

SUBCHAPTER 4. PERMIT CONDITIONS

§ 401 Conditions Applicable to All NNPDES Permits

The following conditions in subsections (a) - (n), except as otherwise noted, apply to all NNPDES permits. Additional conditions applicable to specific categories of NNPDES permits are in § 401(o). All conditions applicable shall be incorporated into the permits either expressly or by reference. If incorporated by reference, a specific citation to these regulations must be given in the permit. In addition to conditions required in all NNPDES permits, the Director will establish conditions as required on a case-by-case basis under §§ 402 - 404 and Subchapter 5.

(a) Duty to Comply

(1) General requirement. The permittee must comply with all conditions of the NNPDES permit. Any permit noncompliance is a violation of the ~~Navajo Nation Pollutant Discharge Elimination System Act~~ NNCWA and is grounds for enforcement action; permit termination, revocation and reissuance or modification; denial of a permit renewal application; and any other relief available under Navajo law.

(2) Specific duties

A. The permittee shall comply with effluent standards or prohibitions for toxic pollutants established under 40 CFR Part 129 (§ 109(a)) and with standards for sewage sludge use or disposal under 40 CFR Part 503 (§ 109(j)) established by the Navajo Nation within the time provided in the regulations that establish these standards or prohibitions, even if the permit has not yet been modified to incorporate the requirement (40 CFR Parts 129 and 503; §§ 109(a) and (j)).

B. The ~~Navajo Nation Pollutant Discharge Elimination System Act~~ NNCWA, in Subchapter ~~3~~ 9, provides that any person who violates or is in violation of the Act, or any permit, rule, or order adopted under the Act, fee assessed under the Act, duty to allow or carry out an inspection, entry, or monitoring activities, is subject to a civil penalty not to exceed \$25,000 per day of such violation. Any person who (1) willfully or through gross negligence violates any provision, requirement or prohibition of the Act, including but not limited to a regulation adopted pursuant to thereto, a permit or order issued pursuant to the Act, a filing, reporting or notice requirement under this Act; (2) knowingly makes any false material statement, representation or certification in, or omits material information from, or alters, conceals or fails to file or maintain any notice, application, record, report, or other document required pursuant to the Act to be filed or maintained, including required by a permit issued pursuant to this Act; or (3) knowingly falsifies, tampers with, renders inaccurate or fails to install any monitoring device or method required to be maintained or followed under the Act; shall, upon conviction, be punished by a fine in the amount not to exceed \$5,000 per day per violation, or imprisonment for not more than one-hundred eighty (180) days per day per violation, or both, or be subject to any other penalty imposed by the court available under Navajo Nation law. In any instance where the Navajo Nation lacks criminal jurisdiction over the person charged, or where the Director or court is limited in the amount of the fine that he/she may impose, the Director may refer the action to the appropriate US government official. In such case, nothing in this section shall limit the ability of the United States government to take enforcement action pursuant to the Clean Water Act or other applicable law.

C. All permits, including general permits, as well as regulations or other mechanisms issued by the Director for direct implementation of requirements for industrial users and treatment works treating domestic sewage

that are not otherwise required to apply for permits, shall contain the following statement which shall be a part of the permit or other direct implementation mechanism:

"Permittee hereby consents to the jurisdiction of the Navajo Nation in connection with all activities conducted pursuant to, in connection with, or directly affecting compliance with, this permit or direct implementation mechanism to which the provisions of the Navajo Nation ~~Pollutant Discharge Elimination System~~ Clean Water Act otherwise apply. This consent shall be effective when a permit is issued or direct implementation mechanism applies and may not be withdrawn. This consent shall extend to and be binding upon all successors, heirs, assigns, employees and agents, including contractors and subcontractors, of the applicant."

The permittee shall include the foregoing statement as a term and condition of any contract or other agreement it executes for services to be performed or goods to be provided within the Navajo Nation in connection with any permit issued under the ~~NNPDES Act~~ NNCWA, or to which the provisions of the Act otherwise apply. Each party to any such contract or other agreement must agree and subscribe to said statement, substituting the name of the party for "permittee" as appropriate and substituting the phrase "this agreement" in place of the phrase "this permit or direct implementation mechanism." Failure by the applicant to include such statement, or of any party to agree and subscribe to such statement, shall subject the permittee to civil penalty in accordance with the ~~NNPDES Act~~ NNCWA.

(b) Duty to Reapply. If the permittee wishes to continue an activity regulated by this permit after the expiration date of the permit, the permittee shall apply for and obtain a new permit as required in § 301.

(c) Need to Halt or Reduce Activity Not a Defense. It shall not be a defense for a permittee in an enforcement action that it would have been necessary to halt or reduce the permitted activity in order to maintain compliance with the conditions of this permit. (Upon reduction, loss, or failure of the treatment facility, the permittee, to the extent necessary to maintain compliance with the permit, shall control production of all discharges until the facility is restored or an alternative method of treatment is provided.)

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

(e) Proper Operation and Maintenance. The permittee shall at all times properly operate and maintain all facilities and systems of treatment and control and related appurtenances which are installed or used by the permittee to achieve compliance with the conditions of the permit. Proper operation and maintenance also includes adequate laboratory controls and appropriate quality assurance procedures. This provision requires the operation of backup or auxiliary facilities or similar systems which are installed by a permittee only when the operation is necessary to achieve compliance with the conditions of the permit. The Director may, as necessary and appropriate, establish on a case-by-case basis after notice and comment, permit conditions requiring operator training.

(f) Permit Actions. The permit may be modified, revoked and reissued, or terminated for cause. The filing of a request by the permittee for a permit modification, revocation and reissuance, or termination, or a notification of planned changes or anticipated noncompliance, does not stay any permit condition.

(g) Property Rights. The permit does not convey any property rights of any

kind, or any exclusive privilege.

(h) Duty to Provide Information. The permittee shall furnish to the Director, within a reasonable time, any information which the Director may request to determine whether cause exists for modifying, revoking and reissuing, or terminating the permit or to determine compliance with this permit. The permittee shall also furnish to the Director, upon request, copies of records required to be kept by the permit.

(i) Inspection and Entry. The permittee shall allow the Director, or an authorized representative, including an authorized contractor acting as a representative of the Director, upon the presentation of credentials and other documents as may be required by law to:

(1) Enter upon the permittee's premises where a regulated facility or activity is located or conducted, is suspected to be located, or through a premises, or where records must be kept or are suspected to be kept under the conditions of the permit;

(2) Have access to and copy, at reasonable times, any records that must be kept under the conditions of the permit;

(3) Inspect at reasonable times any facilities, equipment, including monitoring and control equipment, practices or operations regulated or required under the permit; and

(4) Sample or monitor at reasonable times for the purposes of assuring NNPDES program compliance or as otherwise authorized by the ~~Navajo Nation Pollutant Discharge Elimination System Act~~ NNCWA, any substances or parameters at any location.

(j) Monitoring and records

(1) Samples and measurements taken for the purpose of monitoring shall be representative of the monitored activity.

(2) The permittee shall retain records of all monitoring information, including all calibration and maintenance records and all original strip chart recordings for continuous monitoring instrumentation, copies of all reports required by the permit, and records of all data used to complete the application for the permit for a period of at least three (3) years from the date of the sample, measurement, report or application. This period may be extended by request of the Director at any time. Records of monitoring information required by the permit related to the permittee's sewage sludge use and disposal activities, shall be retained for a period of at least five (5) years or longer as required by Navajo Nation promulgated standards for sewage sludge use and disposal.

(3) Records of monitoring information shall include:

- A. The date, exact place, and time of sampling or measurements;
- B. The individual(s) who performed the sampling or measurements;
- C. The date(s) and times analyses were performed;
- D. The individual(s) who performed the analyses;
- E. The analytical techniques or methods used; and
- F. The results of such analyses.

(4) Monitoring shall be conducted according to test procedures approved under 40 CFR Part 136 (§ 109(c)) or, in the case of sludge use or disposal, approved under 40 CFR Part 136 (§ 109(c)) unless otherwise specified in Navajo Nation

standards for sludge use or disposal, unless other test procedures, approved by USEPA under 40 CFR Part 136, have been specified in the permit.

(5) Section ~~304(B)(3)~~ 903(b) of the ~~Navajo Nation Pollutant Discharge Elimination System Act~~ NNCWA provides that any person who knowingly falsifies, tampers with, renders inaccurate or fails to install any monitoring device or method required to be maintained or followed under the Act shall, upon conviction, be punished by a fine in the amount not to exceed \$5,000 per day per violation, or imprisonment for not more than ~~one-hundred eighty (180) days per day per violation~~ year, or both, or be subject to any other penalty imposed by the court available under Navajo Nation law. In any instance where the Navajo Nation lacks criminal jurisdiction over the person charged, or where the Director or court is limited in the amount of the fine that he/she may impose, the Director may refer the action to the appropriate US government official for action consistent with federal law and regulations.

(k) Signatory Requirement. All applications, reports, or information submitted to the Director shall be signed and certified as indicated in § 304. Section ~~304(B)(3)~~ 903(b) of the ~~Navajo Nation Pollutant Discharge Elimination System Act~~ NNCWA provides that any person who knowingly makes any false material statement, representation or certification in, or omits material information from, or alters, conceals or fails to file or maintain any notice, application, record, report, or other document required pursuant to the Act to be filed or maintained, including required by a permit issued pursuant to this Act shall, upon conviction, be punished by a fine in the amount not to exceed \$5,000 per day per violation, or imprisonment for not more than ~~one-hundred eighty (180) days per day per violation~~ year, or both, or be subject to any other penalty imposed by the court available under Navajo Nation law. In any instance where the Navajo Nation lacks criminal jurisdiction over the person charged, or where the Director or court is limited in the amount of the fine that he/she may impose, the Director may refer the action to the appropriate US government official for action consistent with federal law and regulations.

(1) Reporting Requirements

(1) Planned changes. The permittee shall give notice to the Director as soon as possible of any planned physical alteration or additions to the permitted facility. Notice is required only when:

A. The alteration or addition to a permitted facility may meet one of the criteria for determining whether a facility is a new source as defined in § 105(a)(40);

B. The alteration or addition would likely result in a discharge due to runoff, flow, or usage;

C. The alteration or addition could significantly change the nature or increase the quantity of pollutants discharged. This notification applies to pollutants which are subject neither to effluent limitations in the permit nor to notification requirements under § 401(o); or,

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

(2) Anticipated Noncompliance. The permittee shall give advance notice to the Director of any planned changes in the permitted facility or activity which may result in noncompliance with permit requirements.

(3) Transfers. The permit is not transferable to any person except after notice to the Director. The Director may require modification or revocation and reissuance of the permit to change the name of the permittee and incorporate such other requirements as may be necessary under the ~~Navajo Nation Pollutant Discharge Elimination System Act~~ NNCWA. (In some cases, modification or revocation and reissuance is mandatory.)

(4) Monitoring reports. Monitoring results shall be reported at the intervals specified elsewhere in the permit. Monitoring results shall be reported as follows:

A. Monitoring results must be reported on a DMR or forms provided or specified by the Director for reporting results of monitoring of discharges, other activities, and/or sludge use or disposal practices.

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

C. Calculations for all limitations which require averaging of measurements shall utilize an arithmetic mean unless otherwise specified in the permit.

(5) Compliance Schedules. Reports of compliance or noncompliance with, or any progress report on, interim and final requirements contained in any compliance schedule of the permit shall be submitted no later than fourteen (14) days following each scheduled date.

(6) Twenty-Four Hour Reporting. The permittee shall orally report any noncompliance which may endanger health or the environment. Any information shall be provided orally within 24 hours from the time the permittee becomes aware of the circumstances. The report shall be in addition to and not in lieu of any other reporting requirement applicable to the noncompliance. A written submission shall also be provided within five (5) days of the time the permittee becomes aware of the circumstances. The written submission shall contain a description of the noncompliance and its cause; the period of noncompliance, including exact dates and times, and if the noncompliance has not been corrected, the anticipated time it is expected to continue; and steps taken or planned to reduce, eliminate, and prevent recurrence of the noncompliance. The Director may waive the written report on a case-by-case basis if the oral report has been received within 24 hours. The following shall be included as events which must be reported within 24 hours:

A. Any unanticipated bypass which exceeds any effluent limitation in the permit, as indicated in § 401(m).

B. Any upset which exceeds any effluent limitation in the permit.

C. Violation of a maximum daily discharge limitation for any of the pollutants listed by the Director in the permit to be reported within 24 hours, as indicated in § 402(g).

(7) Other Non-compliance. The permittee shall report all instances of noncompliance not reported under §§ 401(1)(4), (5), and (6) at the time monitoring reports are submitted. The reports shall contain the information listed in § 401(1)(6).

(8) Other Information. Where the permittee becomes aware that it failed to submit any relevant fact in a permit application, or submitted incorrect information in its permit application or in any report to the Director, it shall promptly submit such facts or information.

(m) Occurrence of a Bypass.

(1) Definitions.

A. "Bypass" means the intentional diversion of waste streams from any portion of a treatment facility.

B. "Severe property damage" means substantial physical damage to property, damage to the treatment facilities which causes them to become inoperable, or substantial and permanent loss of natural resources which can reasonably be expected to occur in the absence of a bypass. Severe property damage does not mean economic loss caused by delays in production.

(2) Bypass Not Exceeding Limitations. The permittee may allow any bypass to occur which does not cause effluent limitations to be exceeded, but only if it also is for essential maintenance to assure efficient operation. These bypasses are not subject to §§ 401(m)(3)(A) and (B) or 401(m)(4).

(3) Notice

A. Anticipated bypass. If the permittee knows in advance of the need for a bypass, it shall submit prior notice, if possible at least ten (10) days before the date of bypass.

B. Unanticipated bypass. The permittee shall submit notice of an unanticipated bypass as required in § 401(1)(6) (24 hour notice).

(4) Prohibition of Bypass

A. Bypass is prohibited, and the Director may take enforcement action against a permittee for bypass, unless:

i. Bypass was unavoidable to prevent loss of life, personal injury, or severe property damage;

ii. There were no feasible alternatives to the bypass, such as the use of auxiliary treatment facilities, retention of untreated wastes, or maintenance during normal periods of equipment downtime. This condition is not satisfied if adequate backup equipment should have been installed in the exercise of reasonable engineering judgment to prevent a bypass which occurred during normal periods of equipment downtime or preventive maintenance, and

iii. The permittee submitted notices as required under § 401(m)(3).

B. The Director may approve an anticipated bypass, after considering its adverse effects, if the Director determines that it will meet the three conditions listed in §§ 401(m)(4)(A)(i), (ii) and (iii).

(n) Occurrence of an Upset

(1) Definition. "Upset" means an exceptional incident in which there is unintentional and temporary noncompliance with technology-based permit effluent limitations because of factors beyond the reasonable control of the permittee. An upset does not include noncompliance to the extent caused by operational error, improperly designed treatment facilities, inadequate treatment facilities, lack of preventive maintenance, or careless or improper operation.

(2) Effect of an Upset. An upset constitutes an affirmative defense to an action brought for noncompliance with such technology-based permit effluent limitations if the requirements of § 401(n)(3) are met. No determination made during administrative review of claims that noncompliance was caused by upset, and before an action for noncompliance, is final administrative action subject to judicial review.

(3) Conditions Necessary for a Demonstration of Upset. A permittee who wishes to establish the affirmative defense of upset shall demonstrate through properly signed, contemporaneous operating logs, or other relevant evidence that:

A. An upset occurred and that the permittee can identify the specific cause(s) of the upset;

B. The permitted facility was at the time being properly operated; and

C. The permittee submitted notice of the upset as required in § 401(1)(6) (24 hour notice).

D. The permittee complied with any remedial measures required under § 401(d).

(4) Burden of Proof. In any enforcement proceeding the permittee seeking to establish the occurrence of an upset has the burden of proof.

(o) Additional Conditions Applicable to Specified Categories of NNPDES Permits. The following conditions, in addition to others set forth in these regulations, apply to all NNPDES permits within the categories specified below:

(1) Existing Manufacturing, Commercial, Mining, and Silvicultural Dischargers. In addition to the reporting requirements under §§ 401(l), (m), and (n), any existing manufacturing, commercial, mining, and silvicultural discharger shall notify the Director as soon as it knows or has reason to believe:

A. That any activity has occurred or will occur which would result in the discharge, on a routine or frequent basis, of any toxic pollutant which is not limited in the permit, if that discharge will exceed the highest of the following "notification levels:"

i. One hundred micrograms per liter (100 ug/l);

ii. Two hundred micrograms per liter (200 ug/l) for acrolein and acrylonitrile; five hundred micrograms per liter (500 ug/l) for 2,4 dinitrophenol and for 2-methyl-4,6-dinitrophenol; and one milligram per liter (1 mg/l) for antimony;

iii. Five (5) times the maximum concentration value reported for that pollutant in the permit application in accordance with § 305(g).

iv. The level established by the Director in accordance with § 402(f).

B. That any activity has occurred or will occur which would result in any discharge on a non-routine or infrequent basis of a toxic pollutant which is not limited in the permit, if that discharge will exceed the highest of the following "notification levels:"

i. Five hundred micrograms per liter (500 ug/l).

ii. One milligram per liter (1 mg/l) for antimony.

iii. Ten (10) times the maximum concentration value reported for that pollutant in the permit application in accordance with § 305(g).

iv. The level established by the Director in accordance with § 402(f).

(2) POTWs. POTWs shall provide adequate notice to the Director of the following:

A. Any new introduction of pollutants into that POTW from an indirect discharger which would be subject to the NNPDES regulations if it were directly discharging those pollutants; and

B. Any substantial change in the volume or character of pollutants being introduced into that POTW by a source introducing pollutants into the POTW at the time of issuance of the permit.

C. For purposes of this paragraph, adequate notice shall include information on the quality and quantity of effluent introduced into the POTW; and any anticipated impact of the change on the quantity or quality of effluent to be discharged from the POTW.

(3) Municipal separate storm sewer systems. [Reserved]

(4) Storm water discharges. The initial permits for discharges composed entirely of storm water issued pursuant to § 309(a) shall require compliance with the conditions of the permit as expeditiously as practicable, but in no event later than three years after the date of issuance of the permit.

§ 402 Establishing Permit Conditions

For the purposes of this section, permit conditions include any statutory or regulatory requirement which takes effect prior to the final administrative disposition of a permit. An applicable requirement may be any requirement which takes effect prior to the modification or revocation or reissuance of a permit, to the extent allowed in § 506. New or reissued permits, and to the extent allowed under § 506, modified or revoked and reissued permits shall incorporate each of the applicable requirements referenced in this section. In addition to the conditions established under § 401, each NNPDES permit will include conditions on a case by case basis to provide for and ensure compliance with all applicable Navajo Nation statutory and regulatory requirements and the following, as applicable:

(a) Technology-based effluent limitations and standards, based on effluent limitations and standards promulgated and/or required under sections ~~103~~ 104 and ~~209~~ 302 of the Navajo Nation Pollutant Discharge Elimination System Act NNCWA or new source performance standards promulgated and/or required under sections ~~103~~ 104 and ~~209~~ 302 of the Navajo Nation Pollutant Discharge Elimination System Act NNCWA, on case-by-case effluent limitations, or a combination of the two in accordance with § 701.

(b) Toxic Effluent Standards and Other Effluent Limitations.

(1) As provided under section ~~209(A)(3)~~ 302(a)(3) of the ~~NNPDES Act~~ NNCWA, if any applicable toxic effluent standard or prohibition, including any schedule of compliance specified in such effluent standard or prohibition, is promulgated under section 307(a) of CWA for a toxic pollutant and that standard or prohibition is more stringent than any limitation on the pollutant in the permit, the Director shall institute proceedings under these regulations to modify or revoke and reissue the permit to conform to the toxic effluent standard or prohibition.

(2) As provided under section ~~209(A)(5)~~ 302(a)(5) of the ~~NNPDES Act~~ NNCWA,

standards for sewage sludge use or disposal promulgated by USEPA under section 405(d) of the CWA. When there are no applicable standards for sewage sludge use or disposal, the permit may include requirements developed on a case-by-case basis to protect public health and the environment from any adverse effects which may occur from toxic pollutants in sewage sludge. If any applicable standard for sewage sludge use or disposal is promulgated under section 405(d) of the CWA and that standard is more stringent than any limitation on the pollutant or practice in the permit, the Director may initiate proceedings under these regulations to modify or revoke and reissue the permit to conform to the standard for sewage sludge use or disposal.

(c) Reopener Clause.

(1) For any discharger within a primary industry category, as listed in § 312, requirements for reopeners will be incorporated as follows. On or after the statutory deadline set forth in sections 301(b)(2)(A), (C), and (E) of CWA, any permit issued shall include effluent limitations to meet the requirements of sections 301(b)(2)(A), (C), (D), (E), and (F) of CWA, whether or not applicable effluent limitations guidelines have been promulgated or approved. These permits need not incorporate a reopener clause.

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

(d) Water quality standards and Tribal/state requirements shall be included as applicable. Any requirements in addition to or more stringent than USEPA's effluent limitation guidelines or standards or technology-based effluent limitations established on a case-by-case basis, will be included, when necessary to:

(1) Achieve water quality standards established under the ~~Navajo Nation Water Quality Standards and Planning Act~~ NNCWA and regulations promulgated pursuant thereto, including Navajo Nation narrative criteria for water quality.

A. Permit limitations must control all pollutants or pollutant parameters (either conventional, nonconventional, or toxic pollutants) which the Director determines are or may be discharged at a level which will cause, have the reasonable potential to cause, or contribute to an excursion above any Navajo Nation water quality standard, including Navajo Nation narrative criteria for water quality.

B. When determining whether a discharge causes, has the reasonable potential to cause, or contributes to an in-stream excursion above a narrative or numeric criteria within a Navajo Nation water quality standard, the Director shall use procedures which account for existing controls on point and nonpoint sources of pollution, the variability of the pollutant or pollutant parameter in the effluent, the sensitivity of the species to toxicity testing (when evaluating whole effluent toxicity), and where appropriate, the dilution of the effluent in the receiving water.

C. When the Director determines, using the procedures in § 402(d)(1)(B), that a discharge causes, has the reasonable potential to cause, or contributes to an in-stream excursion above the allowable ambient concentration of a Navajo Nation numeric criteria within a Navajo Nation water quality standard for an individual pollutant, the permit must contain effluent limits for that

pollutant.

D. When the Director determines, using the procedures in § 402(d)(1)(B), that a discharge causes, has the reasonable potential to cause, or contributes to an in-stream excursion above the numeric criterion for whole effluent toxicity, the permit must contain effluent limits for whole effluent toxicity.

E. Except as provided in this subparagraph, when the Director determines, using the procedures in § 402(d)(1)(B), toxicity testing data, or other information, that a discharge causes, has the reasonable potential to cause, or contributes to an in-stream excursion above a Navajo Nation narrative criterion within an applicable Navajo Nation water quality standard, the permit must contain effluent limits for whole effluent toxicity. Limits on whole effluent toxicity are not necessary where the Director determines in the fact sheet or statement of basis of the NNPDES permit, using the procedures in § 402(d)(1)(B), that chemical specific limits for the effluent are sufficient to attain and maintain applicable numeric and narrative Navajo Nation water quality standards.

F. Where the Navajo Nation has not established a water quality criterion for a specific chemical pollutant that is present in an effluent at a concentration that causes, has the reasonable potential to cause, or contributes to an excursion above a narrative criterion within an applicable Navajo Nation water quality standard the Director will establish effluent limits using one or more of the following options:

i. Establish effluent limits using a calculated numeric water quality criterion for the pollutant which the Director determines will attain and maintain applicable narrative water quality criteria and will fully protect the designated use. Such a criterion may be derived using a proposed Navajo Nation criterion, or an explicit Navajo Nation policy or regulation interpreting its narrative water quality criteria supplemented with other relevant information which may include: USEPA's Water Quality Standards Handbook, October 1983, or as revised, risk assessment data, exposure data, information about the pollutant from the Food and Drug Administration, and current USEPA criteria documents;

ii. Establish effluent limits on a case-by-case basis, using EPA's water quality criteria, published under section 304(a) of CWA, supplemented where necessary by other relevant information; or

iii. Establish effluent limitations on an indicator parameter for the pollutant of concern, provided:

1. The permit identifies which pollutants are intended to be controlled by the use of the effluent limitations;

2. The fact sheet as required by § 604 and § 206 of the Uniform Hearings sets forth the basis for the limit, including a finding that compliance with the effluent limit on the indicator parameter will result in controls on the pollutant of concern which are sufficient to attain and maintain applicable water quality standards;

3. The permit requires all effluent and ambient monitoring necessary to show that during the term of the permit the limit on the indicator parameter continues to attain and maintain applicable water quality standards; and

4. The permit contains a reopener clause allowing the Director to modify or revoke and reissue the permit if the limits on the indicator parameter no longer attain and maintain applicable water quality standards.

G. When developing water quality-based effluent limits under this paragraph the Director shall ensure that:

i. The level of water quality to be achieved by limits on point sources established under this paragraph is derived from, and complies with all applicable water quality standards; and

ii. Effluent limits developed to protect a narrative water quality criterion, a numeric water quality criterion, or both, are consistent with the assumptions and requirements of any available wasteload allocation for the discharge prepared by the Navajo Nation and approved by EPA pursuant to 40 CFR § 130.7.

(2) Attain or maintain a specified water quality through water quality related effluent limits established under section 302 of the CWA and section ~~209(a)(6)~~ 302(a)(6) of the ~~NNPDES~~ Act NNCWA.

(3) Conform to applicable water quality requirements when (1) the discharge affects a state or Indian Tribe other than the Navajo Nation and/or (2) to conform to conditions of an USEPA certification under section 401 of the CWA, to the extent appropriate.

(4) Incorporate any more stringent limitations, treatment standards, or schedule of compliance requirements established under federal or Tribal or local (including Navajo Nation Chapter, to the extent the authority for the Chapter to establish the requirement is independently and specifically established in Navajo Nation law) law or regulations, including but not limited to Navajo Nation laws on endangered species (17 N.T.C. §§ 500 and 507) and the Navajo Nation Cultural Resources Protection Act (CMY-19-88).

(5) Ensure consistency with the requirements of any Navajo Water Quality Management Plan approved by USEPA.

(6) Incorporate alternative effluent limitations or standards where warranted by "fundamentally different factors" under § 703.

(e) Technology-based Controls for Toxic Pollutants. Limitations established under §§ 402(a), (b), or (d) to control pollutants meeting the criteria listed in § 402(e)(1) will be included in the permit, if applicable. Limitations will be established in accordance with § 402(e)(2). An explanation of the development of these limitations will be included in the fact sheet under § 604 and § 206 of the Uniform Regulations.

(1) Limitations must control all toxic pollutants which the Director determines, based on information reported in a permit application under §§ 305(g) and (j), or in a notification under § 401(o)(1) of this regulation or on other information, are or may be discharged at a level greater than the level which can be achieved by the technology-based treatment requirements appropriate to the permittee under §§ 701(c)(1), (2) and (3).

(2) The requirement that the limitations control the pollutants meeting the criteria of paragraph (1) of this subsection will be satisfied by:

A. Limitations on those pollutants; or

B. Limitations on other pollutants which, in the judgment of the Director, will provide treatment of the pollutants under paragraph (1) of this subsection to the levels required by §§ 701(c)(1), (2) and (3).

(f) Notification Level. A "notification level" which exceeds the notification level of § 401(o), upon a petition from the permittee or on the Director's initiative, will be incorporated as a permit condition, if applicable. This

new notification level may not exceed the level which can be achieved by the technology-based treatment requirements appropriate to the permittee under § 701(c).

(g) Twenty-Four (24) Hour Reporting. Pollutants for which the permittee will report violations of maximum daily discharge limitations under § 401(l)(6) shall be listed in the permit. This list will include any toxic pollutant or hazardous substance, or any pollutant specifically identified as the method to control a toxic pollutant or hazardous substance.

(h) Monitoring Requirements. The permit will incorporate, as applicable, in addition to §§ 401(l) and 503, the following monitoring requirements:

(1) To assure compliance with permit limitations, requirements to monitor:

A. The mass, or other measurement specified in the permit, for each pollutant limited in the permit;

B. The volume of effluent discharged from each outfall;

C. Other measurements as appropriate, including pollutants in internal waste streams under § 403(h); pollutants in intake water for net limitations under § 403(g); frequency and rate of discharge for noncontinuous discharges under § 403(e); pollutants subject to notification requirements under § 401(o)(1); and pollutants in sewage sludge or other monitoring as specified in Navajo Nation rules for sludge use or disposal or as determined to be necessary pursuant to § 201.

D. According to test procedures approved under 40 CFR Part 136 (§ 109(c)) for the analyses of pollutants having approved methods under the federal regulation, and according to a test procedure specified in the permit for pollutants with no approved methods.

(2) Except as provided in paragraphs (4) and (5) of this subsection, requirements to report monitoring results with a frequency dependent on the nature and effect of the discharge, but in no case less than once a year. For sewage sludge use or disposal practices, requirements to monitor and report results with a frequency dependent on the nature and effect of the sewage sludge use or disposal practice; this shall be as specified in Navajo Nation rules governing sludge use or disposal, but in no cases less than once a year.

(3) Requirements to report monitoring results for storm water discharges associated with industrial activity which are subject to an effluent limitation guideline shall be established on a case-by-case basis with a frequency dependent on the nature and effect of the discharge, but in no case less than once a year.

(4) Requirements to report monitoring results for storm water discharges associated with industrial activity (other than those addressed in paragraph (3) of this subsection) shall be established on a case-by-case basis with a frequency dependent on the nature and effect of the discharge. At a minimum, a permit for such a discharge must require:

A. The discharger to conduct an annual inspection of the facility site to identify areas contributing to a storm water discharge associated with industrial activity and evaluate whether measures to reduce pollutant loadings identified in a storm water pollution prevention plan are adequate and properly implemented in accordance with the terms of the permit or whether additional control measures are needed;

B. The discharger to maintain for a period of three (3) years a record summarizing the results of the inspection and a certification that the

facility is in compliance with the plan and the permit, and identifying any incidents of non-compliance;

C. Such report and certification be signed in accordance with § 304; and

D. Permits for storm water discharges associated with industrial activity from inactive mining operations may, where annual inspections are impracticable, require certification once every three (3) years by a Registered Professional Engineer that the facility is in compliance with the permit, or alternative requirements.

(5) Permits which do not require the submittal of monitoring result reports at least annually shall require that the permittee report all instances of noncompliance not reported under §§ 401(1)(1), (4), (5), and (6) at least annually.

(i) **Pretreatment Program for POTWs.** If applicable to the facility the permit will incorporate as a permit condition, requirements for POTWs to:

(1) Identify, in terms of character and volume of pollutants, any significant indirect dischargers into the POTW subject to pretreatment standards under the NNPDES regulations and sections ~~213~~ 307 - ~~217~~ 308 of the ~~NNPDES Act~~ NNCWA.

(2) Submit a local program when required by and in accordance with Subchapter 8 to assure compliance with pretreatment standards to the extent applicable in the NNPDES regulations and sections ~~213~~ 307 - ~~217~~ 308 of the ~~NNPDES Act~~ NNCWA. The local program will be incorporated into the permit as described in Subchapter 8. The program shall require all indirect dischargers to the POTW to comply with the applicable reporting requirements.

(3) For POTWs which are "sludge-only facilities," a requirement to develop a pretreatment program under Subchapter 8 when the Director determines that a pretreatment program is necessary to assure compliance with Navajo Nation rules governing sludge use or disposal.

(j) **Best management practices** shall be included as a permit condition, as applicable, to control or abate the discharge of pollutants when:

(1) Authorized under section ~~209(A)(2)~~ 302(a)(2) of the ~~NNPDES Act~~ NNCWA and the NNPDES rules for the control of toxic pollutants and hazardous substances from ancillary activities;

(2) Numeric effluent limitations are infeasible; or

(3) The practices are reasonably necessary to achieve effluent limitations and standards or to carry out the purposes and intent of the ~~NNPDES Act~~ NNCWA.

(k) **Reissued Permits**

(1) A permit may not be renewed, reissued, or modified to contain effluent limitations, standards, or conditions which are less stringent than the comparable effluent limitations, standards, or conditions in the previous permit, unless:

A. the permit limit was based on a water quality standard established pursuant to section 301(b)(1)(C) or section 303(d) or (e) of the CWA/section ~~209(A)(6)~~ 302(a)(6) of the ~~NNPDES Act~~ NNCWA and the revision of the limit complies with the requirements of either paragraph (2) or paragraph (3) of this subsection; or

B. the permit limit was based on best professional judgment (BPJ) under section 402(a)(1)(B) of the CWA/section ~~209(A)(2)~~ 302(a)(2) of the ~~NNPDES Act~~

NNCWA and is being revised to reflect a subsequently promulgated effluent guideline and the revision of the limit complies with the requirements of paragraph (3) of this section; or

C. the permit limit, standard or condition, was based on authorities other than those identified in either subparagraphs (1)(A) or (B) of this section, and complies with paragraph (4) below; and

D. the revision complies with paragraph (5) below.

(2) In the case of effluent limitations based on a water quality standard pursuant to section 301(b)(1)(C) or sections 303(d) or (e) of the CWA/section ~~209(A)(6)~~ 302(a)(6) of the ~~NNPDES Act~~ NNCWA, 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 that:

A. in waters where the applicable water quality standard has not yet been attained, effluent limitations based on a total maximum daily load or other waste load allocation may be revised to be less stringent if the cumulative effect of all such revisions assures attainment of such water quality standard, or the designated use which is not being attained is removed in accordance with 40 CFR § 131.10;

B. in waters where the applicable water quality standard has been attained, effluent limitations based on a total maximum daily load, other waste load allocation, or any other permitting standard (including any water quality standard) may be revised to be less stringent if such revision is subject to and consistent with the Navajo Nation's antidegradation policy.

(3) A. In the case of effluent limitations established on the basis of section 402(a)(1)(B) of the CWA/section ~~209(A)(2)~~ 302(a)(2) of the ~~NNPDES Act~~ NNCWA, or water quality based effluent limitations established pursuant to section 301(b)(1)(C) or sections 303(d) or (e) of the CWA/section ~~209(A)(6)~~ 302(a)(6) of the ~~NNPDES Act~~ NNCWA, 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.

B. Exceptions -- A permit with respect to which paragraph (k)(3) of this section applies may be renewed, reissued, or modified to contain a less stringent effluent limitation applicable to a pollutant, if-

i. Material and substantial alterations or additions to the permitted facility occurred after permit issuance which justify the application of a less stringent effluent limitation;

ii.(a) 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, provided that such information does not include revised waste load allocations or any alternative grounds for translating water quality standards into effluent limitations unless the cumulative effect of such revised allocations results in a decrease in the amount of pollutants discharged into the concerned waters and is not the result of a discharger eliminating or substantially reducing its discharge due to complying with the requirements of the CWA and the ~~NNPDES Act~~ NNCWA or for reasons unrelated to water quality; or

ii.(b) In the case of effluent limitations established on the basis of section 402(a)(1)(B) of the CWA/sections ~~209(A)(2)~~ 302(a)(2) of the ~~NNPDES Act~~ NNCWA, the Director determines that technical mistakes or mistaken interpretations of law were made in issuing the permit which justifies relaxation of effluent limits;

iii. 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;

iv. The permittee has received a permit modification under § 506; or

v. 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).

(4) In the case of other permit limitations, standards, and conditions identified in subparagraph (k)(3) of this section, a permit may not be renewed, reissued, or modified to contain limitations or conditions which are less stringent than the comparable limitations, standards and conditions in the previous permit unless the circumstances on which the previous permit was based have materially and substantially changed since the time the permit was issued and would constitute cause for permit modification or revocation and reissuance under § 506.

(5) Limitations. In no event may a permit with respect to which § 402(k) applies be renewed, reissued or modified to contain an effluent limitation, standard, or condition which is less stringent than required by effluent guidelines or water quality standards 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, issued, or modified to contain a less stringent effluent limitation if the implementation of such limitation would result in a violation of the water quality standard applicable to such waters.

(1) Privately Owned Treatment Works. For a privately owned treatment works, any conditions expressly applicable to any user, as a limited co-permittee, that may be necessary in the permit issued to the treatment works to ensure compliance with applicable requirements under this regulation will be imposed as applicable. Alternatively, the Director may issue separate permits to the treatment works and to its users, or may require a separate permit application from any user. The Director's decision to issue a permit with no conditions applicable to any user, to impose conditions on one or more users, to issue separate permits or to require separate applications, and the basis for that decision will be stated in the fact sheet for the draft permit for the treatment works.

(m) Grants. Any conditions imposed in grants made by the Administrator to POTWs under sections 201 and 204 of the CWA which are reasonably necessary for the achievement of effluent limitations under section 301 of the CWA/section ~~209(A)~~ 302(a) of the ~~NNPDES Act~~ NNCWA will be required as applicable.

(n) Sewage Sludge. Requirements governing the disposal of sewage sludge from publicly owned treatment works or any other treatment works treating domestic sewage for any use for which rules have been established, in accordance with any applicable regulations.

(o) Coast Guard. When a permit is issued to a facility that may operate at certain times as a means of transportation over water, the permit will be conditioned to require that the discharge comply with any applicable federal regulation promulgated by the Secretary of the department in which the Coast Guard is operating, and such condition will establish specifications for safe transportation, handling, carriage, and storage of pollutants, if applicable.

(p) Navigation. Any conditions that the Secretary of the Army considers necessary to ensure that navigation and anchorage will not be substantially impaired, in accordance with § 609 will be included.

(q) Duration of permits, as set forth in § 501.

§ 403 Calculating NNPDES Permit Conditions

The following provisions will be used to calculate terms and conditions of the NNPDES permit.

(a) Outfalls and Discharge Points. All permit effluent limitations, standards, and prohibitions shall be established for each outfall or discharge point of the permitted facility, except as otherwise provided under § 402(j) with BMPs where limitations are infeasible; and under § 403(h), limitations on internal waste streams.

(b) Production-Based Limitations

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

(2) Except in the case of POTWs or as provided for changing production levels, calculation of any permit limitations, standards, or prohibitions which are based on production, or other measure of operation, shall be based not upon the designed production capacity but rather upon a reasonable measure of actual production of the facility. For new sources or new dischargers, actual production shall be estimated using projected production. The time period of the measure of production will correspond to the time period of the calculated permit limitations; for example, monthly production will be used to calculate average monthly discharge limitations.

(3) A. The Director may include a condition establishing alternate permit limitations, standards or prohibitions based upon anticipated increased (not to exceed maximum production capability) or decreased production levels.

B. For the automotive manufacturing industry only, the Director may establish a condition under § 403(b)(3)(A) if the applicant satisfactorily demonstrates to the Director at the time the application is submitted that its actual production, as indicated in § 403(b)(2), is substantially below maximum production capability and that there is a reasonable potential for an increase above actual production during the duration of the permit.

(4) If the Director establishes permit conditions based on production levels under § 403(b)(3):

A. The permit shall require the permittee to notify the Director at least two (2) business days prior to a month in which the permittee expects to operate at a level higher than the lowest production level identified in the permit. The notice shall specify the anticipated level and the period during which the permittee expects to operate at the alternate level. If the notice covers more than one (1) month, the notice shall specify the reasons for the anticipated production level increase. New notice of discharge at alternate levels is required to cover a period or production level not covered by prior notice or, if during two consecutive months otherwise covered by a notice, the production level at the permitted facility does not in fact meet the higher level designated in the notice.

B. The permittee shall comply with the limitations, standards, or prohibitions that correspond to the lowest level of production specified in the permit, unless the permittee has notified the Director under § 403(b)(4)(A), in which case the permittee shall comply with the lower of the

actual level of production during each month or the level specified in the notice.

C. The permittee shall submit with the DMR the level of production that actually occurred during each month and the limitations, standards, or prohibitions applicable to that level of production.

(c) Metals. All permit effluent limitations, standards, or prohibitions for a metal will be expressed in terms of the total recoverable metal, that is, the sum of the dissolved and suspended fractions of the metal, unless:

(1) An applicable effluent standard or limitation has been promulgated by USEPA and specifies the limitation for the metal in the dissolved or valent or total form; or

(2) In establishing permit limitations on a case-by-case basis under Subchapter 7, it is necessary to express the limitation on the metal in the dissolved or valent or total form in order to carry out the provisions of the ~~NNPDES Act~~ NNEPA; or,

(3) All approved analytical methods for the metal inherently measure only its dissolved form.

(d) Continuous Discharges. For continuous discharges all permit effluent limitations, standards, and prohibitions, including those necessary to achieve water quality standards, unless impracticable will be stated as:

(1) Maximum daily and average monthly discharge limitations for all dischargers other than publicly owned treatment works; and

(2) Average weekly and average monthly discharge limitations for POTWs.

(e) Non-continuous Discharges. Discharges which are not continuous, as defined in § 105(a)(12), shall be particularly described and limited, considering the following factors, as appropriate:

(1) Frequency; for example, a batch discharge shall not occur more than once every three (3) weeks;

(2) Total mass; for example, not to exceed 100 kilograms of zinc and 200 kilograms of chromium per batch discharge;

(3) Maximum rate of discharge of pollutants during the discharge; for example, not to exceed 2 kilograms of zinc per minute; and

(4) Prohibition or limitation of specified pollutants by mass, concentration, or other appropriate measure; for example, shall not contain at any time more than 0.05 mg/l zinc or more than 250 grams (0.25 kilogram) of zinc in any discharge.

(f) Mass Limitations

(1) All pollutants limited in permits shall have limitations, standards, or prohibitions expressed in terms of mass except:

A. For pH, temperature, radiation, or other pollutants which cannot appropriately be expressed by mass;

B. When applicable standards and limitations are expressed in terms of other units of measurement; or

C. If, in establishing permit limitations on a case-by-case basis under § 701, limitations expressed in terms of mass are infeasible because the mass of the pollutant discharged cannot be related to a measure of operation (for example, discharges of TSS from certain mining operations), and permit conditions ensure that dilution will not be used as a substitute for treatment.

(2) Pollutants limited in terms of mass additionally may be limited in terms of other units of measurement, and the permit shall require the permittee to comply with both limitations.

(g) Pollutants in Intake Water

(1) Upon request of the discharger, technology-based effluent limitations or standards shall be adjusted to reflect credit for pollutants in the discharger's intake water if:

A. The applicable effluent limitations and standards contained in effluent guidelines and standards promulgated by USEPA provide that they shall be applied on a net basis; or

B. The discharger demonstrates that the control system it proposes or uses to meet applicable technology-based limitations and standards would, if properly installed and operated, meet the limitations and standards in the absence of pollutants in the intake waters.

(2) Credit for generic pollutants such as biochemical oxygen demand (BOD) or total suspended solids (TSS) should not be granted unless the permittee demonstrates that the constituents of the generic measure in the effluent are substantially similar to the constituents of the generic measure in the intake water or unless appropriate additional limits are placed on process water pollutants either at the outfall or elsewhere.

(3) Credit shall be granted only to the extent necessary to meet the applicable limitation or standard, up to a maximum value equal to the influent value. Additional monitoring may be necessary to determine eligibility for credits and compliance with permit limits.

(4) Credit shall be granted only if the discharger demonstrates that the intake water is drawn from the same body of water into which the discharge is made. The Director may waive this requirement if he/she finds that no environmental degradation will result.

(5) This section does not apply to the discharge of raw water clarifier sludge generated from the treatment of intake water.

(h) Internal Waste Streams

(1) When permit effluent limitations or standards imposed at the point of discharge are impractical or infeasible, effluent limitations or standards for discharges of pollutants may be imposed on internal waste streams before mixing with other waste streams or cooling water streams. In those instances, the monitoring required by § 402(h) shall also be applied to the internal waste streams.

(2) Limits on internal waste streams will be imposed only when the fact sheet under § 604 and § 206 of the Uniform Regulations sets forth the exceptional circumstances which make such limitations necessary, such as when the final discharge point is inaccessible, for example, under 10 meters of water, the wastes at the point of discharge are so diluted as to make monitoring impracticable, or the interferences among pollutants at the point of discharge would make detection or analysis impracticable.

(i) Disposal of Pollutants Into Wells, Into POTWs, or by Land Application.
Permit limitations and standards shall be calculated as provided in § 404.

§ 404 Disposal of Pollutants into Wells, into POTWs or By Land Application

(a) The disposal of pollutants into wells shall be prohibited, unless the disposal is authorized by the federal underground injection control (UIC) program or by the Navajo Nation UIC program approved by the Administrator. The Director, as necessary, may issue NNPDES permits to control the disposal of pollutants into wells, which result or may result in a discharge of pollutants from a point source to waters of the Navajo Nation, when necessary to protect the public health and welfare, and to prevent the pollution of ground and surface waters. The Director shall regulate any such discharges that are subject to the NNPDES program through NNPDES permits that incorporate appropriate federal or Navajo Nation UIC requirements.

(b) When part of a discharger's process wastewater is not being discharged into waters of the Navajo Nation because it is disposed of into a well, into a POTW, or by land application, thereby reducing the flow or level of pollutants being discharged into waters of the Navajo Nation, applicable effluent standards and limitations for the discharge in a NNPDES permit shall be adjusted to reflect the reduced raw waste resulting from such disposal. Effluent limitations and standards in the permit shall be calculated by one of the following methods:

(1) If none of the waste from a particular process is discharged into waters of the Navajo Nation and effluent limitations guidelines provide separate allocation for wastes from that process, all allocations for the process shall be eliminated from calculation of permit effluent limitations or standards.

(2) In all cases other than those described in § 404(b)(1), effluent limitations shall be adjusted by multiplying the effluent limitation derived by applying effluent limitation guidelines to the total waste stream by the amount of wastewater flow to be treated and discharged into waters of the Navajo Nation and dividing the result by the total wastewater flow. Effluent limitations and standards so calculated may be further adjusted under § 703 to make them more or less stringent if discharges to wells, publicly owned treatment works, or by land application change the character or treatability of the pollutants being discharged to receiving waters.

This method may be algebraically expressed as: $P = E \times N/T$

Where P is the permit effluent limitation, E is the limitation derived by applying effluent guidelines to the total waste stream, N is the wastewater flow to be treated and discharged to waters of the Navajo Nation and T is the total wastewater flow.

(c) § 404(b) shall not apply to the extent that promulgated effluent limitations guidelines:

(1) Control concentrations of pollutants discharged but not mass; or

(2) Specify a different specific technique for adjusting effluent limitations to account for well injection, land application, or disposal into POTWs.

(d) § 404(b) does not alter a discharger's obligation to meet any more stringent requirements established under this Subchapter.