NO. 14-13508-D

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

CAHABA RIVERKEEPER, et al.,

Petitioners,

v.

U.S. ENVIRONMENTAL PROTECTION AGENCY, et al.,

Respondents.

On Petition for Review of Action of the
United States Environmental Protection Agency

PRINCIPAL BRIEF OF PETITIONERS

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to 11th Cir. R. 26.1-1, the Petitioners, by and through their undersigned counsel, certify that the following persons and entities may have an interest in the outcome of this case:

ADEM Reform Coalition

Alabama Department of Environmental Management

Alabama Environmental Council

Alabama Environmental Management Commission

Alabama Rivers Alliance, Inc.

Bentley, Robert J., Governor, State of Alabama

Bhat, Simi, Attorney, United States Department of Justice

Biodiversity Legal Foundation

Black Warrior Riverkeeper, Inc.

Cahaba Riverkeeper

Choctawhatchee Riverkeeper, Inc.

Conservation Alabama Foundation, Inc.

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Coosa River Basin Initiative, Inc.

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Friends of Hurricane Creek

Friends of the Locust Fork River

Friends of Big Canoe Creek

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Heard, v. Anne, Regional Counsel, United States Environmental Protection Agency - Region 4

Heather McTeer Toney, Regional Administrator, United States Environmental Protection Agency - Region 4

Hitte, Steve, formerly United States Environmental Protection Agency - Region 4

Holder, Eric H., Jr., Attorney General of the United States

Hollimon, Shelia, United States Environmental Protection Agency - Region 4

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Lookout Mountain Heritage Alliance, Inc.

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Schwartz, Paul, Associate Regional Counsel, United States Environmental Protection Agency – Region 4

Sibley, Steven Shawn, Associate General Counsel, Alabama Department of Environmental Management

Sierra Club –Alabama Chapter, The

Sisario, Kelly, United States Environmental Protection Agency – Region 4

Srinivasan, Gautam, Office of General Counsel, United States Environmental Protection Agency

Strange, Luther, Attorney General, State of Alabama

Stoner, Nancy K., Assistant Administrator for Water (Acting), United States Environmental Protection Agency

Thomas, Chris, United States Environmental Protection Agency – Region 4

Toney, Heather McTeer, Regional Administrator, United States Environmental Protection Agency – Region 4

Vaughn, Ray, Attorney for Wild Alabama and Biodiversity Legal Foundation

Wathen, John L., Creekkeeper, Friends of Hurricane Creek

Wild Alabama

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Wilkes, Mary, Regional Counsel, United States Environmental Protection Agency – Region 4

Pursuant to Fed. R. App. P. 26.1 and 11th Cir. R. 26.1-1, Petitioners Cahaba Riverkeeper, Choctawhatchee Riverkeeper, Inc., and Friends of Hurricane Creek (collectively "Riverkeepers), by and through undersigned counsel, also certify that they have no parent corporations and have issued no stock.

STATEMENT REGARDING ORAL ARGUMENT

Oral argument may be beneficial to the Court because this case presents a number of issues of first impression under the Clean Water Act and its implementing regulations.

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I. JURISDICTIONAL STATEMENT

A. Subject Matter Jurisdiction

Since federal courts are courts of limited jurisdiction, those courts may hear cases only if authorized by statute. *Bell v. New Jersey*, 461 U.S. 773, 777, 103 S.Ct. 2187, 2190 (1983). "Where 'Congress . . . specifically designates a forum for judicial review of administrative action, that forum is exclusive . . ..'" *Federal Election Comm'n v. Reform Party of the United States*, 479 F.3d 1302, 1309 (11th Cir. 2007) (per curiam) (quoting *Drummond Coal Co. v. Watt*, 735 F.2d 469, 475 (11th Cir. 1984)).

33 U.S.C. § 1369(b)(1) "provides for review in the courts of appeals of specified EPA actions." *City of Sarasota v. EPA*, 813 F.2d 1106, 1107 (11th Cir. 1987). *Accord*, *Friends of the Everglades v. EPA*, 699 F.3d 1280, 1285 (11th Cir. 2012). 33 U.S.C. § 1369(b)(1)(D) provides that judicial review of EPA's action "in making *any determination* as to a State permit program submitted under 33 U.S.C. § 1342(b)," may be had by any interested person in the Circuit Court of Appeals. (Emphasis added)[1]. *See National Ass'n of Home Builders v. Defenders*

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[1] An application for judicial review shall be made within 120 days from the date of such determination. 33 U.S.C. § 1369(b). The Order of the U.S. Environmental Protection Agency entitled "Interim Response to Petitions to Withdraw Alabama's National Pollutant Discharge Elimination System (NPDES)

(continued...)

of Wildlife, 551 U.S. 644, 655, 127 S.Ct. 2518, 2528 (2007) ("33 U.S.C. § 1369(b)(1)(D) . . . allows private parties to seek direct review of the EPA's determinations regarding state permitting programs in the federal courts of appeals")*; EPA v. California ex rel. State Water Res. Control Bd.*, 426 U.S. 200, 210, 96 S.Ct. 2022, 2027 (1976) (33 U.S.C. § 1369(b)(1)(D) authorizes a court of appeals to review EPA's action in making any determination as to a State permit program); *Save the Bay, Inc. v. Adm'r of EPA*, 556 F.2d 1282, 1288 (5th Cir. 1977) (determinations regarding revocation of NPDES permit program are reviewable in Circuit Court of Appeals); *American Forest & Paper Ass'n v. EPA*, 154 F.3d 1155, 1158 (10th Cir. 1998) (33 U.S.C. § 1369(b)(1)(D) "grants the federal courts of appeals original jurisdiction over determinations by the EPA regarding a state NPDES permit program."); *Shell Oil Co. v. Train*, 585 F.2d 408, 410 (9th Cir. 1978) ("The Administrator's determination that a state program does not meet the statutory criteria for approval is reviewable in the appropriate court of appeals.").

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[1] (...continued)
Permit Program" was entered on April 9, 2014. AR007937; AR006813. The Riverkeepers' Petition for Review was filed with the Court on August 4, 2014, 117 days after the Order was issued.

The "determinations" referred to in 33 U.S.C. § 1369(b)(1)(D) are those "as to a State permit program submitted under 33 U.S.C. § 1342(b)." These include the "determinations" mentioned in 33 U.S.C. §§ 1342(b), 1342(c)(1), 1342(c)(3) and 40 C.F.R. § 123.64(b)(1). Among these are the following:

> 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.

33 U.S.C. § 1342(c)(3) (emphasis added); and

> The Administrator may order the commencement of withdrawal proceedings on his or her own initiative or in response to a petition from an interested person alleging failure of the State to comply with the requirements of this part as set forth in §123.63 . . .. The Administrator will respond in writing to any petition to commence withdrawal proceedings. He may conduct an informal investigation of the allegations in the petition to *determine* whether cause exists to commence proceedings under this paragraph.

40 C.F.R. § 123.64(b)(1) (emphasis added).

Riverkeepers seek review of a determination by Respondents (collectively referred to as "EPA") that cause does not exist to commence proceedings to withdraw approval of Alabama's NPDES permit program.

B. Finality of EPA Determinations

"Unlike many other statutes providing for judicial review of agency action in the court of appeals, [§ 1369(b)] is not in terms limited to final agency action." *Pennsylvania Dep't of Envtl. Res. v. EPA*, 618 F.2d 991, 994 (3rd Cir. 1980).[2] The "determinations" made reviewable by § 1369(b) are, by congressional design, determinations that precede EPA action to approve or disapprove a state NPDES permit program, or to withdraw or refusal to withdraw approval of a state NPDES permit program. Congress did *not* say in § 1369(b) that only EPA's approval or disapproval of a state NPDES permit program, or withdrawal of approval or refusal to withdraw approval of a state NPDES permit program, is reviewable in the Circuit Court of Appeals. Had it done so, an argument that EPA's Interim Response to Petitions is not reviewable would have some force because EPA may yet order program withdrawal after it makes additional determinations regarding four remaining alleged program deficiencies. Instead, Congress said that *any*

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[2] The language of 5 U.S.C. § 704 is instructive. It recognizes two categories of agency action that are subject to judicial review. The first is "[a]gency action made reviewable by statute" and the second is "final agency action for which there is no other adequate remedy in a court are subject to judicial review." EPA "determinations as to a State permit program" under 33 U.S.C. § 1342(b) are made reviewable by 33 U.S.C. § 1369(b)(1)(D). *See Attorney General's Manual on the Administrative Procedure Act* 101 (1947) ("Many statutes specifically provide for judicial review of particular agency action, and such action will continue to be reviewable.").

determination as to a State permit program is reviewable in the Circuit Court of Appeals. Judicial review of these determinations does not require that EPA have approved or disapproved a state NPDES permit program, or withdrawn approval or refused to withdraw approval of a state NPDES permit program.

Despite a statute's silence with regard to administrative finality, Riverkeepers recognize that "[t]he strong presumption is that judicial review will be available only when agency action becomes final . . .." *Bell*, 461 U.S. at 778, 103 S.Ct. at 2191. That presumption is substantially diminished by the CWA drafters' use of the word "determination" in § 1369(b) and §§ 1342(b), 1342(c)(1), and 1342(c)(3). Nevertheless, the Supreme Court has "interpreted pragmatically the requirement of administrative finality, focusing on whether judicial review at the time will disrupt the administrative process." *Bell*, 461 U.S. at 779-780, 103 S.Ct. at 2191. Thus, "[a]s a general matter, two conditions must be satisfied for agency action to be 'final': First, the action must mark the 'consummation' of the agency's decision making process, . . . – it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which 'rights or obligations have been determined,' or from which 'legal consequences will flow,' . . .." *Bennett v. Spear*, 520 U.S. 154, 177-78, 117 S.Ct. 1154, 1168 (1997). *Accord*, *Sackett v. EPA*, 566 U.S. ___, ___, 132 S.Ct. 1367, 1371-72 (2012).

It is clear that EPA's "determinations" with respect to 22 of the program deficiencies alleged by Riverkeepers are concluded and EPA intends to engage in no further deliberation or fact-finding with regard to these determinations. EPA's Interim Response to Petitions states:

> In connection with certain grounds asserted in the Petitions, the *EPA has concluded that they do not warrant initiation of program withdrawal proceedings*. With respect to other issues, however, as explained below, EPA has significant concerns about the adequacy of ADEM's NPDES Program. Based on those concerns, *EPA is deferring a decision on the Petitions with respect to these issues*, and will work with ADEM and give ADEM an opportunity to address EPA's concerns before EPA determines whether it is necessary to order the commencement of proceedings for program withdrawal under 40 C.F.R. § 123.64(b). This document summarizes EPA's review and the bases for the Agency's determination.

AR006814 (emphasis added). The EPA's decision-making process with respect to the remaining four alleged program deficiencies is independent of the 22 determinations that EPA has made. Thus, EPA's determinations on these alleged program deficiencies are not tentative or interlocutory and judicial review of these determinations will not "disrupt the orderly process of adjudication" of the four remaining allegations of program deficiencies. *Port of Boston Marine Terminal Ass'n v. Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 71, 91 S.Ct. 203, 209 (1970); *Florida Public Serv. Comm'n v. ICC* , 724 F.2d 1460, 1462 (11th Cir. 1984).

Legal consequences flow from the 22 determinations made by EPA. Because EPA has apparently determined that Alabama is administering its approved program in accordance with the requirements of 33 U.S.C. § 1342(b) and 40 C.F.R. Part 123, and refused to commence program withdrawal proceedings, Alabama's permit program remains unchanged. Thus, persons with financial conflicts of interest may continue to be members of the Environmental Management Commission despite a clear statutory mandate to the contrary. And the State and its agencies will continue to avoid penalties for violations of the NPDES permit program despite clear program requirements to the contrary. Had EPA determined that Alabama's NPDES permit program was, for any reason, not in accordance with the requirements of 33 U.S.C. § 1342(b) and 40 C.F.R. Part 123, as Riverkeepers allege, EPA would be required to commence proceedings to withdraw approval of Alabama's authority to administer the program, 33 U.S.C. § 1342(c)(3), though those proceedings could be terminated by Alabama's prompt corrective action.

C. Standing of Riverkeepers

33 U.S.C. § 1369(b)(1) permits judicial review of specified EPA actions by any "interested person." To qualify as an "interested person" under § 1369(b)(1), a party, at a minimum, must have Article III standing. *E.g., Natural Res. Def.*

Council v. EPA, 526 F.3d 591, 601-602 (9th Cir. 2008); *Texas Indep. Producers and Royalty Owners Ass'n v. EPA*, 410 F.3d 964, 971 (7th Cir. 2005).

In *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333, 97 S.Ct. 2434 (1977), the Court announced a three-prong test for an association's standing to sue based on injury to one of its members. When a plaintiff is an association, the association has standing to represent the interests of its members if (1) the individual members have standing in their own right; (2) the interests represented are germane to the association's purpose; and (3) the relief sought does not require the participation of the individual members. *Id*. at 343, 97 S.Ct. at 2441. *Accord, United Food and Commercial Workers v. Brown Group, Inc.*, 517 U.S. 544, 553, 116 S.Ct. 1529, 1534 (1996); *Friends of the Earth v. Laidlaw Envtl. Serv. (TOC), Inc.*, 528 U.S. 167, 181, 120 S.Ct. 693, 704 (2000).

To satisfy the first prong of the *Hunt* test for association standing, an association member normally must show that (1) he has suffered an "injury in fact" that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. *Laidlaw Envtl. Serv.*, 528 U.S. at 180-181, 120 S.Ct. at 704 (citing *Lujan v. Defenders of Wildlife*, 504 U.S.

555, 560-561, 112 S.Ct. 2130, 2136 (1992)). "[E]nvironmental plaintiffs adequately allege injury in fact when they aver that they use the affected area and are persons 'for whom the aesthetic and recreational values of the area will be lessened' by the challenged activity." *Laidlaw Envtl. Serv.*, 528 U.S. at 183, 120 S.Ct. at 705. *Accord*, *Sierra Club v. Johnson*, 436 F.3d 1269, 1279 (11th Cir. 2006).

"When the plaintiff complains of an injury in fact that is procedural in nature, the plaintiff must demonstrate that 'the procedures in question are designed to protect some threatened concrete interest of his.'" *Sierra Club v. Johnson*, 436 F.3d at 1276-77 (citing *Lujan*, 504 U.S. at 573 n. 8, 112 S.Ct. at 2158 n. 8). "The Lujan Court offered two examples of procedural requirements that a plaintiff would have standing to enforce: (1) a required hearing prior to the denial of his license application, and (2) the required issuance of an environmental impact statement before a federal facility was constructed next door to him." *Id.* at 1277. "The Court indicated that these procedural requirements are enforceable because disregarding them could impair a plaintiff's non-procedural, concrete interest." *Id*. Thus, injury in fact exists as a result of concerns about pollution – concerns that arise because a regulatory agency's failure to use mandated procedures leaves the claimant uncertain about whether pollution is being emitted in illegal quantities.

Id. at 1279. This Circuit has held that a person has standing to challenge the failure of the State to provide notice of a proposed permit to a mailing list as required by regulation because the regulation was designed to protect environmental interests and his environmental interests might be harmed by the granting of a permit. *Id*.

A "person who has been accorded a procedural right to protect his concrete interests can assert that right without meeting all the normal standards for redressability and immediacy. Thus, under our case law, one living adjacent to the site for proposed construction of a federally licensed dam has standing to challenge the licensing agency's failure to prepare an Environmental Impact Statement, even though he cannot establish with any certainty that the Statement will cause the license to be withheld or altered, and even though the dam will not be completed for many years." *Lujan*, 504 U.S. at 572 n. 7, 112 S.Ct. at 2142 n. 7. Moreover, in a procedural injury case, "the causation and redressability requirements are generally more relaxed." *Ouachita Watch League v. Jacobs*, 463 F.3d 1163, 1172 (11th Cir. 2006). To establish causation, a person suffering a procedural injury must demonstrate only that it is reasonably probable that the challenged actions will threaten his concrete interests. *Id*. If the court concludes

that the defendant did not comply with procedural requirements, it generally has the power to order compliance to redress plaintiff's procedural injury. *Id*.

Under 40 C.F.R. § 123.64(b)(1), members of Riverkeepers have been accorded the right to seek commencement of proceedings to withdraw Alabama's authority to administer the NPDES permit program. Riverkeepers contend that commencement of such proceedings is required if EPA determines that cause exists to find that Alabama is not administering its NPDES permit program in accordance with the minimum requirements of 33 U.S.C. § 1342 and 40 C.F.R. Part 123. This right is designed to protect the concrete interests of Riverkeepers in their water-based activities such as swimming, boating, fishing, etc.

Riverkeepers challenge EPA's partial rejection of their Petition to Commence Proceedings to Withdraw Alabama's Authorization to Administer the National Pollutant Discharge Elimination System based on Alabama's failure to meet four minimum procedural requirements.

First, Alabama is required to publish in newspapers and to circulate to a mailing list notices of proposed pollution permits. These notices shall include a "general description of the location of each existing or proposed discharge point." 40 C.F.R. § 123.25(a)(28). This procedural requirement is intended to assist interested parties in determining whether a proposed permit might affect waters or

parts of waters of interest to them and whether they should seek additional information and submit comments. Although Alabama does not include a "general description of the location of each existing or proposed discharge point" in its public notices, EPA determined that there is insufficient cause to commence proceedings to withdraw the Alabama program. Riverkeepers have demonstrated that it is reasonably probable that EPA's determination will threaten their water-based activities. Declarations of Michael William Mullen at ¶¶ 21-34, Myra Ann Crawford at ¶¶ 28-35, and John Wathen at ¶¶ 44-51.

Second, Alabama is required to have "procedures and ability for . . . [i]nspecting the facilities of all major dischargers at least annually." 40 C.F.R. § 123.26(e)(5).[3] This procedural requirement is intended to provide independent assurance that major dischargers are in compliance with NPDES requirements on an annual basis. Although Alabama has elected to disregard this requirement and to perform biennial inspections of major dischargers, EPA determined that there is insufficient cause to commence proceedings to withdraw the Alabama program. Riverkeepers have demonstrated that it is reasonably probable that EPA's

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[3] *See* 33 U.S.C. § 1342(b)(2)(B) (State NPDES programs shall have authority "[t]o inspect, monitor, enter, and require reports to at least the same extent as required in section 1318 of this title;").

determination will threaten their water-based activities. Declarations of Michael William Mullen at ¶¶ 9-20 and Myra Ann Crawford at ¶¶ 12-27.

Third, the Alabama Environmental Management Commission may not include among its members, persons who receive, or have during the previous two years received, a significant portion of income directly or indirectly from permit holders or applicants for a permit. 40 C.F.R. § 125.25(c).[4] This requirement is intended to ensure that the interests of NPDES permittees and applicants are not represented on the Commission and cannot influence NPDES-related decisions of the Commission. Although Alabama allows the Commission to include among its members such financially conflicted persons, EPA determined that there is insufficient cause to commence proceedings to withdraw the Alabama program. Riverkeepers have demonstrated that it is reasonably probable that EPA's determination will threaten their water-based activities. Declarations of Michael William Mullen at ¶¶ 35-59, Myra Ann Crawford at ¶¶ 36-58, and John Wathen at ¶¶ 10-43.

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[4] *See* 33 U.S.C. § 1314(i)(2)(D) ("no board or body which approves permit applications or portions thereof shall include, as a member, any person who receives, or has during the previous two years received, a significant portion of his income directly or indirectly from permit holders or applicants for a permit").

Finally, Alabama must have the authority to seek or recover penalties against violators of the NPDES program. 40 C.F.R. § 123.27(a)(3).[5] This procedural requirement is intended to ensure that Alabama has sufficient ability to coerce compliance and deter non-compliance with NPDES requirements by all persons, including state entities. Although Alabama does not have authority to seek or recover penalties against State entities, EPA determined that there is insufficient cause to commence proceedings to withdraw the Alabama program. Riverkeepers have demonstrated that it is reasonably probable that EPA's determination will threaten their water-based activities. Declarations of Michael William Mullen at ¶¶ 60-64 and John Wathen at ¶¶ 52-61.

All of these requirements, along with other requirements of the CWA and 40 C.F.R. Part 123, are designed to ensure that the State NPDES permit program is adequate to achieve the goals and objectives of the CWA, 33 U.S.C. § 1251(a) (*e.g.*, "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters"). Thus, these requirements are designed to protect the interests of Riverkeepers' members in their water-based activities.

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[5] *See* 33 U.S.C. § 1342(b)(7) (State NPDES programs shall have authority "[t]o abate violations of the permit or the permit program, including civil and criminal penalties and other ways and means of enforcement;").

To satisfy the second prong of the *Hunt* test for association standing, the association must demonstrate that the interests that it seeks to protect on behalf of its members are germane to the association's purpose. The purpose of the Cahaba Riverkeeper is to protect and restore the ecological health of the Cahaba River, its tributaries and the surrounding land and water systems that constitute the approximate 1845 acres of the watershed. Declaration of Myra Ann Crawford at ¶ 2. The purpose of the Choctawhatchee Riverkeeper, Inc. is to protect and restore the ecological health of the Choctawhatchee River, its tributaries and the surrounding terrestrial systems that constitute the watershed. Declaration of Michael William Mullen at ¶ 2. The purpose of Friends of Hurricane Creek is to promote the understanding, appreciation, enjoyment, protection and stewardship of Hurricane Creek and all its water resources; and to maintain and restore the chemical, physical, and biological integrity of Hurricane Creek's aquatic ecosystems. Declaration of John Wathen at ¶ 2. The interests of Riverkeepers' members Myra Ann Crawford, Michael William Mullen, and John Wathen are germane to these purposes.

Finally, to satisfy the third prong of the *Hunt* test for association standing, neither the claim asserted nor the relief requested must require the participation of the individual members in the lawsuit. "*Hunt* held that 'individual participation' is

not normally necessary when an association seeks prospective or injunctive relief for its members . . ..” *United Food and Commercial Workers Union Local 751,* 517 U.S. at 546, 116 S.Ct. at 1531. Here, Riverkeepers seek to set aside EPA’s determinations and remand the matter to EPA for reconsideration. This remedy does not require individual participation of the Riverkeepers’ members.

II. STATEMENT OF THE ISSUES

A. Whether EPA’s determination that there is insufficient cause to commence proceedings to withdraw approval of the Alabama NPDES permit program is in accordance with law.

B. Whether EPA’s determination that there is insufficient cause to commence proceedings to withdraw approval of the Alabama NPDES permit program is arbitrary.

C. Whether EPA’s determination that there is insufficient cause to commence proceedings to withdraw approval of the Alabama NPDES permit program rests on an erroneous interpretation of 40 C.F.R. § 123.25(a)(28) (Public Notice) and is not in accordance with law.

D. Whether EPA’s determination that there is insufficient cause to commence proceedings to withdraw approval of the Alabama NPDES permit

program rests on an erroneous interpretation of 40 C.F.R. § 123.26(e)(5) (Annual Inspections of Major Dischargers) and is not in accordance with law.

E. Whether EPA's determination that there is insufficient cause to commence proceedings to withdraw approval of the Alabama NPDES permit program rests on an erroneous interpretation of 33 U.S.C. § 1314(i)(2)(D) and 40 C.F.R. § 123.25(c) (Board Membership) and is not in accordance with law.

F. Whether EPA's determination that there is insufficient cause to commence proceedings to withdraw approval of the Alabama NPDES permit program rests on an erroneous interpretation of 33 U.S.C. § 1342(b)(7) and 40 C.F.R. § 123.27(a)(3) (Penalty Authority) and is not in accordance with law.

III. STATEMENT OF THE CASE

This case presents a petition by Riverkeepers for review of determinations by EPA that there is insufficient cause to commence proceedings to withdraw approval of Alabama's National Pollutant Discharge Elimination System (NPDES) permit program as requested in the Riverkeepers' "Petition to Commence Proceedings to Withdraw Alabama's Authorization to Administer the National Pollutant Discharge Elimination System."

A. Course of Proceedings

On January 14, 2010, Riverkeepers (and eleven other environmental organizations) filed with EPA a "Petition to Commence Proceedings to Withdraw Alabama's Authorization to Administer the National Pollutant Discharge Elimination System" alleging twenty-six failures by Alabama to conduct its EPA-approved NPDES permit program in accordance with the requirements of 33 U.S.C. § 1342 and 40 C.F.R. Part 123, and requesting that "the United States Environmental Protection Agency order the commencement of proceedings to withdraw approval of the National Pollutant Discharge Elimination System (NPDES) permit program for the State of Alabama in accordance with 40 C.F.R. § 123.64(b)." AR001249–001325.[6]

[6] Riverkeepers also submitted a first "Supplement to Petition" on February 18, 2010, AR004115–004158; the Alabama Department of Environmental Management submitted a "Response of the Alabama Department of Environmental Management" to the petition on April 13, 2010, AR004161–004266; Riverkeepers submitted the "Reply of Petitioners to the Response of the Alabama Department of Environmental Management" on November 8, 2010, AR004819–004920; and Riverkeepers submitted a second "Supplement to Petition" on April 22, 2012. AR005199–005260.

On April 9, 2014, EPA issued its "Interim Response to Petitions," partially denying the Riverkeepers' petition. AR006813–006880.[7]

On August 4, 2014, Riverkeepers filed a petition for review of EPA's Interim Response to Petitions with the Circuit Court of Appeals for the Eleventh Circuit.

B. Statement of the Facts

1. Statutory and Regulatory Framework

The Clean Water Act of 1972 (CWA), established a National Pollutant Discharge Elimination System (NPDES) permit program that is designed to prevent harmful discharges into the Nation's waters. 33 U.S.C. § 1342. *See also* § 1251(a). The Environmental Protection Agency (EPA) is directed to administer the NPDES permit program for each State, but a State may apply for a transfer of permitting authority to state officials by demonstrating that it has a program that meets the requirements of 33 U.S.C. § 1342(b) and guidelines promulgated under 33 U.S.C. § 1314(i)(2). Those *minimum* guidelines have been

[7] For purposes of its Interim Response to Petitions, EPA consolidated consideration of the Riverkeepers' Petition with two petitions previously submitted by Wild Alabama, and the Biodiversity Legal Foundation, and one petition subsequently submitted by Lookout Mountain Heritage Alliance. AR006813.

promulgated at 40 C.F.R. Part 123 and are characterized by EPA as "requirements." 40 C.F.R. § 123.1.

Once a State permit program is approved by EPA, the CWA requires that the program *shall at all times* be in accordance with the minimum requirements of 33 U.S.C. § 1342 and 40 C.F.R. Part 123. 33 U.S.C. § 1342(c)(2). *See* 40 C.F.R. § 123.1(f) ("Any State program approved by the Administrator *shall at all times* be conducted in accordance with the requirements of this part") (emphasis added); *National Pollutant Discharge Elimination System State Program Guidance*, AR003860-003861 ("*At all times* after program approval, State programs *must* be consistent with the CWA and federal rules and must be administered accordingly") (emphasis added).

Whenever EPA *determines*, after public hearing, that a State is not administering an approved permit program in accordance with the requirements of 33 U.S.C. § 1342 and 40 C.F.R. Part 123, EPA *shall* so notify the State and, if appropriate corrective action is not taken within a reasonable time, not to exceed ninety days, EPA *shall* withdraw approval of such program. 33 U.S.C. § 1342(c)(3).

40 C.F.R. § 123.64(b) provides that EPA may order the commencement of withdrawal proceedings in response to a petition from an interested person

alleging failure of the State to comply with the minimum requirements of 40 C.F.R. Part 123. Before doing so, however, EPA may conduct an informal investigation of the allegations in the petition to *determine* whether cause exists to commence proceedings to withdraw. 40 C.F.R. § 123.64(b). *See National Pollutant Discharge Elimination System State Program Guidance*, AR003861 ("Upon receipt of such a petition, the Administrator may undertake an initial, informal investigation to determine whether the State program is being administered in accordance with federal requirements"). EPA "may grant the petition and initiate the withdrawal process" if it determines that cause exists, or it may "deny the petition" if it does not. *National Pollutant Discharge Elimination System State Program Guidance*, AR003861.

2. Factual Background

EPA initially granted approval of the State of Alabama's NPDES permit program pursuant to 33 U.S.C. § 1342(b) on October 19, 1979. 44 Fed. Reg. 61,452 (Oct. 25, 1979); AR001250; AR006814.

On January 14, 2010, Riverkeepers (and eleven other environmental organizations) filed with EPA a "Petition to Commence Proceedings to Withdraw Alabama's Authorization to Administer the National Pollutant Discharge Elimination System" alleging twenty-six failures by Alabama to conduct its EPA-

approved NPDES permit program in accordance with the minimum requirements of 33 U.S.C. § 1342 and 40 C.F.R. Part 123, and requesting that EPA "order the commencement of proceedings to withdraw approval of the National Pollutant Discharge Elimination System (NPDES) permit program for the State of Alabama in accordance with 40 C.F.R. § 123.64(b)." AR001249–001325.[8]

On April 9, 2014, EPA issued its "Interim Response to Petitions." AR006813–006880; AR007937–007938.[9] EPA concluded:

> The EPA has carefully reviewed the issues raised by the Petitions. In connection with certain grounds asserted in the Petitions, the EPA has concluded that they do not warrant initiation of program withdrawal proceedings. With respect to other issues, however, as explained below, EPA has significant concerns about the adequacy of ADEM's NPDES Program. Based on those concerns, EPA is deferring a decision on the Petitions with respect to these issues, and will work with ADEM and give ADEM an opportunity to address EPA's concerns before EPA determines whether it is necessary to order the commencement of proceedings for program withdrawal under 40 C.F.R. § 123.64(b). This document summarizes EPA's review and the bases for the Agency's determination.

AR006814. A discussion of the facts material to the issues presented for review follows.

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[8] *See* Note 6 *supra*. EPA incorrectly asserts in its Interim Response to Petitions that "[t]he Petitioners ask EPA to withdraw approval of Alabama's NPDES program . . . ." AR006815.

[9] *See* Note 7 *supra*.

40 C.F.R. § 123.25(a)(28) requires that State NPDES permit programs comply with the public notice provisions of 40 C.F.R. § 124.10(c) and (d). Sections 124.10(c)(2)(i) and 124.10(c)(1)(ix) require publication of a notice that a draft NPDES permit has been prepared in a daily or weekly newspaper within the area affected by the facility or activity and distribution of the public notice to a mailing list. Section 124.10(d) requires that "all" such NPDES permit notices shall contain the following "minimum" information: * * * "(vii) *a general description of the location of each existing or proposed discharge point* and the name of the receiving water . . .." (Emphasis added). Riverkeepers demonstrated that many of Alabama's public notices (from January 17, 2008 to December 15, 2009, January 19, 2010 to September 15, 2010, and October 19, 2010 to December 15, 2011) do not include a general description of the location of each discharge point. AR002252–002401; AR002206–002251; AR007050–007133. Riverkeepers also presented an uncontradicted analysis of two notices which did not include a general description of the location of the discharge points and from which the location of the discharge points could only be narrowed to a 17-square mile area and 9-square mile area. AR005212–005218. Riverkeepers also presented uncontradicted evidence that a 2004 U.S. Department of Commerce study found that approximately 50% of Alabama's population does not use the

internet. AR004859. EPA agreed that ADEM's notices "lack the required description of outfall locations." AR006823. Nevertheless, EPA determined that "this allegation does not justify the initiation of withdrawal proceedings because ADEM does identify the receiving waters in its public notices and also includes in its public notices for draft permits a web address link to documents where more specific information about the location of proposed outfalls can be found." AR006823.

40 C.F.R. § 123.27(a)(3) requires that "State NPDES compliance evaluation programs shall have procedures and ability for . . . [i]nspecting the facilities of all major dischargers at least annually." Riverkeepers' alleged that Alabama was operating under a policy "whereby only 50% of all major dischargers will be inspected each year." AR001265. Riverkeepers alleged and demonstrated that Alabama failed to inspect over 43-46% of major dischargers in FY2008, 44% of major dischargers in FY2009, and 46% of major dischargers in FY2010. AR001266; AR004860; AR005219–005220; AR002408–002411; AR002416; AR006954. EPA determined that "this issue does not warrant the initiation of withdrawal proceedings because ADEM has responded to and is meeting the goals of EPA's own National Compliance Monitoring Strategy ("*Clean Water Act National Pollutant Discharge Elimination System Compliance Monitoring*

Strategy for the Core Program and Wet Weather Sources," EPA October 2007), which establishes a national goal of at least one inspection of each major discharger every two years." AR006824. *See* AR000915–000942.

40 C.F.R. § 123.25(c) requires that "State NPDES programs shall ensure that any board or body which approves all or portions of permits *shall not include as a member* any person who receives, or has during the previous 2 years received, a significant portion of income directly or indirectly from permit holders or applicants for a permit." (Emphasis added). *Se*e 33 U.S.C. § 1314(i)(2) (same requirement). Riverkeepers' demonstrated that Alabama allows the Environmental Management Commission to include as members, persons who receive a significant portion of income directly or indirectly from NPDES permit holders or applicants for NPDES permits, provided they recuse themselves from voting on all NPDES-related matters. AR003744-003750. Riverkeepers presented a 1973 EPA Office of General Counsel opinion holding that abstention by a conflicted board member is not adequate to comply with the law given the flat proscription against board membership where the particular member has received a significant portion of his income from permit holders or applicants. AR003743. Riverkeepers also presented EPA's 1986 *National Pollutant Discharge Elimination System State Program Guidance* which states that "[s]ome States have

sought to avoid the prohibition through recusal on matters affecting the permittees. This alternative is also not acceptable." AR003888. Citing an April 22, 1997 denial of a petition asserting the same program deficiency in the same State, AR003751–003752, EPA determined that "this issue does not warrant the initiation of withdrawal proceedings" because "EPA finds that ADEM's process for complying with this requirement, which includes the execution by affected persons of a Conflict of Interest Disclosure form, and a general recusal process whereby persons with a prohibited conflict recuse themselves from consideration of NPDES-related matters, complies with the CWA." AR006853.

40 C.F.R. § 123.27(a)(3) requires that State NPDES permit programs include authority to assess and sue to recover civil penalties and criminal fines for violation of program requirements. *See* 33 U.S.C. § 1342(b)(7) (states must have authority to abate violations of the permit or the permit program, including civil and criminal penalties and other ways and means of enforcement). Riverkeepers alleged that "Alabama Constitution art. I § 14 prohibits the State and any of its agencies (including state universities and colleges and county boards of education) from being made a defendant in State court." AR001315. ADEM agreed that "Alabama has the legal authority to 'assess or sue to recover in court civil penalties' against any defendant *except the state and its agencies*." AR004246

(emphasis added). Despite finding that "ADEM's inability to sue state agencies for civil penalties is a weakness in its enforcement program that may not fully meet the requirements of 40 CFR § 123.27(a)(3)," EPA determined that "this [does not] constitute[ ] a basis for program withdrawal, as many states operate under state constitutional or state law limitations on their authority to penalize fellow state agencies, and EPA does not believe the CWA was intended to preclude program authorization for states with an inability to assess penalties against fellow state agencies or to require constitutional or statutory amendments to address this shortcoming." AR006854.

C. Standard of Review

The Court reviews subject matter jurisdiction and standing *de novo*. *Sicar v. Chertoff*, 541 F.3d 1055, 1059 (11th Cir. 2008). "[T]he Court owes no deference to an agency's interpretation of a statute that defines [the] Court's subject matter jurisdiction." *Friends of the Everglades*, 699 F.3d at 1285 (quoting *Sierra Club v. Leavitt*, 355 F. Supp.2d 544, 548 (D. D.C. 2005)).

Where the statute authorizing review of agency action sets forth no independent standard of review, the Court applies the standard of review in the Administrative Procedure Act, 5 U.S.C. §§ 701-706. *Sierra Club v. Johnson*, 436 F.3d at 1273; *Legal Envtl. Assistance Found., Inc. v. EPA*, 118 F.3d 1467, 1473

(11th Cir. 1997). Under the APA, the Court will set aside agency action if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law"; exceeds the agency's statutory authority; or is "without observance of procedure required by law." 5 U.S.C. § 706(2)(A), (C), & (D); *Alabama Envtl. Council v. Adm'r, U.S. EPA*, 711 F.3d 1277, 1285 (11th Cir. 2013).

The arbitrary and capricious standard is exceedingly deferential. *Fund for Animals, Inc. v. Rice*, 85 F.3d 535, 541 (11th Cir. 1996). The Court may not substitute its own judgment for the agency's as long as its conclusions are rational. *Miccosukee Tribe of Indians of Fla. v. United States*, 566 F.3d 1257, 1264 (11th Cir. 2009). The Court may however, find an agency action

> arbitrary and capricious where the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

Id.

The Court reviews *de novo* issues of statutory interpretation. *Moulton v. U.S. Att'y Gen.*, 515 Fed. Appx. 804, 805 (11th Cir. 2013) (per curiam). When reviewing an agency's construction of a statute that it administers, a court must first determine whether Congress has directly spoken to the question at issue.

Williams v. Secretary, U.S. Dep't of Homeland Sec., 741 F.3d 1228, 1231 (11th Cir. 2014) (citing *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842, 104 S.Ct. 2778, 2781 (1984)). "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 842-43, 104 S.Ct. at 2781. *Accord*, *Legal Envtl. Assistance Found., Inc. v. EPA*, 118 F.3d at 1473. "[I]f the statute is silent or ambiguous with respect to the specific issue," the Court must decide whether the agency's interpretation "is based on a permissible construction of the statute." *Chevron*, 467 U.S. at 843, 104 S.Ct. at 2782. To uphold an agency's interpretation of a statute, the Court need not conclude that the agency construction was the only one it permissibly could have adopted or even that the Court would have interpreted the statute the same way the agency did. However, a reviewing court must reject administrative constructions that are inconsistent with the statutory mandate or that frustrate the policy that Congress sought to implement. An agency may not construe a statute in a way that completely nullifies textually applicable provisions meant to limit its discretion. *Sierra Club v. Johnson*, 541 F.3d 1257, 1265 (11th Cir. 2008) (citing *Whitman v. American Trucking Ass'ns, Inc.,* 531 U.S. 457, 485, 121 S.Ct. 903, 918-19 (2001)).

An agency's interpretation of its own regulations is entitled to deference unless that interpretation (1) is plainly erroneous, (2) is inconsistent with the regulation, or (3) there is reason to suspect that the interpretation does not reflect that agency's fair and considered judgment. *Bonilla v. U.S. Dep't of Justice*, 535 Fed. Appx. 891, 893 (11th Cir. 2013) (per curiam) (citing *Talk Am., Inc. v. Michigan Bell Tel. Co.*, 564 U.S. __, __, 131 S. Ct. 2254, 2260-61 (2011) (internal quotation marks omitted)). *See Legal Envtl. Assistance Found., Inc. v. EPA*, 276 F.3d 1253, 1262 (11th Cir. 2001) ("In construing administrative regulations, we must give 'controlling weight' to the agency interpretation 'unless it is plainly erroneous or inconsistent with the regulation.'").

IV. SUMMARY OF ARGUMENT

On a petition to commence proceedings to withdraw EPA approval of a state NPDES permit program, EPA is required to determine whether cause exists to find that the state program is not being administered in accordance with the minimum requirements of 33 U.S.C. § 1342 and 40 C.F.R. Part 123. If EPA determines that cause exists, it *shall* commence proceedings to withdraw program approval. These proceedings allow EPA to fully examine the evidence, make determinations, and allow the State an opportunity to correct any program deficiencies to avert program withdrawal.

In the present case, EPA made findings that the Alabama NPDES permit program is not being administered in accordance with the minimum requirements of 33 U.S.C. § 1342 and 40 C.F.R. Part 123, but, notwithstanding those findings, declined to make a determination that cause exists to commence proceedings to withdraw program approval and declined to commence such proceedings. For example, EPA admits that the notices of proposed permits published and distributed by ADEM "lack the required description of outfall locations" but "this allegation does not justify the initiation of withdrawal proceedings because ADEM does identify the receiving waters in its public notices and also includes in its public notices for draft permits a web address link to documents where more specific information about the location of proposed outfalls can be found." AR006823. And, "EPA acknowledges that ADEM's inability to sue state agencies for civil penalties is a weakness in its enforcement program that may not fully meet the requirements of 40 CFR § 123.27(a)(3)" but "EPA disagrees that this constitutes a basis for program withdrawal, as many states operate under state constitutional or state law limitations on their authority to penalize fellow state agencies, and EPA does not believe the CWA was intended to preclude program authorization for states with an inability to assess penalties against fellow state agencies or to require constitutional or statutory amendments to address this

shortcoming." AR006854. Despite making findings that the Alabama NPDES permit program is not being administered in accordance with the minimum requirements of 33 U.S.C. § 1342 and 40 C.F.R. Part 123, EPA incorrectly claims that it has discretion to decline to commence program withdrawal proceedings.

EPA also made some determinations that the Alabama NPDES permit program is being administered in accordance with the minimum requirements of 33 U.S.C. § 1342 and 40 C.F.R. Part 123, but these determinations rest on erroneous interpretations of the CWA and 40 C.F.R. Part 123. For example, EPA concludes that 40 C.F.R. § 123.25(a)(28) does not always require that a State NPDES permit program provide that notices of proposed permits published in newspapers and circulated to mailing lists include "a general description of the location of each existing or proposed discharge point." EPA also concludes that 40 C.F.R.§ 123.26(e)(5) does not always require that a State NPDES program have procedures and ability for inspecting the facilities of all major dischargers at least annually. EPA also concludes that 40 C.F.R. § 123.25(c) does not always require that a State NPDES program preclude persons who receive, or have during the previous two years received, a significant portion of their income directly or indirectly from permit holders or applicants for a permit from serving as members of a State board or body which approves all or portions of NPDES permits. And

finally, EPA concludes that 40 C.F.R. § 123.27(a)(3) does not always require that a State NPDES program have authority to recover penalties against State agencies that violate the NPDES program. However, 33 U.S.C. § 1342(c)(2) requires that any State NPDES permit program *shall at all times* be in accordance with § 1342 and guidelines promulgated pursuant to § 1314(i)(2) (*i.e.*, 40 C.F.R. Part 123).

V. ARGUMENT

A. EPA's determination that there is insufficient cause to commence proceedings to withdraw approval of the Alabama NPDES permit program is not in accordance with law.

In 33 U.S.C. § 1342(c)(3), Congress directed that EPA *shall* withdraw program approval if (1) EPA has made a determination, after a public hearing, that a state NPDES permit program is not being administered in accordance with the minimum requirements of 33 U.S.C. § 1342 and guidelines promulgated under §1314(i) (*i.e.*, 40 C.F.R. Part 123); and (2) EPA finds that the State has not taken appropriate corrective action within a reasonable time, not to exceed ninety days, after notice of EPA's determination. Program withdrawal is a mandatory duty if these conditions are present. *Cf. National Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 661, 127 S.Ct. 2518, 2531 (2007) (EPA has a mandatory duty to approve a state NPDES permit program if it meets nine specified criteria; if

the criteria are satisfied, EPA does not have the discretion to deny approval of a state program). Specifically, the CWA does not authorize EPA to withhold program withdrawal because, in its judgment, the program deficiencies are not sufficiently egregious to warrant program withdrawal.

It follows from the text of 33 U.S.C. § 1342(c)(3) and 40 C.F.R. § 123.64(b)(1), that EPA's singular focus on receipt of a petition to commence proceedings to withdraw approval of a state's NPDES permit program is to be on whether cause exists to determine that the state NPDES permit program is not being administered in accordance with the minimum requirements of 33 U.S.C. § 1342 and 40 C.F.R. Part 123. *National Pollutant Discharge Elimination System State Program Guidance*, AR003861 ("Upon receipt of such a petition, the Administrator may undertake an initial, informal investigation to determine whether the State program is being administered in accordance with federal requirements."); 40 C.F.R. § 123.64(b)(1) (EPA "may conduct an informal investigation of the allegations in the petition to determine whether cause exists to commence proceedings under this paragraph.").

However, in its decision partially denying the Riverkeepers' Petition to Commence Proceedings to Withdraw Approval of Alabama's NPDES Permit Program, EPA strayed from that singular focus. Despite EPA's acknowledgment

that Alabama failed to meet a number of minimum program requirements,[10] EPA impermissibly considered whether, in its judgment, the program deficiencies are sufficiently egregious to warrant program withdrawal.[11]

EPA may not rely on 40 C.F.R. § 123.63 ("The Administrator *may* withdraw program approval") or 40 C.F.R. § 123.64(b)(1) ("The Administrator *may* order the commencement of withdrawal proceedings") as authorizing it to exercise discretion to decline to commence proceedings to withdraw program approval because, in its judgment, the program deficiencies are not sufficiently egregious to warrant program withdrawal. To do so would allow EPA to thwart the CWA and avoid the mandate of 33 U.S.C. § 1342(c)(3). Broad as EPA's discretion in formulating regulatory policy within the framework of the CWA may be, it must

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[10] *E.g.*, AR006823 ("The [Riverkeepers'] Petition includes as an Exhibit copies of public notices issued from January 17, 2008, to December 15, 2009, which lack the required description of outfall locations"); AR006854–006855 ("EPA acknowledges that ADEM's inability to sue state agencies for civil penalties is a weakness in its enforcement program that may not fully meet the requirements of 40 CFR § 123.27(a)(3)").

[11] AR006823 ("EPA has determined that this allegation does not justify the initiation of withdrawal proceedings because ADEM does identify the receiving waters in its public notices and also includes in its public notices for draft permits a web address link to documents where more specific information about the location of proposed outfalls can be found."); AR006854 ("This gap in penalty authority can be addressed through citizen and federal enforcement, ... Accordingly, EPA has concluded that withdrawal proceedings on this ground of the Petition are not warranted.").

bow to the specific directives of Congress. *See Legal Envtl. Assistance Found., Inc. v. EPA*, 118 F.3d at 1478. EPA may not construe the CWA in a way that completely nullifies textually applicable provisions meant to limit its discretion. *Cf. Whitman v. American Trucking Ass'ns, Inc.*, 531 U.S. at 485, 121 S.Ct. at 918-919 (2001); *Sierra Club v. Johnson*, 541 F.3d at 1265. Thus, EPA may not decline to commence proceedings to withdraw program approval on any basis other than that cause does not exist to determine that the State NPDES permit program is not being administered in accordance with the minimum requirements of 33 U.S.C. § 1342 and 40 C.F.R. Part 123.

EPA also may not rely on its statutory authority to make a "determination" under 33 U.S.C. § 1342(c)(3) as allowing it the discretion to consider factors other than whether the State NPDES permit program is not being administered in accordance with the minimum requirements of 33 U.S.C. § 1342 and 40 C.F.R. Part 123. *Cf. National Ass'n of Home Builders*, 551 U.S. at 671, 127 S.Ct. at 2537 ("While the EPA may exercise some judgment in determining whether a State has demonstrated that it has the authority to carry out § 402(b)'s enumerated statutory criteria, the statute clearly does not grant it the discretion to add another entirely separate prerequisite to that list"). Specifically, the authority to make a "determination" does not authorize EPA to decline to commence proceedings to

withdraw program approval because, in its judgment, the State's failures are not sufficiently egregious to warrant program withdrawal. The use of the word "determination" does not grant EPA a roving license to ignore the statutory text. It is but a direction to exercise discretion within defined statutory limits. *See Massachusetts v. EPA*, 549 U.S. 497, 533, 127 S.Ct. 1438, 1462 (2007) ("[T]he use of the word 'judgment' [in the Clean Air Act] is not a roving license to ignore the statutory text. It is but a direction to exercise discretion within defined statutory limits").

In *Massachusetts v. EPA*, EPA denied a petition for rulemaking asking EPA to regulate greenhouse gas emissions from new motor vehicles. *Id*. at 510, 127 S.Ct. at 1449. EPA concluded that it lacked authority to regulate carbon dioxide emissions from new motor vehicles because carbon dioxide is not an 'air pollutant' as that term is defined in the Clean Air Act. In the alternative, EPA concluded that even if it possessed authority to regulate carbon dioxide emissions from new motor vehicles, it would decline to do so because such regulation would conflict with other administration priorities. *Id*. at 528, 127 S.Ct. at 1459. After concluding that the Clean Air Act granted EPA the authority to regulate carbon dioxide emissions, the Court addressed EPA's alternative reason for denial of the petition.

> The alternative basis for EPA's decision – that even if it does have statutory authority to regulate greenhouse gases, it would be unwise to do so at this time – rests on reasoning divorced from the statutory text. While the statute does condition the exercise of EPA's authority on its formation of a "judgment," 42 U.S.C. §7521(a)(1), that judgment must relate to whether an air pollutant "cause[s], or contribute[s] to, air pollution which may reasonably be anticipated to endanger public health or welfare," *ibid*. Put another way, the use of the word "judgment" is not a roving license to ignore the statutory text. It is but a direction to exercise discretion within defined statutory limits.
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> If EPA makes a finding of endangerment, the Clean Air Act requires the agency to regulate emissions of the deleterious pollutant from new motor vehicles. *Ibid*. (stating that "[EPA] shall by regulation prescribe . . . standards applicable to the emission of any air pollutant from any class of new motor vehicles"). EPA no doubt has significant latitude as to the manner, timing, content, and coordination of its regulations with those of other agencies. But once EPA has responded to a petition for rulemaking, its reasons for action or inaction must conform to the authorizing statute. Under the clear terms of the Clean Air Act, EPA can avoid taking further action only if it determines that greenhouse gases do not contribute to climate change or if it provides some reasonable explanation as to why it cannot or will not exercise its discretion to determine whether they do. *Ibid*. To the extent that this constrains agency discretion to pursue other priorities of the Administrator or the President, this is the congressional design.

Id. at 532-533, 127 S.Ct. at 1462.

While NPDES program withdrawal depends on EPA's formation of a *determination*, that determination must relate exclusively to whether the Alabama NPDES permit program is being administered in accordance with the minimum

requirements of 33 U.S.C. § 1342 and 40 C.F.R. Part 123. Once EPA responds to a petition to commence withdrawal proceedings, its reasons for action or inaction must relate exclusively to whether the Alabama NPDES permit program is being administered in accordance with the minimum requirements of 33 U.S.C. § 1342 and 40 C.F.R. Part 123. Under the clear terms of the CWA, EPA can avoid commencement of proceedings to withdraw program approval only if it determines that the Alabama NPDES permit program is being administered in accordance with the minimum requirements of 33 U.S.C. § 1342 and 40 C.F.R. Part 123. To the extent that this constrains agency discretion, this is by congressional design. A reviewing court's task is to apply the text of the statute, not to improve upon it, regardless of the practical difficulties they may create. *EPA v. EME Homer City Generation, L.P.*, 572 U.S. ___, ___, 134 S. Ct. 1584, 1600-01 (2014).

It is apparent from EPA's determinations and discussions that Alabama's administration of the NPDES permit program has fallen short of the minimum requirements of 33 U.S.C. § 1342 and 40 C.F.R. Part 123. Despite these admitted shortcomings, however, EPA determined that, in its judgment, program withdrawal was not warranted for other reasons. These reasons do not conform to the authorizing statute (33 U.S.C. § 1342(c)) and are founded upon an unlawful exercise of discretion. Once EPA determines that cause exists to determine that

the Alabama NPDES permit program is not being administered in accordance with the minimum requirements of 33 U.S.C. § 1342 and 40 C.F.R. Part 123, EPA must commence withdrawal proceedings. Accordingly, EPA's determination that there is insufficient cause to commence proceedings to withdraw approval of the Alabama NPDES permit program is not in accordance with law.

B. EPA's determination that there is insufficient cause to commence proceedings to withdraw approval of the Alabama NPDES permit program is arbitrary.

Congress directed EPA to commence proceedings to withdraw approval of a state NPDES permit program if cause exists to determine that the state NPDES permit program is not being administered in accordance with the minimum requirements of 33 U.S.C. § 1342 and guidelines promulgated under §1314(i) (*i.e.*, 40 C.F.R. Part 123). If, in making that determination, EPA relied on factors which Congress did not intend for it to consider, its determination is arbitrary. *National Ass'n of Home Builders*, 551 U.S. at 658, 127 S.Ct. at 2529; *Sierra Club, Inc. v. Leavitt*, 488 F.3d 904, 911 (11th Cir. 2007).

EPA's determination not to commence proceedings to withdraw approval of the Alabama NPDES permit program relies on EPA's judgment that Alabama's failures to administer the NPDES permit program in accordance with the minimum requirements of 33 U.S.C. § 1342 and 40 C.F.R. Part 123 are not sufficiently

egregious to warrant program withdrawal. Thus, EPA has relied on a factor that Congress has not authorized it to consider and acted in an arbitrary manner.

In addition, it is apparent from EPA's Interim Response to Petitions that EPA relied on other factors which Congress did not intend for it to consider. For example, EPA concluded that Alabama complies with the public notice requirements of 40 C.F.R. §§ 123.25(a)(28) and 124.10(d)(vii) because ADEM "includes in its public notices for draft permits a web address link to documents where more specific information about the location of proposed outfalls can be found." AR006823. EPA concluded that Alabama complies with the major discharger inspection requirements of 40 C.F.R. § 123.26(e)(5) because "ADEM has responded to and is meeting the goals of EPA's own National Compliance Monitoring Strategy." AR006824. EPA concluded that Alabama complies with 33 U.S.C. § 1314(i)(2)(D) and 40 C.F.R. § 123.25(c) because ADEM has a process requiring that members of the Environmental Management Commission with financial conflicts of interest recuse themselves from NPDES-related matters. AR006853. And EPA concluded that Alabama complies with the enforcement authority requirements of 40 C.F.R. § 123.27(a)(3) because its "gap in penalty authority can be addressed through citizen and federal enforcement." AR006854. These are factors which Congress did not intend for EPA to consider.

Accordingly, EPA's determinations that there is insufficient cause to commence proceedings to withdraw approval of Alabama's NPDES program are arbitrary.

C. EPA's determination that there is insufficient cause to commence proceedings to withdraw approval of the Alabama NPDES permit program is not in accordance with law because it rests on an erroneous interpretation of 40 C.F.R. § 123.25(a)(28) (Public Notice).

33 U.S.C. § 1342(c)(2) requires that any State NPDES permit program shall at all times be in accordance with § 1342 and guidelines promulgated pursuant to § 1314(i)(2). Among those guidelines is 40 C.F.R. § 123.25(a)(28) which requires that State NPDES permit programs comply with the public notice provisions of 40 C.F.R. § 124.10(c) and (d). Sections 124.10(c)(2)(i) and 124.10(c)(1)(ix) require publication of a notice that a draft NPDES permit has been prepared in a daily or weekly newspaper within the area affected by the facility or activity and distribution of the notice to a mailing list. Section 124.10(d) requires that "all" such NPDES permit notices shall contain the following "minimum" information: "[n]ame and address of the permittee or permit applicant and, if different, of the facility of activity regulated by the permit," 40 C.F.R. § 124.10(d)(ii); "[a] brief description of the business conducted at the facility or activity described in the permit application or the draft permit," 40 C.F.R. § 124.10(d)(iii); and "*a general description of the location of each existing or proposed discharge point* and the

name of the receiving water . . ..” 40 C.F.R. § 124.10(d)(vii) (emphasis added).[12] The EPA-approved Alabama NPDES permit program requires that public notices contain the same “minimum” information. Ala. Admin. Code r. 335-6-6-.21(4).

Riverkeepers demonstrated that many of Alabama’s public notices (from January 17, 2008 to December 15, 2009, January 19, 2010 to September 15, 2010, and October 19, 2010 to December 15, 2011) contain the name of the receiving water, but do not contain “a general description of the location of each existing or proposed discharge point.” AR001264–001265, AR002252–002401; AR004857–004859; AR002206–002251; AR005211–005219; AR007050–007133.

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[12] The current regulation has its genesis in the first regulations published by EPA to prescribe state NPDES program submission requirements. 37 Fed. Reg. 28,390, 28,394 (Dec. 22, 1972) (codified at 40 C.F.R. § 124.32(c) (1973)) (“The contents of public notice of applications for NPDES permits shall include at least the following . . . : * * * Name of waterway to which each discharge is made and a short description of the location of each discharge on the waterway indicating whether such discharge is a new or an existing discharge;”). This first regulation provided a sample public notice “which meets the requirements of this section.” That sample provides “Both discharges are presently to Martin Creek one-half-mile upstream from Whitehall Bay.” For forty-two uninterrupted years, EPA regulations have required that States provide public notice of NPDES permits including both the name of the receiving water *and* the location of the discharge.

ADEM responded that the public notices include an internet address where "any interested person can view . . . a very detailed description of the location of each existing and proposed discharge point." AR004186.

Riverkeepers replied that ADEM assumes that "anyone" in Alabama has access to a computer and the internet. However, a 2004 U.S. Department of Commerce study found that only 50.5 to 55.8 percent of Alabama's population use the internet. AR004859.[13] *See* AR006823 ("Petitioners contend that simply linking to a web address where the required information can be reviewed is inadequate, especially in light of the large percentage of citizens of Alabama who do not have internet access at home."). Moreover, Riverkeepers pointed out that merely providing a facility location and receiving water name do not adequately describe the general location of a discharge point "because the facility may not be located near the discharge point and the receiving water may be large or merely an 'unnamed tributary.'" AR005212.[14]

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[13] *A Nation Online: Entering the Broadband Age* (U.S. Dep't of Commerce, 2004), *now available at* http://www.ntia.doc.gov/files/ntia/editor_uploads/NationOnlineBroadband04_files/NationOnlineBroadband04.pdf.

[14] Riverkeepers provided two concrete examples of how actual public notices contain so little information about the location of discharge points that the best one could determine is that they are likely to be anywhere in a 9-square mile area and 17-square mile area. AR005212–005218. *See* AR006823 ("To illustrate (continued...)

EPA determined that "this allegation does not justify the initiation of withdrawal proceedings because ADEM does identify the receiving waters in its public notices and also includes in its public notices for draft permits a web address link to documents where more specific information about the location of proposed outfalls can be found." AR006823. EPA explains:

> EPA finds that ADEM's mechanism for informing the public of outfall locations, where ADEM identifies the receiving water in its public notices and includes in the public notices a web address where outfall location and other information about the discharge can be reviewed, achieves the goals of the regulatory requirement, and therefore that the initiation of withdrawal proceedings on this ground is not warranted. EPA will encourage ADEM to supplement its public notices with more specific information about outfall locations. However, the Petitioners' argument that the regulation requires a more specific description of outfall locations in the public notice does not warrant the initiation of program withdrawal proceedings.

AR006823–006824.

EPA's determination is not in accordance with law because it rests on an erroneous interpretation of 40 C.F.R. § 123.25(a)(28). That regulation requires

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[14] (...continued)
the problem with ADEM's approach, the April 2012 Supplement describes specific examples which provide information in the public notice only to identify receiving waters (which are often unnamed tributaries to named streams). According to the ARA Petitioners, the information provided does not indicate the number or location of discharge points and only allows the public to narrow the discharge points down, in the two examples provided, to a 17 square mile area and a 9 square mile area.").

that a notice of a draft NPDES permit include a description of the general location of each existing or proposed discharge point. It does not say that a notice need not include a description of the general location of the discharge point if a web address link to documents is provided where more specific information about the location of proposed outfalls can be found. EPA's interpretation of 40 C.F.R. § 123.25(a)(28) is inconsistent with the plain language of the regulation and is therefore contrary to law. *See Legal Envtl. Assistance Found., Inc. v. EPA*, 276 F.3d 1253, 1262-64 (11th Cir. 2001) (EPA's construction of its well classification scheme runs afoul of the plain language of the regulations and is therefore contrary to law). Accordingly, EPA's determination that there is insufficient cause to commence proceedings to withdraw approval of the Alabama NPDES permit program is not in accordance with law and must be set aside.

D. EPA's determination that there is insufficient cause to commence proceedings to withdraw approval of the Alabama NPDES permit program is not in accordance with law because it rests on an erroneous interpretation of 40 C.F.R. § 123.26(e)(5) (Annual Inspections of Major Dischargers).

33 U.S.C. § 1342(c)(2) requires that any State NPDES permit program shall at all times be in accordance with § 1342 and guidelines promulgated pursuant to § 1314(i)(2). Among those guidelines is 40 C.F.R. § 123.26(e) which requires that

"State NPDES compliance evaluation programs shall have procedures and ability for . . . [i]nspecting the facilities of all major dischargers at least annually."

The genesis of this regulation is 37 Fed. Reg. 28,390, 28,400 (Dec. 22, 1972) (codified at 40 C.F.R. § 124.92(b) (1973)). That regulation provided that State NPDES permit programs shall "have . . . [an] inspection program for the periodic inspection (*to be performed not less than once every year for every discharge which is not a minor discharge*) of discharges of pollutants from point sources and facilities for the treatment and control of such discharges of pollutants." By 1979, the regulation provided that State NPDES permit programs shall include "[a] program for periodic inspections of the activities subject to regulation. *The facilities of major dischargers . . . shall be inspected at least annually*." 44 Fed. Reg. 32,854, 32,924 (June 7, 1979) (codified at 40 C.F.R. § 123.31(c)(2) (1980)).

In 1980, EPA consolidated the regulations of multiple regulatory programs, including the NPDES program. One of the purposes of the promulgation was "[t]o consolidate program requirements for the RCRA and UIC programs with those already established for the NPDES program." 45 Fed. Reg. 33,290 (May 19, 1980). The regulation then provided that "State NPDES compliance evaluation programs shall have procedures and ability for . . . [i]nspecting the facilities of

all major dischargers at least annually." 45 Fed. Reg. 33,290, 33,462 (May 19, 1980) (codified at 40 C.F.R. § 123.8(e) (1980)). Subsequently, EPA deconsolidated its programmatic regulations and retained the 1980 language. 48 Fed. Reg. 14,146, 14,182 (April 1, 1983) (codified at 40 C.F.R. § 123.26(e) (1983)). This language continues in force today. 40 C.F.R. § 123.26(e).

In 1986, EPA published *National Pollutant Discharge Elimination System State Program Guidance*. AR003825–004019. It states:

> The State's [NPDES permit program] description also should indicate the projected scope and frequency of inspections and outline the State's inspection priorities. *At a minimum, State compliance monitoring programs must provide for annual inspection of all major dischargers.*

AR003976 (emphasis added).

Riverkeepers alleged in their Petition that "[t]he State of Alabama has adopted and is implementing a policy whereby only 50% of all major dischargers will be inspected each year." AR001265. *See also* AR004860–004862; AR005219–005221. Thus, each major discharger will be inspected, on average, once every two years rather than annually. Riverkeepers alleged and demonstrated that Alabama failed to inspect over 43-46% of major dischargers in FY2008, 44% of major dischargers in FY2009, and 46% of major dischargers in FY2010. AR001266; AR004860; AR005219–005220; AR002408–002411; AR002416;

AR006954. Riverkeepers concluded from these and earlier inspection data that "the State of Alabama does not have compliance and evaluation programs that have procedures and ability for inspecting the facilities of all major dischargers at least annually as required by 40 C.F.R. § 123.26(e)(5)." AR001267. *See also* AR004861–004862; AR005221.

ADEM responded:

> EPA revised its inspection goal for major dischargers in 2007. "OECA's revised goal for state and regional inspection of major permittees is a minimum frequency of at least one comprehensive inspection every two fiscal years. This modifies the existing measure of inspections of major permittees which expresses the goal of inspecting 100% of major permittees annually." (Compliance Monitoring Strategy for the Core Program and Wet Weather Sources, USEPA, October 17, 2007).

AR004188.[15]

Petitioners replied that "[n]either a Workplan developed by ADEM and EPA Region 4 nor an EPA Headquarters policy can alter the mandate for annual inspections of all major dischargers found in 40 C.F.R. § 123.26(e)(5)." AR004861.

EPA determined that "this issue does not warrant the initiation of withdrawal proceedings because ADEM has responded to and is meeting the goals

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[15] The Compliance Monitoring Strategy is at AR000915–000942. The modified goal is expressed in Workplans at AR006656, AR006683, AR006705.

of EPA's own National Compliance Monitoring Strategy ('Clean Water Act National Pollutant Discharge Elimination System Compliance Monitoring Strategy for the Core Program and Wet Weather Sources,' EPA October 2007), which establishes a national goal of at least one inspection of each major discharger every two years." AR006824. EPA explains:

> EPA disagrees with ARA's interpretation of § l23.25(e)(5). Under 40 C.F.R. § 123.26(e)(5), State programs must have "procedures and ability for" inspecting the facilities of all major dischargers at least annually. The requirement to have procedures and ability for conducting inspections of all major dischargers annually is not equivalent to a mandate to actually conduct inspections of all major dischargers annually. EPA's Compliance Monitoring Strategy establishes inspection frequency goals that will deter noncompliance, support the enforcement program and permitting process and protect and restore water quality. In doing so, the Compliance Monitoring Strategy provides for EPA and authorized states to direct "resources toward the most important noncompliance and environmental problems." ADEM has consistently met or exceeded the national inspection frequency goals for major dischargers established in EPA's Compliance Monitoring Strategy. Accordingly, EPA has determined that the initiation of withdrawal proceedings on this ground is not warranted.

AR006824–006825 (footnote omitted).

EPA's Compliance Monitoring Strategy permits Alabama to redirect its resources away from annual inspections of major dischargers. AR000916 ("We recognize that we are reducing longstanding inspection frequency goals in some NPDES program areas in order to direct resources toward other non-compliance

and environmental problems that are currently not well addressed."). Without those resources, Alabama's NPDES compliance evaluation program does not have procedures and ability for inspecting the facilities of *all major dischargers at least annually* as required by 40 C.F.R. § 123.26(e)(5). The evidence that Alabama lacks procedures and ability to achieve annual inspections of 100% of major dischargers is the substantially reduced inspection frequencies achieved for major dischargers in FY2008 (54-57%), FY2009 (56%), and FY2010 (54%).

If EPA believes the annual inspection requirement (or goal) for major dischargers of 100% should be amended, it must engage in rulemaking to amend 40 C.F.R. § 123.26(e)(5). *See Warshauer v. Solis*, 577 F.3d 1330, 1337 (11th Cir. 2009) ("Congress directed [federal agencies] to follow the APA, 5 U.S.C. § 553, when . . . amending rules and regulations . . .. The APA requires all federal agencies to publish proposed rules in the Federal Register in order to provide the public with notice and an opportunity to comment."). EPA may not repeal or amend 40 C.F.R. § 123.26(e)(5) by adopting a policy without public notice and opportunity for comment.

EPA interprets 40 C.F.R. § 123.26(e)(5) as being consistent with its Compliance Monitoring Strategy. EPA's interpretation however, is inconsistent with the plain language of the regulation is therefore contrary to law. *See Legal*

Envtl. Assistance Found., Inc., 276 F.3d at 1262-64 (EPA's construction of its well classification scheme runs afoul of the plain language of the regulations and is therefore contrary to law). Accordingly, EPA's determination that there is insufficient cause to commence proceedings to withdraw approval of the Alabama NPDES permit program is not in accordance with law and must be set aside.

E. EPA's determination that there is insufficient cause to commence proceedings to withdraw approval of the Alabama NPDES permit program is not in accordance with law because it rests on an erroneous interpretation of 33 U.S.C. § 1314(i)(2)(D) and 40 C.F.R. § 123.25(c) (Board Membership).

33 U.S.C. § 1342(c)(2) requires that any State NPDES permit program shall at all times be in accordance with § 1342 and guidelines promulgated pursuant to § 1314(i)(2). Specifically, 33 U.S.C. § 1314(i)(2)(D) provides that the guidelines shall require that "no board or body which approves permit applications or portions thereof shall include, as a member, any person who receives, or has during the previous two years received, a significant portion of his income directly or indirectly from permit holders or applicants for a permit[.]" EPA promulgated a guideline to implement this requirement at 40 C.F.R. § 123.25(c). It provides:

> State NPDES programs shall ensure that any board or body which approves all or portions of permits *shall not include as a member* any person who receives, or has during the previous 2 years received, a

> significant portion of income directly or indirectly from permit holders or applicants for a permit.

(Emphasis added).

In 1973, only months after the enactment of the CWA, the EPA's Office of General Counsel issued an opinion on the subject of the conflict of interest provision. Therein, the General Counsel rejected the suggestion that abstention by a conflicted board member is adequate to comply with the law. The General Counsel said:

> Non-participation by a board on certain permit applications. *It has been suggested that the conflict of interest provision might be avoided by requiring a member with a conflict to abstain from ruling upon permit applications in which he has or may have an interest which causes a conflict. This is not a viable alternative, in view of the flat proscription against board membership where the particular member has received a significant portion of his income from permit holders or applicants*. Since the provision applies to permit holders, as well as applicants, there would be a continuing conflict.

AR003743 (emphasis added).

In 1986, EPA published *National Pollutant Discharge Elimination System State Program Guidance*. AR003825–004019. Once again, EPA rejected the suggestion that recusal by a conflicted board member is adequate to comply with the law. EPA said:

> All State programs must have conflict of interest protections which are at least as stringent as those of the [Clean Water Act].

> This statutory prohibition against conflicts of interest has been a problem in a number of States. Some States require permitting boards to have representatives of the regulated public. Other State boards are elected and could include members who receive income from permittees. These States' approaches are inconsistent with the explicit language of the Act. States must either establish the federal conflict prohibition or the Board must delegate its permitting and enforcement powers to a position that is prohibited from conflicts. *Some States have sought to avoid the prohibition through recusal on matters affecting the permittees. This alternative is also not acceptable*.

AR003888 (emphasis added).

On July 10, 1995, the Legal Environmental Assistance Foundation, Inc. (and two co-petitioners) filed with EPA a Petition for Issuance of Order Commencing Proceedings to Withdraw Approval of National Pollutant Discharge Elimination System (NPDES) Permit Program for Alabama. One of the two allegations in this Petition was that the Alabama NPDES permit program does not comply with the conflict of interest requirements of the CWA and 40 C.F.R. § 123.25(c). AR004438; AR003751; AR006853. In response to this Petition, Alabama adopted a policy that conflicted members of the Environmental Management Commission should recuse themselves from all NPDES-related matters. AR003744-003750. EPA approved this policy and denied the Petition as to the conflict of interest allegation on April 22, 1997 saying that it had determined that Alabama's recusal policy "was appropriate under the CWA and

EPA policy." AR003751–003752; AR001313–001314. The Legal Environmental Assistance Foundation, Inc. and two co-petitioners did not seek judicial review.

In their Petition, Riverkeepers alleged that "[t]he State of Alabama has not provided a procedure to ensure that persons who do not comply with the conflict of interest provisions of 33 U.S.C. § 1314(i)(2)(D) and 40 C.F.R. § 123.25(c) do not remain as members of the Environmental Management Commission."[16] EPA's determination on this issue is as follows:

> EPA finds that ADEM's process for complying with this requirement, which includes the execution by affected persons of a Conflict of Interest Disclosure form, and a general recusal process whereby persons with a prohibited conflict recuse themselves from consideration of NPDES-related matters, complies with the CWA. Accordingly, this ground of the Petition does not warrant the initiation of withdrawal proceedings.

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[16] The initial Petition alleges that Riley Boykin Smith served as a member of the Environmental Management Commission from December 16, 2002 to September 30, 2006 and during that time received a significant portion of his income directly or indirectly from NPDES permit holders or applicants for NPDES permits. AR001314. *See* AR003753 and AR003754 (General Recusal Forms). The first Supplement to the Petition alleges that Anita Archie is currently serving as the Chair of the Environmental Management Commission, recently accepted a position as the Senior Vice President for Governmental Affairs and Legal Advisor for the Business Council of Alabama, is a registered lobbyist for the Business Council, will receive a significant portion of her income directly or indirectly from NPDES permit holders or applicants for NPDES permits; and has determined that [she] may retain her position on the Commission. AR004115–AR004158. ADEM states that "Commissioner Archie has indicated that she intends to file a general recusal form and will not vote on NPDES matters." AR004244.

AR006853. EPA explains that the basis for its determination is the previous determination that Alabama's recusal process "is consistent with Agency policy and has been offered to resolve problems in several States." AR003752. EPA says it "stands by its prior determination that a disclosure and recusal process may be used to comply with the CWA's conflict of interest requirements." AR006853.

Congress has directly spoken to the question at issue – "no board or body which approves permit applications or portions thereof shall include, as a member, any person who receives, or has during the previous two years received, a significant portion of his income directly or indirectly from permit holders or applicants for a permit[.]" The intent of Congress is clear – conflicted persons may not serve on such a board or body . That is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. *Chevron*, 467 U.S. at 842-43, 104 S.Ct. at 2781. Moreover, EPA's interpretation of 40 C.F.R. § 123.25(c) is inconsistent with the plain language of the regulation and is therefore contrary to law. *See Legal Envtl. Assistance Found., Inc.*, 276 F.3d at 1262-64 (EPA's construction of its well classification scheme runs afoul of the plain language of the regulations and is therefore contrary to law). Accordingly, EPA's determination that there is

insufficient cause to commence proceedings to withdraw approval of the Alabama NPDES permit program is not in accordance with law and must be set aside.

F. EPA's determination that there is insufficient cause to commence proceedings to withdraw approval of the Alabama NPDES permit program is not in accordance with law because it rests on an erroneous interpretation of 33 U.S.C. § 1342(b)(7) and 40 C.F.R. § 123.27(a)(3) (Penalty Authority).

33 U.S.C. § 1342(c)(2) requires that any State NPDES permit program shall at all times be in accordance with § 1342 and guidelines promulgated pursuant to § 1314(i)(2). Section 1342(b)(7) requires that State NPDES permit programs must have adequate authority "[t]o abate violations of the permit or the permit program, including civil and criminal penalties . . .." Among the guidelines is 40 C.F.R. § 123.27(a)(3) which requires that State NPDES permit programs include authority to recover civil penalties and criminal fines for violation of program requirements.

Alabama statutes authorize the imposition of civil penalties and criminal fines against any "person," including "any governmental entity," Ala. Code §§ 22-22A-3(7), 22-22A-5(18), 22-22-1(b)(7), 22-22-14. *See also* Ala. Admin. Code rs. 335-6-6-.02(ll) and 335-6-6-.18(2) (any governmental entity is subject to penalties). However, the Alabama courts have held that state agencies, including state universities and colleges and county boards of education, have sovereign

immunity under Ala. Const. 1901, art. I, § 14, and may not be made a defendant in any court. AR001315; AR004908–004909; AR005252. *E.g.*, *Ex parte Alabama Dep't of Transp.*, 978 So.2d 17, 22 (Ala. 2007); *Russo v. Alabama Dep't of Corrections*, 149 So. 3d 1079, 1081 (Ala. 2014) (per curiam). Neither the Legislature nor any other State authority may waive this constitutional immunity. *Larkins v. Dep't of Mental Health and Mental Retardation*, 806 So.2d 358, 363 (Ala. 2001); *Druid City Hospital Bd. v. Epperson*, 378 So.2d 696, 697 (Ala. 1979) (per curiam). The Alabama Attorney General admits that the State of Alabama is prohibited by Section 14 from recovering a civil penalty against the Alabama Department of Corrections for NPDES permit program violations. *Alabama ex rel King v. Alabama Dep't of Corrections*, No. CV-05-40 (Jefferson Cnty. Cir. Ct. June 14, 2006) (plaintiff's motion to dismiss), AR003755–003757. *See also Alabama ex rel King v. Alabama Dep't of Corrections*, No. CV-09-000294 (Montgomery Cnty. Cir. Ct. Apr. 22, 2009) (defendant asserts sovereign immunity in motion for summary judgment), AR003758–003762. ADEM admits that "Alabama has the legal authority to 'assess or sue to recover in court civil penalties' against any defendant *except the state and its agencies*." AR004246 (emphasis added).

EPA's determination states as follows:

> EPA does not agree that this constitutes a basis for program withdrawal, as many states operate under state constitutional or state law limitations on their authority to penalize fellow state agencies, and EPA does not believe the CWA was intended to preclude program authorization for states with an inability to assess penalties against fellow state agencies or to require constitutional or statutory amendments to address this shortcoming. EPA notes that its own enforcement authority is limited in the case of violations by fellow federal agencies and it would be incongruous to expect state agencies to surmount legal disabilities that are similar to those affecting EPA. This gap in penalty authority can be addressed through citizen and federal enforcement, and EPA has in fact targeted some state agencies for enforcement. Accordingly, EPA has concluded that withdrawal proceedings on this ground of the Petition are not warranted.

AR006854. Thus, EPA has interpreted 33 U.S.C. § 1342(b)(7) and 40 C.F.R. § 123.63(a) as including an exception – State NPDES permit programs need not have authority to recover civil penalties and criminal fines from State agencies.[17] No such exception is expressed or implied in the statutory or regulatory language.

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[17] EPA's suggestion that State agencies in violation can be sued by EPA and citizens does not cure the deficiency in Alabama's program. As EPA once explained,

> All State programs must have both civil penalties and criminal sanctions. Fines and penalties must be recoverable under State law; a State program cannot rely on the levying of Federal fines, as one commenter suggested, since the State, not EPA, is to have primary enforcement responsibility upon program approval.

45 Fed. Reg. 33,290, 33,381-82 (May 19, 1980).

It is the reviewing court's task to apply the text of the statute as it is written, not to improve upon it, regardless of the practical difficulties they may create. *EME Homer City Generation, L.P.*, 572 U.S. at ___, 134 S. Ct. at 1600-01.

Congress has directly spoken to the question at issue – State NPDES permit programs must have adequate authority "[t]o abate violations of the permit or the permit program, including civil and criminal penalties . . .." The intent of Congress is clear – a State NPDES permit program must be capable of obtaining civil and criminal penalties for violation of program requirements. That is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. *Chevron*, 467 U.S. at 842-43, 104 S.Ct. at 2781. Moreover, EPA's interpretation of 40 C.F.R. § 123.63(a) is inconsistent with the plain language of the regulation and is therefore contrary to law. *See Legal Envtl. Assistance Found., Inc.*, 276 F.3d at 1262-64 (EPA's construction of its well classification scheme runs afoul of the plain language of the regulations and is therefore contrary to law). Accordingly, EPA's determination that there is insufficient cause to commence proceedings to withdraw approval of the Alabama NPDES permit program is not in accordance with law and must be set aside.

VI. CONCLUSION

For the foregoing reasons, EPA's Interim Response to Petitions to Withdraw Alabama's National Pollutant Discharge Elimination System (NPDES) Permit Program is due to be set aside and the matter remanded to EPA for reconsideration.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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s/ David A. Ludder
David A. Ludder
Attorney for Petitioners

Dated: January 26, 2015

CERTIFICATE OF SERVICE

I, David A. Ludder, hereby certify that on January 26, 2015, the foregoing Principal Brief of Petitioners was electronically filed with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following persons:

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ADDENDUM A

(g) Guidelines for pretreatment of pollutants

(1) For the purpose of assisting States in carrying out programs under section 1342 of this title, the Administrator shall publish, within one hundred and twenty days after October 18, 1972, and review at least annually thereafter and, if appropriate, revise guidelines for pretreatment of pollutants which he determines are not susceptible to treatment by publicly owned treatment works. Guidelines under this subsection shall be established to control and prevent the discharge into the navigable waters, the contiguous zone, or the ocean (either directly or through publicly owned treatment works) of any pollutant which interferes with, passes through, or otherwise is incompatible with such works.

(2) When publishing guidelines under this subsection, the Administrator shall designate the category or categories of treatment works to which the guidelines shall apply.

(h) Test procedures guidelines

The Administrator shall, within one hundred and eighty days from October 18, 1972, promulgate guidelines establishing test procedures for the analysis of pollutants that shall include the factors which must be provided in any certification pursuant to section 1341 of this title or permit application pursuant to section 1342 of this title.

(i) Guidelines for monitoring, reporting, enforcement, funding, personnel, and manpower

The Administrator shall (1) within sixty days after October 18, 1972, promulgate guidelines for the purpose of establishing uniform application forms and other minimum requirements for the acquisition of information from owners and operators of point-sources of discharge subject to any State program under section 1342 of this title, and (2) within sixty days from October 18, 1972, promulgate guidelines establishing the minimum procedural and other elements of any State program under section 1342 of this title, which shall include:

(A) monitoring requirements;

(B) reporting requirements (including procedures to make information available to the public);

(C) enforcement provisions; and

(D) funding, personnel qualifications, and manpower requirements (including a requirement that no board or body which approves permit applications or portions thereof shall include, as a member, any person who receives, or has during the previous two years received, a significant portion of his income directly or indirectly from permit holders or applicants for a permit).

(j) Lake restoration guidance manual

The Administrator shall, within 1 year after February 4, 1987, and biennially thereafter, publish and disseminate a lake restoration guidance manual describing methods, procedures, and processes to guide State and local efforts to improve, restore, and enhance water quality in the Nation's publicly owned lakes.

(k) Agreements with Secretaries of Agriculture, Army, and the Interior to provide maximum utilization of programs to achieve and maintain water quality; transfer of funds; authorization of appropriations

(1) The Administrator shall enter into agreements with the Secretary of Agriculture, the Secretary of the Army, and the Secretary of the Interior, and the heads of such other departments, agencies, and instrumentalities of the United States as the Administrator determines, to provide for the maximum utilization of other Federal laws and programs for the purpose of achieving and maintaining water quality through appropriate implementation of plans approved under section 1288 of this title and nonpoint source pollution management programs approved under section 1329 of this title.

(2) The Administrator is authorized to transfer to the Secretary of Agriculture, the Secretary of the Army, and the Secretary of the Interior and the heads of such other departments, agencies, and instrumentalities of the United States as the Administrator determines, any funds appropriated under paragraph (3) of this subsection to supplement funds otherwise appropriated to programs authorized pursuant to any agreement under paragraph (1).

(3) There is authorized to be appropriated to carry out the provisions of this subsection, $100,000,000 per fiscal year for the fiscal years 1979 through 1983 and such sums as may be necessary for fiscal years 1984 through 1990.

(*l*) Individual control strategies for toxic pollutants

(1) State list of navigable waters and development of strategies

Not later than 2 years after February 4, 1987, each State shall submit to the Administrator for review, approval, and implementation under this subsection—

(A) a list of those waters within the State which after the application of effluent limitations required under section 1311(b)(2) of this title cannot reasonably be anticipated to attain or maintain (i) water quality standards for such waters reviewed, revised, or adopted in accordance with section 1313(c)(2)(B) of this title, due to toxic pollutants, or (ii) that water quality 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;

(B) a list of all navigable waters in such State for which the State does not expect the applicable standard under section 1313 of this title will be achieved after the requirements of sections 1311(b), 1316, and 1317(b) of this title are met, due entirely or substantially to discharges from point sources of any toxic pollutants listed pursuant to section 1317(a) of this title;

(C) for each segment of the navigable waters included on such lists, a determination of the specific point sources discharging any such toxic pollutant which is believed to be preventing or impairing such water quality

ADDENDUM B

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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) of this section 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) of this section 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 limi-

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tations 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.

(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) of this section.

(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) of this section.

(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) of this section if—

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

(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 stand-

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ards 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

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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.

(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.)

AMENDMENTS

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.

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2347; Pub. L. 112–213, title VII, § 703, Dec. 20, 2012, 126 Stat. 1580, provided that:

''SECTION 1. DEFINITIONS.

''In this Act:

''(1) ADMINISTRATOR.—The term 'Administrator' means the Administrator of the Environmental Protection Agency.

''(2) COVERED VESSEL.—The term 'covered vessel' means a vessel that is—

''(A) less than 79 feet in length; or

''(B) a fishing vessel (as defined in section 2101 of title 46, United States Code), regardless of the length of the vessel.

''(3) OTHER TERMS.—The terms 'contiguous zone', 'discharge', 'ocean', and 'State' have the meanings given the terms in section 502 of the Federal Water Pollution Control Act (33 U.S.C. 1362).

''SEC. 2. DISCHARGES INCIDENTAL TO NORMAL OPERATION OF VESSELS.

''(a) NO PERMIT REQUIREMENT.—Except as provided in subsection (b), during the period beginning on the date of the enactment of this Act [July 31, 2008] and ending on December 18, 2014, the Administrator, or a State in the case of a permit program approved under section 402 of the Federal Water Pollution Control Act (33 U.S.C. 1342), shall not require a permit under that section for a covered vessel for—

''(1) any discharge of effluent from properly functioning marine engines;

''(2) any discharge of laundry, shower, and galley sink wastes; or

''(3) any other discharge incidental to the normal operation of a covered vessel.

''(b) EXCEPTIONS.—Subsection (a) shall not apply with respect to—

''(1) rubbish, trash, garbage, or other such materials discharged overboard;

''(2) other discharges when the vessel is operating in a capacity other than as a means of transportation, such as when—

''(A) used as an energy or mining facility;

''(B) used as a storage facility or a seafood processing facility;

''(C) secured to a storage facility or a seafood processing facility; or

''(D) secured to the bed of the ocean, the contiguous zone, or waters of the United States for the purpose of mineral or oil exploration or development;

''(3) any discharge of ballast water; or

''(4) any discharge in a case in which the Administrator or State, as appropriate, determines that the discharge—

''(A) contributes to a violation of a water quality standard; or

''(B) poses an unacceptable risk to human health or the environment.''

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:

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''(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 byproducts 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.

ADDENDUM C

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§ 1369. Administrative procedure and judicial review

(a) Subpenas

(1) For purposes of obtaining information under section 1315 of this title, or carrying out section 1367(e) of this title, the Administrator may issue subpenas for the attendance and testimony of witnesses and the production of relevant papers, books, and documents, and he may administer oaths. Except for effluent data, upon a showing satisfactory to the Administrator that such papers, books, documents, or information or particular part thereof, if made public, would divulge trade secrets or secret processes, the Administrator shall consider such record, report, or information or particular portion thereof confidential in accordance with the purposes of section 1905 of title 18, except that such paper, book, document, or information may be disclosed to other officers, employees, or authorized representatives of the United States concerned with carrying out this chapter, or when relevant in any proceeding under this chapter. Witnesses summoned shall be paid the same fees and mileage that are paid witnesses in the courts of the United States. In case of contumacy or refusal to obey a subpena served upon any person under this subsection, the district court of the United States for any district in which such person is found or resides or transacts business, upon application by the United States and after notice to such person, shall have jurisdiction to issue an order requiring such person to appear and give testimony before the Administrator, to appear and produce papers, books, and documents before the Administrator, or both, and any failure to obey such order of the court may be punished by such court as a contempt thereof.

(2) The district courts of the United States are authorized, upon application by the Administrator, to issue subpenas for attendance and testimony of witnesses and the production of relevant papers, books, and documents, for purposes of obtaining information under sections 1314(b) and (c) of this title. Any papers, books, documents, or other information or part thereof, obtained by reason of such a subpena shall be subject to the same requirements as are provided in paragraph (1) of this subsection.

(b) Review of Administrator's actions; selection of court; fees

(1) Review of the Administrator's action (A) in promulgating any standard of performance under section 1316 of this title, (B) in making any determination pursuant to section 1316(b)(1)(C) of this title, (C) in promulgating any effluent standard, prohibition, or pretreatment standard under section 1317 of this title, (D) in making any determination as to a State permit program submitted under section 1342(b) of this title, (E) in approving or promulgating any effluent limitation or other limitation under section 1311, 1312, 1316, or 1345 of this title, (F) in issuing or denying any permit under section 1342 of this title, and (G) in promulgating any individual control strategy under section 1314(*l*) of this title, may be had by any interested person in the Circuit Court of Appeals of the United States for the Federal judicial district in which such person resides or transacts business which is directly affected by such action upon application by such person. Any such application shall be made within 120 days from the date of such determination, approval, promulgation, issuance or denial, or after such date only if such application is based solely on grounds which arose after such 120th day.

(2) Action of the Administrator with respect to which review could have been obtained under paragraph (1) of this subsection shall not be subject to judicial review in any civil or criminal proceeding for enforcement.

(3) AWARD OF FEES.—In any judicial proceeding under this subsection, the court may award costs of litigation (including reasonable attorney and expert witness fees) to any prevailing or substantially prevailing party whenever it determines that such award is appropriate.

(c) Additional evidence

In any judicial proceeding brought under subsection (b) of this section in which review is sought of a determination under this chapter required to be made on the record after notice and opportunity for hearing, if any party applies to the court for leave to adduce additional evidence, and shows to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the Administrator, the court may order such additional evidence (and evidence in rebuttal thereof) to be taken before the Administrator, in such manner and upon such terms and conditions as the court may deem proper. The Administrator may modify his findings as to the facts, or make new findings, by reason of the additional evidence so taken and he shall file such modified or new findings, and his recommendation, if any, for the modification or setting aside of his original determination, with the return of such additional evidence.

(June 30, 1948, ch. 758, title V, § 509, as added Pub. L. 92–500, § 2, Oct. 18, 1972, 86 Stat. 891; amended Pub. L. 93–207, § 1(6), Dec. 28, 1973, 87 Stat. 906; Pub. L. 100–4, title III, § 308(b), title IV, § 406(d)(3), title V, § 505(a), (b), Feb. 4, 1987, 101 Stat. 39, 73, 75; Pub. L. 100–236, § 2, Jan. 8, 1988, 101 Stat. 1732.)

AMENDMENTS

1988—Subsec. (b)(3), (4). Pub. L. 100–236 redesignated par. (4) as (3) and struck out former par. (3) relating to venue, which provided for selection procedure in subpar. (A), administrative provisions in subpar. (B), and transfers in subpar. (C).

1987—Subsec. (b)(1). Pub. L. 100–4, §§ 308(b), 406(d)(3), 505(a), substituted "transacts business which is directly affected by such action" for "transacts such business", "120" for "ninety", and "120th" for "ninetieth", substituted "1316, or 1345 of this title" for "or 1316 of this title" in cl. (E), and added cl. (G).

Subsec. (b)(3), (4). Pub. L. 100–4, § 505(b), added pars. (3) and (4).

1973—Subsec. (b)(1)(C). Pub. L. 93–207 substituted "pretreatment" for "treatment".

EFFECTIVE DATE OF 1988 AMENDMENT

Amendment by Pub. L. 100–236 effective 180 days after Jan. 8, 1988, see section 3 of Pub. L. 100–236, set out as a note under section 2112 of Title 28, Judiciary and Judicial Procedure.

ADDENDUM D

(b) Revision of a State program shall be accomplished as follows:

(1) The State shall submit a modified program description, Attorney General's statement, Memorandum of Agreement, or such other documents as EPA determines to be necessary under the circumstances.

(2) Whenever EPA determines that the proposed program revision is substantial, EPA shall issue public notice and provide an opportunity to comment for a period of at least 30 days. The public notice shall be mailed to interested persons and shall be published in the FEDERAL REGISTER and in enough of the largest newspapers in the State to provide Statewide coverage. The public notice shall summarize the proposed revisions and provide for the opportunity to request a public hearing. Such a hearing will be held if there is significant public interest based on requests received.

(3) The Administrator will approve or disapprove program revisions based on the requirements of this part (or, in the case of a sewage sludge management program, 40 CFR part 501) and of the CWA.

(4) A program revision shall become effective upon the approval of the Administrator. Notice of approval of any substantial revision shall be published in the FEDERAL REGISTER. Notice of approval of non-substantial program revisions may be given by a letter from the Administrator to the State Governor or his designee.

(c) States with approved programs must notify EPA whenever they propose to transfer all or part of any program from the approved State agency to any other State agency, and must identify any new division of responsibilities among the agencies involved. The new agency is not authorized to administer the program until approved by the Administrator under paragraph (b) of this section. Organizational charts required under §123.22(b) (or, in the case of a sewage sludge management program, §501.12(b) of this chapter) must be revised and resubmitted.

(d) Whenever the Administrator has reason to believe that circumstances have changed with respect to a State program, he may request, and the State shall provide, a supplemental Attorney General's statement, program description, or such other documents or information as are necessary.

(e) *State NPDES programs only.* All new programs must comply with these regulations immediately upon approval. Any approved State section 402 permit program which requires revision to conform to this part shall be so revised within one year of the date of promulgation of these regulations, unless a State must amend or enact a statute in order to make the required revision in which case such revision shall take place within 2 years, except that revision of State programs to implement the requirements of 40 CFR part 403 (pretreatment) shall be accomplished as provided in 40 CFR 403.10. In addition, approved States shall submit, within 6 months, copies of their permit forms for EPA review and approval. Approved States shall also assure that permit applicants, other than POTWs, submit, as part of their application, the information required under §§124.4(d) and 122.21 (g) or (h), as appropriate.

(f) Revision of a State program by a Great Lakes State or Tribe (as defined in 40 CFR 132.2) to conform to section 118 of the CWA and 40 CFR part 132 shall be accomplished pursuant to 40 CFR part 132.

[48 FR 14178, Apr. 1, 1983, as amended at 49 FR 31842, Aug. 8, 1984; 50 FR 6941, Feb. 19, 1985; 53 FR 33007, Sept. 6, 1988; 58 FR 67983, Dec. 22, 1993; 60 FR 15386, Mar. 23, 1995; 63 FR 45123, Aug. 24, 1998]

§ 123.63 Criteria for withdrawal of State programs.

(a) In the case of a sewage sludge management program, references in this section to ''this part'' will be deemed to refer to 40 CFR part 501. The Administrator may withdraw program approval when a State program no longer complies with the requirements of this part, and the State fails to take corrective action. Such circumstances include the following:

(1) Where the State's legal authority no longer meets the requirements of this part, including:

(i) Failure of the State to promulgate or enact new authorities when necessary; or

(ii) Action by a State legislature or court striking down or limiting State authorities.

(2) Where the operation of the State program fails to comply with the requirements of this part, including:

(i) Failure to exercise control over activities required to be regulated under this part, including failure to issue permits;

(ii) Repeated issuance of permits which do not conform to the requirements of this part; or

(iii) Failure to comply with the public participation requirements of this part.

(3) Where the State's enforcement program fails to comply with the requirements of this part, including:

(i) Failure to act on violations of permits or other program requirements;

(ii) Failure to seek adequate enforcement penalties or to collect administrative fines when imposed; or

(iii) Failure to inspect and monitor activities subject to regulation.

(4) Where the State program fails to comply with the terms of the Memorandum of Agreement required under §123.24 (or, in the case of a sewage sludge management program, §501.14 of this chapter).

(5) Where the State fails to develop an adequate regulatory program for developing water quality-based effluent limits in NPDES permits.

(6) Where a Great Lakes State or Tribe (as defined in 40 CFR 132.2) fails to adequately incorporate the NPDES permitting implementation procedures promulgated by the State, Tribe, or EPA pursuant to 40 CFR part 132 into individual permits.

(b) [Reserved]

[48 FR 14178, Apr. 1, 1983; 50 FR 6941, Feb. 19, 1985, as amended at 54 FR 23897, June 2, 1989; 60 FR 15386, Mar. 23, 1995; 63 FR 45123, Aug. 24, 1998]

§ 123.64 Procedures for withdrawal of State programs.

(a) A State with a program approved under this part (or, in the case of a sewage sludge management program, 40 CFR part 501) may voluntarily transfer program responsibilities required by Federal law to EPA by taking the following actions, or in such other manner as may be agreed upon with the Administrator.

(1) The State shall give the Administrator 180 days notice of the proposed transfer and shall submit a plan for the orderly transfer of all relevant program information not in the possession of EPA (such as permits, permit files, compliance files, reports, permit applications) which are necessary for EPA to administer the program.

(2) Within 60 days of receiving the notice and transfer plan, the Administrator shall evaluate the State's transfer plan and shall identify any additional information needed by the Federal government for program administration and/or identify any other deficiencies in the plan.

(3) At least 30 days before the transfer is to occur the Administrator shall publish notice of the transfer in the FEDERAL REGISTER and in enough of the largest newspapers in the State to provide Statewide coverage, and shall mail notice to all permit holders, permit applicants, other regulated persons and other interested persons on appropriate EPA and State mailing lists.

(b) The following procedures apply when the Administrator orders the commencement of proceedings to determine whether to withdraw approval of a State program.

(1) *Order*. The Administrator may order the commencement of withdrawal proceedings on his or her own initiative or in response to a petition from an interested person alleging failure of the State to comply with the requirements of this part as set forth in §123.63 (or, in the case of a sewage sludge management program, §501.33 of this chapter). The Administrator will respond in writing to any petition to commence withdrawal proceedings. He may conduct an informal investigation of the allegations in the petition to determine whether cause exists to commence proceedings under this paragraph. The Administrator's order commencing proceedings under this paragraph will fix a time and place for the commencement of the hearing and will specify the allegations against the State which are to be considered at the hearing. Within 30 days the State must admit or deny these allegations in a written answer. The party seeking

withdrawal of the State's program will have the burden of coming forward with the evidence in a hearing under this paragraph.

(2) *Definitions.* For purposes of this paragraph the definitions of "Act," "Administrative Law Judge," "Hearing Clerk," and "Presiding Officer" in 40 CFR 22.03 apply in addition to the following:

(i) *Party* means the petitioner, the State, the Agency, and any other person whose request to participate as a party is granted.

(ii) *Person* means the Agency, the State and any individual or organization having an interest in the subject matter of the proceeding.

(iii) *Petitioner* means any person whose petition for commencement of withdrawal proceedings has been granted by the Administrator.

(3) *Procedures.* (i) The following provisions of 40 CFR part 22 (Consolidated Rules of Practice) are applicable to proceedings under this paragraph:

(A) § 22.02—(use of number/gender);

(B) § 22.04(c)—(authorities of Presiding Officer);

(C) § 22.06—(filing/service of rulings and orders);

(D) § 22.09—(examination of filed documents);

(E) § 22.19(a), (b) and (c)—(prehearing conference);

(F) § 22.22—(evidence);

(G) § 22.23—(objections/offers of proof);

(H) § 22.25—(filing the transcript); and

(I) § 22.26—(findings/conclusions).

(ii) The following provisions are also applicable:

(A) *Computation and extension of time*—(*1*) *Computation.* In computing any period of time prescribed or allowed in these rules of practice, except as otherwise provided, the day of the event from which the designated period begins to run shall not be included. Saturdays, Sundays, and Federal legal holidays shall be included. When a stated time expires on a Saturday, Sunday, or legal holiday, the stated time period shall be extended to include the next business day.

(*2*) *Extensions of time.* The Administrator, Regional Administrator, or Presiding Officer, as appropriate, may grant an extension of time for the filing of any pleading, document, or motion (*i*) upon timely motion of a party to the proceeding, for good cause shown, and after consideration of prejudice to other parties, or (*ii*) upon his own motion. Such a motion by a party may only be made after notice to all other parties, unless the movant can show good cause why serving notice is impracticable. The motion shall be filed in advance of the date on which the pleading, document or motion is due to be filed, unless the failure of a party to make timely motion for extension of time was the result of excusable neglect.

(*3*) The time for commencement of the hearing shall not be extended beyond the date set in the Administrator's order without approval of the Administrator.

(B) *Ex parte discussion of proceedings.* At no time after the issuance of the order commencing proceedings shall the Administrator, the Regional Administrator, the Regional Judicial Officer, the Presiding Officer, or any other person who is likely to advise these officials in the decision on the case, discuss ex parte the merits of the proceeding with any interested person outside the Agency, with any Agency staff member who performs a prosecutorial or investigative function in such proceeding or a factually related proceeding, or with any representative of such person. Any ex parte memorandum or other communication addressed to the Administrator, the Regional Administrator, the Regional Judicial Officer, or the Presiding Officer during the pendency of the proceeding and relating to the merits thereof, by or on behalf of any party, shall be regarded as argument made in the proceeding and shall be served upon all other parties. The other parties shall be given an opportunity to reply to such memorandum or communication.

(C) *Intervention*—(*1*) *Motion.* A motion for leave to intervene in any proceeding conducted under these rules of practice must set forth the grounds for the proposed intervention, the position and interest of the movant and the likely impact that intervention will have on the expeditious progress of the proceeding. Any person already a party to the proceeding may file an answer to a motion to intervene, making specific

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reference to the factors set forth in the foregoing sentence and paragraph (b)(3)(ii)(C)(*3*) of this section, within ten (10) days after service of the motion for leave to intervene.

(*2*) However, motions to intervene must be filed within 15 days from the date the notice of the Administrator's order is first published.

(*3*) *Disposition*. Leave to intervene may be granted only if the movant demonstrates that (*i*) his presence in the proceeding would not unduly prolong or otherwise prejudice that adjudication of the rights of the original parties; (*ii*) the movant will be adversely affected by a final order; and (*iii*) the interests of the movant are not being adequately represented by the original parties. The intervenor shall become a full party to the proceeding upon the granting of leave to intervene.

(*4*) *Amicus curiae*. Persons not parties to the proceeding who wish to file briefs may so move. The motion shall identify the interest of the applicant and shall state the reasons why the proposed amicus brief is desirable. If the motion is granted, the Presiding Officer or Administrator shall issue an order setting the time for filing such brief. An amicus curiae is eligible to participate in any briefing after his motion is granted, and shall be served with all briefs, reply briefs, motions, and orders relating to issues to be briefed.

(D) *Motions*—(*1*) *General*. All motions, except those made orally on the record during a hearing, shall (*i*) be in writing; (*ii*) state the grounds therefor with particularity; (*iii*) set forth the relief or order sought; and (*iv*) be accompanied by any affidavit, certificate, other evidence, or legal memorandum relied upon. Such motions shall be served as provided by paragraph (b)(4) of this section.

(*2*) *Response to motions*. A party's response to any written motion must be filed within ten (10) days after service of such motion, unless additional time is allowed for such response. The response shall be accompanied by any affidavit, certificate, other evidence, or legal memorandum relied upon. If no response is filed within the designated period, the parties may be deemed to have waived any objection to the granting of the motion. The Presiding Officer, Regional Administrator, or Administrator, as appropriate, may set a shorter time for response, or make such other orders concerning the disposition of motions as they deem appropriate.

(*3*) *Decision*. The Administrator shall rule on all motions filed or made after service of the recommended decision upon the parties. The Presiding Officer shall rule on all other motions. Oral argument on motions will be permitted where the Presiding Officer, Regional Administrator, or the Administrator considers it necessary or desirable.

(4) *Record of proceedings*. (i) The hearing shall be either stenographically reported verbatim or tape recorded, and thereupon transcribed by an official reporter designated by the Presiding Officer;

(ii) All orders issued by the Presiding Officer, transcripts of testimony, written statements of position, stipulations, exhibits, motions, briefs, and other written material of any kind submitted in the hearing shall be a part of the record and shall be available for inspection or copying in the Office of the Hearing Clerk, upon payment of costs. Inquiries may be made at the Office of the Administrative Law Judges, Hearing Clerk, 1200 Pennsylvania Ave., NW., Washington, DC 20460;

(iii) Upon notice to all parties the Presiding Officer may authorize corrections to the transcript which involves matters of substance;

(iv) An original and two (2) copies of all written submissions to the hearing shall be filed with the Hearing Clerk;

(v) A copy of each submission shall be served by the person making the submission upon the Presiding Officer and each party of record. Service under this paragraph shall take place by mail or personal delivery;

(vi) Every submission shall be accompanied by an acknowledgement of service by the person served or proof of service in the form of a statement of the date, time, and manner of service and the names of the persons served, certified by the person who made service, and;

(vii) The Hearing Clerk shall maintain and furnish to any person upon request, a list containing the name, service address, and telephone number of all parties and their attorneys or duly authorized representatives.

(5) *Participation by a person not a party*. A person who is not a party may, in the discretion of the Presiding Officer, be permitted to make a limited appearance by making oral or written statement of his/her position on the issues within such limits and on such conditions as may be fixed by the Presiding Officer, but he/she may not otherwise participate in the proceeding.

(6) *Rights of parties*. (i) All parties to the proceeding may:

(A) Appear by counsel or other representative in all hearing and pre-hearing proceedings;

(B) Agree to stipulations of facts which shall be made a part of the record.

(7) *Recommended decision*. (i) Within 30 days after the filing of proposed findings and conclusions, and reply briefs, the Presiding Officer shall evaluate the record before him/her, the proposed findings and conclusions and any briefs filed by the parties and shall prepare a recommended decision, and shall certify the entire record, including the recommended decision, to the Administrator.

(ii) Copies of the recommended decision shall be served upon all parties.

(iii) Within 20 days after the certification and filing of the record and recommended decision, all parties may file with the Administrator exceptions to the recommended decision and a supporting brief.

(8) *Decision by Administrator*. (i) Within 60 days after the certification of the record and filing of the Presiding Officer's recommeded decision, the Administrator shall review the record before him and issue his own decision.

(ii) If the Administrator concludes that the State has administered the program in conformity with the appropriate Act and regulations his decision shall constitute ''final agency action'' within the meaning of 5 U.S.C. 704.

(iii) If the Administrator concludes that the State has not administered the program in conformity with the appropriate Act and regulations he shall list the deficiencies in the program and provide the State a reasonable time, not to exceed 90 days, to take such appropriate corrective action as the Administrator determines necessary.

(iv) Within the time prescribed by the Administrator the State shall take such appropriate corrective action as required by the Administrator and shall file with the Administrator and all parties a statement certified by the State Director that such appropriate corrective action has been taken.

(v) The Administrator may require a further showing in addition to the certified statement that corrective action has been taken.

(vi) If the State fails to take such appropriate corrective action and file a certified statement thereof within the time prescribed by the Administrator, the Administrator shall issue a supplementary order withdrawing approval of the State program. If the State takes such appropriate corrective action, the Administrator shall issue a supplementary order stating that approval of authority is not withdrawn.

(vii) The Administrator's supplementary order shall constitute final Agency action within the meaning of 5 U.S.C. 704.

(viii) Withdrawal of authorization under this section and the appropriate Act does not relieve any person from complying with the requirements of State law, nor does it affect the validity of actions by the State prior to withdrawal.

[48 FR 14178, Apr. 1, 1983; 50 FR 6941, Feb. 19, 1985, as amended at 57 FR 5335, Feb. 13, 1992; 63 FR 45123, Aug. 24, 1998]

PART 124—PROCEDURES FOR DECISIONMAKING

Subpart A—General Program Requirements

Sec.

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