

**ENVIRONMENTAL PROTECTION
AGENCY**
40 CFR Part 123

[FRL-5148-6]

**Amendment to Requirements for
Authorized State Permit Programs
Under Section 402 of the Clean Water
Act**
AGENCY: Environmental Protection
Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA is proposing to amend the regulations concerning the minimum requirements for federally authorized State permitting programs under section 402 of the Clean Water Act. The proposed rule would explicitly require that State law must provide any interested person an opportunity to challenge the approval or denial of 402 permits issued by the State in State court. The intent of the proposed rule is to ensure that any interested person has the opportunity to challenge judicially the final action on State-issued permits, to the same extent as if the permit were issued by EPA. Most States already have this authority which allows for local resolution of issues. As a result, EPA believes today's proposed rule will apply to a very small number of States with authorization to administer the National Pollutant Discharge Elimination System (NPDES) permit program. EPA is not proposing at this time to establish this requirement for Tribal permitting programs under section 402, but is soliciting comments on various issues related to extending this requirement to Tribes. No Tribes are currently authorized to operate the NPDES program.

DATES: Written comments on this proposed rule must be submitted on or before June 15, 1995.

ADDRESSES: Commenters are requested to submit three copies of their comments to the Comment Clerk for the section 402 Amendment; Water Docket; MC-4101, Environmental Protection Agency, 401 M Street, SW., Washington DC 20460. Commenters who would like acknowledgement of receipt of their comments should include a self-addressed, stamped envelope. No facsimiles (faxes) will be accepted.

A copy of the supporting information for this proposal is available for review at EPA's Water Docket, room L-102, 401 M Street, SW., Washington, DC 20460. For access to the docket materials, call (202) 260-3027 between 9 a.m. and 3:30 p.m. for an appointment.

FOR FURTHER INFORMATION CONTACT:
Laura J. Phillips, Office of Wastewater

Management (OWM), Permits Division (4203), Environmental Protection Agency, 401 M Street, SW., Washington, DC 20460, (202) 260-9541.

SUPPLEMENTARY INFORMATION:
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**I. Summary and Explanation of Today's
Action**
1. Background

Congress enacted the Clean Water Act, 33 U.S.C. 1251 *et seq.* ("CWA" or "the Act"), "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." Section 101(a), 33 U.S.C. 1251(a). To achieve this objective, the Act authorizes EPA, or a State approved by EPA, to issue permits controlling the discharge of pollutants to navigable waters. Section 402(a)(1), 33 U.S.C. 1342(a)(1). A State that wishes to administer its own permit program for discharges of pollutants, other than dredged or fill material, to navigable waters may submit a description of the program it proposes to administer to EPA for approval according to criteria set forth in the statute. Section 402(b), 33 U.S.C. 1342(b).

EPA is authorized to treat Indian Tribes in the same manner as States for purposes of certain provisions of the CWA, including section 402. Section 518(e), 33 U.S.C. 1377(e).

EPA's regulations at 40 CFR part 123 establish minimum requirements for federally authorized State permit programs under section 402 of the CWA. These regulations include federally recognized Indian Tribes within the definition of "State." 40 CFR 122.2. EPA is proposing to add language to part 123 that makes clear the intent that, to receive or retain Federal authorization, a State must have laws that afford any interested person the opportunity to challenge in State court the final approval or denial of 402 permits by the State. The intent of this proposal is to ensure that State programs provide the public with an opportunity to challenge

final action on 402 permits in State courts, to the same extent as if the permit were federally-issued. EPA is inviting comment on various issues related to extending this requirement to Tribes.

**2. Rationale and Authority for Proposed
Rule**

EPA has become aware of instances in which citizens are barred from challenging State-issued permits because of restrictive standing requirements in State law. EPA believes this is a gap in the regulations setting minimum requirements for State 402 permit programs that needs to be addressed.

A coalition of environmental groups has filed two petitions requesting that EPA withdraw the Virginia State 402 permit program, citing a limitation on citizen standing, among other alleged deficiencies. In particular, they allege that recent changes in the law in the State of Virginia have significantly narrowed the public's opportunity to challenge State-issued 402 permits. Virginia's State Water Control Law, the State law under which Virginia's authorized program is administered, authorizes only an "owner aggrieved" to challenge permits in court. VA Code 62.1-44.29. In 1990, the Virginia legislature amended and narrowed the statutory definition of "owner." The environmental groups allege that under three opinions of the Virginia Court of Appeals and the State Water Control Law, only a permittee has standing to challenge the issuance or denial of a 402 permit in State court. *Environmental Defense Fund v. State Water Control Board*, 12 Va. App. 456, 404 SE.2d 728 (1991), *reh'g en banc denied*, 1991 Va. App. LEXIS 129; *Town of Fries v. State Water Control Board*, 13 Va. App. 213, 409 SE.2d 634 (1991). See *Citizens for Clean Air v. State Air Pollution Control Board*, 13 Va. App. 430, 412 SE.2d 715 (1991) (interpreting similar language in Virginia Air Pollution Control Law). They allege that under these three decisions, riparian landowners, local governments that wish to draw drinking water from the waters in question, downstream permittees, local business and property owners associations, local civic associations and environmental organizations whose members use the waters in question may not challenge a State-issued permit in State court.

The Agency is committed to moving away from permit-by-permit oversight. At the same time, it is critical that EPA continue in its partnership role to support effective State implementation. It is also essential to provide for meaningful local participation and

resolution of permit specific issues. An important component of effective public participation is that the public have access to judicial forums to challenge State-issued permits to the same extent as would be the case were EPA the permitting authority. This approach ensures that as EPA reduces its oversight, both EPA and the States remain directly accountable on a permit-by-permit basis to the public. To this end, EPA believes the purposes of the CWA can best be accomplished by providing an opportunity for review in State court of the final approval or denial of 402 permits by all interested persons, as well as permittees and permit applicants, in order to ensure an adequate and meaningful opportunity for public review and comment on issues addressed by the permit. The same concerns arise when the program is federally administered; that is why Congress provided for judicial review of Federal permit actions in Federal court.

When citizens are denied the opportunity to challenge executive agency decisions in court, their ability to influence permitting decisions through other required elements of public participation, such as through public comments and public hearings on proposed permits, may be seriously compromised. If citizens perceive that a State is not addressing their concerns about 402 permits because the citizens have no recourse to an impartial judiciary, that perception also has a chilling effect on all the remaining forms of public participation in the permitting process. EPA believes that in order to effectuate the policies and purposes of the CWA, States must address the legitimate concerns of citizens about 402 permits. Accordingly, EPA is proposing to add language to part 123 explicitly requiring that all interested persons must have an opportunity to challenge the final approval or denial of 402 permits in State court. In the judgment of EPA, this effectively balances the CWA's strong policy favoring public participation in the development of water pollution controls with the policy to "recognize, preserve and protect the primary responsibilities and rights of the States to prevent, reduce and eliminate pollution..." Section 101(b), 33 U.S.C. 1251(b). It effectuates EPA's strong policy interest in deferring to State administration of authorized NPDES programs while ensuring that citizens will be able to influence permitting decisions through public participation and will have access to the courts to challenge State-issued permits to the

same extent as if the program were federally administered.

EPA's direct authority to specify this requirement is found at sections 101(e), 304(i), 402(b) and (c), and 501(a) of the CWA.

Section 501(a), 33 U.S.C. 1361(a), confers general authority on the Administrator to prescribe such regulations as are necessary to carry out her functions under the CWA. Section 304(i), 33 U.S.C. 1314(i), provides that EPA shall promulgate guidelines establishing the minimum procedural and other elements of any State program under section 402. Section 101(e) provides that "[p]ublic participation in the development, revision, and enforcement of any regulation, standard, effluent limitation, plan, or program established by the Administrator or any State under this chapter shall be provided for, encouraged, and assisted by the Administrator and the States . . ." 33 U.S.C. 1251(e). To establish minimum public participation requirements consistent with these statutory goals, section 101(e) directs the Administrator, in cooperation with the States, to establish minimum guidelines for public participation. *Id.*

Congress included the provisions relating to public participation in section 101(e) because it recognized that "[a] high degree of informed public participation in the control process is essential to the accomplishment of the objectives we seek—a restored and protected natural environment." S. Rep. 414, 92d Cong., 2d Sess. 12 (1972), reprinted in *A Legislative History of the Water Pollution Control Act Amendments of 1972*, Cong. Research Service, Comm. Print No. 1, 93d Cong., 1st Sess. 108 (1973) (hereinafter cited as *1972 Legis. Hist.*) at 1430. The Senate Conference Report observed further that implementation of water pollution control measures would depend, "to a great extent, upon the pressures and persistence which an interested public can exert upon the governmental process. The Environmental Protection Agency and the State should actively seek, encourage and assist the involvement and participation of the public in the process of setting water quality requirements and in their subsequent implementation and enforcement." *Id.* See also Senate Conference Report at 72, *1972 Legis. Hist.* at 1490 ("The scrutiny of the public... is extremely important in insuring expeditious implementation of the authority [conferred by section 402] and a high level of performance by all levels of government and discharge sources.") Similarly, the House directed EPA and the States "to encourage and

assist the public so that it may fully participate in the administrative process." H. Rep. 911, 92d Cong., 2d Sess. 79, *1972 Legis. Hist.* at 766. Congressman Dingell, a leading sponsor of the CWA, characterized section 101(e) as applying "across the board." *Id.* at 108. See also *id.* at 249.

Section 402(b) establishes the statutory standards applicable to the approval of State 402 permitting programs. These standards also reflect the importance that Congress attached to effective public participation in establishing controls on water pollution. States wishing to administer a 402 permit program must establish to the satisfaction of the Administrator that they have enacted laws that provide adequate authority to carry out the State program. Section 402(b), 33 U.S.C. 1342(b). Section 402(b)(3) contains an explicit requirement for public participation in the development of State permits. Subsection (3) allows disapproval upon a finding of inadequate authority "[t]o 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." *Id.* Section 402(c), 33 U.S.C. 1342(c), authorizes EPA to withdraw a State program if it is not being administered in accordance with applicable requirements.

The courts have also recognized that meaningful and adequate public participation is an essential part of a State program under section 402. See *Natural Resources Defense Council v. EPA*, 859 F.2d 156, 175-78 (D.C. Cir. 1988) (approving part 123 regulations regarding citizen intervention in State enforcement actions); *Citizens for a Better Environment v. EPA*, 596 F.2d 720, *reh'g denied*, 596 F.2d 725 (7th Cir. 1979) (invalidating EPA approval of a State program in the absence of prior promulgation of guidelines regarding citizen participation in State enforcement actions).

Thus, the CWA vests considerable discretion in the Administrator to set minimum requirements applicable to authorized 402 programs, particularly with respect to public participation and the rights of citizens to influence the permitting process. See *Natural Resources Defense Council v. EPA*, 859 F.2d at 175-178.

EPA's proposal is further supported by the statutory provisions governing challenges to 402 permits issued by EPA. Section 509(b)(1) of the CWA, 33 U.S.C. 1369(b)(1), provides that "any interested person" may obtain judicial review in the United States Court of

Appeals of the Administrator's action in issuing or denying any permit under section 402. There is no indication that Congress intended that the public's rights to challenge permit actions would be diminished, upon EPA's approval of a State 402 program, to the point that the goal of adequate and effective public participation in the permit issuance process would be compromised. (Similarly, Congress has provided citizens the ability, except in defined circumstances, to commence a civil action in the United States District Court against any person who is alleged to be in violation of any effluent standard or limitation under the CWA, regardless of whether the permitting authority is EPA or the State. Section 505(a), 33 U.S.C. 1365(a)).

The regulations setting minimum requirements for authorized State 402 permit programs, 40 CFR part 123, do not explicitly address requirements for citizen standing to challenge the approval or denial of permits in State court. The current part 123 regulations were originally issued on May 19, 1980, 45 FR 33290. When EPA issued those regulations, the Agency did not contemplate that State law might limit the opportunity for interested citizens to challenge final permit decisions in State court to such a degree that it is substantially narrower than the opportunity afforded under section 509 to challenge federally-issued permits. Accordingly, EPA believes it needs to specify standing requirements in part 123. EPA seeks to add language to part 123 that would explicitly require that in order to receive or retain authorization, a State must afford any interested person the opportunity to challenge the final approval or denial of 402 permits in State court. The proposal would codify the Agency's interpretation of the CWA, as set forth above. EPA believes the Clean Water Act authorizes the Agency to specify this requirement as a precondition to the assumption and continued operation of a 402 permitting program by a State.

The proposed rule would apply to final actions with respect to modification, revocation and reissuance and termination of permits as well as the approval or denial of permits in the first instance.

3. Scope of Standing Requirement

EPA's proposal makes it clear that "any interested person" must be afforded standing to challenge final action by a State in issuing or denying a 402 permit; this proposal would ensure consistency with the standing afforded the public to challenge federally-issued permits in Federal

court. The legislative history of the CWA states explicitly that the term "interested person" in section 509(b) is intended to embody the injury in fact rule of the Administrative Procedure Act, as set forth by the Supreme Court in *T3Sierra Club v. Morton*, 405 U.S. 727 (1972). S. Conference Rep. No. 1236, 92d Cong. 2d Sess. 146 (1972), 1972 *Legis. Hist.* at 281, 329.

Montgomery Environmental Coalition v. Costle, 646 F.2d 568, 576-78 (D.C. Cir. 1980). See *Trustees for Alaska v. EPA*, 749 F.2d 549, 554-55 (9th Cir. 1984). EPA intends that the term "interested person" as used in the proposed rule have the same meaning that it has in section 509(b). Today's proposal would ensure that citizen standing to challenge the issuance or denial of State-issued 402 permits is similarly expansive where the State is authorized to administer 402 permit programs.

As interpreted by the United States Supreme Court, the standing requirement of Article III of the Constitution contains three key elements:

[A]t an irreducible minimum, Art. III requires the party who invokes the court's authority to "show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant,"... and that the injury "fairly can be traced to the challenged action" and "is likely to be redressed by a favorable decision."

Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 472 (1982)(citations omitted). See also *Lujan v. Defenders of Wildlife*, 504 U.S. _____, 119 L.Ed.2d 351, 364 (1992).

With respect to the nature of the injury that an "interested person" must show to obtain standing, the Supreme Court held in *Sierra Club v. Morton*, 405 U.S. at 734-35, that harm to an economic interest is not necessary to confer standing. Harm to an aesthetic, environmental, or recreational interest is sufficient, provided that the party seeking judicial review is among the injured. This holding was most recently reaffirmed by the Supreme Court in *Lujan v. Defenders of Wildlife*, 504 U.S. _____, 119 L.Ed.2d at 365 ("[o]f course, the desire to use or observe an animal species, even for purely aesthetic purposes, is undeniably a cognizable interest for purposes of standing."). See also *Japan Whaling Ass'n v. American Cetacean Society*, 478 U.S. 221, 231 n. 4 (1986); *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1, 16-17. This low threshold for sufficiency of injury has been applied in many decisions. See, e.g., *Sierra Club v. Simkins Industries, Inc.*,

847 F.2d 1109 (4th Cir. 1988), cert. denied, 491 U.S. 904 (1989) (injury to aesthetic and environmental interests is sufficient where pollution would affect a river along which a single group member hiked); *Friends of the Earth v. Consolidated Rail Corp.*, 768 F.2d 57, 61 (2d Cir. 1985) (recreational use of a river and offense to aesthetic values are sufficient to demonstrate injury in fact).

4. Exhaustion of Administrative Remedies

A requirement that all interested persons have the opportunity to challenge final permitting actions judicially should be distinguished from a requirement that interested persons must exhaust administrative remedies in order to preserve their opportunity to challenge permitting actions judicially. For example, Federal regulations require that interested persons must raise reasonably ascertainable issues during the public comment period on a draft 402 permit (40 CFR 124.13) and must request an evidentiary hearing on a permit decision they wish to challenge (40 CFR 124.74). Today's proposal does not affect the authority of States to adopt similar, reasonable requirements that interested persons exhaust available administrative remedies in order to preserve their opportunity to challenge final permitting actions in State court.

5. Alternatives Under Consideration

EPA also considered amending part 123 to require that State law must provide an opportunity for judicial review of a final State permit action under section 402 by the permit applicant and any person who participated in the public comment process. See section 502(b)(6) of the Clean Air Act, 42 U.S.C. 7661a(b)(6). The Agency prefers the "any interested person" language because it tracks section 509(b)(1) of the CWA, which allows "any interested person" to challenge specified final actions of the Administrator, including the issuance or denial of any permit under section 402, in the United States Court of Appeals. It is also consistent with existing regulations under the CWA which allow "any interested person" to request an evidentiary hearing on a Regional Administrator's final permit decision. 40 CFR 124.74. As noted above, States would be free under today's proposal to impose reasonable requirements that interested persons must exhaust administrative remedies, such as participation in the public comment process, in order to preserve their opportunity to challenge a final permitting action in State court.

EPA solicits comment on whether it should adopt a requirement, in lieu of the proposed regulatory language, that State law must provide an opportunity for judicial review of a final permitting action under section 402 by the permit applicant and any person who participated in the public comment process.

6. Time Period for Compliance

Under EPA's existing regulations, any approved State 402 program that requires revision to conform to today's proposal, when it is finally promulgated, would need to be revised within one year of the date of final promulgation of today's proposed rule, unless the State must amend or enact a statute in order to make the required revision. In that case, under EPA's existing regulations, the revision must take place within two years. 40 CFR 123.62(e). EPA is considering amending the regulations to require that States revise their programs sooner than specified under 40 CFR 123.62(e) to bring the program into compliance with today's proposed rule. For example, EPA is considering requiring that if a State must amend or enact a statute to make the necessary revisions to its law, this must be done during the first legislative session that begins after the date of promulgation of today's proposal as a final rule. EPA requests comment on whether it should impose a requirement that States revise their programs sooner than specified under 40 CFR 123.62(e) to bring the program into compliance with today's proposed rule, and if so, what would be an appropriate shortened time period for compliance.

II. Request for Comment

EPA solicits comment on all aspects of today's proposal. In particular, EPA seeks comment on the appropriateness of the proposal from a legal and a policy perspective; on the "any interested person" language as proposed; on the alternative that would require that State law must provide an opportunity for judicial review of a final permitting action under section 402 by the permit applicant and any person who participated in the public comment process, as discussed above; and on any alternative language that would specify appropriate explicit standing requirements applicable to authorized State 402 programs.

EPA also requests comment on whether it should amend the regulations to require States to revise their programs sooner than would otherwise be required under 40 CFR 123.62(e) to bring the program into compliance with

today's proposed rule, when it is finally promulgated.

EPA is not proposing at this time to establish this requirement for Tribal permitting programs under section 402. Tribes are just beginning the development of various Clean Water Act programs and the issues of sovereign immunity and access to Tribal courts must be carefully considered. No Tribes are currently authorized to operate the NPDES program. EPA is soliciting comments on various issues, including the issue of sovereign immunity, related to extending this requirement to Tribes. Based upon the comments received on this proposal, EPA may propose regulatory action in the future with respect to review of Tribally-issued NPDES permits. EPA also invites comment about how it could phase in such a requirement for Tribes, if the Agency moves forward with such a proposal in the future.

EPA is aware that access to Tribal courts may not be as broad as access to State courts. (EPA addressed some issues with regard to Tribal regulation of nonmembers, as well as differences in Tribal criminal enforcement programs, in the preamble to and/or the final regulation on NPDES authority for Tribes, 58 FR 67966, December 22, 1993.) EPA specifically invites comment on (1) these differences with regard to access to Tribal courts for appeal of NPDES permits (which may be issued to nonmembers of the Tribe), (2) the basis of the differences, (3) as well as any alternative procedures that may be used to provide for an appeal of final Tribal NPDES permit actions, if a Tribal court system is not available to a person.

III. Supporting Documentation

1. Compliance With Executive Order 12866

Under Executive Order 12866 (58 FR 51735, October 4, 1993), the Agency must determine whether the regulatory action is "significant," and therefore subject to review by the Office of Management and Budget (OMB) and the requirements of the Executive Order. The Order defines "significant regulatory action" as one that is likely to lead to a rule that may:

- (1) Have an annual effect on the economy of \$100 million or more, or adversely and materially affecting a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or Tribal governments or communities;
- (2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;

(3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs, or the rights and obligations, of recipients thereof; and

(4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

EPA believes that only a very few authorized States may be impacted by this proposed rule. The proposed action is consistent with and effectuates the public participation provisions of the CWA. As a result, EPA has determined that the final rule does not meet the definition of a significant regulation, and, therefore, the Agency is not conducting a Regulatory Impact Analysis.

It has also been determined that this proposed rule is not a "significant regulatory action" under the terms of Executive Order 12866 and is therefore not subject to OMB review.

2. Compliance With Executive Order 12875

Under Executive Order 12875, entitled Enhancing the Intergovernmental Partnership, the Agency is required to develop an effective process to permit elected officials and other representatives of State and Tribal governments to provide meaningful and timely input in the development of regulatory proposals.

EPA fully supports this objective and has initiated a consultation process with both States and Tribes which will be continued through proposal and the public comment period. The Agency will be contacting each State individually for their views on this proposal. With regard to Indian Tribes, EPA is aware of the complex issues associated with applying this proposal to Tribes and is soliciting comments on those issues. EPA will work both with representatives of Tribes as well as through the Agency's American Indian Environmental Office to assure a full opportunity for review and comment on today's proposal and also to ensure an understanding of Tribal concerns or issues raised by today's proposal rule.

EPA anticipates a reaction from the relatively few NPDES-authorized States which restrict standing to challenge State-issued NPDES permits. Businesses and municipalities in States which restrict standing may argue that allowing standing will make it more difficult to obtain a permit due to court challenges by citizens. However, based on EPA's experience in States which already provide broad standing to challenge permits, EPA does not expect that any significant portion of permits will be challenged in State courts.

EPA believes that it has developed an effective process for receiving comments on this proposed rulemaking and has met the consultation requirements for States, federally recognized Tribes and localities under the terms of Executive Order 12875.

3. Paperwork Reduction Act

This proposed rule does not contain information requirements subject to OMB review under the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.*

4. Regulatory Flexibility Act

Under the Regulatory Flexibility Act (RFA), 5 U.S.C. 601 *et seq.*, EPA must prepare a Regulatory Flexibility Analysis for regulations having a significant impact on a substantial number of small entities.

This proposed rule applies only to States with authorization to administer the NPDES permit program. States are not considered small entities under the RFA. Therefore, pursuant to section 605(b) of the Regulatory Flexibility Act, I certify that this proposed rule will not have a significant impact on a substantial number of small entities.

List of Subjects in 40 CFR Part 123

Environmental protection,
Administrative practice and procedure,
Water pollution control.

Dated: March 9, 1995.

Carol M. Browner,
Administrator.

For the reasons set forth in this preamble, part 123, chapter I, title 40 of the Code of Federal Regulations is proposed to be amended as follows:

PART 123—[AMENDED]

1. The authority citation for part 123 continues to read as follows:

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

2. Section 123.30 is added to read as follows:

§ 123.30 Judicial review of approval or denial of permits.

All States that administer or seek to administer a program under this part must provide any interested person an opportunity for judicial review in State Court of the final approval or denial of permits by the State. This requirement does not apply to Indian Tribes.

[FR Doc. 95-6676 Filed 3-16-95; 8:45 am]

BILLING CODE 6560-50-F