

Public Participation and EPA/State Approval Process
CWA Consulting Services POTW.com ©2017

EPA and states have not really published guidance on how POTWs should process substantial modifications. Realistically, EPA and state must be cautious about requiring guidance to be followed because the Agency has been overruled on requiring guidance (i.e. Court cases, OMB, Small Business Administration, etc.). The General Pretreatment Regulations (40 CFR sections 403.11 and 403.18) define the required public participation and process EPA must use, but the order that they should be done is not dictated nor do they recognize municipal administrative procedural rules.

If your POTW makes a change that is substantial (see 40 CFR Section 403.18(b)) you have to make sure that a submittal is provided to the Approval Authority (EPA or State) for review, public notice and approval.

40 CFR Section 403.18(c)(4) allows the municipality to do the public notice in lieu of EPA/state, if EPA/state "...finds that the POTW notice otherwise satisfies the requirements of § 403.11". Many approval authorities will let POTWs do this to save \$\$ and administrative processing time. The municipality would issue a public notice that is consistent with what EPA/State would use (format). Some approval authorities do not allow a POTW to do the public notice.

In any case, the municipality has a public notice process (Constitutional basis) that includes allowing public comment over no less than a 30-day period. This is most commonly accomplished by 1st reading (work session), 2nd reading and final approval over a period of 30 days or longer. This is typically done by the City Council or Board (for Districts). EPA and states meet the 30-day public participation requirement by publishing a notice in a newspaper of meaningful circulation.

This public participation process makes it so the provisions being adopted are enforceable (e.g. the municipality could issue penalties for violations). No municipality should accept any NPDES permit requirement or pretreatment program component that is based upon guidance that has not been afforded public participation.

Important note: If you make changes that are non-substantial modifications to your program, even though EPA or the State will not public notice these, your municipality will have to complete a public participation process if the POTW intends to enforce these changes, especially where a penalty could be issued for continuing violations. If the non-substantial changes will not be enforced, there is no specific requirement to afford public participation at the Federal or State level (but may be at the local level).

Below is a typical outline for a municipality that adopts new local limits, revised legal authority, etc. These are substantial modifications.

Project Outline

Example Local Limits Project starts - where the POTW completes this in-house	Day 0
POTW compiles all needed data and information.	Stay organized. Review analytical data (QA/QC). Not a fun part of the project and takes a lot of time, but this is the data used in the process.
POTW compiles an initial list of Pollutants of Concern (POCs) and a list of additional sampling data needed.	This is the time to include or exclude specific pollutants. Short justification needed. Included pollutants need to have adequate data (start sampling domestic+commercial a year before you do local limits.... hopefully).
POTW provides additional sampling data as needed.	This should result in adequate data for all included pollutants.
A final list of POCs are drafted.	This step is to identify the final pollutants to be taken through the local limits process (this does not mean you will adopt local limits for all of these pollutants). This is for all included pollutants where there is justification to consider the pollutant and do the calculations.
Draft 1 of the local limits	This first draft would typically be reviewed by the POTW technical staff and first-line supervisor. This is where it is critical that the POTW understands the process and report.
Draft 2 of the local limits	This is the draft that typically contains identified areas where POTW decisions need to be made (POTW discretion). EPA and states do not make these decisions, but will review for reasonableness.
Draft 3 of the local limits	Typically, this document is passed through other levels of management and the legal staff (Ordinance or Rules will change based upon new local limits).
Final Draft intended for informal EPA/State review.	This is the document that is a blend of POTW and Consultant (if you have one) technical decisions.
POTW submits draft to EPA/State for informal review	Almost every State and EPA office will do this. I have seen some states that initially want to charge for this, but typically they realize that the appropriate charge comes when the POTW submits for approval. In any case, this is a critical step because the POTW should not go to City Council or a Board with a document that may have to be modified.

Resolve final EPA/state questions and produce a Final Draft Submittal Report including final Ordinance/Rules and Regulations language.	There are always questions or comments from the State or EPA. Since the 2004 Local Limits guidance is guidance, most POTWs will refine the framework presented in that guidance when doing local limits. EPA and states want summary information about how local limits were calculated. They are going to approve based upon a finding that they believe the limits will (1) reasonably protect against Pass Through or Interference, (2) protect applicable standards, and (3) that the decisions made by the POTW are reasonable. This is the functional definition of “technically-based”.
1 st reading (work session) by City Council/Board.	Time to go before the City Council or Board. Get it through senior management, City Attorney, City Clerk, and any internal procedures. Sometimes 1 st reading is a work session where the Council or Board will want a short presentation or to ask questions. Be prepared with “what is the impact to IUs?”! Other times, they just make notice of it for public inspection.
2 nd reading by City Council/Board.	This step is typically no sooner than 2 weeks after the 1 st reading.
Submit to EPA/State for public notice and approval with attorney statement.	If everything appears to be without conflict, the municipality would submit to EPA/state for public notice and approval. Be sure to include an attorney statement with the submittal to EPA/state. If you do not have an attorney statement, contact your Approval Authority for an example.
Adopt local limits	The municipality may be ready to approve the local limits before EPA does. Not always a great idea because EPA could get significant comments (typically does not happen, but...). I always advise municipalities that if their Council/Board approve the changes, always include language similar to “... these changes shall become effective upon EPA (or State) approval”. Once EPA/State closes out its 30-day public comment period, it will take at least one more week before they can approve your submittal (they must wait in case some comments are postmarked on the last day of the public comment period). Their approval will be in writing. If not already completed, the municipality should obtain final approval as soon as possible.
Implement new local limits.	Time to revise permits. Time to install compliance schedules in permits for Industrial Users, if needed, to meet the new limits.

Another Important note: If your POTW has other jurisdictions that have non-domestic dischargers, it is likely that there will be some changes to those jurisdictions legal authorities (e.g. incorporation of new local limits by reference, adopting specific language, etc.). It is beyond the scope of this newsletter to discuss here.

There will be variations to this process so it is best to check with your City Attorney and EPA/state person for any modifications to this general process (e.g. you have to coordinate with a different business development department or group). I want to stress that most EPA and states prefer to do the informal review to avoid having conflict with City Councils and Boards and embarrassing the POTW pretreatment program. This is really an inherent part of the Approval Authority's job. Timely reviews are great!