disrupt the proceeding.

(1) *Agencies responsible for mandatory terms and conditions and presentations.* Any agency responsible for mandatory terms and conditions or prescriptions for licenses or exemptions, pursuant to sections 4(e), 18, and 30(c) of the Federal Power Act and section 405(d) of the Public Utility Regulatory Policies Act of 1978, as amended, must provide these terms and conditions or prescriptions in its initial comments filed with the Commission pursuant to paragraph (b) of this section. In those comments, the agency must specifically identify and explain the mandatory terms and conditions or prescriptions and their evidentiary and legal basis. In the case of an application prepared other than pursuant to part 5 of this chapter, if ongoing agency proceedings to determine the terms and conditions or prescriptions are not completed by the date specified, the agency must submit to the Commission by the due date:

(i) Preliminary terms and conditions or prescriptions and a schedule showing the status of the agency proceedings and when the terms and conditions or prescriptions are expected to become final; or

(ii) A statement waiving the agency's right to file the terms and conditions or prescriptions or indicating the agency does not intend to file terms and conditions or prescriptions.

(2) *Fish and Wildlife agencies and Indian tribes.* All fish and wildlife agencies must set forth any recommended terms and conditions for the protection, mitigation of damages to, or enhancement of fish and wildlife, pursuant to the Fish and Wildlife Coordination Act and section 10(j) of the Federal Power Act, in their initial comments filed with the Commission by the date specified in paragraph (b) of this section. All Indian tribes must submit recommendations (including fish and wildlife recommendations) by the same date. In those comments, a fish and wildlife agency or Indian tribe must discuss its understanding of the resource issues presented by the proposed facilities and the evidentiary basis for the recommended terms and conditions.

(3) *Other Government agencies and members of the public.* Resource agencies, other governmental units, and members of the public must file their recommendations in their initial comments by the date specified in paragraph (b) of this section. The comments must clearly identify all recommendations and present their evidentiary basis.

(4) *Submittal of modified recommendations, terms and conditions or prescriptions.* (i) If the information and analysis (including reasonable alternatives) presented in a draft environmental document, issued for comment by the Commission, indicate a need to modify the recommendations or terms and conditions or prescriptions previously submitted to the Commission pursuant to paragraphs (b)(1), (b)(2), or (b)(3) of this section, the agency, Indian tribe, or member of the public must file with the Commission any modified recommendations or terms and conditions or prescriptions on the proposed project (and reasonable alternatives) no later than the due date for comments on the draft environmental impact statement. Modified recommendations or terms and conditions or prescriptions must be clearly distinguished from comments on the draft document.

(ii) If an applicant files an amendment to its application that would materially change the project's proposed plans of development, as provided in § 4.35, an agency, Indian tribe or member of the public may modify the recommendations or terms and conditions or prescriptions it previously submitted to the Commission pursuant to paragraphs (b)(1), (b)(2), or (b)(3) of this section no later than the due date specified by the Commission for comments on the amendment.

(5)(i) With regard to certification requirements for a license applicant under section 401(a)(1) of the Federal Water Pollution Control Act (Clean

Water Act), an applicant shall file within 60 days from the date of issuance of the notice of ready for environmental analysis:

(A) A copy of the water quality certification;

(B) A copy of the request for certification, including proof of the date on which the certifying agency received the request; or

(C) Evidence of waiver of water quality certification as described in paragraph (b)(5)(ii) of this section.

(ii) In the case of an application process using the alternative procedures of paragraph 4.34(i), the filing requirement of paragraph (b)(5)(i) shall apply upon issuance of notice the Commission has accepted the application as provided for in paragraph 4.32(d) of this part.

(iii) A certifying agency is deemed to have waived the certification requirements of section 401(a)(1) of the Clean Water Act if the certifying agency has not denied or granted certification by one year after the date the certifying agency received a written request for certification. If a certifying agency denies certification, the applicant must file a copy of the denial within 30 days after the applicant received it.

(c) *Additional procedures.* If necessary or appropriate the Commission may require additional procedures (*e.g.,* a prehearing conference, further notice and comment on specific issues or oral argument). A party may request additional procedures in a motion that clearly and specifically sets forth the procedures requested and the basis for the request. Replies to such requests may be filed within 15 days of the request.

(d) *Consultation procedures.* Pursuant to the Federal Power Act and the Public Utility Regulatory Policies Act of 1978, as amended, the Commission will coordinate as appropriate with other government agencies responsible for mandatory terms and conditions for exemptions and licenses for hydropower projects. Pursuant to the Federal Power Act and the Fish and Wildlife Coordination Act, the Commission will consult with fish and wildlife agencies concerning the impact of a hydropower proposal on fish and wildlife and appropriate terms and conditions for license to adequately and equitably protect, mitigate damages to, and enhance fish and wildlife (including related spawning grounds and habitat). Pursuant to the Federal Power Act and the Endangered Species Act, the Commission will consult with the U.S. Fish and Wildlife Service or the National Marine Fisheries Service, as appropriate, concerning the impact of a hydropower proposal on endangered or threatened species and their critical habitat.

(e) *Consultation on recommended fish and wildlife conditions; Section 10(j) process.* (1) In connection with its environmental review of an application for license, the Commission will analyze all terms and conditions timely recommended by fish and wildlife agencies pursuant to the Fish and Wildlife Coordination Act for the protection, mitigation of damages to, and enhancement of fish and wildlife (including related spawning grounds and habitat) affected by the development, operation, and management of the proposed project. Submission of such recommendations marks the beginning of the process under section 10(j) of the Federal Power Act.

(2) The agency must specifically identify and explain the recommendations and the relevant resource goals and objectives and their evidentiary or legal basis. The Commission may seek clarification of any recommendation from the appropriate fish and wildlife agency. If the Commission's request for clarification is communicated in writing, copies of the request will be sent by the Commission to all parties, affected resource agencies, and Indian tribes, which may file a response to the request for clarification within the time period specified by the Commission. If the Commission believes any fish and wildlife recommendation may be inconsistent with the Federal Power Act or other applicable law, the Commission will make a preliminary determination of inconsistency in the draft environmental document or, if none, the environmental assessment. The preliminary determination, for any recommendations believed to be inconsistent, shall include an explanation why the Commission believes the recommendation is inconsistent with the

Federal Power Act or other applicable law, including any supporting analysis and conclusions, and an explanation of how the measures recommended in the environmental document would adequately and equitably protect, mitigate damages to, and enhance, fish and wildlife (including related spawning grounds and habitat) affected by the development, operation, and management of the project.

(3) Any party, affected resource agency, or Indian tribe may file comments in response to the preliminary determination of inconsistency, including any modified recommendations, within the time frame allotted for comments on the draft environmental document or, if none, the time frame for comments on the environmental analysis. In this filing, the fish and wildlife agency concerned may also request a meeting, telephone or video conference, or other additional procedure to attempt to resolve any preliminary determination of inconsistency.

(4) The Commission shall attempt, with the agencies, to reach a mutually acceptable resolution of any such inconsistency, giving due weight to the recommendations, expertise, and statutory responsibilities of the fish and wildlife agency. If the Commission decides, or an affected resource agency requests, the Commission will conduct a meeting, telephone, or video conference, or other procedures to address issues raised by its preliminary determination of inconsistency and comments thereon. The Commission will give at least 15 days' advance notice to each party, affected resource agency, or Indian tribe, which may participate in the meeting or conference. Any meeting, conference, or additional procedure to address these issues will be scheduled to take place within 90 days of the date the Commission issues a preliminary determination of inconsistency. The Commission will prepare a written summary of any meeting held under this subsection to discuss section 10(j) issues, including any proposed resolutions and supporting analysis, and a copy of the summary will be sent to all parties, affected resource agencies, and Indian tribes.

(5) The section 10(j) process ends when the Commission issues an order granting or denying the license application in question. If, after attempting to resolve inconsistencies between the fish and wildlife recommendations of a fish and wildlife agency and the purposes and requirements of the Federal Power Act or other applicable law, the Commission does not adopt in whole or in part a fish and wildlife recommendation of a fish and wildlife agency, the Commission will publish the findings and statements required by section 10(j)(2) of the Federal Power Act.

(f) *Licenses and exemption conditions and required findings*—(1) *License conditions.* (i) All licenses shall be issued on the conditions specified in section 10 of the Federal Power Act and such other conditions as the Commission determines are lawful and in the public interest.

(ii) Subject to paragraph (f)(3) of this section, fish and wildlife conditions shall be based on recommendations timely received from the fish and wildlife agencies pursuant to the Fish and Wildlife Coordination Act.

(iii) The Commission will consider the timely recommendations of resource agencies, other governmental units, and members of the public, and the timely recommendations (including fish and wildlife recommendations) of Indian tribes affected by the project.

(iv) Licenses for a project located within any Federal reservation shall be issued only after the findings required by, and subject to any conditions that may be timely received pursuant to, section 4(e) of the Federal Power Act.

(v) The Commission will require the construction, maintenance, and operation by a licensee at its own expense of such fishways as may be timely prescribed by the Secretary of Commerce or the Secretary of the Interior, as appropriate, pursuant to section 18 of the Federal Power Act.

(2) *Exemption conditions.* Any exemption from licensing issued for conduit facilities, as provided in section 30(b) of the Federal Power Act, or for small hydroelectric power projects having a proposed installed capacity of 10,000 kilowatts or less, as provided in section 405(d) of the Public Utility Regulatory Policies Act of 1978, as amended, shall include such terms and conditions as the fish and wildlife agencies may

timely determine are appropriate to carry out the responsibilities specified in section 30(c) of the Federal Power Act.

(3) *Required findings.* If, after attempting to resolve inconsistencies between the fish and wildlife recommendations of a fish and wildlife agency and the purposes and requirements of the Federal Power Act or other applicable law, the Commission does not adopt in whole or in part a fish and wildlife recommendation of a fish and wildlife agency, the Commission will publish the findings and statements required by section 10(j)(2) of the Federal Power Act.

(g) *Application.* The provisions of paragraphs (b) through (d) and (f) of this section apply only to applications for license or exemption; paragraph (e) applies only to applications for license.

(h) Unless otherwise provided by statute, regulation or order, all filings in hydropower hearings, except those conducted by trial-type procedures, shall conform to the requirements of subpart T of part 385 of this chapter.

(i) *Alternative procedures.* (1) An applicant may submit to the Commission a request to approve the use of alternative procedures for pre-filing consultation and the filing and processing of an application for an original, new or subsequent hydropower license or exemption that is subject to §4.38 or §16.8 of this chapter, or for the amendment of a license that is subject to the provisions of §4.38.

(2) The goal of such alternative procedures shall be to:

(i) Combine into a single process the pre-filing consultation process, the environmental review process under the National Environmental Policy Act and administrative processes associated with the Clean Water Act and other statutes;

(ii) Facilitate greater participation by and improve communication among the potential applicant, resource agencies, Indian tribes, the public and Commission staff in a flexible pre-filing consultation process tailored to the circumstances of each case;

(iii) Allow for the preparation of a preliminary draft environmental assessment by an applicant or its contractor or consultant, or of a preliminary draft environmental impact statement by a contractor or consultant chosen by the Commission and funded by the applicant;

(iv) Promote cooperative efforts by the potential applicant and interested entities and encourage them to share information about resource impacts and mitigation and enhancement proposals and to narrow any areas of disagreement and reach agreement or settlement of the issues raised by the hydropower proposal; and

(v) Facilitate an orderly and expeditious review of an agreement or offer of settlement of an application for a hydropower license, exemption or amendment to a license.

(3) A potential hydropower applicant requesting the use of alternative procedures must:

(i) Demonstrate that a reasonable effort has been made to contact all resource agencies, Indian tribes, citizens' groups, and others affected by the applicant's proposal, and that a consensus exists that the use of alternative procedures is appropriate under the circumstances;

(ii) Submit a communications protocol, supported by interested entities, governing how the applicant and other participants in the pre-filing consultation process, including the Commission staff, may communicate with each other regarding the merits of the applicant's proposal and proposals and recommendations of interested entities; and

(iii) Serve a copy of the request on all affected resource agencies and Indian tribes and on all entities contacted by the applicant that have expressed an interest in the alternative pre-filing consultation process.

(4) As appropriate under the circumstances of the case, the alternative procedures should include provisions for:

(i) Distribution of an initial information package and conduct of an initial information meeting open to the public;

(ii) The cooperative scoping of environmental issues (including necessary scientific studies), the analysis of completed studies and any further scoping; and

(iii) The preparation of a preliminary draft environmental assessment or preliminary draft environmental impact statement and related application.

(5)(i) If the potential applicant's request to use the alternative procedures is filed prior to July 23, 2005, the Commission will give public notice in the FEDERAL REGISTER inviting comment on the applicant's request to use alternative procedures. The Commission will consider any such comments in determining whether to grant or deny the applicant's request to use alternative procedures. Such a decision will not be subject to interlocutory rehearing or appeal.

(ii) If the potential applicant's request to use the alternative procedures is filed on or after July 23, 2005 and prior to the deadline date for filing a notification of intent to seek a new or subsequent license required by §5.5 of this chapter, the Commission will give public notice and invite comments as provided for in paragraph (i)(5)(i) of this section. Commission approval of the potential applicant's request to use the alternative procedures prior to the deadline date for filing of the notification of intent does not waive the potential applicant's obligation to file the notification of intent required by §5.5 of this chapter and Pre-Application Document required by §5.6 of this chapter.

(iii) If the potential applicant's request to use the alternative procedures is filed on or after July 23, 2005 and is at the same time as the notification of intent to seek a new or subsequent license required by §5.5, the public notice and comment procedures of part 5 of this chapter shall apply.

(6) If the Commission accepts the use of alternative procedures, the following provisions will apply.

(i) To the extent feasible under the circumstances of the proceeding, the Commission will give notice in the FEDERAL REGISTER and the applicant will give notice, in a local newspaper of general circulation in the county or counties in which the project is located, of the initial information meeting and the scoping of environmental issues. The applicant will also send notice of these stages to a mailing list approved by the Commission.

(ii) Every six months, the applicant shall file with the Commission a report summarizing the progress made in the pre-filing consultation process and referencing the applicant's public file, where additional information on that process can be obtained. Summaries or minutes of meetings held in the process may be used to satisfy this filing requirement. The applicant must also file with the Commission a copy of its initial information package, each scoping document, and the preliminary draft environmental review document. All filings with the Commission under this section must include the number of copies required by paragraph (h) of this section, and the applicant shall send a copy of these filings to each participant that requests a copy.

(iii) At a suitable location, the applicant will maintain a public file of all relevant documents, including scientific studies, correspondence, and minutes or summaries of meetings, compiled during the pre-filing consultation process. The Commission will maintain a public file of the applicant's initial information package, scoping documents, periodic reports on the pre-filing consultation process, and the preliminary draft environmental review document.

(iv) An applicant authorized to use alternative procedures may substitute a preliminary draft environmental review document and additional material specified by the Commission instead of Exhibit E to its application and need not supply additional documentation of the pre-filing consultation process. The applicant will file with the Commission the results of any studies conducted or other documentation as directed by the Commission, either on its own motion or in response to a motion by a party to the licensing or exemption proceeding.

(v) Pursuant to the procedures approved, the participants will set reasonable deadlines requiring all resource agencies, Indian tribes, citizens' groups, and interested persons to submit to the applicant requests for scientific studies during the pre-filing consultation process, and additional requests for studies may be made to the Commission after the filing of the application only for good cause shown.

(vi) During the pre-filing process the Commission may require the filing of preliminary fish and wildlife recommendations, prescriptions, mandatory conditions, and comments, to be submitted in final form after the filing of the application; no notice that the application is ready for environmental analysis need be given by the Commission after the filing of an application pursuant to these procedures.

(vii) Any potential applicant, resource agency, Indian tribe, citizens' group, or other entity participating in the alternative pre-filing consultation process may file a request with the Commission to resolve a dispute concerning the alternative process (including a dispute over required studies), but only after reasonable efforts have been made to resolve the dispute with other participants in the process. No such request shall be accepted for filing unless the entity submitting it certifies that it has been served on all other participants. The request must document what efforts have been made to resolve the dispute.

(7) If the potential applicant or any resource agency, Indian tribe, citizens' group, or other entity participating in the alternative pre-filing consultation process can show that it has cooperated in the process but a consensus supporting the use of the process no longer exists and that continued use of the alternative process will not be productive, the participant may petition the Commission for an order directing the use by the potential applicant of appropriate procedures to complete its application. No such request shall be accepted for filing unless the entity submitting it certifies that it has been served on all other participants. The request must recommend specific procedures that are appropriate under the circumstances.

(8) The Commission may participate in the pre-filing consultation process and assist in the integration of this process and the environmental review process in any case, including appropriate cases where the applicant, contractor, or consultant funded by the applicant is not preparing a preliminary draft environmental assessment or preliminary draft environmental impact statement, but where staff assistance is available and could expedite the proceeding.

(9) If this section requires an applicant to reveal Critical Energy Infrastructure Information (CEII), as defined by §388.113(c) of this chapter, to any person, the applicant shall follow the procedures set out in §4.32(k).

[Order 533, 56 FR 23148, May 20, 1991, as amended at 56 FR 61155, Dec. 2, 1991; Order 540, 57 FR 21737, May 22, 1992; Order 596, 62 FR 59810, Nov. 5, 1997; Order 2002, 68 FR 51116, Aug. 25, 2003; Order 643, 68 FR 52094, Sept. 2, 2003; 68 FR 61742, Oct. 30, 2003; Order 756, 77 FR 4893, Feb. 1, 2012; Order 800, 79 FR 59110, Oct. 1, 2014]

§4.35 Amendment of application; date of acceptance.

(a) *General rule.* Except as provided in paragraph (d) of this section, if an applicant amends its filed application as described in paragraph (b) of this section, the date of acceptance of the application under §4.32(f) is the date on which the amendment to the application was filed.

(b) Paragraph (a) of this section applies if an applicant:

(1) Amends its filed license or preliminary permit application in order to change the status or identity of the applicant or to materially amend the proposed plans of development; or

(2) Amends its filed application for exemption from licensing in order to materially amend the proposed plans of development, or

(3) Amends its filed application in order to change its statement of intent of whether or not it will seek benefits under section 210 of PURPA, as originally filed under §4.32(c)(1).

(c) An application amended under paragraph (a) is a new filing for:

(1) The purpose of determining its timeliness under §4.36 of this part;

(2) Disposing of competing applications under §4.37; and

(3) Reissuing public notice of the application under §4.32(d)(2).

(d) If an application is amended under paragraph (a) of this section, the Commission will rescind any acceptance letter already issued for the application.

(e) *Exceptions.* This section does not apply to:

(1) Any corrections of deficiencies made pursuant to §4.32(e)(1);

§ 121.16 Waiver.

The certification requirement with respect to an application for a license or permit shall be waived upon:

(a) Written notification from the State or interstate agency concerned that it expressly waives its authority to act on a request for certification; or

(b) Written notification from the licensing or permitting agency to the Regional Administrator of the failure of the State or interstate agency concerned to act on such request for certification within a reasonable period of time after receipt of such request, as determined by the licensing or permitting agency (which period shall generally be considered to be 6 months, but in any event shall not exceed 1 year).

In the event of a waiver hereunder, the Regional Administrator shall consider such waiver as a substitute for a certification, and as appropriate, shall conduct the review, provide the notices, and perform the other functions identified in §§121.13, 121.14, and 121.15. The notices required by §121.13 shall be provided not later than 30 days after the date of receipt by the Regional Administrator of either notification referred to herein.

Subpart C—Certification by the Administrator

§ 121.21 When Administrator certifies.

Certification by the Administrator that the discharge resulting from an activity requiring a license or permit will not violate applicable water quality standards will be required where:

(a) Standards have been promulgated, in whole or in part, by the Administrator pursuant to section 10(c)(2) of the Act: *Provided, however,* That the Administrator will certify compliance only with respect to those water quality standards promulgated by him; or

(b) Water quality standards have been established, but no State or interstate agency has authority to give such a certification.

§ 121.22 Applications.

An applicant for certification from the Administrator shall submit to the Regional Administrator a complete description of the discharge involved in the activity for which certification is sought, with a request for certification signed by the applicant. Such description shall include the following:

(a) The name and address of the applicant;

(b) A description of the facility or activity, and of any discharge into navigable waters which may result from the conduct of any activity including, but not limited to, the construction or operation of the facility, including the biological, chemical, thermal, and other characteristics of the discharge, and the location or locations at which such discharge may enter navigable waters;

(c) A description of the function and operation of equipment or facilities to treat wastes or other effluents which may be discharged, including specification of the degree of treatment expected to be attained;

(d) The date or dates on which the activity will begin and end, if known, and the date or dates on which the discharge will take place;

(e) A description of the methods and means being used or proposed to monitor the quality and characteristics of the discharge and the operation of equipment or facilities employed in the treatment or control of wastes or other effluents.

§ 121.23 Notice and hearing.

The Regional Administrator will provide public notice of each request for certification by mailing to State, County, and municipal authorities, heads of State agencies responsible for water quality improvement, and other parties known to be interested in the matter, including adjacent property owners and conservation organizations, or may provide such notice in a newspaper of general circulation in the area in which the activity is proposed to be conducted if the Regional Administrator deems mailed notice to be impracticable. Interested parties shall be provided an opportunity to comment on such request in such manner as the

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

SOURCE: 48 FR 14178, Apr. 1, 1983, unless otherwise noted.

Subpart A—General

§ 123.1 Purpose and scope.

(a) This part specifies the procedures EPA will follow in approving, revising, and withdrawing State programs and the requirements State programs must meet to be approved by the Administrator under sections 318, 402, and 405(a) (National Pollutant Discharge Elimination System—NPDES) of the CWA. This part also specifies the procedures EPA will follow in approving, revising, and withdrawing State programs under section 405(f) (sludge management programs) of the CWA. The requirements that a State sewage sludge management program must meet for approval by the Administrator under section 405(f) are set out at 40 CFR part 501.

(b) These regulations are promulgated under the authority of sections 304(i), 101(e), 405, and 518(e) of the CWA, and implement the requirements of those sections.

(c) The Administrator will 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.

(d)(1) Upon approval of a State program, the Administrator shall suspend the issuance of Federal permits for those activities subject to the approved State program. After program approval EPA shall 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 shall 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.

(2) The procedures outlined in the preceding paragraph (d)(1) of this section for suspension of permitting authority and transfer of existing permits will also apply when EPA approves an Indian Tribe's application to operate a State program and a State was the authorized permitting authority under §123.23(b) for activities within the scope of the newly approved program. The authorized State will retain jurisdiction over its existing permits as described in paragraph (d)(1) of this section absent a different arrangement stated in the Memorandum of Agreement executed between EPA and the Tribe.

(e) Upon submission of a complete program, EPA will conduct a public hearing, if interest is shown, and determine whether to approve or disapprove the program taking into consideration the requirements of this part, the CWA and any comments received.

(f) Any State program approved by the Administrator shall at all times be conducted in accordance with the requirements of this part.

(g)(1) Except as may be authorized pursuant to paragraph (g)(2) of this section or excluded by §122.3, the State program must prohibit all point source discharges of pollutants, all discharges into aquaculture projects, and all disposal of sewage sludge which results in any pollutant from such sludge entering into any waters of the United States within the State's jurisdiction except as authorized by a permit in effect under the State program or under section 402 of CWA. NPDES authority may be shared by two or more State agencies but each agency must have Statewide jurisdiction over a class of activities or discharges. When more than one agency is responsible for issuing permits, each agency must make a submission meeting the requirements of §123.21 before EPA will begin formal review.

(2) A State may seek approval of a partial or phased program in accordance with section 402(n) of the CWA.

(h) In many cases, States (other than Indian Tribes) will lack authority to regulate activities on Indian lands. This lack of authority does not impair that State's ability to obtain full program approval in accordance with this part, i.e., inability of a State to regulate activities on Indian lands does not constitute a partial program. EPA will administer the program on Indian lands if a State (or Indian Tribe) does not seek or have authority to regulate activities on Indian lands.

NOTE: States are advised to contact the United States Department of the Interior, Bureau of Indian Affairs, concerning authority over Indian lands.

(i) Nothing in this part precludes a State from:

(1) Adopting or enforcing requirements which are more stringent or more extensive than those required under this part;

(2) 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.

NOTE: For example, if a State requires permits for discharges into publicly owned treatment works, these permits are not NPDES permits.

[48 FR 14178, Apr. 1, 1983, as amended at 54 FR 256, Jan. 4, 1989; 54 FR 18784, May 2, 1989; 58 FR 67981, Dec. 22, 1993; 59 FR 64343, Dec. 14, 1994; 63 FR 45122, Aug. 24, 1998]

§123.2 Definitions.

The definitions in part 122 apply to all subparts of this part.

[63 FR 45122, Aug. 24, 1998]

§123.3 Coordination with other programs.

Issuance of State permits under this part may be coordinated with issuance of RCRA, UIC, NPDES, and 404 permits whether they are controlled by the State, EPA, or the Corps of Engineers. See §124.4.

Subpart B—State Program Submissions

§123.21 Elements of a 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 (or in the case of an Indian Tribe in accordance with §123.33(b), the Tribal authority exercising powers substantially similar to those of a State Governor) requesting program approval;

(2) A complete program description, as required by §123.22, describing how the State intends to carry out its responsibilities under this part;

(3) An Attorney General's statement as required by §123.23;

(4) A Memorandum of Agreement with the Regional Administrator as required by §123.24;

(5) Copies of all applicable State statutes and regulations, including those governing State administrative procedures;

(b)(1) 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 statutory review period (i.e., the period of time allotted for formal EPA review of a proposed State program

R.C. § 6111.03

6111.03 Powers of director of environmental protection

Effective: October 17, 2019
Currentness

The director of environmental protection may do any of the following:

(A) Develop plans and programs for the prevention, control, and abatement of new or existing pollution of the waters of the state;

(B) Advise, consult, and cooperate with other agencies of the state, the federal government, other states, and interstate agencies and with affected groups, political subdivisions, and industries in furtherance of the purposes of this chapter. Before adopting, amending, or rescinding a standard or rule pursuant to division (G) of this section or section 6111.041 or 6111.042 of the Revised Code, the director shall do all of the following:

(1) Mail notice to each statewide organization that the director determines represents persons who would be affected by the proposed standard or rule, amendment thereto, or rescission thereof at least thirty-five days before any public hearing thereon;

(2) Mail a copy of each proposed standard or rule, amendment thereto, or rescission thereof to any person who requests a copy, within five days after receipt of the request therefor;

(3) Consult with appropriate state and local government agencies or their representatives, including statewide organizations of local government officials, industrial representatives, and other interested persons.

Although the director is expected to discharge these duties diligently, failure to mail any such notice or copy or to so consult with any person shall not invalidate any proceeding or action of the director.

(C) Administer grants from the federal government and from other sources, public or private, for carrying out any of its functions, all such moneys to be deposited in the state treasury and kept by the treasurer of state in a separate fund subject to the lawful orders of the director;

(D) Administer state grants for the construction of sewage and waste collection and treatment works;

(E) Encourage, participate in, or conduct studies, investigations, research, and demonstrations relating to water pollution, and the causes, prevention, control, and abatement thereof, that are advisable and necessary for the discharge of the director's duties under this chapter;

(F) Collect and disseminate information relating to water pollution and prevention, control, and abatement thereof;

(G) Adopt, amend, and rescind rules in accordance with Chapter 119. of the Revised Code governing the procedure for hearings, the filing of reports, the issuance of permits, the issuance of industrial water pollution control certificates, and all other matters relating to procedure;

(H) Issue, modify, or revoke orders to prevent, control, or abate water pollution by such means as the following:

(1) Prohibiting or abating discharges of sewage, industrial waste, or other wastes into the waters of the state;

(2) Requiring the construction of new disposal systems or any parts thereof, or the modification, extension, or alteration of existing disposal systems or any parts thereof;

(3) Prohibiting additional connections to or extensions of a sewerage system when the connections or extensions would result in an increase in the polluting properties of the effluent from the system when discharged into any waters of the state;

(4) Requiring compliance with any standard or rule adopted under sections 6111.01 to 6111.05 of the Revised Code or term or condition of a permit.

In the making of those orders, wherever compliance with a rule adopted under section 6111.042 of the Revised Code is not involved, consistent with the Federal Water Pollution Control Act, the director shall give consideration to, and base the determination on, evidence relating to the technical feasibility and economic reasonableness of complying with those orders and to evidence relating to conditions calculated to result from compliance with those orders, and their relation to benefits to the people of the state to be derived from such compliance in accomplishing the purposes of this chapter.

(I) Review plans, specifications, or other data relative to disposal systems or any part thereof in connection with the issuance of orders, permits, and industrial water pollution control certificates under this chapter;

(J)(1) Issue, revoke, modify, or deny sludge management permits and permits for the discharge of sewage, industrial waste, or other wastes into the waters of the state, and for the installation or modification of disposal systems or any parts thereof in compliance with all requirements of the Federal Water Pollution Control Act and mandatory regulations adopted thereunder [1], including regulations adopted under section 405 of the Federal Water Pollution Control Act [2], and set terms and conditions of permits, including schedules of compliance, where necessary. In issuing permits for sludge management, the director shall not allow the placement of sewage sludge on frozen ground in conflict with rules adopted under this chapter. Any person who discharges, transports, or handles storm water from an animal feeding facility, as defined in section 903.01 of the Revised Code, or pollutants from a concentrated animal feeding operation, as both terms are defined in that section, is not required to obtain a permit under division (J)(1) of this section for the installation or modification of a disposal system involving pollutants or storm

water or any parts of such a system on and after the date on which the director of agriculture has finalized the program required under division (A)(1) of section 903.02 of the Revised Code. In addition, any person who discharges, transports, or handles storm water from an animal feeding facility, as defined in section 903.01 of the Revised Code, or pollutants from a concentrated animal feeding operation, as both terms are defined in that section, is not required to obtain a permit under division (J)(1) of this section for the discharge of storm water from an animal feeding facility or pollutants from a concentrated animal feeding operation on and after the date on which the United States environmental protection agency approves the NPDES program submitted by the director of agriculture under section 903.08 of the Revised Code.

Any permit terms and conditions set by the director shall be designed to achieve and maintain full compliance with the national effluent limitations, national standards of performance for new sources, and national toxic and pretreatment effluent standards set under that act, and any other mandatory requirements of that act that are imposed by regulation of the administrator of the United States environmental protection agency. If an applicant for a sludge management permit also applies for a related permit for the discharge of sewage, industrial waste, or other wastes into the waters of the state, the director may combine the two permits and issue one permit to the applicant.

A sludge management permit is not required for an entity that treats or transports sewage sludge or for a sanitary landfill when all of the following apply:

(a) The entity or sanitary landfill does not generate the sewage sludge.

(b) Prior to receipt at the sanitary landfill, the entity has ensured that the sewage sludge meets the requirements established in rules adopted by the director under section 3734.02 of the Revised Code concerning disposal of municipal solid waste in a sanitary landfill.

(c) Disposal of the sewage sludge occurs at a sanitary landfill that complies with rules adopted by the director under section 3734.02 of the Revised Code.

As used in division (J)(1) of this section, “sanitary landfill” means a sanitary landfill facility, as defined in rules adopted under section 3734.02 of the Revised Code, that is licensed as a solid waste facility under section 3734.05 of the Revised Code.

(2) An application for a permit or renewal thereof shall be denied if any of the following applies:

(a) The secretary of the army determines in writing that anchorage or navigation would be substantially impaired thereby;

(b) The director determines that the proposed discharge or source would conflict with an areawide waste treatment management plan adopted in accordance with section 208 of the Federal Water Pollution Control Act [3];

(c) The administrator of the United States environmental protection agency objects in writing to the issuance or renewal of the permit in accordance with section 402 (d) of the Federal Water Pollution Control Act [4];

(d) The application is for the discharge of any radiological, chemical, or biological warfare agent or high-level radioactive waste into the waters of the United States.

(3) To achieve and maintain applicable standards of quality for the waters of the state adopted pursuant to section 6111.041 of the Revised Code, the director shall impose, where necessary and appropriate, as conditions of each permit, water quality related effluent limitations in accordance with sections 301, 302, 306, 307, and 405 of the Federal Water Pollution Control Act [5] and, to the extent consistent with that act, shall give consideration to, and base the determination on, evidence relating to the technical feasibility and economic reasonableness of removing the polluting properties from those wastes and to evidence relating to conditions calculated to result from that action and their relation to benefits to the people of the state and to accomplishment of the purposes of this chapter.

(4) Where a discharge having a thermal component from a source that is constructed or modified on or after October 18, 1972, meets national or state effluent limitations or more stringent permit conditions designed to achieve and maintain compliance with applicable standards of quality for the waters of the state, which limitations or conditions will ensure protection and propagation of a balanced, indigenous population of shellfish, fish, and wildlife in or on the body of water into which the discharge is made, taking into account the interaction of the thermal component with sewage, industrial waste, or other wastes, the director shall not impose any more stringent limitation on the thermal component of the discharge, as a condition of a permit or renewal thereof for the discharge, during a ten-year period beginning on the date of completion of the construction or modification of the source, or during the period of depreciation or amortization of the source for the purpose of section 167 or 169 of the Internal Revenue Code of 1954 [6], whichever period ends first.

(5) The director shall specify in permits for the discharge of sewage, industrial waste, and other wastes, the net volume, net weight, duration, frequency, and, where necessary, concentration of the sewage, industrial waste, and other wastes that may be discharged into the waters of the state. The director shall specify in those permits and in sludge management permits that the permit is conditioned upon payment of applicable fees as required by section 3745.11 of the Revised Code and upon the right of the director's authorized representatives to enter upon the premises of the person to whom the permit has been issued for the purpose of determining compliance with this chapter, rules adopted thereunder, or the terms and conditions of a permit, order, or other determination. The director shall issue or deny an application for a sludge management permit or a permit for a new discharge, for the installation or modification of a disposal system, or for the renewal of a permit, within one hundred eighty days of the date on which a complete application with all plans, specifications, construction schedules, and other pertinent information required by the director is received.

(6) The director may condition permits upon the installation of discharge or water quality monitoring equipment or devices and the filing of periodic reports on the amounts and contents of discharges and the quality of receiving waters that the director prescribes. The director shall condition each permit for a government-owned disposal system or any other “treatment works” as defined in the Federal Water Pollution Control Act upon the reporting of new introductions of industrial waste or other wastes and substantial changes in volume or character thereof being introduced into those systems or works from “industrial users” as defined in section 502 of that act [7], as necessary to comply with section 402(b)(8) of that act [8]; upon the identification of the character and volume of pollutants subject to pretreatment standards being introduced into the system or works; and upon the existence of a program to ensure compliance with pretreatment standards by “industrial users” of the system or works. In requiring monitoring devices and reports, the director, to the extent consistent with the Federal Water Pollution Control Act, shall give consideration to technical feasibility and economic reasonableness and shall allow reasonable time for compliance.

(7) A permit may be issued for a period not to exceed five years and may be renewed upon application for renewal. In renewing a permit, the director shall consider the compliance history of the permit holder and may deny the renewal if the director determines that the permit holder has not complied with the terms and conditions of the existing permit. A permit may be modified, suspended, or revoked for cause, including, but not limited to, violation of any condition of the permit, obtaining a permit by misrepresentation or failure to disclose fully all relevant facts of the permitted discharge or of the sludge use,

storage, treatment, or disposal practice, or changes in any condition that requires either a temporary or permanent reduction or elimination of the permitted activity. No application shall be denied or permit revoked or modified without a written order stating the findings upon which the denial, revocation, or modification is based. A copy of the order shall be sent to the applicant or permit holder by certified mail.

(K) Institute or cause to be instituted in any court of competent jurisdiction proceedings to compel compliance with this chapter or with the orders of the director issued under this chapter, or to ensure compliance with sections 204(b), 307, 308, and 405 of the Federal Water Pollution Control Act;

(L) Certify to the government of the United States or any agency thereof that an industrial water pollution control facility is in conformity with the state program or requirements for the control of water pollution whenever the certification may be required for a taxpayer under the Internal Revenue Code of the United States, as amended;

(M) Issue, modify, and revoke orders requiring any "industrial user" of any publicly owned "treatment works" as defined in sections 212(2) and 502(18) of the Federal Water Pollution Control Act to comply with pretreatment standards; establish and maintain records; make reports; install, use, and maintain monitoring equipment or methods, including, where appropriate, biological monitoring methods; sample discharges in accordance with methods, at locations, at intervals, and in a manner that the director determines; and provide other information that is necessary to ascertain whether or not there is compliance with toxic and pretreatment effluent standards. In issuing, modifying, and revoking those orders, the director, to the extent consistent with the Federal Water Pollution Control Act, shall give consideration to technical feasibility and economic reasonableness and shall allow reasonable time for compliance.

(N) Exercise all incidental powers necessary to carry out the purposes of this chapter;

(O) Pursuant to section 401 of the Federal Water Pollution Control Act, do any of the following:

(1) Issue or deny a section 401 water quality certification to, or, pursuant to an appealable action, waive a section 401 water quality certification for, any applicant for a federal license or permit to conduct any activity that may result in any discharge into the waters of the state. Any waiver shall contain a justification for the action.

(2) At the request or concurrence of the certification holder, transfer or modify a section 401 water quality certification;

(3) Revoke a section 401 water quality certification when the director determines that the certification approval was based on false or misleading information.

(P) Administer and enforce the publicly owned treatment works pretreatment program in accordance with the Federal Water Pollution Control Act. In the administration of that program, the director may do any of the following:

(1) Apply and enforce pretreatment standards;

(2) Approve and deny requests for approval of publicly owned treatment works pretreatment programs, oversee those programs, and implement, in whole or in part, those programs under any of the following conditions:

(a) The director has denied a request for approval of the publicly owned treatment works pretreatment program;

(b) The director has revoked the publicly owned treatment works pretreatment program;

(c) There is no pretreatment program currently being implemented by the publicly owned treatment works;

(d) The publicly owned treatment works has requested the director to implement, in whole or in part, the pretreatment program.

(3) Require that a publicly owned treatment works pretreatment program be incorporated in a permit issued to a publicly owned treatment works as required by the Federal Water Pollution Control Act, require compliance by publicly owned treatment works with those programs, and require compliance by industrial users with pretreatment standards;

(4) Approve and deny requests for authority to modify categorical pretreatment standards to reflect removal of pollutants achieved by publicly owned treatment works;

(5) Deny and recommend approval of requests for fundamentally different factors variances submitted by industrial users;

(6) Make determinations on categorization of industrial users;

(7) Adopt, amend, or rescind rules and issue, modify, or revoke orders necessary for the administration and enforcement of the publicly owned treatment works pretreatment program.

Any approval of a publicly owned treatment works pretreatment program may contain any terms and conditions, including schedules of compliance, that are necessary to achieve compliance with this chapter.

(Q) Except as otherwise provided in this division, adopt rules in accordance with Chapter 119. of the Revised Code establishing procedures, methods, and equipment and other requirements for equipment to prevent and contain discharges of oil and hazardous substances into the waters of the state. The rules shall be consistent with and equivalent in scope, content, and coverage to section 311(j)(1)(c) of the Federal Water Pollution Control Act and regulations adopted under it. The director shall not adopt rules under this division relating to discharges of oil from oil production facilities and oil drilling and workover facilities as those terms are defined in that act and regulations adopted under it.

(R)(1) Administer and enforce a program for the regulation of sludge management in this state. In administering the program, the director, in addition to exercising the authority provided in any other applicable sections of this chapter, may do any of the following:

(a) Develop plans and programs for the disposal and utilization of sludge and sludge materials;

(b) Encourage, participate in, or conduct studies, investigations, research, and demonstrations relating to the disposal and use of sludge and sludge materials and the impact of sludge and sludge materials on land located in the state and on the air and waters of the state;

(c) Collect and disseminate information relating to the disposal and use of sludge and sludge materials and the impact of sludge and sludge materials on land located in the state and on the air and waters of the state;

(d) Issue, modify, or revoke orders to prevent, control, or abate the use and disposal of sludge and sludge materials or the effects of the use of sludge and sludge materials on land located in the state and on the air and waters of the state;

(e) Adopt and enforce, modify, or rescind rules necessary for the implementation of division (R) of this section. The rules reasonably shall protect public health and the environment, encourage the beneficial reuse of sludge and sludge materials, and minimize the creation of nuisance odors.

The director may specify in sludge management permits the net volume, net weight, quality, and pollutant concentration of the sludge or sludge materials that may be used, stored, treated, or disposed of, and the manner and frequency of the use, storage, treatment, or disposal, to protect public health and the environment from adverse effects relating to those activities. The director shall impose other terms and conditions to protect public health and the environment, minimize the creation of nuisance odors, and achieve compliance with this chapter and rules adopted under it and, in doing so, shall consider whether the terms and conditions are consistent with the goal of encouraging the beneficial reuse of sludge and sludge materials.

The director may condition permits on the implementation of treatment, storage, disposal, distribution, or application management methods and the filing of periodic reports on the amounts, composition, and quality of sludge and sludge materials that are disposed of, used, treated, or stored.

An approval of a treatment works sludge disposal program may contain any terms and conditions, including schedules of compliance, necessary to achieve compliance with this chapter and rules adopted under it.

(2) As a part of the program established under division (R)(1) of this section, the director has exclusive authority to regulate sewage sludge management in this state. For purposes of division (R)(2) of this section, that program shall be consistent with section 405 of the Federal Water Pollution Control Act and regulations adopted under it and with this section, except that the director may adopt rules under division (R) of this section that establish requirements that are more stringent than section 405 of the Federal Water Pollution Control Act and regulations adopted under it with regard to monitoring sewage sludge and sewage sludge materials and establishing acceptable sewage sludge management practices and pollutant levels in sewage sludge and sewage sludge materials.

This chapter authorizes the state to participate in any national sludge management program and the national pollutant discharge elimination system, to administer and enforce the publicly owned treatment works pretreatment program, and to issue permits for the discharge of dredged or fill materials, in accordance with the Federal Water Pollution Control Act. This chapter shall be administered, consistent with the laws of this state and federal law, in the same manner that the Federal Water Pollution Control Act is required to be administered.

(S) Develop technical guidance and offer technical assistance, upon request, for the purpose of minimizing wind or water erosion of soil, and assist in compliance with permits for storm water management issued under this chapter and rules adopted under it.

(T) Study, examine, and calculate nutrient loading from point and nonpoint sources in order to determine comparative contributions by those sources and to utilize the information derived from those calculations to determine the most environmentally beneficial and cost-effective mechanisms to reduce nutrient loading to watersheds in the Lake Erie basin and the Ohio river basin. In order to evaluate nutrient loading contributions, the director or the director's designee shall conduct a study of the nutrient mass balance for both point and nonpoint sources in watersheds in the Lake Erie basin and the Ohio river basin using available data, including both of the following:

(1) Data on water quality and stream flow;

(2) Data on point source discharges into those watersheds.

The director or the director's designee shall report and update the results of the study to coincide with the release of the Ohio integrated water quality monitoring and assessment report prepared by the director.

(U) Establish the total maximum daily load (TMDL) for waters of the state where a TMDL is required under the Federal Water Pollution Control Act.

(V) Coordinate with the supervisors of a soil and water conservation district to ensure compliance with rules adopted by the director that pertain to urban sediment and storm water runoff pollution abatement. As used in this division "urban sediment and storm water runoff pollution abatement" has the same meaning as in section 939.01 of the Revised Code.

This section does not apply to residual farm products and manure disposal systems and related management and conservation practices subject to rules adopted pursuant to division (E)(1) of section 939.02 of the Revised Code. For purposes of this exclusion, "residual farm products" and "manure" have the same meanings as in section 939.01 of the Revised Code. However, until the date on which the United States environmental protection agency approves the NPDES program submitted by the director of agriculture under section 903.08 of the Revised Code, this exclusion does not apply to animal waste treatment works having a controlled direct discharge to the waters of the state or any concentrated animal feeding operation, as defined in 40 C.F.R. 122.23(b)(2). On and after the date on which the United States environmental protection agency approves the NPDES program submitted by the director of agriculture under section 903.08 of the Revised Code, this section does not apply to storm water from an animal feeding facility, as defined in section 903.01 of the Revised Code, or to pollutants discharged from a concentrated animal feeding operation, as both terms are defined in that section. Neither of these exclusions applies to the discharge of animal waste into a publicly owned treatment works.

Not later than December 1, 2016, a publicly owned treatment works with a design flow of one million gallons per day or more, or designated as a major discharger by the director, shall be required to begin monthly monitoring of total and dissolved reactive phosphorus pursuant to a new NPDES permit, an NPDES permit renewal, or a director-initiated modification. The director shall include in each applicable new NPDES permit, NPDES permit renewal, or director-initiated modification a requirement that such monitoring be conducted. A director-initiated modification for that purpose shall be considered and processed as a minor modification pursuant to Ohio Administrative Code 3745-33-04. In addition, not later than December 1, 2017, a publicly owned treatment works with a design flow of one million gallons per day or more that, on July 3, 2015, is not subject to a phosphorus limit shall complete and submit to the director a study that evaluates the technical and financial capability of the existing treatment facility to reduce the final effluent discharge of phosphorus to one milligram per liter using possible source reduction measures, operational procedures, and unit process configurations.

CREDIT(S)

(2019 H 166, eff. 10-17-19; 2017 S 2, eff. 10-6-17; 2017 H 49, eff. 9-29-17; 2015 H 64, eff. 1-1-16; 2015 S 1, eff. 7-3-15; 2014 S 150, eff. 8-21-14; 2012 S 294, eff. 9-5-12; 2009 H 363, eff. 12-22-09; 2003 H 152, eff. 11-5-03; 2000 S 141, eff. 3-15-01; 1999 H 197, eff. 3-17-00; 1994 S 182, eff. 10-20-94; 1988 S 367, eff. 12-14-88; 1984 H 37; 1981 S 155, H 694; 1980 H 766; 1973 S 80; 1972 S 397; 132 v H 314, S 20; 131 v H 1; 1953 H 1; GC 1261-1d)

Footnotes

1 Prior and current versions differ; although no amendment to this language was indicated in 2000 S 141, "thereunder" appeared as "tereunder" in 1999 H 197.

2 33 U.S.C.A. § 1345.

3 33 U.S.C.A. § 1288.

4 33 U.S.C.A. § 1342(d).

5 33 U.S.C.A. §§ 1311, 1312, 1316, 1317, and 1345.

6 26 U.S.C.A. § 167 or 169.

7 33 U.S.C.A. § 1362.

8 33 U.S.C.A. § 1342(b)(8).

R.C. § 6111.03, OH ST § 6111.03

Current through File 40 of the 133rd General Assembly (2019-2020).

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