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THE OVERSIGHT PROCESS

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CHAPTER SIX

THE OVERSIGHT PROCESS

A. Background On the Oversight Process

This Chapter addresses EPA oversight of State NPDES programs. State program oversight encompasses overall program operation and performance, including permitting and enforcement, as well as oversight to assure consistency of State NPDES legal authority with minimum federal NPDES requirements. This Chapter addresses primarily the legal aspects of State program oversight. This Chapter also addresses methods for resolving program deficiencies.

State programs must at all times be administered consistent with federal requirements. EPA is required by the CWA to oversee State programs after approval to ensure adequate consistency. Responsible and effective oversight is beneficial to both the approved States and EPA. In addition to ensuring that State programs are being run in accordance with the requirements of the CWA, the oversight process provides EPA with information on the day to day operation of the NPDES program. Among other uses, this type of information may be used to form the basis for reports to Congress on the effectiveness of current laws and justifying State grant funding levels and State-assistance programs. Federal oversight also provides a means by which to collect and exchange information between the States. More importantly, regular

State oversight enables EPA to identify State program problems before they reach the crisis stage, thus allowing easier resolution.

EPA's oversight activities are designed to help both the Agency and approved States evaluate the strengths and weaknesses of State programs and thus increase the program's effectiveness. In addition to issuing high quality NPDES permits without allowing backlogs of expired or unissued permits to develop, States must be able to manage a timely and effective enforcement program and a competent and effective pretreatment program. Operating such a comprehensive program requires up-to-date legal authorities, properly trained personnel in numbers sufficient to meet the program's needs, and adequate resources. Strengths and weaknesses are generally identified as falling within the following three classes: (1) programmatic performance, (2) legal authorities, or (3) resource levels.

(1) Programmatic Deficiencies

Programmatic deficiencies are those resulting from the State's failure properly to administer the program the State described in its program submission. Essentially, this means that the State is not complying with the requirements of the MOA (which sets out the State's commitments). Specific examples of these types of deficiencies include: an excessive backlog of expired permits, an inadequate permit issuance rate, deficient permits which do not contain all required conditions and limitations, failure by the State to comply

with NPDES regulations, including failure to comply with procedural requirements when issuing permits, failure to submit permits for Regional review or respond to the Region's comments, failure to run an effective enforcement program, and failure to properly administer the pretreatment program. In addition, an approved State's failure to seek pretreatment and federal facilities authority from EPA, as required by Federal law, is considered to be a programmatic deficiency.

(2) Legal Deficiencies

Legal deficiencies include outdated State legal authorities or improper revisions to those authorities. Many State programs have not been reviewed for legal sufficiency since their initial approval. Since most State programs were approved before 1977, this also means that many State programs may not have been updated to reflect requirements mandated by the 1977 CWA amendments. In addition, the federal regulations have undergone numerous and significant changes since these Amendments.

Legal deficiencies also may have occurred due to State changes to statutes or regulations subsequent to program approval, where the State did not request program modification to reflect those changes. Examples of such revisions include: statutory amendments eliminating or modifying a general conflict of interest bar to members of the State's permitting body; and creating permit variances not allowed under the CWA. Other States have experienced judicial decisions that affect State program operations.

States with outdated or inconsistent legal authorities are expected to review and revise those authorities to be consistent with federal requirements. EPA Regions and Headquarters are now implementing a program for periodic review of approved State legal authorities.

(3) Resource-Related Deficiencies

Resource problems include inadequate funding and insufficient or inadequately trained personnel. In some cases, State resource shortfalls appear to be the result of a shift in resources, previously committed to NPDES activities, to other State environmental programs. A shortage of qualified personnel can have an appreciable negative impact on program administration, particularly when there is a lack of qualified permit writers or properly trained inspectors. Resource deficiencies frequently will lead to serious problems in other aspects of program administration, leaving the State unable to properly operate the program. In such cases, EPA must require that proper funding and staffing be provided by the State as a condition of continued program approval.

In an effort to improve NPDES program quality through improved communication of EPA's expectations of State and Regional program performance, EPA has developed a comprehensive oversight policy for State NPDES programs. This policy will be reviewed and updated annually. (The FY 1987 Guidance for Oversight of NPDES Programs has been reproduced in Volume Two.) The guidance sets out goals

for State NPDES programs and defines an adequate NPDES program. When EPA oversees State program administration, the Agency will evaluate the State program against the objectives set out in the guidance. For example, the Guidance calls for States and Regions to issue high quality permits and maintain a low backlog. In its oversight of State programs, EPA will examine these aspects. The Guidance does not address specific annual commitments, although these are based upon the goals set out in the Guidance.

B. Statutory Basis

In creating the NPDES program, Congress clearly intended that the program be implemented largely by the States. Section 402(b) requires that a State, wishing to manage the NPDES program in lieu of EPA, demonstrate that it possesses the requisite authorities, procedures and resources to do so. For a detailed discussion of the approval process, see Chapter Two, above. The CWA is abundantly clear that EPA is expected to retain an important oversight responsibility following State program approval. EPA's fulfillment of this oversight duty is critical to achieving national consistency and the sucessful implementation of the NPDES program.

The statutory basis for EPA's oversight function is contained in section 402(c) of the CWA. Paragraph (c)(2) of that section states that "[a]ny State permit program under this section shall at all times be in accordance with this section and guidelines promulgated pursuant to section 304(i)(2)

of this Act." Paragraph (c)(3) states that if the Administrator determines, after hearing, that a State program is not being administered in accordance with federal requirements, he shall withdraw the program. In order to carry out this duty, the Administrator must continually oversee State program operation. Section 402 also requires State programs to fully comply with the federal regulations upon approval.

These statutory mandates are reiterated in Part 123 of the NPDES regulations which provides that "[a]ny State program approved by the Administrator shall at all times be conducted in accordance with the requirements of this part" (see, 40 CFR 123.1(f) and 123.62(e)). Part 123 also requires State legal authority to be revised to comply with new or revised federal authority. Such revisions are to be made within one year or, when statutory revisions are needed, within two years of the federal change. A State's failure to have up-to-date legal authorities can have a significant negative impact on the State program and result in deficient permits or legal challenges to the program's approval status. Out-of-date statutes and regulations can also have adverse effects on one of the primary goals of the CWA: general consistency among State water pollution control programs. Inadequate State legal authorities could give dischargers in one State an unfair advantage over dischargers in other States. Finally, inadequate or out-of-date legal authorities are grounds for EPA to withdraw its program approval (see, 40 CFR 123.63).

C. EPA and State Roles

The program description and the MOA should clearly set out the respective oversight roles of EPA and the State. For a complete discussion of these documents, see Chapter 5, above, and the Model MOA reproduced in Volume Two. Establishing responsibilities in writing clarifies the scope of anticipated program activities and provides a framework for the resolution of any disputes which may arise.

EPA's role in the oversight process originates with initial approval of the State program. At the time of approval, EPA reviews the State's submission to ascertain that the State has adequate funding, resources, organizational structure, and legal authority to run an effective program. However, EPA approval of the "paper program" is only the first step in assuring a quality State program. To ensure a smooth transition, EPA assists newly-approved States following approval. The MOA typically requires EPA to transfer its relevant files on permits and permittees to the State. In addition, EPA will provide technical assistance in developing effluent limitations and drafting permits. This assistance is available in the form of actual drafting of specific permits, and workshops and seminars for permit writers.

EPA ongoing oversight activities are designed to evaluate both the on-going State program operations and overall program planning and performance. The oversight of on-going program administration focuses on individual permits and compliance

activities. These activities include receiving and reviewing draft or proposed State permits, evaluating reports addressing compliance and enforcement activities, and participating in inspections of permitted facilities or indirect dischargers in the State.

For the broader perspective, EPA Regions conduct mid-year State program reviews and periodic audits of State performance. These inquiries allow EPA to assess program performance as a whole, focusing on the State's achievement of overall program goals. The mid-year review is often carried out in conjunction with the annual State-EPA agreement (SEA) and the section 106 grant funding negotiations.

The section 106 grant process involves the negotiation of a State work plan between EPA and the State. The section 106 funds are disbursed by EPA Regional offices based upon a formula determined by data reflecting the scope of each State's water quality problem. Generally, the EPA Regions provide targets for the completion of activities by the State agencies which receive the section 106 funds.

The 106 work plan designates commitments consistent with the essential State program activities defined in EPA's annual operating guidance and summarizes activities that the State and Region agree should be performed during the fiscal year. The work plan covers all activities which are supported by the annual section 106 grant. The work plan also indicates

the level of grant resources to be devoted to specific tasks. It must also be consistent with the MOA. Generally, the plan is incorporated into an annual State/EPA Agreement (SEA). The SEA serves as a tool for joint State/EPA planning and evaluation. It establishes priorities, measures program successes, and indicates each party's formal commitments. The SEA thus may be broader than the section 106 workplan. However, the two documents are frequently similar and may be combined by some Regional Offices. The SEA is not required by federal law, and currently, only about half of the Regional offices implement SEAs with their approved States.

The State's responsibilities in the oversight process are largely informational, although EPA coordinates all its oversight activities with the State. Of course, the State is also required to submit copies of proposed and issued permits to EPA in accordance with the MOA. As noted in Chapter 2, the CWA and the MOA obligates the State to notify EPA of any proposed revisions to its legal authorities and submit a copy of the proposed revisions to EPA for review.

In summary, EPA's role in the oversight process is to analyze and assess program performance, based largely upon information supplied by the State itself. However, for various reasons, the necessary information is not always provided to the EPA Regions and Headquarters in a timely and consistent manner. These problems distort and reduce the effectiveness of the oversight process.

As is discussed in the following section, EPA is expand-

ing its State oversight activities relating to both program performance and legal authorities. It is anticipated that these activities will fulfill EPA's statutory obligation to ensure that State programs are in full compliance with the CWA, as well as identify those State programs with serious deficiencies. The results of these activities will in turn enable EPA to efficiently utilize its own resources in resolving those deficiencies.

D. Identification and Resolution of State Program Deficiencies

(1) Identification

The identification and resolution of deficiencies in State programs and legal authorities has not received priority attention until recently. However, the adequacy of State permit program performance is a critical link in achieving the Agency's mission under the CWA, and the adequacy of legal authorities is directly linked to the adequacy and defensibility of State-issued permits. Thus, the identification and correction of program deficiencies is an essential part of the oversight process.

In the past, problems with State programs have usually been brought to EPA's attention by a problem or challenge to a particular permit. For example, EPA might learn that a permit is unenforceable because the State lacks adequate regulations, or that a State is reluctant to take enforcement actions because of concerns about the adequacy of its authority. On other occasions, EPA learns of program deficiencies through letters or lawsuits from environmental groups, or these problems

are identified in the course of reviewing State legal authorities in response to a State's request for authority to administer a pretreatment or general permit program, or to regulate federal facilities. However, until now, the common denominator of virtually all deficiencies identified by EPA has been that they have been identified in a remedial or passive context. In many cases, these deficiencies have been brought to EPA's attention by outside parties. EPA's on-going oversight of State programs identifies many of the deficiencies that may need to be resolved. For example, EPA conducts regular reviews of State-issued permits, which may indicate that a number of permits are inadequate. However, these are generally individual instances where problems have occurred; EPA and the States generally can work out informal means to correct these day-to-day program operation problems.

On a separate track, EPA oversees programs to identify more significant concerns. Rather than being remedial, EPA's current oversight program is intended to be preventative in nature, and will attempt to locate and resolve potential deficiencies in State program operations and legal authorities before they actually come to pass. Although EPA continually oversees State programs, the Agency's current procedures for identifying State program problems rely upon the following two tools, each with a different emphasis. These tools, mid-year evaluations (which are focused on implementation problems) and legal reviews (which focus on legal authorities

and resources) are described below.

(a) Mid-Year Evaluations

Regional offices are expected to perform comprehensive evaluations of approved State programs at least once each year. This review is usually conducted prior to the Office of Water's (EPA Headquarters) mid-year evaluation of the Region. The Region's comprehensive review typically summarizes the results of the periodic program evaluations that have been performed during the preceeding year.

The Region's own review of the State's performance revolves around the SEA and section 106 grant negotiations discussed above. During these processes, priorities and commitments are established for the coming year. In addition, specific difficulties, peculiar to the State, should be identified and addressed in the SEA whenever posible.

At the conclusion of the annual review, the Region will prepare a written report outlining the State's accomplishments and indicating areas where improvements are needed, as well as summarizing agreements reached on the resolution of any problems identified during the process. Copies of these documents should be provided by the Region to the appropriate staff in the Office of Water Enforcement and Permits, EPA Headquarters.

(b) Legal Authority Reviews

Since the NPDES program is constantly evolving, there will always be a need to revise and update State programs.

State law should be reviewed periodically to ensure legal authorities are consistent and up-to-date. Many approved State legal authorities have neither been updated by the State nor reviewed by EPA since the time of initial program approval. To rectify this situation, EPA has developed a strategy for reviewing approved programs which calls for each Region to conduct a comprehensive evaluation of at least one approved State's legal authorities each year (See, Memorandum, "Review of Approved NPDES Programs," from the Director of the Office of Water Enforcement and Permits to EPA Regional Water Management Directors, reproduced in Volume Two). In addition, the FY 86 Guidance for Oversight of NPDES Programs calls for all approved State legal authorities to be reviewed by the end of FY 86 (this commitment also appeared in the FY 85 Guidance).

Once the individual States are selected and a priority for review is established, EPA will request each State to conduct a self-evaluation of its legal authorities. After each State completes an initial analysis of its legal authorities, EPA will conduct an independent review. These reviews will be coordinated between EPA Headquarters and Regional Offices and will be equivalent in scope to the review now carried out for new or modified NPDES programs. (The procedures for legal reviews are set out in Chapter 2, above.)

If EPA or a State identifies deficiencies in the State's legal authorities, EPA will work closely with the State to

remedy the deficiencies. If needed, EPA will provide legal support and assistance in drafting these revisions. It is anticipated that in many cases, EPA's concerns can be resolved by a well-documented opinion from the State Attorney General.

(2) Deficiency Resolution

Once a State program deficiency is identified, it must be resolved. The appropriate remedy or remedies will be selected by EPA after considering the nature and seriousness of the problem, the State's awareness of the problem, and the State's willingness to deal expeditiously with it. In many cases, the problem can be worked out informally by the joint efforts of the State and EPA. Whenever possible, EPA will accept a resolution of the problem which is the least disruptive and time-consuming. For example, with questions concerning State legal authority, EPA will generally accept an Attorney General's statement supported with adequate citations and case law as an alternative to requiring a more costly and time consuming statutory change. The tools EPA has at its disposal to resolve State program deficiencies include the following (in roughly escalating order):

(a) Informal Dialogue With State

Virtually all problem resolution efforts will begin with a discussion about the problem. The State will be advised as to what problems EPA perceives and what steps EPA believes should be taken to resolve the problem. EPA will attempt to determine the cause of the problem and recommend a plan for resolution. This may include technical assistance

or additional guidance from EPA or a recommendation that the State obtain contractor assistance. As with any of the deficiency resolution techniques discussed below, EPA's goal during these informal discussions is to help the State return to compliance with CWA requirements. However, EPA may indicate during these discussions that further action will be taken by EPA if the State fails to take prompt corrective action. In such situations, EPA will apply one or more of the remaining tools for deficiency resolution.

(b) Modification of State-EPA Agreement or MOA

In some cases, it may be effective for EPA and the State to address the problem in the SEA or annual section 106 grant (these two documents are described above at page 6-6), or amend the MOA to reflect program performance goals necessary to eliminate the problem. For certain problems, particularly those relating to information transfer, other procedural problems, or those deficiencies impacting the program over a long period of time, modification of the MOA may be an appropriate step. Other short-term performance problems (e.g., elimination of a specified backlog), are more appropriately addressed through the annual SEA/106 grant negotiation process. EPA may put specific State goals in these documents to be achieved during the following year. The State's performance can then be tracked against these commitments. Since the commitment is set out specifically, the State's compliance can be easily determined, as well as the need for further action. These documents may also be useful in

the resolution of enforcement or compliance deficiencies, particularly if the State needs to increase activities which may be included in the agreements as quantifiable outputs, such as compliance inspections or enforcement referrals.

(c) Conditioning Receipt of §106 Grant on Achievement of Specific Commitments

EPA intends to use performance-based grants, including the §106 grant, as a mangement tool to promote and recognize the effective performance of State NPDES programs (see, Administrator Thomas' May 31, 1985, Policy on Performance-Based Assistance). This policy is reproduced in Volume Two. It explicitly links the provision of EPA grant funds to effective State performance.

In the case of §106 funds, effective State performance is evidenced by the State achieving its work plan commitments. States with superior performance may be eligible for financial incentives, including supplemental funding, while States which fail to meet significant goals in their work plan may be subject to reductions in funding, restrictions on the use of federal funding, or adjustments to the schedule for release of funding (including witholding a portion of the grant until the commitment is met). Since a properly drafted work plan contains quantifiable outputs for each described activity, it provides an excellent basis for evaluating the State's progress toward meeting its commitments.

Regional Offices are required to review State progress

against the work plan throughout the year (see, 40 CFR 35.3150). If a State fails significantly to achieve the commitments contained in the work program, such as additional measures as discussed above, the Region should consider actions to encourage improved future State performance. As one means to encourage improved State performance, the Region should strongly consider a financial penalty such as a reduction of the grant award. This grant reduction is based upon the principle that funds are awarded to accomplish specific, mutually agreed tasks. If the State fails significantly in accomplishing the tasks, the funding should be reduced proportionately. Since there are no objective, automatic standards to be applied, the Region should use its best judgement in using grant reduction. Two important factors which should be considered are actual State performance compared to its output commitments and the prior history of State performance. In instances where a State has repeatedly failed to meet its commitments, the Region has little choice but to reduce grant funding. However, any reduction or elimination of grant funding must always be carried out in accordance with the Agency-wide policy on the subject, and should be reserved for instances of clearly inadequate performance.

(d) Review of State-issued permits

The CWA provides for EPA review of State-issued NPDES permits. EPA review ensures that EPA provides comment where appropriate to assure that State NPDES permits meet minimum

federal requirements. In addition, EPA can often provide information or data helpful to assist State permit writers in keeping up with new developments in control techniques in other parts of the nation. This procedure often has the additional benefit of helping State permit writers improve their skills, particularly if the permit review is carried out in conjunction with additional training or guidance.

Section 402(e) provides that, for certain classes, EPA may waive its review of all permits. The Agency's State program regulations establish the types of permits which may not be waived. These include major permits, general permits, permits for discharges which may affect another State and permits for discharges into the territorial seas (see, 40 CFR 123.24(d)). However, if a State often needs assistance in developing appropriate permit limits or is otherwise having difficulty issuing adequate permits, the Region should not waive its review to the maximum allowable extent. Instead, the Region should conduct a detailed review of any State-issued permits of concern, focusing attention on the aspects of permit development which are known to be troublesome for that State.

(e) Formal Audit of State Permitting and Compliance Activities

On occasion, it is necessary or appropriate for EPA to conduct a detailed review of State program performance and permit files. (This process is separate from the Agency's Permit Quality Review Program.) Where this is undertaken,

EPA will generally spend a period of time carefully evaluating the State's permit and/or pretreatment files. Audits can be both diagnostic (because a formal audit can help locate specific programmatic problems) and remedial since it may provide the basis for determining appropriate corrective action. The audit is most useful where a State program is known to be suffering from deficiencies in overall program operation or management but specific deficiencies have not yet been identified. A formal audit may be performed upon the entire State program, or its scope may be limited to a specific aspect, such as pretreatment. Upon completion of the audit, EPA will evaluate its findings. These will normally be submitted to the State in the form of a report. If deficiencies are found, EPA will generally seek agreement on prompt corrective action through one of the other mechanisms discussed in this part to resolve the problems, such as delineating commitments in the section 106 workplan.

(f) EPA veto of State-issued permits

As discussed above, EPA is empowered to review State-issued permits. In cases where EPA has exercised that authority, sections 402(a) and (c) of the CWA authorize EPA to object to (veto) proposed State permits which do not comply with federal requirements, such as a failure to issue adequate BPJ permits. Objection to State-issued permits is part of EPA's routine State program oversight and its use is not normally considered a remedy for State program deficiencies. Regions are expected to review permits and object when they fail to meet CWA requirements. See 40 CFR 123.44. The Region should

be prepared to issue the permit in the event that the State is unable to satisfy any important EPA concerns. It is essential that this tool be utilized where appropriate in order to ensure high quality NPDES permits and fulfill EPA's obligations for effective State program oversight. Once a State permit becomes effective, EPA's ability to require changes in its conditions is little better than that of any other interested party.

Where States have chronic permit quality problems, EPA will strongly consider increasing the scrutiny given to State permits, thus increasing the frequency of objections. For example, Regions sometimes submit informal comments to States on certain deficiencies rather than phrasing them as objections to the permit. Where the State continues to issue poor permits or does not address EPA's informal comments, the Region will begin to issue the comments as formal objections, requiring the State to address the concern to avoid the permit being vetoed after the 90-day period. Where appropriate, Regions also should consider increasing the scrutiny given to certain classes of permits that are normally not carefully reviewed.

(g) Cutting EPA-Provided Funding

This is the reduction or elimination of federal funding provided under the CWA. Cutting or reducing federal funding is a more serious and consequential sanction than the performance-based grants program discussed above, since the State cannot obtain the financial assistance merely by meeting stated

goals, and this procedure can result in the elimination of funding beyond just the §106 grant. A program with serious deficiencies often is already suffering from resource problems, and reduction or elimination of federal funding may only serve to exacerbate the problem. Therefore, cutting funding, as distinguished from the performance-based grant, should only be considered in serious cases where other remedies, including the use of performance-based grants, have failed to bring about improved program performance.

(h) EPA-State Consent Agreement

In cases where EPA has identified several different significant deficiencies in a State program, and informal methods have not resulted in improved State performance, an EPA-State consent agreement can be a useful tool to assist the State to return to compliance. Such an agreement is essentially a contract between the State and EPA, in which the State is required to carry out specified activities according to a schedule agreed to by the parties. For example, such an agreement might, in part, call for the State to submit revised NPDES regulations to EPA for review by a specified date. The schedule would eventually culminate with the promulgation of the final revised regulations by a set date. Such a schedule may also be developed to eliminate permit backlogs, require increased compliance or enforcement activities, or mandate increased State staffing of the program.

In order to be meaningful, the consent agreement must contain specific consequences for the State's failure to comply with the agreement. These consequences can include monetary penalties or other sanctions. For example, monetary penalties could include reduction of the State §106 grant by "X" dollars per each permit which the State commits to but fails to issue. Other sanctions might include the staging of a public fact finding hearing (see below) on program quality in the event the State misses any of the milestones specified in the agreement or, the initiation of withdrawal proceedings for certain types of violations. The consent agreement may also obligate EPA to provide financial, legal, technical, or management assistance to the State.

A consent agreement should be tailored to the specific circumstances of the case at hand, taking into account the State's particular strengths, weaknesses, and needs. A consent agreement can be used in conjunction with other remedies. Finally, the consent agreement may be a useful tool in helping to resolve actual or threatened legal actions brought by outside parties. For example, an environmental group, otherwise prepared to bring suit or file a petition for withdrawal, may be willing to settle in exchange for either having input into, or being made a party to, the terms of a State-EPA consent agreement.

(i) Federal Assumption of State Enforcement

Sections 309(a) and 402(i) of the CWA provide EPA with the authority to take enforcement action against dischargers

in approved States. This enables EPA to supplement a State's enforcement program. These EPA enforcement operations are part of on-going program activities and are not out of the ordinary.

EPA also has authority under section 309 to assume all enforcement responsibilities within the State. This remedy is available to EPA when the Administrator determines that violations by dischargers are so widespread that they appear to result from the State's failure to enforce the requirements of State law. In these instances, EPA may assume primary enforcement responsibility until such time as the State demonstrates that it will properly enforce the program. Federally assumed enforcement is an unusual occurence, in many ways equivalent to partial program withdrawal (which is not otherwise authorized under the current law).

(j) Fact-Finding Hearing on Program Deficiencies

A public fact-finding hearing or public meeting on the State program can be an important step and generally should be held only after the State has failed to respond to efforts by EPA to assure prompt corrective action. Public hearings, which are not required by the NPDES regulations, are a means to review concerns about the quality of the State program in a public forum. Such a hearing also provides a mechanism for concerned parties to express their views on State program performance. A fact-finding hearing can range in scope from

simply soliciting public opinion on program performance relating to specific issues, to actually being a preliminary step in the decision to implement withdrawal proceedings. (Note: a fact-finding hearing is not a mandatory prerequisite for the implementation of the withdrawal process.) In addition to an EPA-initiated hearing, the State may wish to initiate a hearing itself. An EPA-initiated hearing should normally be noticed in the Federal Register.

(k) Program Withdrawal

EPA will choose from the above remedies to develop an appropriate response tailored to resolve specific program deficiencies. If those remedies are unsuccessful in remedying State deficiencies, EPA can initiate proceedings for program withdrawal. Program withdrawal is a drastic remedy which will only be considered for very serious program deficiencies after all other options are exhausted. Program withdrawal entails the return of full program administration responsibilities to EPA. The CWA does not permit partial program withdrawal (e.g., EPA cannot withdraw only a State's pretreatment program).

Program withdrawal proceedings can be triggered by an initial investigation in response to EPA concerns, or by a petition for withdrawal, filed by any interested outside party, which alleges that EPA's program criteria have not been met. EPA has established the criteria for program withdrawal in 40 CFR 123.63. These criteria are based upon

CWA requirements that State programs at all times be consistent with federal law. Clearly, a State program may be withdrawn if the State's legal authorities are not consistent with EPA's minimum requirments for State programs. This includes statutory or regulatory deficiencies or judicial decisions that may limit the scope of State law. States also are required to update their legal authorities when EPA makes changes in its regulations, and failure to do so is grounds for program withdrawal. For example, since all States were required to request and receive approval to administer a pretreatment program by March 27, 1980, any approved State which has not so requested is a potential candidate for program withdrawal (see, 40 CFR 403.10(c)).

EPA's authority is not limited to withdrawing a State program for legal deficiencies, but extends as well to failure to adequately administer the State program, including failure to issue adequate permits or conduct an adequate enforcement program, as well as failure to comply with the State/EPA Memorandum of Agreement. In practice, these deficiencies may present a more significant problem then the legal problems, even though the latter are important. EPA regulations specifically mention failure to issue permits or issuance of permits that do not conform to CWA requirements as grounds for program withdrawal. Thus, continued high permit backlogs and low permit issuance rates are areas of possible concern in a State program that may warrant closer investigation. Inadequate administration of an approved State pretreatment program,

such as a minimal number of POTW pretreatment program approvals, may also constitute grounds for withdrawal.

Inadequate enforcement constitutes still another ground for program withdrawal. (This is separate from federally assumed enforcement discussed in paragraph (i), above.) Examples of inadequate enforcement include the failure to act on violations of permits or other requirements, failure to seek adequate enforcement penalties, or failure to operate an adequate inspection program. Thus State programs with continued high rates of noncompliance (as measured by the QNCR) or programs which fail to act promptly to resolve noncompliance could be withdrawn even if State legal authorities and permit issuance are adequate.

The program withdrawal process consists of six basic steps:

(i) The EPA Administrator issues an order commencing the withdrawal proceedings and stating the allegations justifying the proceedings;

(ii) The State responds to the allegations;

(iii) An adjudicatory hearing is held to probe the sufficiency of the program;

(iv) A proposed decision is issued by the hearing officer;

(v) The Adminstrator reaches a final decision as to whether the program is deficient and what corrective action is necessary to avoid withdrawal; and

(vi) Failure to comply with the corrective action within 90 days results in a second order from the Administrator withdrawing the State's program.

(<u>see</u>, 40 CFR 123.64)

The withdrawal process does not have as its central purpose the return of the program to EPA nor does initiation of withdrawal proceedings mean that the program will actually be withdrawn. The withdrawal process is primarily a device to encourage the State to correct program deficiencies in order to retain NPDES authority. To date, EPA has not withdrawn any State NPDES programs. However, given the current emphasis upon State program quality, and recent activities by environmental groups (such as filing petitions requesting the withdrawal of a State program), EPA may consider withdrawal proceedings for any State which consistently operates its NPDES (including pretreatment) program in violation of the CWA.